LOOKING UNDER THE HOOD OF STATE FARM'S (REJECTED, FOR NOW) MISSISSIPPI KATRINA CLAIMS SETTLEMENT

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Introduction

There are a host of reasons why litigants call off the dogs and reach a settlement of a dispute. While every case has a unique set, there is one constant: settlement eliminates the uncertainty that is inherent in all litigation—no matter how confident you are that you can win. Settlement affords litigants an opportunity to resolve disputes on their own terms, rather than someone else's. For this reason, State Farm's recently announced and highly publicized settlement of a significant portion of its Mississippi claims for damage caused by Hurricane Katrina had a curious side—its failure to provide the certainty and peace that are the principal reasons for doing the deal in the first place.

State Farm's critics will fault the company no matter what it does. For several reasons, however, State Farm deserves a lot of credit for agreeing to a settlement that left many questions, including the company's ultimate financial exposure, unanswered. While the settlement was rejected by the court, without prejudice, just three days after it was signed, this uncertainty would have existed for State Farm even if the court had blessed it. Now that the court has put the kibosh on it (at least temporarily), it simply adds to the uncertainty. But this new element was not of State Farm's making.

State Farm's Settlement of its Mississippi Katrina Claims

The Agreement of Compromise and Settlement reached by State Farm—for cases not already in litigation—is comprised of 41 pages of detail (54 definitions alone), plus exhibits, and is docketed at *Dennis R. and S. Imani Woullard v. State Farm Fire and Casualty Company*, United States District Court for the Southern District of Mississippi, Southern Division, No. 1:06CV1057LTS-RHW ("*Woullard* Settlement Agreement"). Its principal term, and the one that had received the most attention in the media, was the creation of an administrative process for a class of approximately 35,000 State Farm policyholders in Mississippi to have their claims reassessed. Under this mechanism, additional policy benefits were to be paid based on a damage matrix. Not counting "slab" claims, discussed below, the matrix lists four categories of damage to structures: Minor (up to 10%); Moderate (>10% to 30%); Severe (>30% to 60%); and Total (>60%). For each damage category, there are maximum payments offered based on a percentage of coverage A limits (structure), coverage B limits (contents) and loss of use. For example, a structure in the severe damage category would be paid up to 8% of coverage A limits, up to 1.25% of coverage B limits, and up to 4% of coverage A limits for loss of use. The settlement also contemplated an arbitration procedure for handling any disputes following the re-evaluation.

This re-evaluation was guaranteed to result in the additional payment of at least $50 million and was not subject to any cap. Many had estimated that State Farm's ultimate payment, when all was said and done, would be as much as $500 million. Other estimates went to $600 million (*The New York Times*, citing participants in the settlement talks)[i] and one analyst even placed the number as high as $2 billion.[ii] This is all a lot of money—even for a company of State Farm's profitability, namely, a net income in 2005 of $3.24 billion.[iii]

For its part, State Farm stated that "there are too many variables to extrapolate what the company may ultimately pay as a result of the settlement."[iv] Very true. At this stage, anyone estimating State Farm's ultimate exposure under the original class action settlement terms was doing nothing more than licking their index finger and holding it up to the wind. After all, think about how accurate those estimates of insurers' asbestos liabilities have been over the years.

As part of a separate settlement, State Farm had agreed to pay $80 million to resolve 640 claims in which suit had been filed by the Scruggs Law Firm. Here, State Farm agreed to pay the full insured value for 300 homes that were swept away. A similar slab claim in the non-litigation, class action settlement, would have been valued *at a minimum* of 35% of coverage A (dwelling) limits. The owners of the 340 other homes, with varying degrees of damage, were to receive an average of $124,400.[v] Comparing the two settlements, those who filed suit in response to an unsatisfactory claim determination were clearly rewarded for their efforts. Nobody likes lawyers—until they need one.

On top of these settlement amounts was the issue of legal fees, which could have reached $46 million between the class action and Scruggs litigation settlements. One critic of the legal fees awarded in the tobacco settlement called the fees here "remarkably fair."[vi] In rejecting the settlement, the court mentioned the amount of legal fees at issue and said "not so fast".

