INSURERS FACE NEW LAW AFTER KATRINA – BILLIONS AT STAKE

WALTER BOONE
Forman Perry Watkins Krutz & Tardy
Jackson, MS

INSURANCE COVERAGE LITIGATION AFTER NATURAL DISASTERS

Lessons Learned in Mass Disaster Cases

Walter H. Boone
Forman Perry Watkins Krutz & Tardy, LLP

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I. INTRODUCTION

As expected, there has been a virtual torrent of insurance coverage litigation following Hurricane Katrina. Within days and months following Hurricane Katrina, the Mississippi Attorney General and many nationally renown trial lawyers filed lawsuits against insurers directly attacking standard exclusions in insurance policies, and otherwise seeking the abrogation of long-recognized policy terms. Many of these "frontal attacks" have gradually have been addressed by the Mississippi courts, and have, by and large, been narrowed, limited or dismissed in place of individual complaints against individual insurers dealing with individual coverage determinations.

These materials discuss the formative decisions that have been rendered by the Mississippi and Louisiana Courts, so far exclusively the federal courts, in the wake of Hurricane Katrina. While the litigation is ongoing and significant legal issues remain to be resolved, these decisions provide general guidance at least on the direction insurance coverage litigation is taking following Hurricane Katrina.

I. INSURANCE COVERAGE DECISIONS FOLLOWING HURRICANE KATRINA

Hood v. Mississippi Farm Bureau Ins. Co. et al., No. 3:05cv572;
United States District Court, Southern District Mississippi, Jackson Division.

Mississippi Attorney General Jim Hood filed suit on September 16, 2005 in the Chancery Court of Hinds County, Mississippi seeking declaratory and injunctive relief to prevent the defendant insurance companies insuring residents and property owners on the Mississippi Gulf Coast from denying claims under their policies based on what the Attorney General claims is an ambiguous and/or invalid exclusion for loss caused by flood or water damages. The Defendant

insurers removed the action contending the claims alleged by the Attorney General arise under federal law, specifically, the National Flood Insurance Act (NFIA).

On March 7, 2006, Judge Tom Lee issued an opinion granting Mississippi Attorney General Jim Hood's motion to remand. The key provision of the NFIA relied on by the defendants, 42 U.S.C. § 4702, mandates that claims challenging the provisions of or the adjustment of claims under Standard Flood Insurance Policies (SFIP) must be brought in federal court. Defendants argued that the allegations in the Complaint were broad and challenged the exclusions of and the adjustment of claims as to both standard homeowners' policies as well as SFIPs. In granting the Attorney General's motion to remand, Judge Lee held, "[i]n the court's opinion, having thoroughly reviewed the complaint, it is apparent that SFIPs are not, and were not intended to be put in issue, by this complaint." Opinion at 10. The case has been remanded to the Chancery Court of Hinds County, Mississippi.

On January 23, 2007, the Attorney General Jim Hood and State Farm reached a settlement agreement in this case. The terms of the settlement are discussed in detail below.

Elmer and Alexa Buente v. Allstate Insurance Co. et al., No. 1:05cv712;
United States District Court, Southern District Mississippi, Southern Division.

Elmer and Alexa Buente filed an individual complaint against their homeowner's insurer, Allstate, which was subsequently removed to federal court. On April 12, 2006, Judge L.T. Senter, Jr. denied Plaintiffs' motion for partial summary judgment requesting a finding of coverage for all hurricane damage to their property. Plaintiffs argued the policy's "flood exclusions" were ambiguous, and as such, unenforceable. Essentially, Plaintiffs asserted the water damage was a result of "storm surge," and should be covered because "storm surge" is not specifically listed as a peril excluded by the Allstate policy.

Judge Senter found the "flood exclusions" to be clear and unambiguous. Judge Senter held: "Hurricane Katrina moved tidal waters from the Mississippi Sound on shore and inundated thousands of homes .... The innundation that occurred during Hurricane Katrina was a flood, as

that term is ordinarily understood, whether that term appears in a flood insurance policy or in a home owners insurance policy. The exclusions found in the policy for damages attributable to flooding are valid and enforceable policy provision."

Tuepker v. State Farm Fire & Casualty Co., No. 1:5cv559;
United States District Court, Southern District Mississippi, Southern Division.

