MEALEY'S LITIGATION REPORT
Catastrophic Loss

How Do You Catch A Cloud And Pin It Down?: Solving The Problem Of Insurance Coverage For Hurricane Katrina

Making Sense Of Leonard v. Nationwide

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A commentary article reprinted from the September 12, 2006 issue of Mealey's Litigation Report: Catastrophic Loss

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Commentary

How Do You Catch A Cloud And Pin It Down?: Solving The Problem Of Insurance Coverage For Hurricane Katrina

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[Editor's Note: Randy J. Maniloff is a Partner in the Business Insurance Practice Group at White and Williams, LLP in Philadelphia. He concentrates his practice in the representation of insurers in coverage disputes over primary and excess policy obligations for various types of claims, including construction defect, mold, general liability (products/premises), environmental property damage, asbestos/silica and other toxic torts, first-party property, homeowners, director's & officer's liability, a variety of professional liability exposures, including medical malpractice, media liability, community associations, public official's liability, school board liability, police liability, computer technology liability, managed care and additional insured/contractual indemnity issues. The views expressed herein are solely those of the author and are not necessarily those of his firm or its clients. *Responses are welcome.]*

Introduction

In 1939, Winston Churchill famously described Russia as "a riddle wrapped in a mystery inside an enigma."[1] Anyone following the so-called *wind vs. water* issue surrounding Hurricane Katrina coverage claims may feel that the same description applies. Consider this.

As has been widely reported, the first wind vs. water coverage action went to trial in July and a decision was handed down on August 15. Following an eight day bench trial, Judge L.T. Senter Jr. of the Southern District of Mississippi ruled that the plaintiffs, Paul and Julie Leonard, were entitled to $1,228.16 from Nationwide Mutual Insurance Company for wind damage to their home. However, the plaintiffs had sought in excess of $130,000 in damages, with $47,000 allegedly attributable to wind. *Paul and Julie Leonard v. Nationwide Mutual Insurance Co.*, United States District Court, Southern District of Mississippi, No. 1:05CV475 (Memorandum Opinion, August 15, 2006).[2]

Yet, despite being awarded less than 1% of the damages being sought, Richard Scruggs, the Leonards' attorney, described Judge Senter's ruling as "a big win." He went on to say: "We asked for more and thought it was justified, but a win is a win in the first game of the season, and you just take it."[3] With this kind of optimism, Mr. Scruggs may be wondering when Kansas City Royals playoff tickets go on sale.[4]

It would be easy to dismiss Mr. Scruggs's comments as simply spinning, if they didn't come out of the mouth of Mr. Scruggs — a lawyer best known for huge success against the most untouchable of all plaintiff targets — the tobacco industry. Translation — dismiss at your own peril.

Mr. Scruggs wasn't the only one to see Judge Senter's decision in the *Leonard* case as a victory. Not surprisingly, so too did Nationwide, which said that it was "very pleased that the court ruled in [its] favor." Ernie Csiszar, President of the Property Casualty Insurers Association of America, stated: "In the insurance cov-

erage debate over wind vs. water, Judge Senter's ruling has taken much of the wind, literally and figuratively out of the plaintiff's attorney's argument."[5]

Others in the insurance industry offered more tempered enthusiasm about the decision. Cecil Pearce, Vice President of the American Insurance Association, noted that the industry could still face challenges and stated: "Each case is different, involving different fact patterns and different levels and types of coverages that apply to each policyholder."[6] Jim Whittle, Assistant General Counsel for the AIA stated, "It's an important case, but there are a lot of cases left. It remains to be seen whether and how it will affect all of them."[7]

Bloggers too weighed-in on who won the case. David Rossmiller of Portland's Dunn, Carney, Allen, Higgins & Tongue, LLP, and publisher of Insurancecoverageblog.com[8] offered the following in response to Mr. Scruggs's claim that his client won the case: "If Scruggs was Custer's lawyer, he'd claim the Seventh Cavalry won the Battle of the Little Big Horn because the Sioux failed to drive Custer off the battlefield."[9] On the other hand, Ted Frank, blogging on the Manhattan Institute's Pointoflaw.com, set out several reasons why "Scruggs isn't completely spinning when he suggests he's happy with the opinion."[10] More from Mr. Frank's post below.

In civil litigation, the surest way to tell the winner from the loser is usually by following the money. Thus, given the amount sought by the Leonards, compared to the amount awarded by the judge, the question of who won the case wouldn't appear to be too difficult. So why all the debate?