The last major part of the settlement was State Farm's dismissal from Mississippi Attorney General Jim Hood's action filed in the Chancery Court of Hinds County, Mississippi, First Judicial District, seeking to declare the flood exclusion in homeowners policies unenforceable. Pursuant to this aspect of the settlement, State Farm agreed to (i) the establishment of the re-evaluation and arbitration process discussed above; (ii) follow certain claims handling procedures; and (iii) make payment to the Attorney General's Office of $5 million to cover the Office's investigative and legal expenses incurred in the litigation. In addition, Mr. Hood agreed to drop a criminal investigation into State Farm's handling of Katrina claims. A grand jury had begun hearing evidence just days before the settlement was announced.[vii]

While State Farm no doubt had various reasons for entering into these settlements, it gave the following official rationale in the *Woullard* Settlement Agreement:

> Plaintiffs and State Farm are cognizant of the uniqueness of the current situation, and without conceding their respective positions on any issue with regard to the claim handling process after Hurricane Katrina, nonetheless wish to resolve these disputed claims in a manner that is just, speedy, and efficient.
>
> After analyzing the relevant facts and applicable law, recognizing the burdens, risks, uncertainties, time and expense of litigation, as well as the advantages of terms and procedures for a fair and efficient resolution of Settlement Class Members' claims under this Agreement, Plaintiffs, proposed Class Counsel and State Farm have concluded that this Agreement is a fair, equitable and just resolution of the Release Claims.
>
> State Farm has concluded that resolving these claims under the terms of this Agreement is desirable to reduce the time, risk and expense of defending multiple claims and individual litigation and to resolve finally and completely all of the Release Claims.

Woullard Settlement Agreement at ¶ ¶ 1.11-1.13.

While these reasons all ring true, State Farm was surely also motivated by a desire to bring to an end Mr. Hood's grand jury investigation, as well as having an opportunity to counter-balance the negative news stories about its handling of Katrina claims. With over 74 million policies in force in the United States and Canada,[viii] and the insurer of more than one in five U.S. homes (and over 30% of the Mississippi market),[ix] the company must protect its singularly most important asset—its Good Neighbor brand. Mississippi Attorney General Hood cited the damage to State Farm's image as the reason for the company coming to the settlement table in the first place.[x] Since many people probably view large homeowner's insurers as fungible, the stigma of allegedly not being responsive to its Katrina claimants was one distinguishing feature that the company could do without.

State Farm deserves a lot of credit for reaching these settlements. First, it had agreed to take on the Herculean administrative task of re-evaluating 35,000 complex claims in which no suit had been filed; in other words,

there was no legal compulsion for the company to re-open these closed claims. The settlement agreement contains many pages that set out in great detail the step-by-step mechanism for how the re-adjustment process was to operate. In rejecting the settlement, the court criticized the process as too complex and likely as preventing claimants from effectively participating without the assistance of counsel. Even if it is eventually simplified, it will no doubt have a few bugs that need to get worked out once the system is up and running.

Second, the company had agreed to a settlement in which the most important reason for doing so—the elimination of uncertainty over its exposure—was lacking. Consider this. The class action portion of the settlement had the company paying at least $50 million and possibly many *unknown* multiples of that. The settlement had no cap on the amount of the company's ultimate exposure. In addition, the portion of the settlement addressing cases in litigation was limited to those filed by the Scruggs Law Firm. Thus, while the litigation settlement did buy the company some peace and certainty, it has been reported that there are 200 additional cases in litigation that are *not* part of the settlement.[xi] And who knows how many of the 35,000 class members would have opted-out, having decided that litigation was now the better route to take. Considering the $2.7 million verdict against the company in *Broussard*, still fresh on the class members' minds (discussed below), leaving 200 existing suits and an unknown number of new ones on the table was no small concession on State Farm's part.

