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Hurricane Katrina And Insurance Coverage: First Words From The Bench

Playing It Down The Senter

by
Randy J. Maniloff, Esq.

White and Williams, LLP
Philadelphia

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Commentary

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Playing It Down The Senter

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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.]*

Say *Hurricane Katrina* and most people immediately think of New Orleans. Say Hurricane Katrina *and insurance coverage* and the story is much different. At the 9-month anniversary since the storm made landfall, when it comes to the question of coverage for the devastation, it's Mississippi cases that have done all the marching in. At least it seems that way thanks to some press-worthy filings.

The Mississippi coverage actions that have grabbed the media's attention include: Attorney General Jim Hood's suit seeking to declare the flood exclusion in homeowners policies unenforceable (See *Jim Hood, Attorney General for the State of Mississippi v. Mississippi Farm Bureau Insurance, et al.*, Chancery Court of Hinds County, Mississippi, First Judicial District, No. G2005-1642); A surge of cases (and attempted class actions) filed in Mississippi by the well-known Scruggs Law Firm, including ones on behalf of Mississippi Senator Trent Lott, Mississippi Congressman Gene Taylor and Mississippi federal judge Louis Guirola (who reportedly would have presided over Katrina coverage cases); An attempted class action filed in federal court in Mississippi against several major oil, coal and chemical companies, alleging that such companies are responsible for global warming, which allegedly created the conditions to enable Hurricane Katrina to form. Therefore, the suit alleges that these companies are responsible for the Katrina damage (You can look it up. See *Ned Comer, et al. v. Murphy Oil, U.S.A., et al.*, United States District Court for the Southern District of Mississippi, No. 1:05-cv-00436); and Biloxi's Hard Rock Hotel and Casino's suits against two insurers for their share of an estimated $175 million loss. See *Premier Entertainment Biloxi LLC v. James River Insurance Company*, United States District Court for the Southern District of Mississippi, No. 1:06-cv-00012 and *Premier Entertainment Biloxi LLC v. SR International Business Insurance Co., Ltd.*, United States District Court for the Southern District of Mississippi, No. 1:06-cv-00013. Of course numerous suits seeking coverage have also been filed in Louisiana, but it sure looks like an all-Mississippi procession so far.

But of all the Mississippi coverage cases that have been filed — including the high-profile ones — the two

that merit the closest scrutiny involve regular Mississippians: Actions brought by Gulfport residents Elmer and Elexa Buente and Long Beach residents John and Claire Tuepker (all represented by the Scruggs Law Firm) seeking coverage under homeowners policies issued by Allstate and State Farm, respectively, have recently been the subject of decisions by Senior Judge L.T. Senter, Jr. of the Southern District of Mississippi. See *Elmer and Elexa Buente v. Allstate Insurance Company, et al.*, United States District Court for the Southern District of Mississippi, Southern Division, 1:05CV712 (Memorandum Opinion, March 24, 2006), *Elmer and Elexa Buente v. Allstate Insurance Company, et al.*, 2006 U.S. Dist. LEXIS 23742 (April 11, 2006) and *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). Since these cases provide some answers and not simply allegations, they are presently the eye of the Katrina coverage storm. A closer look at the *Tuepker* decision, including the parties briefs, and, to a lesser extent, the *Buente* decisions, follows.

John And Claire Tuepker v. State Farm Fire & Casualty Company

On May 24, Judge Senter of the District Court for the Southern District of Mississippi issued a Memorandum Opinion in *Tuepker v. State Farm* addressing coverage under a State Farm homeowners policy for damage caused by Hurricane Katrina. The Tuepker's home in Long Beach Mississippi was completed destroyed during Hurricane Katrina, allegedly caused by "hurricane wind, rain, and/or storm surge from [the hurricane]." *Tuepker* at 2, quoting Plaintiffs' complaint. State Farm disclaimed coverage on the basis that the property was destroyed by "storm surge, wave wash, and flood." *Id.*, quoting State Farm's October 6, 2005 disclaimer letter. Litigation ensured and the matter before Judge Senter was State Farm's Motion to Dismiss under Fed.R.Civ.P. 12(b)(6).