Wind vs. water is hurricane coverage-speak for the fact that a homeowners policy typically covers damage caused by wind and rain, but not flooding. But figuring out which damage was caused by which peril — especially when both may be the cause — can be a complex and hotly contested factual issue. At the heart of the *Leonard* opinion, as well as earlier Katrina coverage decisions by Judge Senter, are certain insurance policy provisions whose interpretation are directly related to the wind vs. water issue. And since *Leonard* is just one of hundreds pending in the Southern District of Mississippi, any discussion of who *won* the case is really about which side benefits more going forward from Judge Senter's rulings.

That the *Leonard* case is not the end of the story was evident in the week after the court's decision, which saw a flurry of commentary from the stakeholders. The Association of Trial Lawyers of America issued a twelve page report titled "Pattern of Greed: How Insurance Companies Put Profits Over Policyholders," available at www.PeopleOverProfits.org. The report is full of anecdotes of insurers who, despite earning huge profits, allegedly failed to honor their obligations to policyholders — post-Katrina and other natural disasters. And you thought Katrina produced a lot of wind.

With all due respect to ATLA, it's a little hard to take it seriously when, on one hand, it accuses the insurance industry of being "one of the most powerful lobbying forces in Washington, D.C." ("Pattern of Greed: How Insurance Companies Put Profits Over Policyholders" at 8), yet, on the other hand, states in the fine print on its membership application that, for 2006, 20% of dues paid will go to lobbying activities.

The insurance industry wasted no time responding to the ATLA report. Sam Miller, executive vice president of the Florida Insurance Council stated, "While the insurance industry is busy helping hurricane victims reconstruct their lives again, the trial bar appears to be hell-bent on deconstructing the insurance industry. It's an apparent act of sour grapes after losing lawsuits in Mississippi that they had hoped would garner millions of dollars for themselves."[11]

Senator Trent Lott (R- Miss.) [himself a Katrina coverage plaintiff, which he freely acknowledged] stated at a news conference that he's shocked that insurance companies are not covered by federal antitrust laws. Noting that insurers could "actually collude" with each other when handling claims, Senator Lott stated, "That has caused me a great deal of concern. I think we need to take a look at that."[12] Also making a "federal threat" in the wake of the *Leonard* decision was Nancy Pelosi, Democratic Leader of the House of Representatives. Congresswoman Pelosi stated, "Insurance policies should not make arbitrary distinctions between wind and water damage. That is why Congressman Gene Taylor (D – Miss.) [a Katrina coverage plaintiff] and House Democrats are propos-

ing insurance reforms that will help homeowners to purchase the insurance they need, and that their insurance will cover all hurricane damage."[13]

The insurance industry also entered the media fray in the week following the *Leonard* decision. The Insurance Information Institute issued a press release stating that about 90% of homeowners in Louisiana and Mississippi who filed claims after Hurricane Katrina are satisfied with their insurers. The III also stated that that fewer than 2% of claims in Mississippi and Louisiana are in dispute. According to III data, insurers have settled 658,700 Louisiana homeowners claims (or 94.8% of expected claims), totaling $10.3 billion, and 334,800 Mississippi homeowners claims (94.3% of expected claims), totaling $5.2 billion. Not surprisingly, one lawyer for Mississippi policyholders was not convinced. Don Barrett, a co-counsel with Mr. Scruggs, who represents 3,000 Mississippi policyholders, stated "The insurance industry has paid out two to three cents on the dollar. Nobody is satisfied with that."[14]

Leonard v. Nationwide Mutual Insurance Company

The difference of opinion surrounding the interpretation of the wind vs. water policy provisions is significant. "[I]t has been said that 'one of the most hotly litigated insurance coverage questions of the late 1980's and early 1990's has been the scope and application of the pollution exclusion contained in the standard commercial general liability (CGL) policy.'"[15] Very few coverage lawyers would dispute that statement. But, at least when it comes to the competing interpretations of the pollution exclusion, everyone agrees what the disagreement is about.

While there is no shortage of opinions when it comes to interpretation of the insurance policy provisions that are at the heart of the wind vs. water issue, there is only one that counts. It's interesting and useful to look at what others say, but Judge Senter's words are of course deserving of the greatest scrutiny.

> "I wonder what the [judge] was sayin' or was he just lost in the flood?" Bruce Springsteen, "Lost in the Flood," *Greetings From Asbury Park, N.J.*, Columbia Records (1973).