On May 24, 2006, Judge L.T. Senter, Jr. issued a memorandum opinion denying State Farm's 12(b)(6) motion to dismiss. The opinion addressed several issues regarding the interrelation of several provisions of the State Farm policy, and their interpretation. Such provisions included: water damage exclusions, weather conditions provision, hurricane deductible endorsement, the anti-concurrent cause clause, and the respective burdens of proof to be carried by the parties.

Judge Senter initially held that damage to the insured property caused by hurricane winds would be covered under the State Farm policy because "destruction of the insured dwelling by a windstorm, including hurricane, would constitute an accidental direct physical loss and would therefore be a covered peril." Opinion at 5. Judge Senter also found coverage for "damage to personal property inside the insured dwelling caused by rain that entered plaintiff's home through breaches in walls or in the roof caused by hurricane winds." *Id*. Next, Judge Senter found the State Farm policy's water damage exclusion was valid and that losses directly attributable to water in the form of a "storm surge" are excluded. *Id*. at 6. Judge Senter used the identical reasoning stated in his previous opinion in *Buente*. The State Farm policy also contained an anti-concurrent cause provision. Judge Senter found the language of the anti-concurrent cause clause to be ambiguous, and would not negate coverage for damage which is caused by the covered risk of wind. Judge Senter summed up his ruling as follows:

> 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. Again, these are fact-specific inquiries that must be

resolved on the basis of the evidence adduced at trial.

Id. at 8.

Note: On September 27, 2006, Judge Senter entered an order granting State Farm's Motion to Certify for Interlocutory Appeal the Court's ruling on State Farm's Motion to Dismiss and subsequent Motion to Alter or Amend Memorandum Opinion and Order. Judge Senter wrote "it is the Court's determination, pursuant to 28 U.S.C. § 1292(b), that [the Court's Orders] involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal from them may materially advance the ultimate termination of the litigation." Order at 3. Consequently, an interlocutory appeal of Judge Senter's order is currently underway.

Ned Comer, et al. v. Nationwide Mutual Ins. Co., et al., No. 1:05cv436;
United States District Court, Southern District Mississippi, Southern Division.

In *Comer*, the plaintiffs (fourteen owners of properties damaged by Hurricane Katrina) sought class action certification of their claims against four separate defendant classes: "Insurance Defendant Class," "Mortgage Lending Defendant Class," "Chemical Manufacturer Defendant Class" and "Oil Company Defendant Class." In an early order denying Plaintiffs' motion to amend, Judge Senter required the plaintiffs to pursue individual actions against their own insurers and mortgage lenders. Judge Senter determined that creating the "extremely broad classes" of parties as proposed by the plaintiffs is impractical in the context of this civil suit given the "preponderance of individual questions of damage, coverage, policy provisions, mortgage obligations, and other relevant particulars involved in the case of each individual property owner who sustained damage as a result of Hurricane Katrina." Opinion at 4. Judge Senter confirmed that "[n]or do I believe that the questions of law and fact common to the insurers and mortgage holders predominate over the questions of law and fact affecting the individual insurers and the individual mortgage holders." Opinion, at 4. Although not technically before the Court on a motion for class certification, Judge Senter, in effect, denied plaintiffs attempts to certify a class arising out of the homeowners' insurance claims.

McFarland v. State Farm Fire & Casualty Co. et al.; No. 1:06cv466;
United States District Court, Southern District Mississippi, Southern Division.

Magistrate Judge Robert H. Walker, *sua sponte*, raised the issue of whether to sever over several hundred plaintiffs joined in the single lawsuit, wherein each plaintiff asserted claims arising out of property damage caused by Hurricane Katrina. Magistrate Judge Walker, relying on the Court's previous opinions in *Comer* and *Guice*, determined that the plaintiffs did not meet the requirements for permissive joinder under Fed. R. Civ. P. 20. Magistrate Judge Walker ordered the plaintiffs claims to be divided into separate lawsuits requiring separate complaints for each damaged property.

Ray v. Rimkus Consulting Group, Inc. et al.; No. 1:06cv516;
United States District Court, Southern District Mississippi, Jackson Division.

Judge L.T. Senter denied defendants' 12(b)(6) motion to dismiss plaintiffs claims of fraud against insurer and adjusting firms. Plaintiffs alleged certain agents of the adjusting firm, Rimkus Consulting Group, Inc., altered an engineering report to falsely indicate that storm surge was the cause of loss rather than wind. Plaintiffs alleged that the original engineering report found that wind was at least 50% of the cause of loss and structural damage to the insured property. Judge Senter held that plaintiffs' complaint had sufficiently pled allegations of "corporate or personal misconduct associated with the adjustment of the Plaintiffs' claim that is cognizable under Mississippi law." Opinion at 5.