While State Farm's settlement eliminated uncertainty vis-à-vis Attorney General Hood, the company (and the insurance industry in general) is still facing a number of threats from inside the Beltway. Rep. Barney Frank (D-Mass.), Chairman of the House Financial Services Committee, recently announced that his committee will investigate allegations of a "failure of the insurance system" to appropriately handle claims from Hurricanes Katrina and Rita; this was prompted by a request from Rep. Gene Taylor (D-Miss.). Senator Trent Lott (R-Miss.) secured language in a Homeland Security Appropriations bill mandating a Government Accounting Office study of the adjustment of wind and water claims from Katrina; a report is due to Congress by April 1.[xii] Senator Lott has also promised to introduce a bill that would repeal the McCarran-Ferguson Act federal antitrust exemption for the property-casualty insurance industry. On January 12, a group of Gulf Coast Senators introduced the "Commission on Catastrophic Disaster Risk and Insurance Act of 2007." The bill would create a federal commission made up of experts to recommend to Congress an approach to ensure preparedness from the financial fallout of natural disasters.[xiii] Then, on the heels of Mississippi's *Broussard* ruling against State Farm, Rep. Bennie Thompson (D-Miss.), chairman of the House Homeland Security Committee, announced that he would be "investigating the assertions that insurance companies are wrongfully passing the costs of Katrina onto an already-burdened federal flood insurance program." [xiv] Considering the billions that FEMA doled out to fraudsters following Katrina, Homeland Security seems a curious choice to be tackling this one.

State Farm's settlement in Mississippi did nothing to eliminate these Congressional calls for action. Indeed, Senator Lott and Rep. Taylor stated precisely that not long after the State Farm settlement was announced. "Taylor said his campaign to eliminate the insurance industry's antitrust immunity, push for all-perils insurance and secure federal oversight of the state-regulated industry, will continue. 'I can assure you that effort does not go away. They have hurt too many of my friends.'"[xv] Further, it has been reported that Reps. Taylor and Thompson sent Attorney General Hood a letter about his criminal investigation of State Farm. "They're coming after my records," Hood said.[xvi]

In addition to failing to bring State Farm the certainty that a litigant expects to get from a settlement, especially one with such a high price tag, the settlement prompted wider questions, also with no certain answers. Most notably, it was being asked whether State Farm would do a similar deal with respect to its Louisiana claims and if other insurers would borrow a page from the State Farm playbook and also enter into a settlement.

On the first question, Louisiana Insurance Commissioner Jim Donelon has stated that he will seek a similar settlement with State Farm for disgruntled policyholders in Louisiana. Commissioner Donelon stated: "I certainly can't imagine how State Farm would not treat its policyholders in our state the way it treated its customers in Mississippi. I would take action to make sure that they treat our policyholders the same way they did in Mississippi." [xvii]

On the second question, other insurers with significant numbers of claims in Mississippi have attempted to distance themselves from State Farm. While their public statements may be to the effect that this is not about them, it is only natural for other insurers to be considering whether a global or near-global settlement is advantageous. Even without the criminal investigation and *Broussard* verdict attached to them, it would not be sur-

prising to hear that other insurers are also crunching the numbers and weighing the various intangible considerations. Indeed, Attorney General Hood issued a statement on January 25 "urging Allstate, Nationwide, Mississippi Farm Bureau, USAA, and other insurance companies to do the right thing like State Farm and settle the litigation on the Mississippi Gulf Coast."[xviii] Of course, any insurer that was considering a settlement will now surely wait and see how the State Farm deal plays out before the court.

The Court's Rejection of the State Farm Settlement

On January 26, 2007, the Honorable L.T. Senter, Jr. issued an Order in *Woullard* that denied the plaintiff's Motion to Certify Class and for Preliminary Approval of the Proposed Agreement of Compromise and Settlement ("*Woullard* Denial of Motion to Certify Class"). His Honor's eight page opinion was respectful of the parties and appreciative of their efforts to reach an accord, but there is no doubt that it was a rebuke of the terms of the deal. David Rossmiller of Insurancecoverageblog.com called the opinion "fairly brutal."

This was not the first time that Judge Senter had addressed the notion of some type of resolution of his Katrina docket other than via the practically impossible method of trying every case individually. Last year the Judge sent a letter to counsel in the Katrina coverage cases asking them 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.