Judge Senter's Findings of Fact included the following. The Leonards' home in Pascagoula, Mississippi is located 515 feet from the beachfront and is approximately twelve feet above sea level. On August 29, 2005, the area surrounding Pascagoula was subjected to Hurricane Katrina's winds in excess of 100 miles per hour. The winds reached a peak of intensity between 9:00 am and noon. Water from the Mississippi Sound was driven ashore by the storm and rose to its peak level between 11:00 a.m. and noon. At its highest point, the water inundated the Leonards' residence to a depth of approximately five feet. *Leonard v. Nationwide*, Memorandum Opinion, Findings of Fact at ¶ ¶ 8, 9.

Judge Senter determined that the inundation of the ground floor of the Leonards' residence caused extensive damage to the floors, carpets, walls and personal property. However, the second floor of the residence was not damaged. The physical damage to the roof consisted of a small number of broken shingles, but the water-tight integrity of the roof was not breached. The attached garage on the Leonards' property was also extensively damaged. The only wind damage on the ground floor of the Leonards' residence was a hole in one window that witnesses described as "golf-ball sized." The exterior of the Leonards' home and the attached garage were soiled by a combination of wind-driven materials and water-borne materials. *Leonard v. Nationwide*, Memorandum Opinion, Findings of Fact at ¶ ¶ 10, 11.

Judge Senter concluded that, following an inspection of the Leonards' property, Nationwide made an estimate of the wind damage sustained during the storm. The Nationwide adjustor found that the wind had caused damage to the shingles of the roof and that a tree was blown down across a fence. After applying the $500 deductible, Nationwide tendered a check to the Leonards in the amount of $1,661.17 to cover these damages. *Leonard v. Nationwide*, Findings of Fact at ¶ ¶ 13, 14.

A substantial portion of Judge Senter's opinion is devoted to his rejection of the Leonards' argument that their Nationwide agent, Jay Fletcher, misrepresented the terms of the Nationwide policy. "Leonard apparently inferred that Fletcher's reason for advising him that he did not need a flood policy was that his homeowners policy would cover any and all water damage that might occur during a hurricane. This was an erroneous inference, and one that might have

been avoided had either party to the conversation been more articulate in his inquiry or in his response." *Leonard v. Nationwide*, Memorandum Opinion, Findings of Fact at ¶ 27.

The misrepresentation claim was an important and time consuming aspect of the *Leonard* trial and Judge Senter's opinion. However, while other homeowners are no doubt making similar claims against their insurance agents, it is not the issue that predominates the wind vs. water debate.[16]

Turning to the wind vs. water issue, Judge Senter made rulings in three key areas.

Water Damage Exclusion

Judge Senter held that "The provisions of the Nationwide policy that exclude coverage for damages caused by water are valid and enforceable terms of the insurance contract. Similar policy terms have been enforced with respect to damage caused by high water associated with hurricanes in many reported decisions." *Leonard v. Nationwide*, Memorandum Opinion, Conclusions of Law at ¶ 2 (seven citations omitted).

There was nothing surprising about this aspect of the *Leonard* opinion. Any suspense whether Judge Senter was going to enforce the water damage exclusion in the Nationwide policy came to an end in March when he ruled on this issue in *Elmer and Elexa Buente v. Allstate Insurance Company, et al.*, 422 F. Supp. 2d 690 (S.D. Miss. 2006). Judge Senter ruled on it again in May in *John and Claire Tuepker v. State Farm Fire & Casualty Company*, United States District Court for the Southern District of Mississippi, Southern Division, 1:05CV559 (Memorandum Opinion, May 24, 2006).

The plaintiffs in *Buente* and *Tuepker* (also represented by Mr. Scruggs) argued that the water/flood exclusion was inapplicable because "storm surge" is not a flood. "Under well settled meteorological principles and construing the policy against State Farm and in favor of coverage, 'storm surge' does not constitute 'flooding,' so that the Tuepkers have coverage for damage to their home caused by hurricane storm surge under the four corners of their State Farm policy."[17]

Judge Senter rejected this argument. "Losses directly attributable to water in the form of a 'storm surge' are excluded from coverage because this damage was caused by the inundation of plaintiffs' home by tidal water from the Mississippi Sound driven ashore during Hurricane Katrina. This is water damage within the meaning of that policy exclusion."[18]

The Leonards also argued that the absence of the phrase "storm surge" from the water damage exclusion precluded the exclusion's applicability. "In construing an all-risk homeowner policy with a self-contained (that is, a listing of excluded perils as opposed to a "for example" sampling of the *types* of excluded risks) listing of excluded perils or causes, "*exceptions not mentioned cannot be engrafted upon it.*" *Leonard v. Nationwide*, Plaintiff's Trial Brief at 8, quoting *Gilchrist Tractor Co. v. Stribling*, 192 So.2d 409, 415 (Miss. 1966) (emphasis added in Trial Brief). The Leonards further argued that, "[W]here including the omitted term — 'storm surge' — would have presented 'no practical difficulty' to the insurer, the Court is prohibited from doing it for the insurer." *Id.* However, the Leonards could not have realistically expected to succeed on this issue, given Judge Senter's prior rulings in *Buente* and *Tuepker*.