Leonard v. Nationwide Mutual Ins. Co., No. 1:05cv475;
United States District Court, Southern District Mississippi, Southern Division.

On August 15, 2006, Judge L. T. Senter, Jr. rendered his decision in *Leonard*, the first Hurricane Katrina-related insurance coverage case to go to trial in Mississippi. The case was tried without a jury by agreement of the parties. Although the case was the first to be tried, Judge Senter's rulings on the enforceability of the water damage exclusions, availability of

coverage for damages resulting from wind, and the ambiguity of the anti-concurrent cause clause were consistent with his previous rulings in *Buente* and *Tuepkar*. Judge Senter held:

> 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).

Opinion, Conclusions of Law at ¶ 7.

Judge Senter determined the Leonards had proved that only a small portion of the damages claimed were sustained as a result of wind damage. The Leonards were awarded $1,228.16 for wind damage to their home, when they had sought in excess of $130,000 in damages. Judge Senter also rejected the Leonards' argument that their Nationwide agent misrepresented the terms of the Nationwide policy.

Note: The *Leonard* decision is currently on appeal to the United States Fifth Circuit Court of Appeals. Oral arguments are scheduled for August 6, 2007.

Gemmill v. State Farm Fire & Casualty Co. et al. 1:05cv692
United States District Court, Southern District Mississippi, Southern Division.

On September 1, 2006, State Farm moved for a change of venue to Mississippi's Northern District, Western Division, where it alleges there is "much less bias" against insurance companies. Citing the results of a survey of 3,600 registered voters in Mississippi, State Farm claimed it could not receive a fair trial by an unbiased jury in the Southern District of Mississippi. Judge Senter reserved ruling on the motion until he could *voir dire* the jury pool in the upcoming *Broussard* trial and observe the "attitude" of the venire first hand. State Farm had also filed a motion to change venue in the *Broussard* case. Judge Senter ultimately denied the motion in *Broussard* stating:

> "I have weighed the considerations set out in 28 U.S.C. §1404, and I am mindful of the additional expenses and the great inconvenience that individual plaintiffs could incur if the trial of this action and of similar actions were moved to another division of this district. After hearing the potential jurors' responses to the voir dire examination of the Court and the parties, I am satisfied that I have impaneled a fair and impartial jury to try the merits of this lawsuit. Accordingly, I will deny the motion for a change of venue at this time, reserving the right to alter or amend this ruling if subsequent events indicate that the parties cannot receive a fair trial from a jury drawn from this division."

Opinion at 3.

Note: In several cases since *Gemmill*, Judge Senter has issued identical orders which reiterate his position that he will not order a change of venue in the Hurricane Katrina trials at this time. As in *Gemmill*, Judge Senter continues to reserve any final ruling on motions to change venue until he conducts a voir dire of the jury pool.

VIII. ***Broussard, et al vs. State Farm et al.***, No. 1:06cv6;
United States District Court, Southern District Mississippi, Southern Division.

On January 11th, 2007, Judge Senter granted Plaintiff's motion for judgment as a matter of law and ordered State Farm to pay the policyholders the full limits under their homeowner's policy—the amount of $212,222. Furthermore, Judge Senter held that State Farm's denial of coverage constituted bad faith as a matter of law, and permitted the jury to consider punitive damages.

Prior to trial, the parties stipulated that the Plaintiff's home sustained both wind and water damage. State Farm's claim manager for Mississippi and State Farm's expert witness admitted at trial that the Plaintiff's home sustained some wind damage. However, due to State Farm's wind/water claim handling protocol in slab cases, State Farm assigned 100% of the loss to flooding unless the policyholder could show "independent windstorm damage." Thus, State Farm paid nothing on Plaintiff's claim.

At trial, Judge Senter ruled that it was State Farm's burden to prove that portion of the total loss that was attributable to excluded flooding. Because State Farm offered no evidence to allow the jury to make a reasonable determination of the amount of the total loss that was

attributable exclusively to water damage, and because the parties had stipulated there was some wind damage, Judge Senter ruled State Farm must be liable for the full limits of coverage.

