

Insurance Litigation Arising From Hurricane Katrina

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I. Introduction and Overview

Starting on August 29, 2005, Hurricane Katrina began to cause devastating losses to property located on the Mississippi Gulf Coast. Under most homeowners' and business owners' insurance policies, "damage by wind is typically covered while water damage from flooding, wind driven water, storm surge, seepage or through openings in the building (not caused by other damage) is specifically excluded."² Although the National Flood Insurance Program (NFIP) underwrites insurance coverage against flood damage, many homeowners have not participated.³ Thus, most homeowners after Hurricane Katrina had no flood insurance. As a result of the massive losses after Hurricane Katrina, the water exclusion has raised serious concerns about how to structure property insurance, spurred litigation between homeowners and their insurers and raised questions as to whether it is viable to continue developing floodplains.

II. Insurance Basics

Although homeowners may feel that they have blanket coverage for all types of damages, most policies are limited in a number of ways. First, insurance policies may cover a certain number of perils or expressly exclude certain perils. Second, standard homeowner policies generally cover damages caused by wind, but specifically exclude flood damage.⁴ Lastly, some policies also include an anti-concurrent causation clause which may provide that a "loss resulting

² Rawle O. King, Post-Katrina Insurance Issues Surrounding Water Damage Exclusions in Homeowners' Insurance Policies, Congressional Research Service Report for Congress, Feb. 27, 2007, at CRS-1. Available at http://openocrs.cdt.org/rpts/RL33892_20070227.pdf (last viewed May 3, 2007).

³ *Id.*

⁴ Christopher W. Martin and Karin Crump, Feature: 2005: The Year in Review: After the Storm: Katrina and Rita Present Challenging Insurance Coverage Questions, 69 Tex. B. J. 22, 22 (Jan. 2006).

from an excluded cause is not covered ‘regardless of any other cause or event contributing concurrently or in any sequence to the loss.’”⁵

III. Flood Coverage

Due to the problems inherent to flood coverage, private insurers avoid this market. As such, the federal government has stepped in to insure flood damage. The Flood Disaster Protection Act of 1973 requires at-risk property owners⁶ who seek loans from federally insured lending institutions to purchase flood insurance.⁷

[U]nder the National Flood Insurance Act [NFIP], 42 U.S.C. §§ 4001, et seq., homeowners may purchase federally backed flood insurance through a Standard Flood Insurance Policy providing a maximum of \$250,000 coverage exclusively for “flood” damage. Private insurers may also offer excess “flood” coverage.⁸

One commentator notes that almost all flood insurance today is issued through the Write-Your-Own (WYO) program.⁹ The program works in the following way:

Participating property and casualty insurers enter into contracts with the [Federal Insurance Administration (FIA)]. These companies are known as “WYO insurers,” and they are fiscal agents of the United States. They issue flood insurance policies in their own names. These insurers charge nearly the same premium as the federal government charges for policies through the direct program. The carriers adjust, defend, settle, and pay all flood claims arising under the policies they issue. The companies receive small administrative fees for policies written and claims processed, but they remit the remainder of the premiums they collect to the government. The government reimburses WYO insurers for claims they pay and bears all underwriting losses.¹⁰

⁵ Seth A. Tucker and Ann-Kelly Kemper, Ill Wind: Selected Insurance Issues After Hurricane Katrina, *The Insurance Coverage Law Bulletin*, Vol. 4, Num. 10 at 2 (November 2005). Available at <http://www.cov.com/listall.aspx?showpubitems=true&archiveyear=2005> (last viewed Apr. 12, 2007).

⁶ But see King, *supra* note 1, at CRS-10 (criticizing the floodplain maps of the Gulf Coast on which NFIP is partially based).

⁷ Crusto, *supra*, note 12, at 341.

⁸ Michael R. Bottaro, Esq., Article: Seeing Through the Eye of the Storm: Hurricanes and Insurance Claim Denials, 55 R.I. Bar Jnl. 5, 5 n.2 (September/October 2006).

⁹ Douglas R. Richmond, Insurance and Catastrophe in the Case of Katrina and Beyond, 26 Miss. C. L. Rev. 49, 55 (2006/2007).

¹⁰ Id.

