SENTER RING: LOOKING BEYOND THE SIDE SHOW OF THE MISSISSIPPI KATRINA COVERAGE LITIGATION

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Introduction

Mardi Gras just ended, but that loud sound you have been hearing coming out of the Gulf Coast was not from New Orleans. The litigation in Mississippi surrounding insurance coverage for damage caused by Hurricane Katrina has produced more noise than even Hurricane-affected tourists (the Pat O'Brien's kind) on Bourbon Street. And most of the hoopla has been heard outside the courtroom.

It has been about six weeks since Mississippi District Judge L.T. Senter, Jr. caught everyone by surprise when he issued the Directed Verdict heard 'round the world in *Broussard v. State Farm*, 2007 U.S. Dist. LEXIS 2611. On January 11th, Judge Senter cut short a Katrina coverage jury trial and ordered State Farm to pay the policyholders the full limits under their homeowner's policy—the amount of $212,222. That same day, the jury awarded plaintiffs punitive damages in the amount of $2.5 million—later reduced to $1 million.

Then, less than four weeks ago, Judge Senter rejected a settlement agreement that was designed to create an administrative process for a class of as many as 35,000 State Farm policyholders in Mississippi to have their previously adjusted and closed claims reassessed. Under this mechanism, additional policy benefits were to be paid based on a damage matrix, with additional payments guaranteed to be at least $50 million and estimates of State Farm's ultimate exposure running as high as $600 million.

In the short period of time since these significant decisions by Judge Senter, the krewe involved in this crucial litigation have put on quite a parade. Needless to say, there are a lot of doubloons at stake.

While Judge Senter rejected the State Farm settlement for a long list of reasons, His Honor scheduled a hearing for February 28th for the parties to respond to his objections. Of all of his concerns, one stands out the most: the adequacy of State Farm's payments. In describing an acceptable settlement, the judge used the word "reasonable" seven times in a five page order. Judge Senter stated:

> I believe that the ultimate key to the success of the proposed settlement procedure will be the minimum guarantees State Farm is willing to offer the class members to induce them to participate in the settlement process. In the absence of substantial guarantees that are reasonably related to the level of damage to the insured property, I see little inducement for the class members to forego their potential extra-contractual claims and the procedural rights they have in the process of litigation. Thus, I would like to hear from the parties on this issue.

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, Order Setting Hearing On Issues Related to Certification of a Settlement Class (February 8, 2007) at ¶ 6.

As the February 28th hearing date approaches, the many stakeholders in this litigation have not sat idly by on the sidelines. To the contrary, they have taken various actions and responded strongly to those of others—

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some say designed to influence the settlement process. The situation in Mississippi is fluid and clearly multi-dimensional, but the potential State Farm settlement serves as an integral piece.

Ironically, the issue that has been lost in the war of words is the most important one—Judge Senter's various rulings on the availability of coverage, and, simply put, whether an appellate court will determine if they were correct. State Farm is entirely free to walk away from the settlement process and deal only with claims that are in litigation, and, for that matter, on an individual basis. Thanks to asbestos litigation, an expectation has been created that mass torts demand global settlements. But the general public is finally being exposed to the fraud created by that process. Refusing to kowtow to a global settlement seems to be having some success for Merck and its Vioxx troubles.

Indeed, Judge Senter has already ruled that Katrina coverage claims are too unique to be "appropriate for class certification under any section of Fed. R. Civ. P. 23." *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). A Motion for Reconsideration of that decision has been filed and a hearing on it will also be held on February 28th.

By reaching a global settlement, State Farm is agreeing to forego substantial rights. At some point in the negotiation process, the value of the rights being given up may exceed the benefits of a global settlement, causing State Farm to stand up from the table. What those rights are worth is directly related to the correctness of Judge Senter's rulings on coverage and whether they will be upheld on appeal. After all, in his January 26th Order rejecting the State Farm settlement, 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.

Thus, it is worth taking a close look at Judge Senter's decisions and whether they are supported by Mississippi law. Before doing so, however, a discussion of the events that have distracted the real Katrina showdown is in order.