Moreover, Judge Senter held as a matter of law that there was clear and convincing evidence finding State Farm acted in such a grossly negligent way in handling Plaintiff's claim the jury could consider punitive damages. Judge Senter stated that "the philosophy or attitude or position adopted by the Defendant that lasted throughout the consideration of Plaintiffs' claim is reprehensible enough to warrant deterrence." Senter Opinion at 4. Judge Senter particularly noted State Farm's failure to make an unconditional tender of policy benefits for wind damage in light of its own expert report showing some wind damage had occurred and State Farm's unreasonable attempt to shift its burden of proof to the Plaintiffs.

The jury later awarded punitive damages in the amount of $2.5 million. Judge Senter reduced the award to $1 million, or approximately five times the actual damage award. Judge Senter held that "a more appropriate punitive assessment against Defendant is the sum of $1,000,000.00, which is between 4 and 5 times the contractual/compensatory damages of $211,222.00." Senter Opinion at 4.

Note: On May 11, 2007, Judge Senter denied State Farm's motions for a partial judgment as a matter of law and/or new trial. The case is currently pending on appeal before the United States Fifth Circuit Court of Appeals.

Dennis R. and S. Imani Woullard v. State Farm Fire and Casualty Co., No. 1:06cv1057; United States District Court, Southern District Mississippi, Southern Division.

On January 23, 2007, State Farm and the plaintiffs' group represented by Dickie Scruggs announced a settlement of all claims by State Farm policyholders in Mississippi arising out of Hurricane Katrina. The parties sought approval of the settlement through a motion for class action certification filed in the above-referenced case. In general, the settlement provided:

- "Opt out". Any class member may "opt out" and pursue his/her own claim against State Farm.

- Objections: Class members will have the right to object, and a fairness hearing will be held before final approval of the class action settlement.

- Mississippi Katrina Resolution Process. For those that do not "opt out", the following procedure will be in place to resolve Katrina claims:

  - To enroll in the process, claimants send a registration form, and receive $200 for sending in the form.

  - Settlement offers can be made by State Farm according to general criteria set forth in the agreement, such as pre-storm conditions, storm and post-storm conditions, and policy provisions. The Mississippi Katrina Resolution Guideline Tool, attached as an exhibit to the agreement, sets forth recommended percentages of coverage limits to be paid based upon the degree of damage. The Guideline Tool is not binding on State Farm except in "slab" cases. For "slab" cases, the Guideline Tool sets forth a minimum payment of 45% of Coverage A, and 6.67% of Coverage B, which State Farm must offer.

  - If settlement offers are not accepted, the claimant can request binding arbitration. State Farm bears the cost of arbitration proceedings.

  - Arbitration awards and settlement offers are capped at a "Maximum Payment", which is defined as coverage limits less amounts received from other insurers.

  - Arbitrations are to be completed within nine months of the deadline to return registration forms.

- Minimum Payments. If State Farm's payments under the Mississippi Katrina Resolution Process do not exceed $50 million, supplemental payments will be made to each class member for their proportionate share of the payment amounts under $50 million.

- Accelerated Implementation Option. Class members may choose to participate in the Mississippi Katrina Resolution Process whether or not the settlement is ultimately approved. Process will begin immediately upon receipt of the registration forms.

- Attorney Fees: Class counsel agreed to seek not more that $10 million in fees, to which State Farm will not object. In the event that the amounts paid to class members exceed $100 million or $150 million, class counsel can seek an additional $5 million or $10 million, respectively.

On January 26, 2007, Judge Senter rejected the settlement agreement. Judge Senter's key concerns were:

- State Farm and Plaintiffs did not submit sufficient evidence in the record whereby he could judge numerosity, etc. to certify a class;
- The claims procedure was too complex;
- There was no guaranteed payment to policyholders other than those with "slabs";
- The agreement required binding arbitration when policyholders had not consented to such;
- The justification for legal fees sought; and
- Foreclosure of declaratory judgments, and appeals of Senter's prior opinions.

On March 12, 2007, attorney Richard Scruggs filed a motion to withdraw the January 24 motion seeking certification of class action and approval of settlement with State Farm.

In April of 2007, the Woullards, the representative plaintiffs in the class settlement, settled their individual claims with State Farm. As a result, State Farm moved for dismissal of this case. On April 16, 2007, Judge Senter entered an order of dismissal for this case and effectively the potential for a class settlement.

Hood vs. Mississippi Farm Bureau Insurance Co., et al., No. G-2005-1642; Chancery Court of Hinds County, Mississippi.