Judge Senter's decision to enforce the water damage exclusion has been seen as a necessity to maintaining the stability of the insurance markets. *The Wall Street Journal* Editorial Board (motto: "Free Markets, Free People") put it this way: "Because the federal government long ago stepped into this breach [the difficulty of spreading flood risk], private insurers haven't collected a penny in flood premiums in years. Yet if the Scruggs theory prevails, these companies could be stuck with an estimated $15 billion in claims. The only way to cover that bill would be to raise premiums for homeowners far and wide. That, or stop selling policies in states (like Mississippi) with higher than normal flood risks."[19]

Damage Caused By Windstorm

The second ruling by Judge Senter concerning wind vs. water was that "The Nationwide policy provides coverage for damage caused by windstorm, including damage caused by water that enters an insured building through a breach in the walls or roof caused by wind." *Leonard* v. *Nationwide*, Memorandum Opinion, Conclusions of Law at ¶ 3.

Here too, Judge Senter's ruling could not have caught anyone by surprise, as the availability of coverage for

damage caused by wind was not in dispute. Nationwide acknowledged the availability of this coverage. "As this court recently recognized in *Buente*, 'windstorm' coverage like Nationwide's 'provides coverage for wind damage and for rain damage resulting from winds that breach the roof or walls of the insured premises.'" *Leonard v. Nationwide*, Defendant's Trial Brief at 6, quoting *Buente v. Allstate Ins. Co.*, 422 F. Supp. 2d 690, 696 (S.D. Miss. 2006).

Anti-Concurrent Causation

Judge Senter's conclusions that the Nationwide policy provides coverage for damage caused by wind, but excludes coverage for damage caused by water, have not been the makings of controversy. This is especially so when you consider that, in *Leonard*, it was not difficult for the court to determine that the damage was caused by either one peril or the other:

> There was ample evidence that the storm surge waters severely damaged the walls of the garage and the overhead doors used to drive into and out of the garage. There was also evidence that later in the day, after the storm surge waters had receded and the wind had shifted and begun to come in from the west, the wind inflicted additional damage to these overhead doors. *My review of the evidence leads me to the conclusion that these garage doors were damaged enough to be considered a total loss before the time the wind shifted and began to come in from the west.* Accordingly, the wind damage to the overhead doors did not enhance or exacerbate the damage these doors had earlier sustained by the force of the storm surge water.
>
> The structural damage to the walls of the garage was more likely than not also caused by the surging water that accompanied the storm. *There was no substantial evidence that the garage was structurally damaged before the rising water reached the Leonard property*.

Leonard v. Nationwide, Memorandum Opinion, Conclusions of Law at ¶ 10 (emphasis added).

Where the wind vs. water debate gets choppy is when the damage at issue was caused by a combination of wind and water. On this point, Judge Senter ruled that "The provisions of the Nationwide policy that purport to exclude coverage entirely for damages caused by a combination of the effects of water (an excluded loss) and damages caused by the effects of wind (a covered loss) are ambiguous." *Leonard v. Nationwide*, Memorandum Opinion, Conclusions of Law at ¶ 4.

Specifically, Judge Senter was addressing the following Nationwide policy language when making this ruling:

> We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.
>
> b) Water or damage caused by water-borne material. Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne material damage means:
>
> > (1) flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind.

Leonard v. Nationwide, Memorandum Opinion, Findings of Fact at ¶ 7.

Having rejected the aforementioned "anti-concurrent causation" language as ambiguous, Judge Senter held as follows:

> Under applicable Mississippi law, in a situation such as this, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), the insured may recover that portion of the loss which he can prove to have been caused by wind. *Grace v. Lititz Mutual Insurance Co*., 257 So. 2d 217 (Miss. 1972). Nationwide is not responsible for that portion of the damage it can prove was caused by water. To the extent property is damaged by wind, and is thereafter also damaged by water, the insured can recover that portion of the loss

> which he can prove to have been caused by wind, but the insurer is not responsible for any additional loss it can prove to have been later caused by water. *Lititz Mutual Insurance Co. v. Boatner*, 254 So. 2d 765 (Miss. 1971).