Further,

[t]he insurance contract is written by NFIP and published in the Federal Register. No deviations are permitted, and it is not governed by the law of insurance contracts generally. Insurance companies retain 30% of premiums as a commission and receive compensation for additional loss-adjustment expenses. These insurers are responsible for enrolling policyholders, collecting premiums, and administering claims WYO insurers have been described as “fiscal agents” of the federal government, a denomination that permeates their legal relationship to policyholders.¹¹

IV. Responses by the Private Insurance Industry

“Because only a small percentage of homeowners in Mississippi and Louisiana had flood coverage through the . . . NFIP . . . their ability to rebuild after Katrina hinges on whether courts will enforce those exclusions or will find a legal basis to avoid flood exclusions and force insurers to pay billions of dollars to repair “flood” damage.”¹² Although Hurricane Katrina litigation has highlighted the problems which arise from lack of water coverage in basic homeowners’ insurance contracts, it is not unusual for courts to interpret insurance contracts in the face of a dispute between an insured and insurer. Insurance companies respond to such litigation by redrafting their contracts into less vague or ambiguous forms. Currently, policy forms are mainly developed within the Insurance Services Office (“ISO”).¹³

Another development of the insurance industry as a response to litigation is the market segmentation provisions which “force consumers to purchase insurance specifically tailored to events with pattern or risk profiles that distinguish them from the basic insurance policy.”¹⁴ Such provisions help avoid the adverse selection problem while guaranteeing a consumer

¹¹ Adam F. Scales, A Nation of Policyholders: Governmental and Market Failure in Flood Insurance, 26 Miss. C. L. Rev. 3, *14 (2006/2007).

¹² Jay M. Levin and Reed Smith, Expert Commentary: The Litigation Aftermath of Hurricane Katrina: Are the Flood Gates Opening?, IRMI.com, July 2006. Available at <http://www.irmi.com/Expert/Articles/2006/Levin07.aspx> (last viewed May 3, 2007).

¹³ Scales, *supra* note 22 at *21.

¹⁴ *Id.* at *22.

coverage for the events they are likely to suffer. However, the “hollowing out” of certain events is not necessarily as apparent to consumers as one may imagine. Although consumers may sign a contract and be aware that certain events are not covered, they are not likely to understand that what may appear as one event, like Hurricane Katrina, will be dissected such that certain damages will be covered and others not, depending on which events are covered by the insurance policy. As one commentator worded this phenomenon, “[h]omeowners policies are particularly susceptible to policyholder arbitrage because they offer several different kinds of coverage for types of losses that often share a common nucleus of operative facts.”¹⁵ Some think that the anti-concurrent causation clauses arose from the problems related to determining causation when an event occurs and related events wreak havoc as well.¹⁶

V. Judicial Interpretation of Insurance Contracts Prior to Katrina: How Disputes Arise and the Established Doctrines which Regulate Them

Prior to Hurricane Katrina, litigation surrounding windstorm policies where a mixed cause was at issue involved causation. After proving that a covered windstorm took place, a plaintiff in a mixed cause event like Hurricane Katrina must contend with the problem of proximate cause in an action to recover from a windstorm policy. The realm of proximate cause becomes a battle between the insured and insurer as the insurer is likely to claim either that a cause other than the windstorm was responsible for the damage or that the windstorm combined with non-covered cause produced the damage. Thus, the insurer diminishes its responsibility based on either defense.

¹⁵ Id.

¹⁶ Id.

When the insurer alleges that a different cause led to the damage at issue, a question of fact exists and recovery is either denied or granted on a case by case basis.¹⁷ When the insurer alleges that a wind storm combined with a non-covered cause produced the damage, then the proximate cause analysis becomes complicated. Many of these cases may also be resolved by a jury. However, where courts have stepped in to review this issue, there is no well-settled rule as to how the damage will be allocated among the causes. One summary of these cases notes that:

The chief rule which emerges from the cases dealing with combined causes is that if a windstorm is the dominant and efficient cause of the loss, the insured is entitled to recover, although other causes may also have contributed thereto. This rule is modified in some cases by the further rule that if the windstorm combines with a hazard expressly excluded from coverage of the policy, such as “high water,” to produce the loss, the policy coverage does not extend to such loss.¹⁸

This rule has been set forth in a number of jurisdictions prior to Hurricane Katrina.¹⁹ Where an excluded cause combines with a windstorm and courts bar recovery of damages, they do so based on the premise that the damage which is attributed to both perils cannot be separated.²⁰ However, courts may allow recovery where the damages can be separated and apportioned between the causes.²¹

Much of the litigation surrounding Hurricane Katrina also involves causation. Specifically, who should bear the costs when an insured suffers losses due to both a covered cause, wind, and an excluded cause, flooding. It is easy to see why the losses of Hurricane

¹⁷ Causes of Loss Under Windstorm Insurance Coverage, American Law Reports 2d, 93 A.L.R.2d 145 *, *11 (2007) (citing cases where recovery was either denied or granted when the issue at hand was differentiating between wind or water as a cause for damages).