On January 23, 2007, Mississippi Attorney General, Jim Hood, and State Farm agreed to the following terms in the Settlement Agreement filed in the Chancery Court of Hinds County:

- Disclosure: Upon request of the policyholder, State Farm will provide full disclosure of all documents in their claim files, including multiple engineering reports;

- Independent Contractors/Engineers: State Farm will use only licensed engineers, will incorporate "appropriate" language in its training material regarding the use of engineers, will provide copies of engineering reports to the insured, will document all communications with engineers in its claims files, and will pay engineers regardless of the conclusions expressed in the engineer's report.

- Re-Evaluation of Claims: State Farm will re-evaluate Katrina claims based upon the procedure set forth, and approved by, the federal court (described below);

- Claims Practices: State Farm agreed to several broad claims practices terms, including not to knowingly misrepresent facts or policy provisions, adopt reasonable standards for prompt investigation and settlement of claims, attempt in good faith to effectuate prompt, fair, and equitable settlements, etc.

- Payment: State Farm agreed to pay the State of Mississippi $5 million.

- Enforcement/Dismissal: Enforcement of the settlement governed by the federal court will be made by the federal court, and state court will retain authority to enforce remainder of agreement. The state court action will be dismissed.

Note: On June 11, 2007, Mississippi Attorney General filed a second lawsuit against State Farm and Casualty Co. alleging bad faith breach of contract related to the settlement agreement the two parties entered into on January 23. Filed on behalf of 30,000 Gulf Coast State Farm policyholders the Attorney General said the breach of contract suit was instituted to address noncompliance with the terms of the settlement agreement. Hood charges that State Farm has violated several specific terms of the settlement agreement including a failure to make "an offer of settlement to the policyholder based upon criteria and guidelines approved by the U.S. District Court for the Southern District of Mississippi." The complaint seeks compensatory and punitive damages from State Farm.

Gemmill vs. State Farm Fire and Casualty Co., No. 1:05cv692;
United States District Court, Southern District Mississippi, Southern Division.

On March 15, 2007 a jury awards plaintiff $66,234.49 for wind damage in "slab" case. The jury found 47 percent of the damage to plaintiff's home was from wind and awarded him $39,464.49 and awarded 25 percent damage due to wind on his contents, which amounted to $26,770. Judge Senter also permitted punitive damages to go to the jury. Both sides reached an undisclosed settlement before the jury's decision on punitive damages had been reached.

Gemmill sought $191.000 for full policy limits, $5 million in punitive damages and $50,000 for emotional distress.

Williams vs. State Farm Fire and Casualty Co., No. 1:05cv692;
United States District Court, Southern District Mississippi, Southern Division.

Plaintiffs and State Farm reached settlement out of court after Judge Peter Beer, sitting by designation from the Eastern District of Louisiana, ruled punitive damages would not go to the jury.

Guice vs. State Farm Fire & Casualty Co. et al., No. 1:06cv1;

United States District Court, Southern District Mississippi, Southern Division.

Judge Senter denied plaintiff's motion to establish a non-opt-out class of State Farm-insured homeowners whose insured property was totally destroyed during Hurricane Katrina (referred to as "slab" cases). In denying the motion, Judge Senter offered the following "important lessons" he learned from the previous Katrina trials:

> Three "slab cases" have now been tried to verdict, and I have learned some important lessons from these trials, lessons that are relevant to the merits of this motion: 1) the forces exerted by Hurricane Katrina varied substantially from one location along the Mississippi Gulf Coast to another; 2) the forces exerted against a particular building varied substantially depending on the building's proximity to the shore line; 3) the damage any given building may have sustained varied substantially depending on its age, quality of construction, and even its design (e.g. gable roof compared with hip roof) and orientation to the forces exerted by the storm, particularly the wind; and 4) claims were handled by Defendant in a variety of ways. These lessons confirm the reasoning of my decisions on the plaintiff's previous motions [] for class certification and inevitably lead me to the conclusion that there are as many differences between the "slab cases" as there are similarities in terms of the evidence available to ascertain the cause of the destruction and damage to these properties.

Opinion at 2.

Palmer et al vs. State Farm et al, No. 1:07cv39
United States District Court, Southern District Mississippi, Southern Division.

