

HOW INSURERS USE PROXIES TO SWAY JUDICIAL RULINGS POA

In combing the newswires for interesting tidbits relating to homeowners insurance, we came across a doozy that helps explain exactly how insurers pressure judges for favorable rulings.

On March 21, the AM Best, an insurance-rating and information agency, issued a one-sided press release over a paid wire service ([BusinessWire](#)). The release struck us as a not-so-veiled threat to the Louisiana Supreme Court as they deliberate two cases that will finally decide if ambiguous policy language means insurers must cover damage done by flooding. The release quoted only the Property Casualty Insurers Association of America and the Insurance Information Institute – two flack groups for insurers, but failed to quote anyone from the other side of the issue.

Justices turn aside flood insurance plea By MICHAEL KUNZELMAN, AP (2/19)

The nation's highest court dealt a blow Tuesday to property owners who want insurance companies to pay for damage from levee breaches after Hurricane Katrina, but the Louisiana Supreme Court is poised to tackle the issue later this month.

The U.S. Supreme Court declined to hear appeals from Xavier University and dozens of other Louisiana policyholders who sued several insurers for refusing to cover water damage from the levee breaches that flooded 80 percent of New Orleans following the August 2005 hurricane.

The plaintiffs were asking the justices to review portions of an August 2007 ruling by the 5th U.S. Circuit Court of Appeals in New Orleans that insurers aren't obligated to cover water damage from a levee failure.

The 5th Circuit had refused to certify the issue as a question for the state Supreme Court to consider, and the U.S. Supreme Court declined to review that decision Tuesday.

Harvard Law School professor Charles Fried, who represented insurers in the Supreme Court appeal, said he

would have been "astonished" if the justices agreed to hear the case.

"There's no important federal question, and they don't do state law. They do federal law," Fried said.

New Orleans-based plaintiffs' attorney James Garner said the Supreme Court didn't consider any substantive coverage issues in declining to hear the appeal. But a spokesman for Allstate Corp. – one of several insurers named as defendants in the federal flood case – applauded the Supreme Court's decision.

"The Supreme Court's decision takes us one step closer to resolving this issue and allowing our customers to move forward with the rebuilding process," Allstate spokesman Michael Siemienas said.

The dispute between insurers and policyholders over levee failures doesn't end with the Supreme Court. Louisiana's highest court is scheduled to hear arguments next Tuesday in a case that is smaller in scope but parallels the issues considered last year by the federal appeals court.

"Whatever the 5th Circuit did

The spokesman for one of the industry groups claimed a ruling unfavorable to the insurance industry would set a precedent that could "cripple the Louisiana economy." He also eluded to potential insolvency of some insurance companies. Threats of more gloom and doom, however overstated such threats may be, to an already devastated area, might send shivers down the spines of the justices. Perhaps that's the goal. The press release neglected to mention the spiraling profits

made by insurers over the last few years. How convenient.

Direct communications made on behalf of only one party in a case (ex-parte communications) are not allowed but that doesn't stop industry groups from sending out press releases by proxy. This is becoming common practice.

The two cases are: Landry vs. Louisiana Citizens Property Casualty Insurance Co. and Sher vs. Lafayette Insurance Co.



massive flood that occurred in New Orleans," Lafayette lawyers wrote in court papers. "To the average person, it seems preposterous that lawyers have spent countless hours arguing over whether there was a 'flood.' Of course there was."

Garner counters that Lafayette and other insurers could have clarified policy language to specifically exclude water from levee breaches from coverage.

"No single case in recent times presents issues that affect more people in the State of Louisiana than this one," he wrote in his state Supreme Court brief.

The cases before the U.S. Supreme Court are Xavier University of Louisiana v. Travelers Casualty Property Company of America, 07-711, and Chahardy v. Allstate Indemnity Company, 07-713. The case to be heard by the Louisiana Supreme Court is Joseph Sher v. Lafayette Insurance Co., 2007-C-2441.

is written in sand," Garner said. "Ultimately, it's the Louisiana Supreme Court that will decide Louisiana law."

Garner represents New Orleans apartment complex owner Joseph Sher, who sued Lafayette Insurance Co. for refusing to pay for most of the damage to his property.