¹⁸ Id.

¹⁹ See id. at *8 (citing cases which reflect the rule that damage is covered if the dominant cause of the damage was windstorm regardless of the nature of the combined cause).

²⁰ See id. at *9 (citing cases which bar recovery based on mixed causes because the damage resulting from each cause cannot be separated).

²¹ See id. at *10 (citing cases which allow recovery based on mixed causes because the damage resulting from each cause can be separated and apportioned between the windstorm and excluded peril).

Katrina do not mesh well with a homeowner's policy with exclusions for water damage. Many view Hurricane Katrina as a singular event, but a detailed analysis of the hurricane uncovers several events which insurers refuse to commingle: hurricane winds, storm surge and broken levees. As such, losses could be described in a number of ways: "[h]omes apparently washed away by the surge of the Gulf Coast or nearby bodies of water; homes damaged by such surges, then destroyed by hurricane winds; homes damages by hurricane winds, then destroyed by flooding; and homes destroyed entirely by flood."²²

Thus, if insurers and insureds each act self interested so as to maximize their benefits, each is likely to have a good argument on their behalf. It is likely that insureds reasonably believed that a hurricane caused the catastrophe at hand, including the related events which added to the losses, and that they were covered for such an event or at least had a reasonable expectation of coverage when the covered peril caused other devastating events. On the other hand, insurers have a good argument that the insurance policy stands on its own and that the devastation of August 2005 can be segmented into very specific events which cannot all possibly be covered by a policy which would never cover so many catastrophes. To add to the gap in coverage, the task of categorizing losses wind- or water-related after such a large scale catastrophe is difficult and subject to disagreement.

Although some commentators dislike the idea of judicial interpretation of a contract which is, based on some points of view, plain on its face, it is not unusual for the judicial system to step in and resolve a contractual issue where the contract is not unlike a contract of adhesion and one party has less bargaining power than the other. Thus, courts will invariably step in when

²² Scales, *supra* note 22, at *24.

there is a failure in coverage and insureds and insurers both stand to lose depending on how a court construes these matters.

Although this event is singular in its devastation, the three states which suffered most heavily did have case law on the treatment of causation in insurance law cases. “The efficient proximate cause doctrine has been adopted by the highest courts of Mississippi, Louisiana, and Alabama, the three states most affected by Hurricane Katrina.”²³ This doctrine “allows recovery so long as the non-excluded cause was the efficient and dominant cause of the loss, notwithstanding that an excluded peril may have contributed to the loss.”²⁴ As interpreted in these states, the doctrine stands to favor the insureds of Hurricane Katrina related claims as “[c]ourts ... have interpreted the doctrine to allow policyholders to recover for hurricane-related losses where the evidence showed that wind was the efficient proximate cause of the damage, notwithstanding that flooding contributed to the loss.”²⁵ However, cases brought to federal court would not necessarily endure scrutiny under this doctrine. Such litigants may have faced the concurrent causation doctrine where “recovery is allowed so long as one of two or more contributing causes is insured, even if other contributing causes are not.”²⁶

To complicate matters, courts must also determine whether to enforce anti-concurrent causation clauses or not. “Anti-concurrent causation clauses provide that the insurer will not pay if one of the causes was an excluded loss, even if there are several enumerated causes that played

²³ Tucker and Kemper, *supra* note 9, at 2 (citing Western Assurance Co. v. Hann, 78 So. 232, 236 (Ala. 1917); Glens Falls Ins. Co. of Glens Falls, N.Y. v. Linwood Elevator, 130 So. 2d 262, 270 (Miss. 1961); Evana Plantation, Inc. v. Yorkshire Ins. Co., 58 So. 2d 797, 798 (Miss. 1952); Roach-Strayhan-Holland Post No. 20, American Legion Club, Inc. v. Continental Ins. Co. of N.Y., 112 So. 2d 680, 683 (La. 1959)).