The Katrina Coverage Side Show

Bipartisan legislation has been introduced in the House and Senate—the Insurance Industry Competition Act—to repeal the insurance industry's limited antitrust exemption provided by the McCarran-Ferguson Act. As Senator Patrick Leahy (D-Vt.) described it: "Federal oversight would provide confidence that the industry is not engaging in the most egregious forms of anticompetitive conduct, price fixing, agreements not to pay, and market allocations."[i]

The insurance industry has countered that the antitrust exemption is limited, and covers the pooling of loss data and the creation of intercompany pools to provide high risk coverage and allow small companies to participate in writing risks that would otherwise be unavailable. The industry believes that a repeal of the exemption would actually lessen competition and stresses that insurers remain subject to antitrust laws relating to boycott, coercion and intimidation.[ii]

This limited antitrust exemption for insurers has existed for over 65 years. It is now being portrayed as evil. Of course, how terrible could it have been when you consider that Senator Trent Lott (R-Miss.), a 33 year Congressional veteran, admitted to having been unaware of it?[iii] Not to mention that Katrina claims handling had nothing to do with antitrust issues. To the contrary, insurers are going out of their way to state that their claims handling practices differed from State Farm's. Consider this February 15th *Associated Press* headline: "Allstate Says It Paid Katrina Claims of Type State Farm Denied." You don't need to be a C-Span junkie to figure out that this legislation has only one purpose—punishment (or two, if you count legislator grandstanding).

Also on the Washington front, a hearing has been scheduled for February 28th before the oversight panel of the House Financial Services Committee to examine the insurance industry's handling of Hurricane Katrina claims. *National Underwriter* (the publisher of the *FC&S Bulletins)* described the hearing as one of "a number of actions being undertaken by Gulf Coast members of Congress to pressure insurers to be generous in settling claims stemming from the 2005 hurricanes, and to hold down rate increases to homeowners and businesses in the area."[iv]

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February 28 is shaping up to be a significant day for those with interests riding on Katrina coverage issues. But look for Judge Senter's hearing to grab much bigger headlines than the House Financial Services Committee. Unlike anything that takes places in Washington, Judge Senter can make a decision swiftly and unilaterally with the stroke of a pen, having a direct and immediate impact on many Mississippians.

Mississippi Attorney General Jim Hood has been no shrinking violet since Judge Senter rejected the State Farm settlement at the end of January. Mr. Hood's grand jury investigation of State Farm's handling of Katrina claims has been a significant act in the Katrina coverage side show. Responding to a February 2nd editorial in *The Wall Street Journal* that was critical of him, Mr. Hood stated the following in a February 8th Letter to the Editor: "State Farm did not settle out of fear, but because an independent federal judge ruled that the law was not on its side…. Since State Farm could not meet the burden of proof, it decided to settle."

The Attorney General was referring to Judge Senter's decision to direct a verdict in *Broussard* and his rulings in the case on burden of proof in a wind vs. water claim. While the State Farm settlement was in fact announced following the decision in *Broussard*, it was reported *prior* to the ruling that settlement talks were underway. Moreover, the terms ultimately reached were very similar to those reportedly on the table before *Broussard* was decided. Revisionist history is nothing new for politicians, but usually they wait more than a couple of weeks before engaging in it.

On February 14th, State Farm announced that it would suspend writing new homeowners and commercial property insurance in Mississippi. The company stated that "criticisms about how it handled Hurricane Katrina claims have complicated matters. The company is concerned that provisions in its insurance policies are being reinterpreted after the fact to provide for coverages that were not contemplated when the policies were written." The company's announcement also stated: "[I]t is no longer prudent for us to take on additional risk in a legal and business environment that is becoming more unpredictable." A February 16th *Wall Street Journal* editorial called that "a polite way of saying 'we'd be nuts to keep doing business in a state that can't spell c-o-n-t-r-a-c-t.'"

