Legal Opinion Letter

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THE THRILLA IN MANOLA:
COURT RESOLVES HEAVYWEIGHT INSURANCE BATTLE IN LOUISIANA

by
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It was an insurance coverage case with all the trappings of a heavyweight title fight: (1) pre-fight publicity (The Associated Press ran a set-up story the day before oral argument.); (2) tickets nearly impossible to obtain (The courtroom was packed with 120 lawyers, paralegals and law clerks.); (3) one of the most coveted prizes in sports on the line (At issue, insurance coverage for thousands of New Orleans residents whose homes were damaged by Hurricane Katrina); (4) unquestionable muscle in both corners (One of the appellate briefs had 59 lawyers on the service list.); (5) the fighters brought an entourage (There was a lot of *amicus* involvement.); and (6) the aura of a re-match hung over the ring (The policyholders had scored a stunning upset just seven months earlier and the insurers were hungry for redemption.).

Such was the atmosphere surrounding the May 6, 2007 oral argument before the U.S. Court of Appeals for the Fifth Circuit in *In re Katrina Canal Breaches Consolidated Litigation v. Encompass Insurance Company, et al.* Before the court was a review of a November 2006 decision by Judge Stanwood Duval, Jr. of the Eastern District of Louisiana that several insurance companies' flood exclusions that did not distinguish between man-made and naturally occurring floods were ambiguous and, therefore, did not preclude coverage for damage caused by the New Orleans levee breaches associated with Hurricane Katrina. *See In re Katrina Canal Breaches*, 466 F. Supp. 2d 729 (E.D. La. 2006).

On August 2, after promising a quick decision, three Fifth Circuit judges returned unanimous scorecards and reversed Judge Duval, holding that "The flood-control measures, i.e., levees, that man had put in place to prevent the canal's floodwaters from reaching the city failed. The result was an enormous and devastating inundation of water into the city, damaging the plaintiffs' property. This event was a 'flood' within that term's generally prevailing meaning as used in common parlance, and our interpretation of the exclusions ends there." *Katrina Canal Breaches,* 2007 U.S. App. LEXIS 18349, *79-80.

Given the significant length of the opinions from the District Court and Fifth Circuit, there is no short answer to the question: why did the courts disagree? For starters, both courts at least agreed

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on one thing – that their task in discerning the meaning of the flood exclusion must be guided by Louisiana's established rules of insurance policy interpretation, which follow the maxims of contract interpretation generally. However, agreeing on the ground rules is not the same as agreeing on their application. And that is where the courts parted ways.

It does not take a lot of effort for a court to conclude that an insurance policy provision is ambiguous. Insurance policies are complex documents, governed by a large body of case law, the determination of ambiguity is inherently subjective and the one making the call has years of experience in a profession in which finding more than one meaning in a word is a core skill. For these reasons, the District Court did not struggle to conclude that the flood exclusion was susceptible to two meanings and, therefore, ambiguous. In general, the court hung its hat on the following hooks (albeit in a 30-page discussion): that the word "flood" has numerous dictionary meanings and has been the subject of differing case law interpretations. *Katrina Canal Breaches* at 756.

The Fifth Circuit looked at the same arguments and concluded that they did not give rise to an ambiguity. It takes more effort for a court to conclude that an insurance policy provision is not ambiguous, and that's what the Fifth Circuit brought to the task. The court reviewed and rejected the various arguments advanced by the policyholders that the flood exclusion was ambiguous.

For example, the Fifth Circuit concluded as follows: The fact that a term used in an exclusion is not defined in the policy alone does not make it ambiguous. If so, "an insurer would have to define every word in its policy, the defining words would themselves then have to be defined, their defining words would have to be defined, and the process would continue to replicate itself until the result became so cumbersome as to create impenetrable ambiguity." *Id.* at *40-41.

The court also held that: "[T]he fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous." *Id.* at *43. "Nor does the fact that other policies have more explicitly defined the scope of similar exclusions." *Id.* at *44. And, just as the District Court did, the Fifth Circuit looked at numerous dictionary definitions of the term "flood." The Court of Appeals concluded that the dictionaries it reviewed "make no distinction between floods with natural causes and those with non-natural causes." *Id.* at *61.

But perhaps the biggest difference between the two opinions was the Fifth Circuit's adherence to La. Civ. Code Ann. Art. 2049, directing it to interpret a term with a meaning that renders the term effective. In doing so, the Fifth Circuit made the following sage observation about the District Court's distinction between man-made and naturally occurring floods: "Because levees are man-made, one could point to man's influence nearly any time a levee fails. If a levee fails despite not being overtopped by the floodwaters, it is because the levee was not adequately designed, constructed, or maintained. If a levee fails due to the floodwaters overtopping it or loosening its footings, it is because the levee was not built high enough or the footings were not established strongly or deeply enough. . . . Any time a flooded watercourse encounters a man-made levee, a non-natural component is injected into the flood, but that does not cause the floodwaters to cease being floodwaters." *Id.* at *69.

In both boxing and litigation, when it's over, those on the losing side never agree with what's on the judges' scorecards. What's more, just as boxers never seem to retire, neither do unsuccessful litigants. The policyholders have sought *en banc* review from the Fifth Circuit.

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