²⁴ Id. at 1.

²⁵ Id.

²⁶ Id. at 1-2.

a role in a loss.”²⁷ Prior to Katrina, Mississippi and Louisiana courts had not analyzed the effect of these clauses. However, the Alabama Supreme Court upheld an anti-concurrent causation clause.²⁸

Insurance cases also contain a burden shifting element with respect to the burden of proof: “[i]t is settled insurance law that the insured bears the burden of establishing that a particular loss falls within a policy’s coverage. The burden then shifts to the insurer to show that the loss falls within a policy exclusion.”²⁹ This element may be troublesome to meet in the Hurricane Katrina cases where the property may be totally destroyed and gathering evidence may have been difficult as many areas were evacuated immediately after the destruction.

VI. Insurance Litigation Arising from the Damages of Hurricane Katrina³⁰

a. Water Damage Litigation

i. Buente v. Allstate Prop. and Cas. Ins. Co.³¹

Plaintiffs brought a challenge to the water damage exclusions of their homeowner’s insurance policy.³² They claimed that exclusion for damage by flood was ambiguous and unenforceable.³³ The court found that the flood exclusions were “drawn quite broadly, and they have the clear purpose of excluding damage caused by inundation from coverage.”³⁴ The court

²⁷ Crusto, *supra* note 12, at 344.

²⁸ Tucker and Kemper, *supra* note 9, at 3 (citing State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293 (Ala. 1999)).

²⁹ Richmond, *supra* note 20, at 57.

³⁰ Also see Laura A. Foggan and Katherine Van Pelt, Post-Katrina Insurance-Related Litigation, Wiley Rein, LLP Articles (November 2006) (listing cases and claims filed in the wake of Hurricane Katrina). Available at http://www.wileyrein.com/publication.cfm?pf=1&publication_id=12842 (last viewed May 3, 2007).

³¹ 2006 U.S. Dist. LEXIS 23742 *, at *1 (S.D. Miss. Apr. 11, 2006).

³² 2006 U.S. Dist. LEXIS 23742 at *2.

³³ Id.

³⁴ Id. at *3.

found that the “inundation that occurred during Hurricane Katrina was a flood.”³⁵ As such, the damage was excluded from coverage pursuant to the valid and enforceable policy provisions.³⁶

ii. Hood v. Mississippi Farm Bureau Ins. Co.³⁷

The water damage exclusion continues to be litigated in state court.³⁸ The attorney general of Mississippi claims that several major insurers include flood exclusions in homeowner’s policies that are void.³⁹ He argues that such exclusions violate public policy and Mississippi’s common law.⁴⁰ The attorney general applies the proximate cause doctrine to argue that all losses should be covered if the “proximate cause” of loss is covered.⁴¹ The suit also seeks a court interpretation of the insurance contract language and claims that policies are unreasonably complex and not subject to negotiation.⁴² Although some of the defendants filed, among other motions, a Notice of Removal, the federal court rejected this application.⁴³

b. Mixed Cause Litigation

i. Tuepker v. State Farm Fire & Cas. Co.⁴⁴

In this case, Judge L.T. Senter, Jr. denied State Farm’s motion to dismiss.⁴⁵ Plaintiffs alleged that their State Farm agent represented to them that they would have “full and

³⁵ Id.

³⁶ Id. at *3-4.

³⁷ No. 3:05cv572-LTS-JCS, 2006 WL 3802170 (S.D. Miss. Dec. 26, 2006).

³⁸ Theo Francis, Mississippi Sues to Make Insurers Pay Flood Claims, The Wall Street Journal: Online, Sept. 16, 2005. Available at <http://online.wsj.com/article/0,,SB112682747102142356,00-search.html?KEYWORDS=insurance&COLLECTION=wsjie/archive> (last viewed May 3, 2007).

³⁹ Id.

⁴⁰ Id.

⁴¹ See id.

⁴² Id.

⁴³ See Hood v. Mississippi Farm Bureau Ins. Co., No. 3:05cv572-LTS-JCS, 2006 WL 3802170 *, at *1 (S.D. Miss. Dec. 26, 2006).

⁴⁴ 2006 U.S. Dist. LEXIS 34710 *, at *1 (S.D. Miss. May 24, 2006).

