



The Legal Case for Payment of Katrina Victims' Insurance Claims

Since Hurricane Katrina devastated the Gulf Coast, there has been much public discussion about whether damage to homes was caused by wind and rain, or by flooding. Many policyholders have policies covering wind and rain damage (under homeowner's policies), but not flooding, which is a separate policy underwritten by the federal government.

Despite press releases and public pronouncements by the insurance industry that those without flood insurance should get nothing if their home was eventually flooded,¹ the situation is far from clear cut. Some consumers purchased what they were told was full hurricane coverage and were not clearly told by insurance representatives that flood coverage was not included. They may have been misled. Others were told flood insurance was unnecessary.²

Moreover, even though a property may have been washed away by the storm surge, it was likely first hit by heavy winds so that by the time the water wiped out the property, some percentage of the property was already destroyed by wind and rain. And suppose the storm surge, caused by low pressure, was 10 feet, but wind caused waves on top of the surge for another 5 feet. If someone's home is at 12 feet and damaged, was not wind the "proximate" cause of the damage?

Indeed, the law is not what the insurance industry says it is.

Some courts have found that where wind and flooding both cause damage, as long as the wind damage is a "proximate" or "efficient" cause of the damage, insurers cannot dodge paying on a claim.

- After Hurricane Camille, this issue was argued in the Mississippi state courts. The highest state court confirmed essentially that it was up to the jury to decide that the wind was a proximate cause of the damage and the jury appropriately apportioned the damage: "[i]t is sufficient to show that wind was the proximate or efficient cause of the loss or damage notwithstanding other factors contributed to the loss."³ In that case, the policy read: "This coverage does not insure against loss ... caused by, resulting from, contributed to or aggravated by ... flood, surface waters, tidal water, or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not."⁴

¹ The Property Casualty Insurance Association of America, the major industry trade association, issued its first press release with this message on August 31, 2005, and has issued similar press releases nearly every day since.

² Angela Early of New Orleans, LA, reported to the Americans for Insurance Reform Katrina Insurance Hotline on September 19, 2005 that when she was purchasing her homeowners insurance, her insurance agent at State Farm said that additional flood insurance would not be necessary as she did not live in a flood zone. Her agent explained further that the decision to not purchase flood insurance was going to save her a lot of money and, as she reported to AIR, "anytime someone tells you that you're getting a deal, you take it."

³ *Grace v. Littitz Mutual Ins. Co.*, 257 So.2d 217, 224 (Sup. Ct. Miss. 1972)(citing *Lititz Mut. Ins. Co. v. Boatner*, 254 So.2d 765 (Miss. 1971); *Kemp v. American Universal Ins. Co.*, 391 F.2d 533 (5th Cir. 1968)).

⁴ *Id.* at 219.

- The Mississippi courts have a well-settled rule that in these types of cases, it is up to a jury to discern whether wind is a “proximate or efficient cause” of damage.⁵ In the cases after Hurricane Camille, three different juries found wind to be the proximate cause of damage.⁶
- Mississippi is not the only state where this is the law. Other courts have also found that in cases of total damage caused by a possible combination of a covered peril (wind) and other excluded perils (flood), where the proximate cause of damage is a covered peril, insurers must pay the claim.⁷ As the Ninth Circuit has explained it, “in determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause – the one that sets the others in motion – is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.”⁸

Courts have repeatedly held that ambiguous contract language, such as in a homeowner’s policy, is resolved in the policyholder’s favor.

- It has been settled law for over 100 years that where language in insurance policies is ambiguous, questions will be resolved in favor of the policyholder.⁹
- According to a West Virginia court, “[a] provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that one cannot expect a mere laymen to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance.”¹⁰

The attitude of the insurance industry in the aftermath of Hurricane Katrina, as they force policyholders to fight to get their claims paid, is consistent with the industry’s efforts to limit claims payouts in other hurricane situations.

- In Florida, in the aftermath of Hurricane Andrew, a court ordered insurance companies to pay their full claims, relying on an explicit statutory provision called a “value added” law, which stated that a policy that covers one peril, even if it expressly excludes another possible contributing peril, must be paid in full.¹¹ The insurance industry’s response was not to respect the court decision but to lobby the legislature to change the law, which it did.¹²

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⁵ Grace, at 224.

⁶ Id.; see also *Lititz Mut. Ins. Co. v. Boatner*, 254 So.2d 765 (Miss. 1971), *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777 (Miss. 1971).

⁷ *Murray v. State Farm Fire and Casualty Co.*, 509 S.E.2d 1, 11 (W.Va. 1998) (“When a loss is caused by a combination of covered and specifically excluded risks, the loss is covered if the covered risk was the proximate cause of the loss.”); *Bartholomew v. Cameron Country Mut. Ins. Co.*, 882 S.W.2d 173 (Mo. Ct. App. W.D. 1994).

⁸ *Berry v. Commercial Union Ins. Co.*, 87 F.3d 387 (9th Cir. 1996) (quoting *Sabella v. Wisler*, 377 P.2d at 895).

⁹ *McMaster v. New York Life Ins. Co.*, 22 S.Ct. 10 (1901).

¹⁰ *Murray*, at FN5.

¹¹ *Mierzwa v. Florida Windstorm Underwriting Assoc.*, 877 So.2d 774 (Fla. Dist. Ct. App. 2004).

¹² <http://www.independentagent.com/VU/NonMember/DisasterFAQs.htm>;

<http://www.insurancenewsnet.com/print.asp?a=top-pc&lnid=295390280>