Leonard v. Nationwide, Memorandum Opinion, Conclusions of Law at ¶ 7.

Thus, the crux of the *Leonard* decision was the court's ruling that a factual determination must be made of the cause of all damage, even if it was caused by a combination of wind and water. The homeowner bears the burden of proving wind and the insurer bears the burden of proving water. Nationwide, and other insurers, have maintained that when damage is caused by a combination of wind and water, there is no need for this factual determination since all of the damage is excluded from coverage. Herein lies the win for homeowners in Mississippi, just not Paul and Julie Leonard.

For example, in reaching his decision that a factual determination must be made of the cause of all damage, even if it was caused by a combination of wind and water, Judge Senter rejected Nationwide's arguments made to the contrary in its Post-trial and Trial Briefs, respectively:

> Where flooding unquestionably occurred but wind may also have contributed to a loss, either concurrently or in any sequence, and flood damage is plainly excluded, it relieves insurers of the unreasonable burden of eliminating wind as a potential partial cause of the loss. Simply put, as Nationwide adjuster Duane Collins explained, "if you can distinguish what is wind damage, it is covered." (7/17/06 Tr. at 67 (Collins).) However, "[w]hen wind and water work together," and "you cannot distinguish, and you know the water did damage it, there is no coverage." *(Id.)*[20]
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> * * *
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> To be sure, where wind (and rain) cause identifiable damage to plaintiffs' property and water was not a contributing cause of the damage then, ***that*** damage is a covered loss. However, where the most that can be said is that wind contributed to what would otherwise be a loss due to water damage, the plain language of Nationwide's homeowner's policy clearly excludes that loss. It makes no difference whether the wind damage occurred before or after the water damage occurred.[21]

While the facts in *Leonard* may have been relatively clear, there is little doubt that Judge Senter fully appreciates the size of the effort required to distinguish between covered wind and excluded water. Besides the meteorology evidence that must be considered, that is just part of the judicial adjusting process. Judge Senter concluded that the expense for exterior cleaning ($1,994.80) should be split 50/50 between covered and uncovered damages — but not because half was caused by wind and the other half by water.

Rather, the Judge showed just how sharp the court's pencil needs to be by explaining that, while most of the exterior of the Leonards' building is above the water line, the smaller portion below the water line was more soiled and scuffed than the higher portions of the building. Therefore, the fact that the lower portion will require a disproportionate amount of time to clean justified the 50/50 split, despite the lower portion being less than 50% of the area cleaned. *Leonard v. Nationwide*, Memorandum Opinion, Conclusions of Law at ¶ ¶ 10, 11.

Given Judge Senter's determination that "Almost all of the damage to the Leonard residence is attributable to the incursion of water" (*Leonard v. Nationwide*, Memorandum Opinion, Conclusions of Law at ¶ 10), his ruling on the anti-concurrent causation provision went essentially unfelt. However, it was not lost on Zach Scruggs, an attorney for the Leonards, who used it as a basis to explain why the court's decision was a win:

> There were some good rulings in there about anti-concurrent cause clause, which are consistent with what he ruled in other cases but had not ruled in Nationwide. There were some good rulings in there about meteorology and that the wind was devastating before water. That and the anti-concurrent cause clause will impact a number of other cases other than the Leonards.[22]

This was also a reason provided by Ted Frank in his Pointoflaw.com blog entry explaining why Mr. (Richard) Scruggs wasn't "completely spinning when he suggests he's happy with the [*Leonard*] opinion." As Mr. Frank observed: "[M]ost importantly, by failing to give credit to the anti-concurrent cause clause in the Nationwide policy, Senter is insuring that Scruggs can force an expensive trial in almost every case, creating settlement value where none is appropriate."[23]

Judy Guice, Individually And On Behalf Of All Others Similarly Situated v. State Farm Fire & Casualty Company

The day before *Leonard* was decided, Judge Senter issued an opinion in *Judy Guice, Individually and on Behalf of all others Similarly Situated v. State Farm Fire & Casualty Company*, United States District Court, Southern District of Mississippi, No. 1:06CV1 (Memorandum Opinion, August 14, 2006). This important Katrina coverage decision was completely overshadowed by the attention showered on *Leonard*.