⁴⁵ 2006 U.S. Dist. LEXIS 34710 at *16.

comprehensive coverage for any and all hurricane damage, including any and all damage proximately, efficiently, and typically, caused by hurricane wind and ‘storm surge’ proximately caused by hurricanes.”⁴⁶ The policy appeared to cover the perils of windstorm or hail and exclude damage resulting from water damage.⁴⁷ Judge Senter held that losses directly attributable to storm surge were excluded by the water damage exclusion, which he found to be unambiguous, valid, and enforceable.⁴⁸ Judge Senter also held that the anti-concurrent causation language was contrary to the settled Mississippi law which applies the proximate cause doctrine.⁴⁹ He also found the language ambiguous as compared to the specific named peril coverage for wind.⁵⁰ Finally, the Judge held that the insurer would be liable for flood damages if (1) the plaintiffs could prove that the hurricane winds and associated rains caused the damage and (2) the trier of fact accepted as true the plaintiffs’ contention that the agent represented coverage with respect to all hurricane damage.⁵¹

ii. Guice v. State Farm Fire & Cas. Co.⁵²

In this case, Judge Senter reaffirmed the insurance policy analysis set forth in Tuepker and denied State Farm’s motion to dismiss.⁵³ In doing so, he reiterated the test which would determine the scope of coverage under the policy:

If the evidence were to indicate that part of the plaintiff[‘s] losses were attributable to wind and rain (making them covered losses under the applicable provisions of the policy), and part of the loss were attributable to flooding (which is excluded from coverage), the determination of which was the proximate cause of the damage to the insured dwelling or to any given item of property (or the

⁴⁶ Id. at *3.

⁴⁷ Id. at *5-7.

⁴⁸ Id. at *9.

⁴⁹ Id. at *12.

⁵⁰ Id.

⁵¹ Id. at *14, 16.

⁵² No. 1:06CV1-LTS-RHW, 2006 WL 2359474 *, at *1 (S.D. Miss. Aug. 14, 2006).

⁵³ No. 1:06CV1-LTS-RHW, 2006 WL 2359474 at *4.

determination of the proportion of the damage to the insured dwelling or to any given item of property was proximately caused by each phenomenon) would be a question of fact under Mississippi law.... Likewise, if the evidence shows that the damage occurred over time, so that wind damage preceded damage from a “storm surge,” the wind damage would be a covered loss, even if subsequent damage from the “storm surge” that exacerbated the loss were properly excluded from coverage....⁵⁴

Significantly, the court also declined to certify class actions aimed at collectively litigating homeowners’ insurance claims. Here, the class members argued that they were similarly situated in that each was a ‘slab case’ where property was totally destroyed as a result of Hurricane Katrina.⁵⁵ In rejecting to certify the class, the court reasoned that the nature and extent of property damage and the combination of forces causing the damage would be very fact specific inquiries.⁵⁶ Thus, a class action would not be the appropriate approach to the resolution of these cases.⁵⁷

iii. Leonard v. Nationwide Mutual Ins. Co.⁵⁸

In another case where Hurricane Katrina extensively damaged the homeowner’s property, the plaintiffs’ policy included a water damage exclusion and a combined causes exclusion.⁵⁹ The court found that the water damages exclusion was enforceable while the combined causes exclusion was not enforceable.⁶⁰ With respect to the combined causes exception, the court found that it would be contrary to Mississippi law “if this second provision were read to exclude wind

⁵⁴ Id. at *4 (quoting Tuepker, 2006 U.S. Dist. LEXIS 34710 at *6).

⁵⁵ Michael Kunzelman, Judge Blocks Class Action vs. State Farm, Yahoo!Finance, Financial News, Mar. 23, 2007. Available at http://biz.yahoo.com/ap/070323/katrina_insurance.html?.v=3&printer=1 (last viewed May 3, 1007).

⁵⁶ No. 1:06CV1-LTS-RHW, 2006 WL 2359474 at *5.

⁵⁷ Id.

⁵⁸ 438 F. Supp. 2d 684 *, at *1 (S.D. Miss. 2006).

⁵⁹ 438 F. Supp. 2d at 687-89.