Last year, a state judge ruled that Lafayette's flood-exclusion language was ambiguous and therefore covered "man-made events." The Army Corps of Engineers is widely blamed for the failure of the city's levee system.

The state's 4th Circuit Court of Appeal also sided with Sher in November, concluding that Lafayette's homeowner policies failed to exclude all forms of flooding because its language was ambiguous.

Lafayette is asking the state Supreme Court to reverse that ruling. The company argues that all flooding in New Orleans is excluded by the terms of Lafayette's homeowner policies.

"An ordinary layperson reading this provision would have no doubt that there is no coverage for damage caused by the

Day In Court For Katrina Insurance Case

CBS
(2/26)

"If Hitler didn't kill you, Katrina wasn't going to kill you either." Ninety-two year old Joseph Sher talks about surviving the holocaust, surviving Hurricane Katrina, and now surviving a fight with his insurance company.

"You still can see the water was this high," he said.

The levee breaches on the day after the storm flooded Sher's basement with four feet of water, reports **Hari Sreenivasan**.

He had almost \$270,000 worth of damage. Sher's insurance company gave him less than \$3,000.

Sher's case being argued before the state Supreme Court is being watched by hundreds of thousands of people who have not recouped damages from their insurance companies post-Katrina.

Insurers argue that they are not responsible for covering any flood damage.

"It should not make a difference what caused the flood no more than it makes a difference in what causes a fire," said Howard Kaplan, a lawyer for Lafayette Insurance.

But Sher's lawyers argue that man-made disasters, such as a breach of levees, should be covered.

"You buy a homeowners policy, you pay a premium for it, you've got an expectation that if there's a catastrophic man-made failure to levees its covered," said Sher's attorney, James Garner.

Ed Sherman, a former Dean at Tulane Law, says the outcome

of this case will have a huge ripple effect.

"We're talking in the hundreds of millions, if not billions, when its all added up, and tens if not hundred thousand people," Sherman said.

People could be affected by a second case up for review. The court also heard arguments in the wind versus water controversy.

Homeowners who lost everything may stand to gain if the court decides whether wind or water, they should have been covered.



Saying his hands were tied by law, a federal judge dismissed a class-action lawsuit against the U.S. Army Corps of Engineers over levee breaches after Hurricane Katrina, but rebuked the agency for failing to protect the city.

U.S. District Judge Stanwood Duval ruled Wednesday that the Corps should be held immune over failures in drainage canals that caused much of the flooding of New Orleans in August 2005. He cited the Flood Control Act of 1928, which protects the federal government from lawsuits when flood control projects like levees break.

The lawsuit led to about 489,000 claims by businesses, government entities and residents, seeking trillions of dollars in damages against the Corps.

The fate of many of those claims was pinned to the suit and a similar one filed over

flooding from a navigation channel in St. Bernard Parish. It was unclear how many claims could still move forward.

Kathy Gibbs, a Corps spokeswoman, said "the Corps agrees with the dismissal of the case" but declined further comment because other lawsuits over Katrina damage are pending.

Plaintiffs lawyers said they would appeal to the 5th U.S. Circuit Court of Appeals, but conceded that overturning Duval's ruling would be difficult.

The judge issued a stinging condemnation of the Corps, saying the agency "cast a blind eye" in protecting New Orleans and "squandered millions of dollars in building a levee system ... which was known to be inadequate by the Corps' own calculations."

But, Duval said, "it is not within the Court's power to address the wrongs committed. It is hopefully within the citizens of the United States' power to address the failures of our laws and agencies."

Breaches at both the 17th Street and London Avenue canals allowed floodwaters to inundate large areas of the city. Plaintiffs lawyers knew they

faced a daunting task because the canals were, over time, used as flood control projects by the Corps.

They tried to bypass the immunity issue by claiming that the Corps used the canals as drainage projects and that the levee failures were brought about by canal dredging.

"I knew we had an uphill battle, but we had to do it," plaintiffs lawyer Joseph Bruno said. "It's an outrage. Read the opinion: The judge reads through all the negligence by the Corps, but says he had to rule the way he had to."

The ruling was another blow to the residents of New Orleans, where loathing for the Corps continues unabated.

"This cost people's lives and property," said Gwen Bierria, 66, who is still living in a government-issued trailer and is among the tens of thousands of people who have filed claims against the federal government for damage from the levee breaches.