Given that the only facts before the court were that the destruction of the plaintiffs' home was allegedly caused by "hurricane wind, rain, and/or storm surge," which the court was obligated to accept as true, it did not find itself constrained to limit its decision to a narrow set of circumstances. As a result, Judge Senter's Memorandum Opinion provides several broad rulings. This cuts both ways. While it provides the parties with guidance on a number of issues, it also makes it easy to read too much into the decision.

Damage Caused By Wind

First, Judge Senter held that there is coverage under the State Farm policy for damage caused by wind "because destruction of the insured dwelling by a windstorm, including a hurricane, would constitute an accidental direct physical loss and would therefore be a covered peril." *Id.* at 5. The judge concluded that this also applied to personal property inside the dwelling that was damaged by rain that entered through breaches in the walls or roof caused by hurricane winds. *Id.*

There was nothing extraordinary about this decision. State Farm readily admitted that homeowners policies provide coverage for damage caused by hurricane winds. See State Farm's Memorandum of Law in Support of its Motion to Dismiss Plantiffs' Complaint at 12: "[T]he [hurricane] Deductible underscores the fact that the policy affords coverage only for hurricane damage caused by wind, rain or hail." See also *Elmer and Elexa Buente v. Allstate Insurance Company, et al.* (Memorandum Opinion, March 24, 2006), *supra* at 7 ("As to the damage caused by wind and rain, there is apparently no dispute that these losses are covered by the policy.")

Flood Exclusion

The court next addressed damage caused by water and held that "The exclusion found in the policy for water damage is a valid and enforceable policy provision. Indeed, similar policy terms have been enforced with respect to damage caused by high water associated with hurricanes in many reported decisions." *Id.* at 6 (citing six decisions from the Mississippi Supreme Court and one from the Fifth Circuit). See also *Buente* at 8 (Memorandum Opinion, March 24, 2006) (virtually identical quote and same citations).

The plaintiffs argued with category five force that the flood exclusion is 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." Plaintiffs' Response to Motion to Dismiss

and Memorandum in Support of Cross-Motion for Partial Summary Judgment at 11. "Had State Farm used alternative or more precise language, this would have put the matter of whether storm surge is a covered cause of loss under the policy beyond reasonable question. * * * Obviously, with just a little more effort, State Farm could have drafted the exclusion to bar coverage for storm surge." *Id.* at 18.

Attempting to eliminate the flood exclusion was clearly the plaintiffs' swing for the fences. This issue was the most heavily briefed in the case — and for good reason. Considering the extent of Katrina damage caused by flood, the elimination of the flood exclusion would be the insurance industry's own version of a levee breach. It's no wonder that this is the issue that dominates the Mississippi Attorney General's suit.

Judge Senter dismissed the plaintiffs' argument without breaking a sweat, nor even a mention of the extent of contentiousness over the issue. The Judge stated, matter-of-factly, that "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." *Tuepker* at 6. See also William Shakespeare, *Romeo and Juliet*, Act 2, Scene 2 ("What's in a name? that which we call a rose by any other name would smell as sweet[.]")

The Judge also dismissed this argument out of hand in his April 11th decision in *Buente*, stating, "Hurricane Katrina moved tidal waters from the Mississippi Sound on shore and inundated thousands of homes, some within and some beyond the ordinary flood plane established by responsible agencies of the United States government. Since the water that entered and damaged the plaintiffs' home was tidal water, I find that the damage caused by this inundation is excluded from coverage under the Allstate policy." *Elmer and Elexa Buente v. Allstate Insurance Company, et al.*, 2006 U.S. Dist. LEXIS 23742, *3.

Not surprisingly, the insurance industry applauded this decision. In a joint release addressing *Buente*, the American Insurance Association, the National Association of Mutual Insurance Companies and the Property Casualty Insurers Association of America stated: "The Court clearly is putting to rest the trial bar's unfounded argument in this and other cases that 'wind-driven water' or 'storm surge' is not covered by plain-language exclusions. Fortunately for all Mississippians, this ruling upholds the integrity of contracts in the state, and is further evidence that misinformed statements by plaintiffs' attorneys regarding long-settled homeowners policy language are meaningless in a court of law."

