

In the hard fought battle after Hurricane Katrina of homeowner versus insurance company, it at first appeared the policyholder would prevail. But time has shown that, on appeal, the insurer almost always wins.

Times Picayune
By Rebecca Mowbray

Initially, the court victories came easily. On the stand, telling their tales of battling to get their insurance claims paid, the homeowners almost always won, often with bad-faith penalties.

But on appeal, in both federal and state courts, insurers prevailed, winning key legal precedents and knocking down monetary judgments if the parties had not settled.

"For a policyholder in the trial court on factual issues, it's an almost wholesale slaughter," said Soren Gisleson, head of the insurance section at the Louisiana Association for Justice,

an association of plaintiff attorneys. "At the appellate level, where you're dealing strictly with legal issues, it's exactly the opposite situation. They have not gone in favor of the homeowners."

For the past three years, Louisiana has been snarled in litigation involving Hurricanes Katrina and Rita. Observers from both sides say the number of claims that went into litigation was more voluminous than after other natural disasters because of the number of people affected by the 2005 storms and the disputes over what caused the damage. Hurricane wind is covered by a homeowner's insurance policy, but rising water is covered separately by the National Flood Insurance Program.

Battles have been pitched. Homeowners, many of whom did not have flood coverage or did not have enough of it, fought bitterly to get the money they needed to rebuild and prodded insurers to take a closer look at the wind damage on their homes. Insurers, facing the most expensive insurance disaster on record with Katrina, dug in their heels and refused to pay.

"I think it was much different than your typical disaster," said Randy Maniloff, an insurance coverage defense attorney in Philadelphia who has published extensively about Katrina. "Normally in disasters you know how the damage was caused, so it was just a question of how much the claim was worth. But in this situation, each individual

had an individual cause of loss. That's what made the system break down."

It is hard to say exactly how many claims ended up in court. Many suits were filed in state court, then moved to federal court by insurers, so it is difficult to evaluate what is still pending in parish chambers. The only ones who know are insurers, and they generally do not divulge the number of claims in litigation.

Gisleson estimates that at least 20,000 to 30,000 hurricane insurance suits were filed in courts in the New Orleans area. Some 12,565 Katrina suits were filed in federal court, the main theater of the litigation because most insurers are from outside Louisiana. Of those, more than half -- 7,837 cases -- have gone to judgment or settlement, according to the clerk's office at U.S. District Court in New Orleans.

It is unclear how much additional money those judgments have put in people's pockets, because the Louisiana Department of Insurance stopped requiring insurance companies to report their claims payouts at the end of 2006.

Judge Martin Feldman, who took the lead developing procedures to streamline the flow of cases in federal court, said the pace of settlement has been uneven. He signed 50 dismissal orders last week, for example, but said his efforts to resolve several hundred State Farm and Allstate cases swiftly have not paid off.



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"Those cases have not been moving as quickly as I hoped," he lamented.

More cases have gone to trial in New Orleans than any other place affected by Katrina -- about 15 insurance cases have been tried in federal court and another 15 or so in Orleans Parish Civil District Court, according to the Louisiana Association for Justice. However, plaintiffs attorneys have been frustrated that more cases have not gone to trial. Settlements are difficult to calibrate without more jury awards, they say, and eyebrow-raising stories of doctored engineering reports and hardball adjustment tactics get sealed from public view when there are confidential settlements.

But Feldman said once the major questions of law created by the storm have been settled, cases should not go to trial.

"No great principle, other than 'I bought insurance and I want my money,' are at stake, and those tend to settle," Feldman said. "They basically only involve issues of money and not issues of deep social and moral principle. Cases of deep social principle should go to trial. Cases of money should settle."

Still, Feldman said he thinks it will take "a couple more years" to settle all the Katrina litigation.

--- Industry prevails ---

In Louisiana, most of the

major questions of insurance law have been decided, and courts sided with the industry.

The overarching question was whether the flood exclusions on insurance policies applied when the flood was caused by a levee breach. In other words, was a man-made flood a flood, and could insurance companies be held responsible for paying for it?

In August 2007, the 5th U.S. Circuit Court of Appeals upheld a lower court decision and said a flood was a flood. Homeowners' insurance companies were off the hook, because people could have bought a flood policy from the government.

The question was transferred to state court in the case *Joseph Sher v. Lafayette Insurance Co.*, the first full-blown trial decision from the storm to make it all the way to the Louisiana Supreme Court. After both the trial court in New Orleans and the appeals court found Lafayette liable for flood damage, policyholder hopes were dashed in April when the state's highest court came up with the same conclusion as their brethren on the federal bench and knocked the financial award from \$870,652 to \$247,001.

In June, the Louisiana Supreme Court ruled in favor of Louisiana Citizens Property Insurance Corp. in a much-watched valued policy law case that illustrated

the steady erosion of pro-policyholder rulings.

A trial court in Vermilion Parish ruled in December 2006 that a century-old state law could trigger payment of the full value of a homeowner's insurance policy when a home was destroyed by two causes of damage, even if one of them was not supposed to be covered, in a ruling that struck terror in the hearts of insurers. A state appeals court modified the ruling to something more of a mixed bag before the state Supreme Court delivered the final blow this spring and threw out the application of the valued policy law to hurricane claims.

The third major legal issue from the 2005 storms, the question of whether insurers can limit their liability by taking a credit for whatever the flood program has already paid, has not been considered by either a federal or state appeals court.