"Anybody that calls themselves the Army Corps of Engineers should be embarrassed," she said.

Activists said they would not

give up on holding the Corps accountable.

"We will stick with our mission of education that this was the worst engineering failure since Chernobyl," said Sandy Rosenthal, founder of Levees.org, a group that has lobbied for overhauling the Corps.

Since Katrina, calls for a makeover of the Corps have gained momentum, and the agency, which has acknowledged mistakes, has re-evaluated its procedures for picking and designing projects.

Duval agreed that legal and bureaucratic change is required.

"The byzantine funding and appropriation methods for this undertaking were in large part a cause of this failure," the judge said, referring to the politics-riddled process Congress has for funding Corps projects.

The Flood Control Act is counterproductive, Duval said, because it negates incentives for good government workmanship and creates an environment where "gross incompetence receives the same treatment as simple mistake."

Katrina levee lawsuit dismissed

By CAIN BURDEAU and MICHAEL KUNZELMAN, Associated Press (1/31)

SCRUGGS SAYS HE'S GUILTY OF JUDICIAL BRIBERY

(3/14) POA

Facing an end of March trial date, Richard Scruggs pleaded guilty to conspiring to bribe a judge in order that he receive a favorable ruling in a case involving legal fees from a post-Hurricane Katrina lawsuit.

The plea came as a major shock to many following the case.

Another co-defendant in the bribery case, Sydney Backstrom, also pleaded guilty but Zach Scruggs (the son of Richard Scruggs and partner

in the law firm) did not plead out and his case is expected to go to trial.

They were accused of conspiring to pay a Lafayette County Circuit Court judge \$50,000 for a favorable ruling in a dispute over \$26.5 million in legal fees from a mass settlement of Hurricane Katrina cases.

Judge Henry L. Lackey reported a bribe overture to the FBI and worked undercover. Two of the men who were indicted — Timothy

Balducci, a lawyer, and Steve Patterson, a former Mississippi state auditor — pleaded guilty and began working with the prosecution about two months ago.

Scruggs became famous because of tobacco and asbestos litigation. Actor, Colm Feore, played Scruggs' character in the 1999 movie — "The Insider" — a movie about a whistle-blower who blew the lid off of tobacco.



Measly Katrina Damage Award Underscores Reason to Review Your Policy

POA

A jury in U.S. District Court awarded USAA Casualty Insurance Co. policyholders only \$64,000 out of the full coverage of \$427,087 sought, for wind damage to their Pass Christian vacation home, which was destroyed by Hurricane Katrina.

The couple, David W. and Marilyn M. Aiken, had already had received \$178,205 from USAA, including loss of use but also sought punitive damages, claiming USAA low-balled their claim. The District Judge — L. T. Senter, Jr. -- refused to allow the jury to consider punitive damages. He believed USAA had legitimate reasons, including the now infamous anti-concurrent clause, for its decision.

The Aikens had accepted \$278,000 from the National Flood Insurance

Program — a sign they believe at least a portion of the damage was caused by tidal surge, a peril not covered by the USAA policy. Senter instructed jurors to take that payment into consideration as well as the previous payment made to the Aikens by USAA of approximately \$178,000 and told jurors they could not award the couple more than policy limits.

Those instructions gave jurors an award range to consider of \$0 - \$272,238 for the structure and \$0 - \$154,849 for contents. The jury chose \$17,000 for structural damage and \$47,000 for contents.

Also impacting the low award was Senter's explanation to jurors about the "anti-concurrent clause". He based his instructions on a recent 5th Circuit Court of Appeals ruling

when he told jurors, "All damage to the property that was caused by storm surge flooding is excluded even if the storm winds concurrently or in any sequence caused or contributed to this excluded storm surge flood damage." The Aikens argued that a tornado destroyed the home before the tidal surge dumped 20 feet of water into it.

With the anti-concurrent clause language now in most policies, jurors were left no choice but to leave the Aikens feeling low-balled yet again.

This case is also a good opportunity for POA to point out that some policies are worthless because of the anti-concurrent clause. If your policy contains specific language negating all coverage if multiple perils contribute to the damage sustained



and at least one of those perils is not covered, your insurer does not have to pay you a dime, even if 99.999% of the damage sustained is due to a covered peril. Homeowners with State Farm policies are particularly at risk and POA strongly advises those policyholders to change insurers.