Damage Caused By Wind And Flooding

So far, the court's decision in *Tuepker*, that coverage is available under the State Farm policy for damage caused by wind, but not flooding, is unremarkable. Of course, a great deal of the damage at issue in Katrina claims may not have been caused by only one or the other. Rather, damage is likely to have been caused by both wind and flooding. This is where the adjusting process gets more complicated and it is less likely that the parties will find common ground. Judge Senter addressed this combination of causes in *Tuepker* and held as follows:

> If the evidence were to indicate that part of the plaintiffs' 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. Grace v. *Lititz Mutual Insurance Co., 257 So.2d 217 (Miss. 1972).* 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. *Lititz Mutual Insurance Co. v. Boatner*, 254 So.2d 765 (Miss. 1971)

Tuepker at 6. "To the extent that plaintiffs can prove their allegations that the hurricane winds (or objects

driven by those winds) and rains entering the insured premises through openings caused by the hurricane winds proximately caused damage to their insured property, those losses will be covered under the policy, and this will be the case even if flood damage, which is not covered, subsequently or simultaneously occurred." *Tuepker* at 8.

In other words, Judge Senter took his initial decisions that coverage is available under the State Farm policy for damage caused by wind, but not flooding, and applied them to damage caused by both. Putting aside issues of feasibility, his decision calls for a finder of fact to determine the extent of damage caused by wind versus flooding. The judge also recognized that this determination would likely be guided by competing experts: "It is likely that both the plaintiffs and State Farm will present expert evidence on the issue of the cause or causes of the damage to the plaintiffs' property." *Id.*

The need for both sides to incur the expense of retaining experts to assist with the adjusting process is unfortunate, but not something that can be blamed on the parties or the judge. The requirement for expert testimony is simply an inherent consequence of the technically-intensive nature of the determination that needs to be made. A review of prior decisions addressing coverage for property damage caused by hurricanes reveals that they are expert-driven, as well as based on any eye-witness accounts of how the damage was caused. The determination may not be easy or perfect, but it's the system we have.

It will also likely be argued by policyholders, as it was in *Tuepker*, that hurricane force winds destroyed their residence before the flood waters arrived, and, therefore, coverage is available. "[T]here is ample proof compiled by the United State Navy that Hurricane Katrina's catastrophic winds *preceded* its peak storm surge by a number of hours. It is far more likely that the surge merely removed the wind-rubble of the Tuepkers' home which awaited it." See Plaintiffs' Response to Motion to Dismiss and Memorandum in Support of Cross-Motion for Partial Summary Judgment at 3-4 (italics in original and citation omitted).

Citing *Home Insurance Company, N.Y. v. Sherrill*, 174 F.2d 945 (5th Cir. 1949), State Farm stated: "[T]he Fifth Circuit's holding makes clear that, under the policy language in question, coverage existed *only* if 'the building was destroyed *by the direct* and *sole action of the wind* before the water was high enough and rough enough to contribute thereto.'" State Farm's Memorandum at 15, quoting *Sherrill* at 946 (emphasis added by State Farm).

The Mississippi Supreme Court has also ruled this way — a point that Judge Senter did not miss when he cited *Lititz Mutual Insurance Company v. Boatner*, 254 So.2d 765 (Miss. 1971) in both *Buente* and *Tuepker*. *Boatner* is a Hurricane Camille case involving coverage for a house that was completely destroyed, leaving only the concrete slab on which it had been built. The flood exclusion in the policy at issue provided as follows: "This Coverage Group does not insure against loss: (b) Caused by, resulting from, contributed to, or aggravated by any of the following: (1) flood, surface water, waves, tidal water, or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not[.]" *Boatner* at 765.