Guice was a putative class action, but Judge Senter put the kibosh on that:

> The Court is not convinced that this case is appropriate for class certification under any section of Fed. R. Civ. P. 23. *Tuepker* alluded to "fact-specific inquiries that must be resolved on the basis of the evidence adduced at trial", *id*. At 8, and in *Comer v. Nationwide Mutual Insurance Co.*, 1:05CV436, which denied Rule 23 relief, it was determined that "[t]he nature and extent of the property damage the owners sustain from the common cause, Hurricane Katrina, will vary greatly in its particulars, depending on the location and condition of the property before the storm struck and depending also on what combination of forces caused the damage". *Comer*, Memorandum Op. at 2-3.

Guice v. State Farm, Memorandum Opinion at 6. Given Judge Senter's decision in *Leonard* that a determination must be made between damage caused by wind versus water, it was hardly surprising that he concluded the day before that there were too many questions affecting individual class members to support class certification.

Judge Senter's denial of class certification in *Guice* received some media attention.[24] However, what went virtually unnoticed was that *Guice* also involved an interpretation of policy provisions concerning wind versus water. As he has done in his other decisions on the issue, Judge Senter held as follows:

> If the evidence were to indicate that part of the plaintiff['s] losses were attributable to wind and rain (making them covered losses under the applicable provisions of the policy), and part of the loss were attributable to flooding (which is excluded from coverage), the determination of which was the proximate cause of the damage to the insured dwelling or to any given item of property (or the determination of the proportion of the damage to the insured dwelling or to any given item of property was proximately caused by each phenomenon) would be a question of fact under applicable Mississippi law. . . . Likewise, if the evidence shows that the damage occurred over time so that wind damage preceded damage from a "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. . . .

Guice v. State Farm, Memorandum Opinion at 5, quoting *Tuepker* at 6 (citations omitted). In a clear pronouncement that Katrina coverage claims must be decided one-by-one, on their facts, despite both sides' desire for a more expeditious resolution, Judge Senter stated: "[W]hile the Plaintiff and State Farm have focused on diametrically opposed interpretations of the policy language in an attempt to position themselves to gain instant victory, the fact remains that there are disputed issues that will determine the scope of coverage under this policy." *Guice v. State Farm*, Memorandum Opinion at 4.

The most significant aspect of Judge Senter's opinion was that, in arriving at this conclusion, he rejected the Mississippi Court of Appeals's recent decision in *Boteler v. State Farm Casualty Insurance Company*, 876 So. 2d 1067 (Miss. Ct. App. 2004). *Boteler* upheld anti-concurrent causation language. Despite the fact that *Boteler's* applicability has been strenuously argued by the insurer in other cases that have been the subject

of opinions by Judge Senter, *Guice* is the only opinion in which he mentions *Boteler*.

In *Boteler*, a homeowner sought coverage from State Farm for damage to his residence caused by a shift in the foundation. It was also discovered that a pipe beneath the house was damaged and leaking water. State Farm's engineering expert found that the structural damage had a direct correlation with unpredictable shrinking and swelling movements of clay. There was also increased moisture in the soil from the plumbing leak. State Farm denied coverage based on the "earth movements" exclusion, which provided as follows:

> 2. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> * * *
>
> b. Earth Movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not.

Boteler at 1068-1069.

While State Farm's expert determined that the damage resulted from unpredictable shrinking and swelling of the clay under the home, Boteler argued that there were other, equally plausible causes that could not be resolved on summary judgment. The court didn't care, responding to Boteler's argument as follows:

> *That may be*, but the "earth movement" exclusion in Section 2 makes the cause of the movement irrelevant: "We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss . . . ."

Boteler at 1069 (emphasis added).

State Farm wasted no time citing *Boteler* in its brief in support of its Motion to Dismiss the *Guice* complaint. On page one (and in the first paragraph), State Farm stated: "[T]he Mississippi Court of Appeals recently held that State Farm's policy language regarding covered and excluded risks in combination or in sequence — which is applicable to water damage — is 'clear' and '[u]nambiguous language of exclusion.'" *Guice v. State Farm*, State Farm Fire and Casualty Company's Memorandum of Law in Support of its Motion to Dismiss the Class Complaint on Contract of Insurance at 1.

Judge Senter rejected *Boteler's* applicability to the Guice claim. He did so by focusing on the following provision in the State Farm policy: "We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events: [water damage]." The Judge noted that, in *Boteler*, as well as two similar Mississippi federal court decisions, "the losses would not have occurred in the absence of the excluded event [earth movement]." *Guice* at 5. However, according to the Judge Senter, State Farm "acknowledge[d] in its claim denial letter that the damage to Plaintiff's home was caused by wind *and* water, but not the alternative which would allow for wind damage independent of water." *Id.* (emphasis in original).

