

## Major Wind v. Water Case Overturned

By Eric Gilkey, Managing Editor CLAIMS MAGAZINE

**The U.S. Court of Appeals for the Fifth Circuit has overturned one of the first wind-versus-water cases to reach verdict following Hurricane Katrina by ruling in favor of defendant State Farm, granting the insurer a new trial, and removing \$1 million in punitive damages that were awarded in the case.**

The case in question involved *Broussard v. State Farm*, which was decided by U.S. District Judge L.T. Senter. The Broussard's home was destroyed down to the slab following Hurricane Katrina, but the issue of whether wind or storm surge was at fault for the loss brought the case to the courts. Under most homeowners' policies, storm surge and flooding from hurricanes are excluded and covered only through a separate policy purchased from the government-funded National Flood Insurance Program. Losses due to wind, however, typically are covered.

In situations where the cause of the loss cannot be determined, it has generally been the burden of the insurance company to prove the extent of the loss attributable to water and to pay for any wind damage. If the loss cannot be attributed — as in the *Broussard* case in which nothing was left but a concrete slab — the insured is given the benefit of the doubt. Insurers had attempted to deal with this situation by including anti-concurrent causation exclusions in homeowners' policies, but in a separate case decided prior to *Broussard*, Judge Senter ruled that the language was ambiguous.

On Jan. 11, 2007, Judge Senter made an unusual move by issuing a bench verdict against State Farm, which prevented the jury in the case from issuing its own decision. In an article that appeared in *Claims'* April 2007 issue, Attorney Jay Brown speculated that Judge Senter did so due to the evidence being "so overwhelming against State Farm that no reasonable jury could find in the insurance company's favor." Brown went on speculate that it also seemed as though the judge felt there was an absence of credible testimony by State Farm, since he also ruled that the

carrier did not offer adequate evidence at trial to meet the burden of allocation.

In the most recent decision, the court of appeals held that the district court erred in entering a judgment as a matter of law for the Broussards. The appeals court further found that the district court erred by even submitting the question of punitive damages to the jury, thus vacating the \$1 million that was awarded to the Broussards above and beyond their policy's limits.

"This ruling confirms our belief the jury should have been given an opportunity to evaluate the question of what damage was caused by wind and what damage was caused by water," said State Farm, in a release found on their web site. "The ruling also confirmed our belief that the claim was handled reasonably and per the contract, and, therefore, there was no basis for punitive damages. Our appeal in this case was important to ensure court rulings remain consistent with the evidence presented at trial, the law, and an accurate interpretation of the insurance contract."



**Speaking to the Biloxi Sun-Herald newspaper, Jack Denton, the Broussards' attorney, said: "The 5th Circuit is a very conservative court and conservative courts tend to favor corporations over individuals. Corporations abhor punitive damages."**



**REMINDER:** If you are a State Farm policyholder, your policy contains language that renders it worthless in the opinion of many. The language is called the "Anti-Concurrent" clause and, in plain English, says that if 99% of the damage to your property is done by something covered by the policy, and only 1% of the damage is caused by something NOT covered by the policy, State Farm owes you **NOTHING.**