The question concerns whether the flood and wind policies should work in tandem or independently. Essentially, if a homeowner whose \$200,000 home is destroyed collects \$150,000 from the flood program, is that person limited to a maximum of \$50,000 on his wind policy? Or, can he collect whatever amount of money it takes to repair the wind damage on his house from his homeowners policy, even if he ultimately collects more than \$200,000 between the two policies?

So far, most federal judges have ruled in favor of insurers, finding that their potential payments can be limited by the flood program. But two federal judges in southwest Louisiana ruled in favor of the policyholders in Rita cases, finding that one policy should not circumscribe the other. A writ application asking the Louisiana Supreme Court to consider the issue has been languishing since March.

--- Issues unresolved ---

To Gisleson, the "flood offset" question gets to what he believes is the most galling development of the Katrina insurance litigation: insurers leaning on government programs to protect their pocketbooks.

After the storm, insurers paid flood claims quickly and generously with government money, but held the line on wind claims while they filed motions in court arguing that flood program payments, disaster loans from the U.S. Small Business Administration and even Road Home grants should be deducted from what they have to pay.

"They've created a disaster model now, where it's not based on the contract with their insured, but it's based on federal relief and aid coming in to save them and their payments," he said. "The lesson they learned from Katrina is how to use the biggest bank around, and that's federal money."

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If the courts do not stop the practice of turning disaster aid into insurance company subsidies, Gisleson said, state insurance regulators need to take a more active role in protecting policyholders by setting clear rules for what insurers have to do and when, and by developing more sophisticated computer models to spot statistical patterns of underpaying claims.

Maniloff sees exactly the opposite dynamic. To him, Katrina highlights the enormous societal pressure that falls on insurers to pay, regardless of whether their contracts call for them to do so when disasters strike. Whether it was political pressure in Mississippi for investigations or efforts to sue the Army Corps of Engineers and hold insurers responsible for damage from levee breach water in New Orleans, he said insurers are unfairly in the hot seat in a catastrophe because no amount of government aid or charitable donations can cover the costs.

"Here, so many people did not have insurance, it created a need to manufacture insurance through alternative means," he said.

But Loyola insurance law professor Mitchell Crusto said the most important point is that three years after the storm, thousands of people are still stuck in litigation, waiting for proper payment for their storm damage. Although the Louisiana Department of Insurance ran a mediation program after the 2005 storms that served 12,242 people, more needs to be done to resolve claims and get people paid.

"Under these circumstances, litigation is not very effective in getting citizens back to where they need to be," he said. "We almost need more mediation strategies, and processes by which insurance companies are encouraged or forced to get things resolved."



CORPORATE BAILOUTS RUN COUNTER TO FREE MARKET THEORY AND REWARD FAILURE

POA Opinion

President Ronald Reagan used to say "Capitalism only works when the possibility of failure exists."

The recent corporate bailouts set an extremely dangerous precedent by taking failure off the table for even the most mismanaged companies. They've also given countries struggling with democratic principles reason to revert back to socialism or communism. Why not? When you look beyond the America's touting of a free market system, the American economy has shown herself to be nothing short of a capitalist/socialist hybrid — the upside (profit) is privatized and the public (taxpayers) eat the downside (losses).

POA has covered the Republican interpretation of the free market system and the conundrum therein for years. The Bush Administration has concocted a plan that rewards failure and does little to address the root causes of the problem — deregulation, outsourcing, and the excesses of corporate America (ridiculous bonuses and severance packages paid to those responsible for the mismanagement).

This crazy strategy has far reaching effects —

- ◆ It's a known fact that other industries have lined up for similar taxpayer subsidies. In fact, automakers and credit card companies are now asking for their fair share of your pie;
- ◆ The major holders of U.S. debt — foreign countries — are further subsidized;

- ◆ While the money will come from the public coffers (taxes collected from you and me), the public has no say-so or ownership stake in the mismanaged corporations;
- ◆ There's no provision for helping the consumer who always gets stuck with the bill. This may actually cause social upheaval;
- ◆ The bailouts will add more than \$1 trillion to the deficit. The U.S. will be forced to print more money resulting in soaring inflation and a weakening dollar; and
- ◆ Most economists believe this stop-gap measure (bailouts) may have an immediate impact on the economy but not a long term impact. In fact, many caution that delaying the inevitable will actually cause a more serious economic downturn several months from now.

All of this comes at the worst time for the average working person who's already struggling to make ends meet.

The most vocal advocates of failure-funding are the Republicans, who have consistently lined up on the side of big (not small) business. These are the same folks who also stripped the rights of the consumer to hold companies accountable for fraud, negligence and bad faith. And, don't you just get goose bumps knowing many of the architects of the bailout plans and its root causes serve as economic and other policy advisors to the McCain/Palin campaign?

None of this stops McCain from pretending he had nothing to do with deregulation, even though he headed the very committee enacting it. It's hard to reconcile the fact that Republicans have become the party of hybrid socialism and, only while in an election cycle, are now touting greater regulatory control. For years, these same Republicans have embraced the mantra: deregulation is the cornerstone of a free market system.

POA hit a brick wall with Republicans when we pushed, since 2001, for stronger regulation of insurers. We pushed for tighter controls because insurance is mandated by mortgage companies, if you own a house, and by states, if you drive a car, and must be readily available and affordable. Currently under the banner of deregulation and the free market system, it's neither.

In order to correct America's economic woes, lawmakers should address the root causes and force companies and executive decision-makers to fear failure. As it stands now, why fear what doesn't exist? (Related story: [click here](#))