While Judge Senter's analysis of *Boteler* was on the sparse side, he appears to have adopted arguments made by Guice in her brief in response to State Farm's Motion to Dismiss: "Under the facts alleged in this case, and the language of the contract drafted by State Farm, in order to establish that the Plaintiffs' losses are excluded by the terms of the contract, State Farm has to show that the losses 'would not have occurred in the absence of' water damage. State Farm acknowledges that the destruction of the house of the named Plaintiff, Judy Guice, was caused by a combination of wind and water." *Guice v. State Farm*, Plaintiffs' Memorandum Brief in Response to State Farm Fire and Casualty Company's Motion to Dismiss the Class Action Complaint on Contract of Insurance at 10.

Plaintiffs in *Guice* acknowledged that an insurer can use an anti-concurrent causation clause. However, according to Plaintiffs, State Farm chose not to make its anti-concurrent causation clause applicable to all losses caused directly or indirectly by water damage. "Had it desired to do so, it could have done so by . . . adopting the ISO [anti-concurrent causation] language under which the exclusion applies to 'any loss caused directly or indirectly' by the enumerated perils." *Guice v. State Farm*, Plaintiffs' Brief in Response to State Farm's Motion to Dismiss at 13-14.

Conclusion

Judge Senter must have drawn the short straw to end up with Mississippi's Katrina coverage docket. Yet, to his credit, he has resisted several opportunities to streamline his workload. Instead, to the contrary, he has done many things to greatly enhance his workload in the name of ensuring that each case is handled individually and decided on its own merits. Judge Senter has declined to enforce the anti-concurrent causation language; ruled that a factual determination must be made of the cause of all damage, even if it was caused by a combination of wind and water; denied class action certification and demonstrated just how painstaking the claims process may need to be by how he allocated the bill for exterior cleaning in *Leonard*.

If something sounds strange about the Southern District of Mississippi affording litigants due process that is worthy of three Michelin stars, it's perhaps because we've simply come to expect mass torts to be resolved by large-scale settlements, *a la asbestos*, where due process is limited to lip service (if that).

Of course, the price to be paid for handling cases in this manner is that litigants may not live to see their case decided. Judge Senter is obviously aware of this problem, as he recently asked counsel in the Katrina coverage cases to send him a confidential memo (up to three pages) containing "ideas concerning the best procedures this Court can follow to secure a just, speedy and inexpensive resolution of these cases." He asked for proposals, including trying representative cases, that might help resolve as many cases as possible in the next twelve months.[25]

There can be no doubt that Judge Senter is giving it his all on the court and leaving nothing on the bench.

Endnotes

1. In 1991, Joe Pesci, portraying David Ferrie in Oliver Stone's *JFK*, modified Churchill's phrase, threw in some colorful additional words, and used it to describe the mystery surrounding the assassination of President Kennedy. Listen for yourself at http://henancius.martin-scorsese.net/sounds/jfk/mystery.wav. Warning: R Rated.

2. While there has been much discussion of Judge Senter's ruling in *Leonard,* and others before it, the Mississippi homeowners suits are just a portion of the coverage landscape that has emerged since Katrina's waters receded. There are also numerous suits involving coverage for corporate policyholders, which are less uniform than the homeowners suits, on account of differences in damages being sought and policy language. And, of course, there are the Louisiana coverage cases. All of this, while significant and interesting, is beyond the scope of this article.

3. "Judge Rejects Claim for Katrina Flood Damage," posted at http://www.cnn.com/2006/LAW/08/15/katrina.lawsuit.

4. As of August 24, the Kansas City Royals have a record of 46 wins and 82 losses and are 35½ games back in the American League Central. [In fairness to K.C., that is a very strong division.]

5. Steve Tuckey, "Industry Victory Viewed in Nationwide Case," National Underwriter Online News Service, August 16, 2006.

6. *Id.*

7. Associated Press, "Judge Who Decided First Katrina Case Now Faces Hundreds," posted at http://www.insurancejournal.com/news/national/2006/08/18/71525.htm.

8. Anyone involved in insurance coverage on a full-time basis, or even just hobbyists, should not miss David Rossmiller's blog at www.insurancecoverageblog.com. See for yourself the superb job that Mr. Rossmiller does of providing daily news and commentary from the coverage world.