⁶⁰ Id. at 693-94.

damage that occurs at or near the time that any excluded water damage occurs.”⁶¹ Even so, the plaintiffs were only awarded about \$1,200 in wind damages as that amount reflected the parties’ ability to carry their burden of proving the portion of the loss which was caused by wind as almost all damage to the residence was shown to be “attributable to the incursion of water.”⁶²

iv. Broussard v. State Farm Fire and Casualty Co.⁶³

This case highlights the importance of the burden shifting in insurance cases after the Tuecker decision. The allocation of the burden of proof becomes critical since Tuecker firmly established that the proximate cause doctrine, which was well established in Mississippi prior to Hurricane Katrina, would not permit the concurrent causation defense by the insurer and that water exclusions are likely enforceable. Thus, in Broussard, State Farm had to establish, by a preponderance of the evidence, the portion of the total loss which was attributable to flood damage and fell outside of the insurance policy coverage.⁶⁴ The record showed that State Farm’s expert witness refuted their claim that 100% of the damage to the property was caused by rising water, not wind.⁶⁵ State Farm was not able to meet its burden of segregating the wind and water damages or that the property did not withstand wind damage.⁶⁶ Thus, the court granted the plaintiffs motion for judgment as a matter of law under Rule 50.⁶⁷

c. **Dual Coverage**

These cases differ from other mixed cause litigation in that plaintiffs do not challenge the enforceability of the water exclusion in their policies or seek to re-characterize their flood

⁶¹ Id. at 694.

⁶² Id. at 695-96.

⁶³ 2007 U.S. Dist. LEXIS 2611 *, at *1 (S.D. Miss. Jan. 11, 2007).

⁶⁴ 2007 U.S. Dist. LEXIS 2611 at *4.

⁶⁵ Id. at *5.

⁶⁶ Id. at *7.

⁶⁷ Id.

damage as wind damage. Instead, plaintiffs had both wind and water coverage under separate policies.

i. Weiss v. Allstate Ins. Co.⁶⁸

This case involved both the standard homeowner's policy and separate flood insurance.⁶⁹ Plaintiffs' home was destroyed by Hurricane Katrina with the first floor being damaged by water and the upper two floors being damaged by wind.⁷⁰ Allstate, the insurance company handling both policies, paid plaintiffs the full limits under the flood policy and only a portion of the homeowners insurance for wind damage.⁷¹ Plaintiffs argued that additional money should have been paid out under the homeowner's policy to cover the wind damage to the upper floors of the home.⁷² The court found that there were disputed issues of material fact sufficient to withstand a motion for summary judgment.⁷³ A jury later found that Allstate's disbursements were not sufficient to cover the wind damage to the property.⁷⁴ The jury awarded the Weiss's more than \$2.8 million in damages and penalties.⁷⁵

ii. SIMA/Signature Lake, L.P. v. Lloyds London⁷⁶

The plaintiffs in this action owned two apartment buildings for which they had a policy through Lloyds which excluded flood coverage and a separate flood insurance policy.⁷⁷ The plaintiffs collected the full amount of their flood policy and Lloyds argued that two clauses in the

⁶⁸ 2007 U.S. Dist. LEXIS 19973 *, at *1 (E.D. La. Mar. 21, 2007).

⁶⁹ 2007 U.S. Dist. LEXIS 19973 at *2.

⁷⁰ Id.

⁷¹ Id.

⁷² Id. at *3.

⁷³ Id. at *8.

⁷⁴ \$2.8 Million Katrina Judgment Against Allstate, MSNBC.com (Apr. 16, 2007). Available at <http://www.msnbc.msn.com/id/18140356> (last viewed May 3, 2007).

⁷⁵ Id.

⁷⁶ 2006 U.S. Dist. LEXIS 88759 *, at *1 (S.D. Miss. Dec. 6, 2006).

⁷⁷ 2006 U.S. Dist. LEXIS 88759 at *2.

wind coverage policy relating to other insurance would curb the amount which plaintiffs could seek under the wind policy.⁷⁸ The court found the two provisions to be ambiguous.⁷⁹

The first provision, by its terms, allows a proration of coverage only for "other insurance subject to the same plan, terms, conditions and provisions" as the Lloyds policy. The flood policy has terms, conditions, and provisions different from the Lloyds policy. For this reason, the limits of liability under the Lloyds policy cannot be prorated with the limits of liability under the plaintiffs' flood policy. The second provision allows an offset of coverage only "If there is other insurance covering the same loss or damage." The flood policy covers different losses and different damages, i.e. losses attributable to water damage. This type of loss and damage is excluded under the Lloyds policy. For this reason, the limits of liability under the Lloyds policy cannot be offset or reduced by the limits of liability under the plaintiffs' flood policy.⁸⁰

For these reasons, Lloyds was not entitled to a proration or offset in the amount of coverage which plaintiffs could receive under the Lloyds wind policy.⁸¹

d. Class Action Litigation⁸² & Consolidated Cases

i. Woullard v. State Farm Fire and Cas. Co.⁸³

Judge Senter "dismissed the case in which State Farm had agreed to review the claims of 35,000 policyholders in three Mississippi counties and set aside a minimum of \$500 million for payments to policyholders."⁸⁴ The class action was dismissed because the named plaintiffs settled with the insurance company and could no longer represent the interests of the class.⁸⁵

⁷⁸ Id. at *3.