On the other hand, 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) in which he rejected class certification for Katrina coverage cases:

> 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.

While many of Judge Senter's objections to the proposed class action settlement are administrative in nature and will likely be relatively easy for the parties to address, others are much more substantial. Most notably, Judge Senter expressed concerns whether the payments proposed in the settlement matrix are fair and reasonable, or whether they are simply arbitrary. His Honor also noted that the agreement contemplates a blanket release of all potential claims for extra-contractual damages, without any compensation for the surrender of these potential claims.

In general, given the complexity and number of claims at issue, as well as the fact that the settlement was designed to pay additional policy benefits to claimants that never filed suit, the settlement undoubtedly had an element of "rough justice" to it. However, Judge Senter seems to be requiring more precision than that. (Too bad his brethren that approve class action settlements that award class members with coupons to obtain more of the offending company's products aren't such sticklers.)

Lastly, Judge Senter stated: "I will never approve a procedure that would allow the resolution of claims under standards that are, or may be, different from or contrary to this Court's prior rulings." *Woullard* Denial of Motion to Certify Class at 7-8. On this point, Judge Senter's ruling is heavy-handed. While His Honor has authored several opinions addressing the parameters of coverage for Hurricane Katrina claims, the fact remains that, and with all due respect, a dozen or so decisions by the same judge—none of which have been subject to appellate review—does not the last word on the law make. Indeed, the Judge himself granted State Farm's Motion for Interlocutory Appeal in *John and Claire Tuepker v. State Farm Fire & Casualty Company*, stating: "While this Court believes in the correctness of its decisions and their analysis, the various contract provisions alluded to above [water damage exclusion, weather conditions provision, hurricane deductible endorsement and anti-concurrent causation clause] arguably possess the potential of multiple plausible interpretations; in

light of their complexity (or confusion), there is substantial ground for difference of opinion." *Tuepker v. State Farm,* Order Certifying Interlocutory Appeal (September 27, 2006) at 3.

After all, don't forget that, unlike some other insurers, State Farm's flood exclusion and anti-concurrent causation clause were upheld in the Eastern District of Louisiana's late 2006 decision *In re Katrina Canal Breaches Consolidated Litigation v. Encompass Insurance Company, et al.*, 2006 U.S. Dist. LEXIS 85779, addressing coverage for flooding caused by the New Orleans levee breaches, and ruling that flood exclusions that do not distinguish between naturally occurring and artificial floods are ambiguous.

Thus, notwithstanding that the 35,000 potential class members have never filed suit, that Judge Senter's decisions have not been examined by the Fifth Circuit, and that His Honor acknowledged "substantial ground for difference of opinion," there appears to be no allowance for compromise between the parties over the meaning of these decisions and their potential ability to withstand appellate scrutiny. As a result, Judge Senter's prior decisions are going to be front and center in any effort to address the concerns that His Honor raised in the *Woullard* Denial of Motion to Certify Class. But that's still a better framework for resolving disputes than the rhetoric and bullying that surely played a part in bringing State Farm to the settlement table.

Even before the State Farm settlement was rejected, the effect of Judge Senter's prior decisions was also something that other insurers were no doubt examining as part of any consideration whether to go the global settlement route: How do *our* claims handling and policy language stack up against Judge Senter's opinions, especially the most recent one in *Broussard?*

Broussard v. State Farm Fire and Casualty Company

"Why don't I give you a few minutes to get over the shock of the court taking the matter away from the jury." *Norman and Genevieve Broussard v. State Farm Fire and Casualty Company*, United States District Court for the Southern District of Mississippi, No. 1:06CV6, Transcript of Jury Trial (1/11/07) at 7. On that note, Judge Senter called for a fifteen minute recess in the Hurricane Katrina coverage trial that had been taking place for the past few days in his courtroom.

The shock was that His Honor had just granted plaintiffs' Rule 50 Motion for Judgment as a Matter of Law (a Directed Verdict, before 1991, but the former name lives on) against State Farm. Perhaps State Farm's counsel took advantage of the break to ask if anyone got the license number of the truck that had just hit them.