9. David Rossmiller, "Further Thoughts on Judge Senter's Decision in *Leonard v. Nationwide*," August 16, 2006, Posted at http://www.insurancecoverageblog.com.

10. Ted Frank, "Katrina Lawsuits: Is the Senter Opinion Such an Insurance Victory?," August 17, 2006, Posted at http://www.pointoflaw.com/archives/002833.php.

11. "Insurers: Trial Bar Short on Facts in Katrina Charges," Florida Insurance Council, August 22, 2006, Posted at http://www.insurancejournal.com/news/national/2006/08/22/71635.htm.

12. Michael Kunzelman, Associated Press, "Sen. Lott Sounds Off Over Katrina Claims, Insurers' Antitrust Status," Posted at http://www.insurancejournal.com/news/southeast/2006/08/21/71557.htm.

13. U.S. Newswire, August 15, 2006, Posted at http://www.insurancebroadcasting.com/081706.htm#8.

14. "Most Katrina Claimants Satisfied: III," Reuters, August 22, 2006, Posted at http://www.businessinsurance.com/cgi-bin/news.pl?newsId=8252.

15. *Madison Construction Co. v. Harleysville Mutual Ins. Co.*, 735 A. 2d 100, 106 (Pa. 1999), quoting *Center for Creative Studies v. Aetna Life and Cas. Co.*, 871 F. Supp. 941, 943 (E.D. Mich. 1994) (quoting Jeffrey W. Stempel**,** *Interpretation of Insurance Contracts: Law and Strategy for Insurers and Policyholders* 825 (1994)).

16. Addressing this aspect of the *Leonard* decision in his Pointoflaw.com blog entry explaining why Mr. Scruggs was not engaging in complete spin when he said he was happy with the decision, Ted Frank stated: "[T]hough Senter did not find that the insurance agent misled the Leonard family, a clever plaintiffs' attorney is going to notice that this was so because the Leonards made several critical concessions in testimony. I'm not saying that future plaintiffs' attorneys are going to coach their clients to lie; but they're certainly going to let their clients know that admitting that they didn't ask their insurance agent for the reasoning behind certain statements or that they read their insurance policy will have consequences. 'Will no one rid me of this insurance policy?' I won't be surprised if there's suddenly a rash of plaintiffs who follow the roadmap left for them in this case, and it remains unclear under what circumstances federal judges are going to completely undo insurance contracts on fraud claims."

17. *John and Claire Tuepker v. State Farm Fire & Casualty Company*, Plaintiffs' Response to Motion to Dismiss and Memorandum in Support of Cross-Motion for Partial Summary Judgment at 11.

18. *Tuepker* at 6.

19. Review and Outlook, "Legal Flood Control," *The Wall Street Journal*, August 17, 2006 at A8.

20. *Leonard v. Nationwide*, Defendant's Post-trial Brief at 57.

21. *Leonard v. Nationwide*, Defendant's Trial Brief at 33 (emphasis in original).

22. Quincy Collins Smith, "Ruling Favors Insurer," SunHerald.com, Posted at http://www.sunherald.com/mld/sunherald/15283734.htm. Also looking beyond *Leonard*, Gulfport attorney William Weatherly, who represents as many as 250 Gulf Coast homeowners who have sued their insurers, put it this way: "We learned from this case. We're more prepared now than we ever have been." "Judge Who Decided First Katrina Case Now Faces Hundreds," Associated Press, August 20, 2006, Posted at http://www.insurancejournal.com/news/national/2006/08/18/71525.htm

23. *Supra*, note 10.

24. Robert Hartwig, chief economist for the Insurance Information Institute, stated: "The trial lawyers were hoping thousands of cases would be lumped together to force the insurers to settle. That door slammed shut." Ed Leefeldt, "Judge Opposes Class Action for Mississippi Lawsuit," Reuters, August 18, 2006, Posted at http://www.insurancebroadcasting.com/082106.htm#lbn1.

25. See text of letter from Judge L.T. Senter, Jr. to All Counsel of Record for Hurricane Katrina Insurance Litigation, Posted at http://www.sunherald.com/mld/sunherald/15275786.htm. ■

MEALEY'S LITIGATION REPORT: CATASTROPHIC LOSS
edited by Gina Cappello
The Report is produced monthly by

LexisNexis®

P.O. Box 62090, King of Prussia Pa 19406-0230, USA
Telephone: (610) 768-7800 1-800-MEALEYS (1-800-632-5397)
Fax: (610) 962-4991
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ISSN 1559-9221