State Farm filed a motion to dismiss the complaint asserting the following four alternative theories: 1) that the plaintiffs made an "election of remedies" by accepting benefits paid under their flood coverage, 2) that the plaintiffs' claim for wind damage is "a prior unrepaired loss," 3) that the plaintiffs are "equitably estopped" from asserting a claim under their homeowners policy by their having accepted benefits payable under their flood insurance policy, and 4) that the plaintiffs are no longer a real party in interest because they have assigned the proceeds of their homeowners policy to the United States Small Business Administration (SBA) as security for an emergency loan.

Judge Senter, describing some of State Farm's theories as "novel," ultimately denied State Farm's motion in its entirety.

Eleuterius vs. State Farm, No. 1:06cv647
United States District Court, Southern District Mississippi, Southern Division.

Addressing motions in limine filed by each party, Judge Senter ruled that the plaintiff could introduce State Farm's "Wind/Water Claims Handling Protocol," during the liability phase of the trial. The "Wind/Water Protocol" is a memorandum developed by State Farm after Hurricane Katrina to establish the rules and procedures its adjustors were to follow with respect to property damage claims in which there was extensive damage from storm surge flooding, including the so-called "slab cases" in which the insured structure was completely destroyed, leaving only the building foundation.

Judge Senter also ruled while the plaintiff could testify as to his own opinion of the value of his insured property, the plaintiff could not buttress his own opinion by stating what he was told by his neighbors concerning the price they received for their property as that would obviously be inadmissible hearsay. Lastly, Judge Senter held that the plaintiff could not testify that the wind during Hurricane Katrina sounded like a "tornado," unless the plaintiff could prove that he knows what a tornado sounds like.

In Re Katrina Canal Breaches Consolidated Litigation
Pertains To: Insurance, No. 2:05cv04182;

United States District Court, Eastern District Louisiana

In the first ruling from a Louisiana court to address insurance coverage issues arising out of Hurricane Katrina, Judge Stanwood R. Duval Jr. held the "flood" exclusion in several insurance policies to be ambiguous.

The case, now captioned "In re: Katrina Canal Breaches Consolidated Litigation," C.A. No. 05-4182, is the "umbrella" for all cases which concern damages caused by flooding as a result of breaches or overtopping of the levees in the areas of the 17th Street Canal, the London Avenue Canal, the Industrial Canal, and the Mississippi Gulf River Outlet ("MRGO"). Essentially, plaintiffs alleged that the water damage sustained by their respective homes and property "was not the result of flood, surface water, waves, title [sic] water, tsunami, seiche, overflow of a body of water, seepage under or over the outfall canal wall or spray from any of the above **but was water intrusion, caused simply from a broken levee wall.**" Opinion at 6. Emphasis added.

> Judge Duval summarized the issue to be decided as follows:
> Simply put, the question before the court is whether it is reasonable to find in the absence of further definition or provision in the ISO policy that there are two interpretations of the term "flood"–one which encompasses both a "flood" which occurs solely because of natural causes and a "flood" which occurs because of the negligent or intentional act of man and one which limits itself only to a flood which occurs solely because of natural causes.

Opinion at 24.

Ultimately, Judge Duval found that the policy language utilized by three of the five insurers was ambiguous. After a thorough analysis, Judge Duval concluded:

> Certainly the damage sued upon was caused by flooding; but was the flooding caused by negligent acts or omissions excluded by the plain language of the policy? The insurers could have drafted such a clear exclusion with very little effort, but they did not. As discussed herein, this precise issue, natural causes versus man-made causes, has been dealt with by various courts for a number of years. If the insurers, who wrote every word of the respective policies, wanted to make the language clear, that "flood" means water damage caused by negligent acts or omissions, it could have so drafted the policy language. For reasons only known to the insurer, it chose not to do so.

Opinion at 44-45.

It is important to note that due to Judge Duval's reasoning, he did not find the "anti-concurrent cause" clause in the ISO policies to be ambiguous. He expressly stated that the anti-concurrent cause clause was "inapplicable" to the ISO water exclusion because "there is no 'separate' or other cause of damage." *Id.* at 49. Judge Duval also made a point to say that the "allegations before the Court are not analogous to those which the Mississippi federal courts are facing in *Buente* ... and *Tuepker* .... *Id*.