Katrina group fed up with State Farm's attorneys

By John O'Brien, LegalNewsline.com (2/6)

GULFPORT, Miss. - Things have recently become even uglier among the attorneys in the highest-profile Hurricane Katrina case of them all.

In battling to keep from being disqualified from all Katrina cases, attorneys for Pamela and Thomas McIntosh – the Katrina Litigation Group – say State Farm Insurance Cos.' lawyers have gone too far.

"State Farm's and its counsel's dishonest personal attacks on Plaintiffs' chosen attorneys have crossed the line that separates aggressive advocacy from improper and vexatious litigation tactics," [wrote Dewitt Lovelace Jan. 28.](#)

"State Farm's Counsel have abused their roles as Officers of the Court by cobbling together gossip, out-of-context quotes and innuendo to poison the jury pool, confuse, the facts and distort the law."

State Farm is seeking to disqualify each firm that makes up the KLG, formerly known as the Scruggs Katrina Group. Richard "Dickie" Scruggs withdrew the Scruggs Law Firm from the group after he was indicted on federal charges that he attempted to bribe a state judge in a dispute over at least \$26.5 million in attorneys fees earned in Katrina settlements.

The company reasoned that the SKG's decision to pay the Rigsby sisters, Kerri and Cori Rigsby Moran, \$150,000 salaries as litigation consultants constitutes bribery. The Rigsby sisters copied 15,000 pages of State Farm confidential documents while working at E.A. Renfroe and Co. and turned them over to Scruggs, who then gave them the jobs.

Kerri Rigsby testified that she only worked about five hours

in a 20-day period in Nov. 2006.

Though the Rigsbys primarily dealt with Scruggs, State Farm said the group's other attorneys are liable as accessories.

"Plaintiffs' counsel have committed numerous egregious ethical violations which warrant their disqualification from this case," says their motion, filed by John Banahan of Tuscahoula's Bryan, Nelson, Schroeder, Castigliola & Banahan.



Don Barrett

Three firms (The Lovelace Law Firm, Barrett Law Office and Nutt & McAlister) took over all the Scruggs cases and renamed themselves the Katrina Litigation Group. Former state Attorney General Mike Moore withdrew from representing the McIntoshes, and the KLG defended current state Attorney General Jim Hood.

When ordered to turn the documents obtained through the Rigsby sisters back to the company's attorneys, Scruggs gave them to Hood. State Farm has also sued Hood for threatening to reopen a criminal investigation it said it settled, with the intention of forcing civil settlements.

"Hood worked with the SKG and the Rigsbys to take documents from State Farm, without a warrant, for use in a criminal investigation," State Farm claimed. "In return, Hood used the threat of criminal indictments as a

means of coercing settlements in the SKG's civil cases."

The KLG, which represents 1,100 Mississippi claims and more than 450 involving State Farm, says that argument is inappropriate.



Jim Hood

"Jim Hood and Mike Moore are not on trial here; nor have any charges been brought against either Mr. Hood or Mr. Moore for the conduct at issue in SF's motion," Lovelace wrote. "State Farm's conjecture-laden mudslinging with the hopes that some might stick is unprofessional and wholly deficient to justify disqualification."

The KLG also said State Farm's motion is merely an attempt to capitalize on the publicity Scruggs' judicial bribery case has received. The company unsuccessfully made the same argument months ago, the response says.

"(I)f the actions of The Scruggs Firm did not result in disqualification months ago, how can those same actions result in the disqualification of separate firms in the very same case months later?" the response says.

Meanwhile, State Farm [asked Wednesday](#) to have the affidavits of Nutt & McAlister's Derek Wyatt struck because they are untrue (view them [here](#) and [here](#)). He had filed them in support of his contention that he never offered money to engineer Brian Ford.

Ford is a former engineer at Forensic Analysis and Engineering Corp. who performed the analysis of the McIntoshes' home and kept a journal that has been [submitted as an exhibit](#). Scruggs offered Ford indemnity, a \$10,000 monthly retainer and a percentage of each settlement work for the SKG to become a "fact witness" and "consultant" on a case, State Farm alleges.