Reaction to State Farm's February 14th announcement was swift. In a news conference held that same day, Mr. Hood stated: "If they'd paid what they owed in the first place, there never would have been a lawsuit filed."[v] He also stated: "The whole reason for reaching the settlement with them [State Farm] was to keep them here."[vi] Mr. Hood described the negotiations over the proposed settlement as "a death roll with an alligator."[vii] Happy Valentine's Day. Mr. Hood was of the view that State Farm's decision was intended to convince Mississippi officials and trial lawyers to retreat from trying to force State Farm to increase its claim payments.[viii]

Two days later, Attorney General Hood, calling State Farm a "robber baron" and accusing it of "decadent actions," then announced that he would introduce legislation designed to *prevent* State Farm from *refusing* to write new homeowners and commercial policies in Mississippi. Mr. Hood's feelings toward State Farm are reminiscent of that great joke recounted by Alvy Singer in Woody Allen's "Annie Hall": "The food in this place is really terrible. Yes, and such small portions."

Mr. Hood stated that the plan to keep State Farm in Mississippi was modeled after Florida, which he *claims* requires any company that writes automobile insurance to also write homeowners policies. Ironically, while insurers are being accused of receiving preferential antitrust treatment, Attorney General Hood is proposing something that resembles an illegal tying agreement. For a discussion of the accuracy of Mr. Hood's statement that Florida requires any company that writes automobile insurance to also write homeowners policies, see "Mississippi Attorney General Hood Denounces State Farm As 'Robber Barons,' Fails To Connect With Facts During Press Conference Despite Repeated Attempts," David Rossmiller's February 20, 2007 post at his blog: insurancecoverageblog.com.

State Farm immediately responded to the proposed legislation: "This is a remarkable response to what was just a business decision, but it does underscore the legal and political challenges faced in Mississippi. We want to continue to serve our customers in Mississippi, but it seems some are intent on making that more difficult."[ix]

Mississippi Governor Haley Barbour also responded quickly to Mr. Hood and his proposed legislation: "Having considered my statutory and constitutional emergency powers including the statute you cited in your letter, I have no authority to force a private company to sell its products in the State of Mississippi."[x]

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Robert Hartwig, Ph.D., President and Chief Economist of the Insurance Information Institute, stated that Mr. Hood's plan is unlikely to succeed, as auto insurance is not profitable enough to keep companies writing homeowners policies in a hurricane-prone region. "The only losers in this situation are consumers facing fewer options for automobile insurance," Dr. Hartwig stated.[xi]

Richard Scruggs, the policyholder lawyer at the heart of the potential State Farm settlement issued his own statement in response to State Farm's decision to cease writing new homeowners policies in Mississippi: "Our legal team will continue to pursue this balanced resolution [the rejected State Farm settlement] to head off an all-out economic war for our state. It is time for everyone to take a deep breath and think through the consequences of their actions."[xii]

Zachary Scruggs also weighed in: "We at Scruggs Katrina Group applaud Attorney General Jim Hood's efforts to prevent State Farm and other insurers, who made $50 billion in net profit last year, from cherry picking its insurance coverage in Mississippi. We also applaud the efforts of Senator Lott, Congressmen Taylor and Congressman Thompson to repeal the insurance industry's anti-trust exemption. It is essential we prevent this kind of industry coercion from happening in Mississippi and other states. The fact is State Farm, Allstate, Nationwide, and other insurance companies owe thousands of families on the Mississippi Gulf Coast millions of dollars for unpaid Hurricane Katrina damage claims. It is wrong for any insurance company to stop issuing homeowner's and commercial policies as punishment for having to pay owed claims." Mr. Scruggs went on to state that his group is still hopeful that it can work out a resolution with the Attorney General, State Farm and the Court.[xiii]

Perhaps the loudest response to the State Farm announcement came from a *front page editorial* by Southern Mississippi's *SunHerald* newspaper, in which it stated: "According to a press release, State Farm 'is concerned that provisions in its insurance policies are being reinterpreted after the fact to provide for coverages that were not contemplated when the policies were written.' Bull. State Farm is not being prudent, it is being punitive. It is using fear to scare up a better settlement in federal court. But it is not the state's legal environment that is becoming untenable for the insurance giant, it is State Farm's insane contention that hurricane-force winds did not damage the property of its policyholders."[xiv]

The Principal Coverage Issues In *Broussard*

There are essentially two principal legal issues on which Judge Senter ruled against State Farm in *Broussard*: (1) allocation of burden of proof; and (2) entitlement to punitive damages. Judge Senter treated them as all-or-nothing decisions, with State Farm finding itself on the nothing end both times.