The effect of Judge Senter's decision was that State Farm was liable to Norman and Genevieve Broussard for the full limits under their homeowner's policy—$211,222, representing $120,698 for the dwelling and $90,524 for contents. And the day was only going to get worse for State Farm. That afternoon, the jury—fresh from having the morning off thanks to the Directed Verdict—came back and awarded plaintiffs punitive damages in the amount of $2.5 million.

Judge Senter was right to describe his Directed Verdict in *Broussard* as a *shock*. First, generally speaking, judges do not grant Directed Verdicts lightly. The legal standard is a high one, as it should be; it is called the *jury system* for a reason. Second, until *Broussard*, Judge Senter's decisions in other Katrina coverage cases had been kiss-your-sister like. Indeed, the decisions were so, uh, down the center, that they left both sides declaring victory. That was obviously not the case following *Broussard*.

Even before *Broussard* dropped so many jaws, State Farm had been in settlement negotiations. Just two days earlier, *The New York Times* reported that State Farm was working on a deal to settle 639 Katrina lawsuits for $80 million, resulting in an average payment of $125,000. In addition, the accord called for State Farm to review as many as 35,000 additional claims, with an eye toward possible increased payments.[xix]

Thus, the decision by State Farm to reach a global settlement of its Mississippi Katrina claims could not have been prompted by the stunner in *Broussard*, since talks had been underway prior to it. Moreover, the terms ultimately reached look very similar to those on the table before *Broussard* was decided, suggesting that the decision had little effect on the settlement. But surely the decision hung like a cloud over the talks, with policyholder counsel now feeling that they had just been dealt a couple of aces.

Given Judge Senter's pronouncement that his prior decisions must be taken into account in the class action settlement, look for these opinions, especially those in *Leonard* and *Broussard,* to come under even more

intense scrutiny. *Leonard* and *Broussard* are likely the most telling of Judge Senter's opinions, as they applied his view of the legal principles to actual facts, arriving at decisions (seemingly, polar opposite) concerning the extent of coverage for a claim involving both wind and water damage.

In *Leonard v. Nationwide Mutual Insurance Co.*, 438 F. Supp. 2d 684, 693 (S.D. Miss. 2006), Judge Senter, after hearing evidence in the first Hurricane Katrina coverage trial, 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. The Nationwide policy provides coverage for damage caused by a windstorm, including damage caused by water that enters an insured building through a breach in the walls or roof caused by the wind." Judge Senter's decisions in *Leonard* on these issues were not surprising, as they came on the heels of earlier similar rulings in *Elmer and Elexa Buente v. Allstate Insurance Company, et al.*, 422 F. Supp. 2d 690 (S.D. Miss. 2006) and *John and Claire Tuepker v. State Farm Fire & Casualty Company*, 2006 U.S. Dist. LEXIS 34710 (S.D. Miss 2006).

Turning to damage that was caused by a combination of wind and water, 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* at 693. Having rejected the "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 at 695.

The Leonards estimated the total damage to their home to be approximately $130,000. 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 at 689.

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 at 689-90. Judge Senter's decision essentially upheld Nationwide's adjustment.

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.)* xx
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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.[xxi]

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* at 695), his ruling on the anti-concurrent causation provision went essentially unfelt.

Broussard v. State Farm, 2007 U.S. Dist. LEXIS 2611 was a "slab" case. Judge Senter held that "The evidence is overwhelming that when the flood reached the Broussard property it was sufficient in force and duration to destroy the dwelling regardless of the extent of the preceding wind damage. Thus, the force of the storm surge was sufficient to destroy the dwelling if it were undamaged at the time the water reached it, and it was sufficient to remove the debris of the property if the dwelling had collapsed or suffered extensive damage from the force of the wind before the storm surge arrived." *Broussard* at *5-*6.

Following *Leonard* and the rejection of the anti-concurrent causation position advanced by Nationwide, the *Broussard* Court then expectedly stated: "The key issue is how much damage had occurred as a result of wind before the storm surge arrived. That preceding wind damage would be covered, and any additional damage caused by the arrival of the flood would be excluded." *Broussard at* *6. Notwithstanding that such statement is consistent with the court's opinion in *Leonard*, it was hard to see what was coming next in *Broussard*.