"Plaintiffs attempted to obscure the fact that their counsel offered money to a material witness in this case by proffering, inter alia, the Wyatt affidavits," State Farm's motion says. "But both of the Wyatt affidavits contain sworn statements that are demonstrably false - i.e., that Wyatt never [negotiated a consulting arrangement](#) with Mr. Ford and never offered to pay him any money."

State Farm's motion to disqualify had quoted the Ford journal.

"(O)n June 25, 2007, (SKG attorney Derek) Wyatt again spoke to Ford, telling that while the SKG could not pay him as a 'fact witness,' it could pay him as a 'consultant,' ultimately prompting Ford to ask, 'Do I need to move assets?'" the motion says.

Feds not intervening in insurance case

(2/1)



NEW ORLEANS (AP) - Federal authorities have declined to take over a 'whistleblower' lawsuit, filed by an embattled plaintiffs attorney, that accuses insurers of overbilling the federal government for Hurricane Katrina's flood damage in Mississippi.

A federal magistrate in Gulfport, Miss., set a deadline Thursday for the U.S. Department of Justice to intervene in the case, which attorney Richard 'Dickie' Scruggs and other lawyers filed more than a year before he was charged in November with trying to bribe a Mississippi judge.

On Thursday, federal authorities informed U.S. Magistrate Robert Walker that they aren't intervening 'at this time' but will continue to investigate allegations that insurance companies defrauded the government in handling flood claims resulting from Katrina.

'The Government's investigation has not been completed, as certain potentially relevant information has not become available,' U.S. Attorney Dunn Lampton and Acting Assistant Attorney General Jeffrey Bucholtz wrote in court papers.

Lampton and Bucholtz didn't elaborate on the nature of that information, but said they couldn't decide by Thursday's deadline whether to proceed. They asked Walker to seek the government's written consent before approving a dismissal or settlement of the case.

In April 2006, Scruggs and other lawyers filed the case on behalf of two sisters who helped State Farm Insurance Cos. adjust policyholder claims on Mississippi's Gulf Coast after the Aug. 29, 2005, hurricane.

Cori and Kerri Rigsby, of Ocean Springs, Miss., secretly copied thousands of pages of internal State Farm claims records and gave them to Scruggs, who claims the documents show that State Farm manipulated engineering reports so that claims could be denied.

Insurers say their homeowner policies cover damage from wind but not rising water. They sell separate flood policies that are subsidized by the federal government. The whistleblower suit accuses insurers of misrepresenting claims to the National Flood Insurance Program -- and overestimating flood damage -- to limit their financial losses after Katrina.

The case against State Farm and several other insurers has remained in a holding pattern while both sides waited for the Justice Department to reach a decision.

'Now that the government has chosen not to intervene at this time, we stand ready to defend against the allegations in the lawsuit brought by Mr. Scruggs. We will proceed with a vigorous defense of this matter,' State Farm spokesman Phil Supple said Friday.

Anthony DeWitt, a lawyer whose Kansas City, Mo.-based firm teamed up with Scruggs to file the suit, said the plaintiffs are eager to proceed without the Justice Department's involvement.

'We intend to move forward and prosecute this case with all deliberate speed,' DeWitt said Friday. 'At this point, there isn't any reason to further delay the case.'

On Nov. 28, Scruggs, his son and law partner, Zach, and three others were indicted by a grand jury in Oxford, Miss., on charges they tried to bribe a judge for a favorable ruling in a dispute over \$26.5 million in attorneys' fees.

DeWitt said he doesn't know if the Justice Department is reluctant to intervene in the case because Scruggs faces federal criminal charges.

'Who knows what may have impacted their decision?' he said.

DeWitt said Scruggs is still involved in the suit even though he has withdrawn from many other Katrina cases since his indictment.

'I can't speak for him,' he said. 'I know we are doing something on this case every day.'

State Farm, Nationwide Insurance Co., Allstate (NYSE:ALL) Insurance Co., USAA Insurance Co., and several engineering firms that contracted with the companies are named as defendants in the whistleblower suit.



Cori and Kerri Rigsby secretly copied internal State Farm documents that show State Farm manipulated engineering reports

to dodge wind claims payouts and dumped onto the taxpayer (flood program) repairs that should have been paid by State Farm.