Burden of Proof

Judge Senter ruled as follows in *Broussard* on burden of proof:

> 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. 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.
>
> In these circumstances, it is the allocation of the burden of proof that is critical, for one 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.

Broussard at *5-*6.

Judge Senter ruled that, because State Farm offered no evidence to allow a fact finder to make a reasonable determination of the amount of the total loss that was attributable exclusively to water damage, it failed to meet its burden of proof, and, therefore, was liable for the *full* limits of coverage.

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Judge Senter's support for this conclusion was rather on the thin side. He cited, but did not explain, *Lunday v. Lititz Mutual Insurance Company*, 276 So.2d 696 (Miss. 1973) and a Fifth Circuit case citing *Lunday* with approval—*U.S. Fidelity & Guar. Co. v. Planters Bank & Trust Company*, 77 F.3d 863 (5th Cir. 1996). Judge Senter cited *Lunday* for the proposition that State Farm's obligation to prove the applicability of its water damage exclusion—which nobody would dispute—went further and required the company to prove "what portion of the total loss is attributable to flood damage and is therefore outside the policy coverage." *Broussard* at *4. Having failed to do so, State Farm became liable for the full limits under the policy, despite the fact that, at most, the loss of a few shingles was the extent of damage caused by a covered peril.

In *Lunday*, the Mississippi Supreme Court addressed coverage for damage to a rooming house caused by Hurricane Camille. The facts, at least those relayed by the court, were minimal. Tidal water inside the house rose to the level of four feet above the first floor. The insurer, Lititz, admitted to $2,500 of damage because of windstorm. A jury returned a verdict for Lititz and judgment was entered for the plaintiff for the $2,500 admitted damage. *Lunday* at 697.

Among other assignments of error, the policyholder argued that the lower court erred in placing the burden on it to go forward with evidence of the affirmative defenses rather than having this burden shift to the insurer. *Id.* at 698. While the opinion is no model of clarity, the Mississippi Supreme Court held that "The trial judge correctly instructed the jury that the burden of proof was on the plaintiff to prove that the damages sustained were covered by the peril insured against, that is, by direct action of the wind. Necessarily, when plaintiff proves that, he negatives the proposition that the damages were caused by tidal or surface water." *Id.* at 699. The court concluded that "The jury simply found that the plaintiff did not meet the burden of proof which plaintiff clearly recognized was his burden, that is, to prove more than $2500.00 windstorm damage." *Id.*

The *Lunday* Court discussed differences in burdens between an all-risk policy (which the policy in *Lunday* was not) and a fire and extended coverage policy, which was the policy type at issue before it—one that added coverage by endorsement for various named perils, including windstorm. Addressing an all-risk policy, the *Lunday* Court noted that "where an exclusion is specifically pleaded as an affirmative defense the burden of proving such affirmative defense is upon the insurer[.]" *Id.* at 698. That is not a disputed point.

Judge Senter also concluded that, as a matter of law, "State Farm has not met its burden of proof as to the segregation of this total loss into wind damages, which are covered, and water damages which are excluded from coverage." *Broussard* at *7. It is difficult to find in *Lunday* where the Mississippi Supreme Court held that State Farm's obligation to prove the applicability of its water damage exclusion *further* required the company to prove "what portion of the total loss is attributable to flood damage and is therefore outside the policy coverage." *Broussard* at *4.

Not only did *Lunday* not discuss in any detail that an insurer has an obligation to segregate a total loss between wind damage and water damage, it also certainly did not state that, as was the outcome in *Broussard*, the recourse for an insurer failing to segregate the damage is that the insured enjoys coverage for full policy limits and a ticket to punitive damages.

The most comprehensive pronouncement of State Farm's position on burden of proof can be found in its Fifth Circuit Brief in *John and Claire Tuepker v. State Farm Fire & Casualty Company*, United States Court of Appeals for the Fifth Circuit, Nos. 06-61075 and 06-61076 ("State Farm's Fifth Circuit Brief in *Tuepker*"). The case is presently before the Fifth Circuit following Judge Senter's Order granting Interlocutory Appeal. *Tuepker v. State Farm,* Order Certifying Interlocutory Appeal (September 27, 2006).