While *Leonard* seemed to make it clear that the proper manner for handling wind and water claims (following the court's rejection of the anti-concurrent causation clause) was that an allocation would need to be made between the amount of damage caused by wind before the arrival of water, the *Broussard* Court went a step further:

> [O]ne party or the other must bear this total loss in the absence of evidence by which the two types of losses may be reasonably identified and separated. Because the plaintiff's have met their burden of proof under the policy, via the stipulations in the pre-trial order [that they suffered an accidental direct physical loss of their dwelling], the burden of proof was and is on State Farm to establish, by a preponderance of the evidence, that portion of the total loss that was attributable to excluded flooding and rising water. State Farm is obliged under its policy to pay all of the loss that it does not establish, by a preponderance of the evidence, to have been caused by flooding.
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> * * *
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> Since State Farm has offered no evidence which would allow the finder of fact to make a reasonable determination of the amount of the total loss that is attributable exclusively to water damage, I find that State Farm has failed to meet its burden of proof as to the extent of the damage caused by water, and since the Broussards have established by stipulation that they sustained a total loss of their dwelling and its contents as a result of Hurricane Katrina, a covered windstorm peril, I find that State Farm is liable to the plaintiffs for the limits of coverage under the policy, the sum of $ 211,222.

Id. at *6-*8.

At the heart of the *Broussard* Court's decision was the fact that State Farm's own expert witness "testified that it was more probable than not that the Broussards' dwelling sustained at least some wind damage to its roof. In an attempt to quantify the likelihood of this wind damage having occurred, Dr. Gurley estimated that there was a 75% probability that the damage to the plaintiffs' roof consisted of the loss of between 0% and 35% of the shingles on the roof of the dwelling. Dr. Gurley also testified that based on the data now available he cannot make a determination of the extent of wind damage to the Broussard dwelling before the storm surge arrived." *Id*. at *5.

Judge Senter's decision in *Broussard* seemed intent on punishing State Farm for failing to make any unconditional tender of policy benefits for the wind damage in light of these estimates from its expert. *Id*. at 8. The court's apparent message is that if State Farm had paid the Broussards the minimal sum to compensate them for the loss of, at most, 35% of the shingles on their roof, the company would have been relieved of paying full policy limits of $120,000 for the dwelling, $90,000 for contents and $2.5 million in punitive damages.

The court's support for such a significant pronouncement seemed deserving of a bit more analysis. Surely something more than a citation to a single case (and no discussion) was warranted under these circumstances.

But even if the court's harsh decision in *Broussard* was correct, the question arises as to how many other claims fit within this fact scenario, versus situations that more closely resemble *Leonard*, where the structure remained and a payment was made for wind damage as distinguished from water damage.

Lastly, it is hard to see how the wind damage to some shingles caused damage to the *contents* of the Broussards' home. Under these circumstances, the damage to the contents could have only been caused by water, for which the court has stated that coverage is clearly excluded. State Farm's Motion to Continue Trial and Stay Proceedings in *Richard Tejedor v. State Farm Fire and Casualty Company*, United States District Court for the Southern District of Mississippi, No. 1:05CV679LG-RHW, the next case on Judge Senter's docket after *Broussard,* and settled confidentially on the eve of trial,[xxii] suggests that there is a lot of merit to this point, and Judge Senter may have acknowledged this error. *Id*. at page 3, n. 1.

Conclusion

While Judge Senter's Order rejecting the State Farm settlement does not say this in so many words, it makes a reference to the class members receiving less than those that had filed suit and are now having their claims resolved in the more generous litigation settlement. You can't help but wonder if the Court is trying to create some parity between these two settlements. It is understandable that Judge Senter would want to sign-off on as rich of a class action settlement as possible. But given that State Farm's legal positions are far from being down for the count, Judge Senter risks sending the boys back to Illinois if he does not give them adequate incentives to settle.

Endnotes

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iv Liam Pleven, note 2.

v Joseph B. Treaster, note 1.

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