Note: Judge Duval did find the exclusions in both the State Farm and Hartford policies to be enforceable. The State Farm Policy language upheld by Judge Duval read: "We do not insure for such loss **regardless of: (a) the cause of the excluded event**;". Opinion at 50 (emphasis in original). Judge Duval stated: "The State Farm policy does precisely what the ISO Water Exclusion Policy fails to do. It makes it clear that regardless of the **cause** of the flooding, there is no coverage provided for any flooding 'regardless of the cause.' Such language is clear to the Court and as such, the Court must find that the State Farm policy as written excludes coverage for all flooding." *Id.*

The Hartford Policy contained a "Amendatory Endorsement Specifically Excepted Perils" which expressly excluded coverage for "ACTS, ERRORS OR OMISSIONS by you or others in ...." Opinion at 52. Judge Duval held "that exception A [Acts, Errors or Omissions] acts as a specific exclusion for flood damage caused by negligently maintained levees." *Id*.

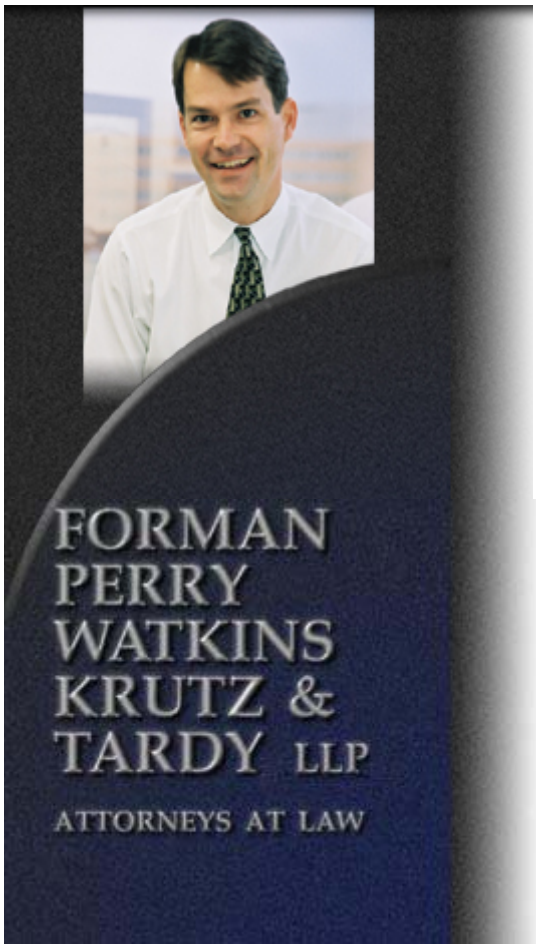
In Re Katrina Canal Breaches Consolidated Litigation,
Pertains To: Levee and MRGO Groups, No. 2:05cv04182;
United States District Court, Eastern District Louisiana

Numerous engineering and construction companies who performed work on the New Orleans Levees were sued by plaintiffs who alleged that the defendants were negligent in connection with the respective services each rendered on the levee and flood wall projects. In several consolidated cases, the defendants were granted summary judgment after successfully

arguing that the plaintiffs' claims against them were preempted by Louisiana statutes that provide for a five year preemptive period to file suit in such cases.

CONCLUSION

The decisions emanating from the federal courts deciding insurance coverage litigation following Hurricane Katrina indicate a return, in Mississippi at least, to the historical precedent of coverage determinations on a case by case basis. Many more insurance coverage claims are pending, and still to be resolved. Due to the importance of these coverage issues, the United States District Court for the Southern District of Mississippi, where most of the Hurricane Katrina-related litigation is pending, has established a website containing the important decisions relating to insurance coverage litigation. *See* http://www.mssd.uscourts.gov (listing insurance coverage rulings from the Souther District of Mississippi). The Eastern District of Louisiana has also established a website to posts opinions, orders and updates on the Katrina Canal Breach Consolidated Litigation. *See* http://www.laed.uscourts.gov/CanalCases/CanalCases.htm



Walter H. Boone

Partner

City Centre
200 South Lamar Street, Suite 100
Jackson, MS 39201-4099

P.O. Box 22608
Jackson, MS 39225-2608

Direct: (601) 960-8616
Fax: (601) 960-8613
Email: whboone@fpwk.com

EDUCATION

Georgetown University (B.A. cum laude, 1987)

University of Mississippi School of Law (J.D., cum laude, 1990)
- Phi Kappa Phi
- Moot Court Board
- Mississippi Law Journal, Symposium Editor (1989-1990)

BAR ADMISSIONS

Mississippi, 1990

MEMBERSHIPS & ASSOCIATIONS

The Mississippi Bar