In its January 30th Fifth Circuit filing in *Tuepker*, State Farm acknowledged that "if the insured meets his threshold burden of proving an accidental direct physical loss to insured property, the burden shifts to the insurer to prove the applicability of any exclusion asserted as an affirmative defense." State Farm's Fifth Circuit Brief in *Tuepker* at 35. This is a general statement of insurance coverage law that both insurers and insureds can agree upon.

State Farm then goes on to explain for seven pages that, under established principles of Mississippi law, "once the insurer adduces evidence that the insured's loss was caused by an excluded peril, the burden 'shifts back' to the insured to show that the claim does not fall within the exclusion or to segregate covered losses from noncovered losses." *Id.* at 35-36. To do otherwise, State Farm argues, would violate the principle that recov-

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ery is only permitted for that which is covered by the policy. Clearly there was no "shifting back" of the burden of proof to the insureds allowed in *Broussard*. To the contrary, it was Judge Senter's conclusion that even State Farm's *attempt* to shift the burden of proof to the insureds, to establish the portion of their loss that was caused by wind, was impermissible, and, thus, the basis for allowing the jury to consider punitive damages against the company.

In support of its "shifting back" position, State Farm's Fifth Circuit Brief in *Tuepker* cited *Britt v. Travelers Ins. Co.*, 566 F.2d 1020 (5th Cir. 1978) (Mississippi law). *Lunday* has been cited by other courts only eight times since it was decided nearly a quarter century ago—five of those citations belong to Judge Senter in Katrina coverage cases. Coincidentally, of the three remaining citing references, one is *Britt*.

Britt involved coverage under a life insurance policy. Travelers paid the $50,000 death benefit under the policy but refused to pay an additional $50,000 that was due if the death was accidental. Mr. Britt, who had mental deficiencies, died from exposure to the elements. It was also determined during the autopsy that Mr. Britt suffered from various heart, kidney and liver ailments.

Britt is a fairly complex case, and not helped by the fact that it is subject to two decisions from the Fifth Circuit, the second one correcting certain errors contained in the first one (556 F.2d 336 (5th Cir. 1977). Addressing burden of proof, the *Britt* Court cited *Lunday* for the proposition that, in a case involving whether a dwelling loss was due to wind or water damage, with an express policy exclusion for water damage, the burden of proof remained on the plaintiff (insured). *Britt*, 566 F.2d at 1022.

Turning to its own situation, the *Britt* Court held as follows:

> The case at bar presents similar burden of proof issues [similar to *Lunday*] in a most confusing context. The company here has asserted the subject matter of its defense—the insured's bodily or mental infirmity—both as part of its general denial that an accident caused his death and by way of an affirmative defense that even if the death was accidental, a pre-existing infirmity contributed to that event. Insofar as the company asserted that Mr. Britt's death was caused by his bodily or mental infirmities, its defense was a denial of the assertions in the complaint and *the burden of proving accident as the cause of death never shifted from the plaintiff*. The company also pled as an affirmative defense that a pre-existing infirmity or disease contributed to Mr. Britt's demise. The burden of proving this latter assertion was upon the company.

Id. (emphasis added).

Given the complexity and huge consequences of the burden of proof issue, Judge Senter's citation to *Lunday*, with nothing more, did not do the parties (at least not State Farm) any favors.

Punitive Damages

The soundness of Judge Senter's decision in *Broussard* on the appropriateness of punitive damages is critical to the price of any State Farm settlement, given His Honor's following statement, as noted above, when discussing the requirement that any global settlement be reasonable: "In the absence of substantial guarantees that are reasonably related to the level of damage to the insured property, I see little inducement for the class members to forego their potential extra-contractual claims and the procedural rights they have in the process of litigation."

Just as Judge Senter's explanation and support for his burden of proof ruling in *Broussard* was light, so too was the basis for His Honor's decision that it was appropriate for the jury to consider the imposition of punitive damages. Simply put, there is no legal support whatsoever cited in the opinion concerning the appropriateness of punitive damages. Moreover, in his January 31, 2006 Remittitur Order in *Broussard* reducing the punitive damages from $2.5 million to $1 million, Judge Senter further elaborated on his rationale for the imposition of punitive damages, but, again, cited no Mississippi authority whatsoever for their appropriateness.