The insurer determined that the damage caused by windstorm was $3,000, but agreed to pay close to $11,000 in an effort to minimize the tragedy of the loss. The insured declined the offer and the case went to trial. The jury returned an award for the insured in the amount of $16,300. The insurer appealed. In concluding that "any other verdict would have been against the overwhelming weight of the evidence," the *Boatner* Court stated:

> There can be no question but that the tidal wave covered the cement slab on which the home of the appellees had been erected, to a depth of more than seven (7) feet, but the great weight of the evidence shows that the house and its contents had already been destroyed and distributed over a large area long before the tidal wave came ashore at 11:00 to 11:30 P.M. The pictures showing the devastation of the hurricane called Camille stagger the imagination. The tidal wave that washed about the debris in this case could not have deposited the debris above the water level of the tidal wave, and there was no way for it to have gotten there except by the terrific force of the wind. The jury had ample evidence on which to base its verdict.

Id. at 766.

Efficient Proximate Cause And Anti-Concurrent Causation

On one hand, in reaching his decision that coverage is available under the State Farm policy for damage caused by wind, but not flooding, Judge Senter's decision does not stray from the general rules that have traditionally governed claims for property damage caused by a hurricane. The judge places the difficult factual issue of allocating damages between those caused by wind versus flooding into the hands of the trier of fact, where competing expert reports will likely assist in the determination.

But Judge Senter's opinion also leaves room for dispute. The court's determination that damage caused by wind and rain is covered, "even if flood damage, which is not covered, subsequently or *simultaneously* occurred," is likely to be challenged by insurers. *Tuepker* at 8 (italics added). On this point, the court's opinion does not thoroughly address the issues of "efficient proximate cause" and "anti-concurrent causation." While these concepts were briefed by the parties at length, they were not addressed by the court in great detail, nor even mentioned by name. In general, the *Tuepker* opinion raises more questions than it answers when it comes to these issues. First, a little background is helpful.

In the first-party property context, some courts have adopted the doctrine of "efficient proximate cause," which provides that if a covered peril causes an excluded peril, coverage is available even for the damage caused by the excluded peril. *Bowers v. Farmers Insurance Exchange*, 991 P.2d 734 (Wash. App. 2000) is a classic example of a court's use of "efficient proximate cause" to find coverage for damage caused by an excluded cause of loss. In *Bowers*, the insured sought coverage under a Landlord's Protection policy for mold damage to her home that resulted when tenants converted the home into a marijuana growing operation. The policy at issue provided coverage for vandalism and malicious mischief, but excluded coverage for mold. The insured argued that while mold growth was the immediate cause of her loss, the "efficient proximate cause" of the loss was not the mold, but the vandalism of her tenants. The court agreed, holding that when the insured can identify an insured peril as the proximate cause, there is coverage, even if subsequent events in the causal chain are specifically excluded from coverage.

The doctrine of "efficient proximate cause" is a principal argument being made by those seeking to preclude the applicability of the flood exclusion to Katrina claims (besides the argument that "Under well settled meteorological principles . . . 'storm surge' does not constitute 'flooding.'). For example, in the Mississippi Attorney General's suit, he alleges that the flood exclusion contradicts Mississippi common law, "which mandates that full coverage be provided if the proximate and efficient cause of the damage (i.e., hurricane wind) is covered . . . even if other 'non' covered causes also contributed to the loss." Attorney General's Complaint at ¶ 27. In a Louisiana suit it is alleged that the flood exclusion is inapplicable because the dominant and efficient cause of the loss was the breach of the levees in New Orleans. See *Gladys Chehardy, et al. v. Louisiana Insurance Commissioner J. Robert Wooley, et al.*, 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana, No. 536451.

The counter to the "efficient proximate cause" argument is that homeowners (and business property) policies typically contain language stating that flood damage is excluded, *regardless of how it was caused*. This is referred to as an "anti-concurrent causation" clause. For example, Insurance Services Office's (ISO) homeowners policy form HO 00 03 05 01 contains the following "anti-concurrent causation" clause which serves as a lead-in to several exclusions, including for water damage (flood):

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

Thus, if a levee breach is a covered peril and it causes flooding (an excluded peril), the doctrine of "efficient proximate cause" may give rise to coverage despite the exclusion, unless such doctrine is pre-empted by "anti-concurrent causation" language contained in the policy.

