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5th Cir. Says 'Flood' Exclusions Bar Coverage for New Orleans Canal

NEW ORLEANS — The 5th Circuit Court of Appeals on Aug. 2 reversed a lower court and ruled that “flood” exclusions in standard homeowners policies issued by several Louisiana insurers unambiguously bar coverage for damage that occurred when New Orleans canals were breached during Hurricane Katrina. *In re: Katrina Canal Breaches*, No. 07-30119 [*Humphreys v. Encompass Insurance Co.*, No. 06-0169; *Vanderbrook v. State Farm Fire & Cas. Co.*, No. 05-6323; *Xavier University of La. v. Travelers Property Cas. Co.*, No. 06-516; and *Chehardy v. State Farm*, Nos. 06-1672, 06-1673 and 06-1674] (5th Cir.).

The ruling by the three-judge panel reversed a Nov. 27 order by Judge Stanwood R. Duval Jr. of the U.S. District Court for the Eastern District of Louisiana that homeowners could reasonably interpret the term “flood” to preclude coverage for naturally occurring events, but not for the damage

resulting from the negligent or intentional acts alleged to have caused the city’s levees to fail during Hurricane Katrina (See *HarrisMartin’s Columns: Mold*, Dec. 2006).

The Circuit Court concluded, “even if the plaintiffs can prove that the levees were negligent designed, constructed, or maintained and that the breaches were due to this negligence, the flood exclusions in the plaintiffs’ policies unambiguously preclude their recovery.”

“Regardless of what caused the failure of the flood-control structures that were put in place to prevent such a catastrophe,” the court said, “their failure resulted in a widespread flood that damaged the plaintiffs’ property. This event was excluded from coverage under the plaintiffs’ insurance policies, and under Louisiana law, we are bound to enforce the unambiguous terms of their insurance contracts as written.”

Insurer defendants in the consolidated cases included dozens of companies, nearly all of whom issued policies containing a standard exclusion precluding coverage for “flood, surface water, waves, tidal water....”

The Circuit Court said that any differences in policy language were immaterial to the appeal.

Counsel for plaintiffs included Joseph M. Bruno of Bruno & Bruno in New Orleans (liaison counsel); Daniel E. Becnel Jr. of Reserve, La.; Calvin Fayard of Fayard & Honeycutt in Denham Springs, La.; Hugh P. Lambert of Lambert & Nelson in New Orleans; and Gerald Meunier of Gainsburgh, Benjamin, David, Meunier & Warshauer in New Orleans.

Counsel for insurers include Ralph S. Hubbard III of Lugenbuhl, Wheaton, Peck, Rankin & Hubbard in New Orleans and Judy Y. Barrasso of Barrasso Usdin Kupperman Freeman & Sarver in New Orleans.

NEW CAUSE OF ACTION MAY PUT AN END TO LOWBALL TECHNIQUES USED BY INSURERS

POA

Some good news for attorneys and policyholders.

Thanks to the good work of one of our professional members, Alex Watkins of Capitelli & Wicker (New Orleans), lawyers across the country can bring a new cause of action against an insurer and their not-so-arms-length price fixing partner, Xactimate. The new cause of action is a Horizontal Price Fixing (antitrust) violation.

In a recent case, Judge Duval ruled that the plaintiffs had stated sufficient facts to pursue fraud and breach of contract claims against State

Farm and Xactimate. More importantly, the Judge held that insured had antitrust standing to bring the antitrust claim, and only lacked sufficient facts to plausibly suggest a conspiracy.

Louisiana, like most other states, has a boilerplate antitrust statute mirroring the Sherman Act, on its books. Any policyholder in a state having such a statute can bring this type of action. Mr. Watkins reported to POA that his firm has filed two other similar cases against Lafayette and Travelers Insurance. We will report on those as soon as possible.

Mr. Watkins told POA. “This ruling means that insureds can potentially bring such actions against carriers.”

Perhaps such cases will bring an end to the phony price fixing scheme (a.k.a. Xactimate) that has allowed insurers to lowball repairs.

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