While *Broussard* does cite (with no explanation) *Gregory v. Continental Insurance Company*, 575 So.2d 534 (Miss. 1990) when discussing punitive damages, it appears that this case is offered for the proposition that an insurer has a duty to take into consideration any new information that comes to it through investigation, whether or not suit has been filed. However, while *Gregory* involved punitive damages, it did not involve the shifting of the burden of proof, which was at the core of Judge Senter's decision to allow the jury to consid-

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er punitive damages. Thus, it appears that *Gregory* only created an obligation for State Farm to consider new information developed through the course of investigation. It was State Farm's alleged failure to do so that then gave rise to the allegedly impermissible shifting of the burden of proof to the insureds, which subsequently opened the door to punitive damages.

Gregory involved coverage for damage caused when Hurricane Elena struck the Gulf Coast resulting in several hundred trees being blown over onto the St. Andrews Country Club, a commercial golf course in Jackson County. In addition to the golf course, the St. Andrews Country Club consisted of a building housing the business office, a pro shop, and a small restaurant, a maintenance building, and a swimming pool and bath house. Hurricane Elena destroyed the maintenance building and caused damage to both the pro shop and the swimming pool. The golf course was closed for approximately fourteen days to clear trees and debris.

The club was insured under a Special Multi-Peril (SMP) policy issued by the Continental Insurance Company. The policy provided hazard insurance for all buildings on the property, insured for their full damage or replacement, as well as coverage for personal property contents. Further, the policy included a gross earnings endorsement (business interruption). The heading of the endorsement gave the location of the premises as location 1 building 1, defined in the policy as the pro shop, restaurant, and office.

Although requested by the insured, Continental refused to provide coverage for the business interruption which occurred when the course was closed for fourteen days because "there was no business interruption insurance for trees on the golf course." *Gregory*, 575 So.2d at 537. The insured filed a complaint against Continental for actual and compensatory damages, as well as $7 million in punitive damages.

At trial, the claims manager testified that Continental never denied the claim, but, rather, their position had been since the beginning that, upon receipt of proper information in order to calculate the company's exposure under the gross earnings endorsement, they could then calculate the loss and offer to pay that amount to the insured. He stated it was only after the suit was filed that Continental began receiving any written financial information.

The Supreme Court of Mississippi agreed with the circuit judge that the business interruption endorsement did not cover loss from the entire golf course being shut down, but, rather, for whatever business was lost resulting from damages to the pro shop and restaurant. The Court also agreed with the circuit judge that Continental's actions *prior* to the plaintiffs filing suit did not justify submitting a punitive damage issue to the jury. However, the Court found that, unfortunately for Continental, the inquiry should not have ended there.

The Mississippi Supreme Court determined that, "an insurance carrier's duty to promptly pay a legitimate claim does not end because a lawsuit had been filed against it for nonpayment." *Id*. at 541. The court determined that, after the suit was filed against Continental, the plaintiff should have been informed that Continental recognized that some amount was owed from business interruption caused by the damage to the pro shop, and that Continental was willing to pay for this loss so long as the plaintiff furnished written documentation of the loss. The Court found that Continental should have either communicated this to the plaintiff's counsel, or specifically raised plaintiff's failure to comply with the policy in its pleading and called the matter to the attention of the court. Since Continental did not insist upon its right to receive documentation of the loss, the Court was left to consider, "why did it not pay the claim?" See *Id*. at 541-42.

The Supreme Court in *Gregory* did not rule out the possibility of punitive damages being assessed against Continental for its post-suit handling of the claim, but remanded for a determination of the reasonableness of or arguable reason for Continental's conduct after suit was filed. Judge Senter himself stated that "a Directed Verdict should be rendered as a matter of law when a party has been *fully heard* on an issue and there is no legally-sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Broussard* at *2 (emphasis added). However, in *Broussard*, there is no discussion of State Farm being afforded any opportunity to explain its conduct before the Court determined that it was unreasonable and warranted punitive damages.