The State Farm homeowners policy issued to the Tuepkers provided the following "anti-concurrent causation" clause:

> 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:
>
> c. Water Damage, meaning:
>
> (1) flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not;

Tuepker at 7.

The Tuepker's argued that the "anti-concurrent causation" clause in the State Farm policy did not apply, since the covered event, Katrina's windstorm, would have occurred in the absence of the excluded event — flooding of their property. Plaintiffs' Response to Motion to Dismiss and Memorandum in Support of Cross-Motion for Partial Summary Judgment at 27. Without addressing this specific argument, Judge Senter concluded that the "anti-concurrent causation" language in the State Farm policy was ambiguous: "The provisions in question purport to exclude from coverage losses that would otherwise be covered, such as wind damage, when that covered loss happens to accompany water damage (an excluded loss)." *Tuepker* at 7. "I find that these [ ] exclusions are ambiguous in light of the other policy provisions granting coverage for wind and rain damage and in light of the inclusion of a 'hurricane deductible' as part of the policy." *Id.* at 7-8.

However, the strength of the *Tuepker* court's decision that the anti-concurrent causation clause is ambiguous is questionable, in light of the fact that it makes no mention whatsoever of *Boteler v. State Farm Casualty Insurance Company*, 876 So.2d 1067 (Miss. App. 2004), in which the Court of Appeals of Mississippi concluded that the exact same anti-concurrent causation language (in a State Farm policy) was "unambiguous." *Boteler* at 1070 (addressing the anti-concurrent causation language in the context of an earth movement exclusion).

The *Tuepker* court's decision that damage caused by wind and rain is covered, even if flood damage, which is not covered, simultaneously occurred, runs counter to an anti-concurrent causation clause.

With causation being such a pivotal issue in Katrina coverage determinations, the road ahead promises to be anything but smooth. In *In re Estate of Eliasen*, 668 P.2d 110 (Ida. 1983), the Idaho Supreme Court described proximate cause as "exceedingly complex and difficult," and then went on to cite the following sobering description by a leading scholar on the subject: "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the proper approach." *Estate of Eliasen* at 119, citing W. Prosser, *Handbook of the Law of Torts*, at 236 (4th ed. 1971).

Conclusion

A review of the *Buente* and *Tuepker* decisions reveals that Judge Senter played it down the middle and handed each side something to applaud. Indeed, it was difficult to tell from media reports of the *Buente* decision who had actually won. For example, in one media report of the *Buente* decision, Plaintiffs' counsel Richard Scruggs called it a "'huge victory' for all Allstate policyholders whose post-Katrina claims were denied." In that same report, an Allstate spokesperson said that the company "is pleased that the judge ruled, 'The exclusions found in the policy for water damage and for damages attributable to flooding are valid and enforceable policy provisions.'"

These decisions also make clear that, even after highly contentious issues surrounding policy interpretation have been addressed, there are complex issues of causation, timing and damages that remain. In other words, Katrina claims aren't much different from first-party property claims in general or those involving past hurricanes.

To be sure, the *Buente* and *Tuepker* decisions are far from the last word on the availability of insurance under homeowners policies for damage caused by Hurricane Katrina. But because they may be the first, and address certain issues of policy interpretation that will likely be common in many claims, they are sure to be studied closely by policyholders and insurers involved in Katrina coverage disputes — and cited by both sides for any support that they offer. In one media report of the *Buente* decision, Mr. Scruggs said that the ruling could be "precedential and highly influential" to the other cases. Just as the early decisions in the asbestos coverage battles were nowhere near the last word on this evolving subject, they certainly played a part in shaping the landscape to come.

Postscript

On May 30, as this article was being type-set, Insurancejournal.com published an *Associated Press* report of Judge Senter's decision in *Tuepker v. State Farm*. As was the case with media reports of the judge's decision in *Buente v. Allstate*, each side found something to cheer. Indeed, J. Robert Hunter, former Texas insurance commissioner and current director of insurance for Consumer Federation of America, told *AP*, "Both sides can claim victory here." ■

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