Lastly, *Gregory* concluded with the following observation from the Mississippi Supreme Court on the subject of claims handling in the face of significant hurricane claims:

> We find no occasion for censure against Continental prior to the institution of this suit. We take judicial notice that Hurricane Elena was a disaster to that particular area of our Gulf Coast. No doubt hundreds of claims running in the millions of dollars were filed. Insurance carriers were

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> burdened with the task of investigating and paying claims as promptly as possible to relieve the great financial hardship inflicted upon a host of Gulf Coast insureds. In this case Continental promptly paid all hazard claims of the Gregorys and Mr. Biddix. The amount due from loss of business to a sandwich shop and pro shop for 11-14 days could not have been a comparatively large claim, or susceptible to easy and certain proof, and Continental was clearly entitled to documentation in a written proof of loss before it was obligated to pay under any such claim. When suit was filed the emergency was long since over and the situation entirely different.

Gregory at 542. The Supreme Court's observation is something to be kept in mind when considering the claims re-evaluation process (up to 35,000) that would take place if the State Farm settlement is ultimately approved.

Conclusion

Judge Senter's decision in *Broussard* was not the only basis for State Farm attempting to reach a global settlement in the Magnolia State. No doubt a host of factors played into it. But since being decided and characterized, one would think that *Broussard's* words were etched on tablets and handed down by the District Court of Mt. Sinai.

Broussard has been seen as creating a huge black cloud over Bloomington, Illinois. For example, the decision—notwithstanding that it was significantly tied to purported principles of *Mississippi* law—has nonetheless been portrayed as a driving force behind potential settlements being discussed in *Louisiana* by State Farm and Louisiana Citizens for "slab" claims.[xv]

Given the significance of the opinion, not to mention the stunning manner in which it was decided, it was given short shrift in the detail and legal support departments. Mr. Scruggs' recent advice, that everyone should take a deep breath, is sage.

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i "House, Senate Get Bipartisan Bills to Repeal Insurance Antitrust Immunity," *Insurance Journal*, February 15, 2007, posted at http://www.insurancejournal.com/news/national/2007/02/15/77000.htm.

ii *Id*.

iii Maria Recio, "Insurance Industry Antitrust Exemption Under Fire," February 16, 2007, *SunHerald*, posted at http://www.sunherald.com/mld/sunherald/business/industries/insurance/16714178.htm

iv Arthur D. Postal, "Insurers Put Positive Spin on Congress' Katrina Probe," *NU Online News Service*, February 2, 2007, posted at http://cms.nationalunderwriter.com/cms/nupc/Breaking+News/2007/02/02-PROBE-dp.

v Joseph B. Treaster, "State Farm Ends New Property Coverage in Mississippi," *The New York Times*, February 15, 2007.

vi Lavonne Kuykendall and Liam Pleven, State Farm Moves to Limit Risk," *The Wall Street Journal*, February 15, 2007.

vii *Id*.

viii Treaster at note v.

ix "Mississippi AG Seeks Law to Block State Farm Exit," *Reuters*, February 16, 2007, posted at http://www.businessinsurance.com/cgi-bin/news.pl?newsId=9557.

x Holbrook Mohr, "Miss. Gov. Barbour Rejects Hood's Call to Block State Farm," *Associated Press*, February 20, 2007, posted at http://www.insurancejournal.com/news/southeast/2007/02/20/77036.htm.

xi *Id*.

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xii "Richard Scruggs' Response to State Farm," *PRNewsWire,* February 14, 2007, posted at http://www.insurancebroadcasting.com (February 16, 2006 edition of *Insurance Newscast*).

xiii "Zachary Scruggs' Statement Regarding Attorney General Hood's Insurance Proposal," *PRNewsWire*, February 16, 2007, posted at http://www.insurancebroadcasting.com (February 20, 2007 edition of *Insurance Newscast*).

xiv *Sun Herald* Editorial, The Good Neighbor Policy: Punishing Mississippi," February 18, 2007, posted at http://www.sunherald.com/mld/sunherald/news/editorial/16728676.htm.

xv Kathy Chu, "Hurricane Suits May Be Settled Soon," USA Today, February 19, 2007. Never mind that, unlike some other insurers, State Farm's flood exclusion and anti-concurrent causation language was upheld in the Eastern District of Louisiana's late 2006 decision in *In re Katrina Canal Breaches Consolidated Litigation v. Encompass Insurance Company, et al.*, 2006 U.S. Dist. LEXIS 85779.

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