⁷⁹ Id. at *4.

⁸⁰ Id. at *5.

⁸¹ Id.

⁸² See also Guice v. State Farm Fire & Cas. Co., No. 1:06CV1-LTS-RHW, 2006 WL 2359474 *, at *1 (S.D. Miss. Aug. 14, 2006).

⁸³ No. 1:06cv1057 LTS-RHW, 2007 WL 1140661 *, at *1 (S.D. Miss. Apr. 16, 2007).

⁸⁴ John O'Brien, Woullard Class Action Against State Farm Dismissed, Legal Newsline.com, Apr. 17, 2007. Available at <http://www.legalnewsline.com/news/193692-woullard-class-action-against-state-farm-dismissed> (last viewed May 3, 2007).

⁸⁵ Woullard, No. 1:06cv1057 LTS-RHW, 2007 WL 1140661 at *1.

Notably, the judge stated that he was prepared and willing to approve a just settlement.⁸⁶ In addition, State Farm continues to resolve claims under a program of the Mississippi Department of Insurance.⁸⁷

ii. In re Katrina Canal Breaches Consolidated Litigation⁸⁸

In these rulings, Judge Stanwood R. Duval interpreted the standard form Insurance Services Office (ISO) flood exclusion to apply only to water damage caused by natural events.⁸⁹ Thus, the standard Insurance Services Office (ISO) flood exclusion does not apply to water damage resulting from the breach of negligently designed or maintained levees in New Orleans.⁹⁰

e. **NFIP Litigation**

An investigation of how insurance companies classified losses related to Hurricane Katrina is also being led by the Department of Homeland Security.⁹¹ Specifically, the Department of Homeland Security is investigating whether insurers apportioned damages to flood which were actually caused by wind.⁹² In so doing, the insurance companies would be able to deflect their costs to the NFIP rather than paying insureds through the private policies which they held through the insurance companies. Currently, the Department of Homeland Security will subpoena Allstate Corp. and its subsidiaries in its investigation.⁹³

⁸⁶ Id. at *2.

⁸⁷ Id. at *1.

⁸⁸ 446 F. Supp. 2d 729 (E.D.La. Nov. 27, 2006).

⁸⁹ 446 F. Supp. 2d at 748-50.

⁹⁰ See id. at 760.

⁹¹ Liam Plevin, Allstate Receives Subpoena Tied to Katrina, The Wall Street Journal, May 4, 2007.

⁹² Id.

⁹³ Id.

VII. Conclusion: The Aftermath of Katrina

Both the policy considerations of insuring against catastrophes and the litigation which has ensued over Hurricane Katrina indicate that insuring against certain risks may not be the most viable way to curb the costs of catastrophes. In fact, the following announcement demonstrates the chilling effect that a catastrophe like Hurricane Katrina can have on even a large company in a main industry: “[o]n February 14, 2007, Mississippi’s largest provider of homeowners’ insurance, State Farm Fire and Casualty Company, announced plans to suspend sales of new policies in the state because of what the insurer claims is an increasingly unpredictable business and legal environment.”⁹⁴ In response, Attorney General Jim Hood proposed legislation to force State Farm to continue providing coverage while State Farm counters that its decision was not driven by anything other than business decisions.⁹⁵

Even so, additional legislative response includes three bills targeted at the insurance industry and introduced to the 110th Congress: R.R. 920, H.R. 1081/S. 618, and H.R. 537/S. 292. H.R. 920⁹⁶:

would [1] create an all-peril policy that covers both wind- and water-related damages for both homeowners and small businesses under NFIP... [;2] expand coverage offered by NFIP from flood only policies to include flood and wind perils... [;3] reduce complexity in claims adjusting associated with wind and flood loss segregation; and [4] enhance wind insurance availability and reduce prices.⁹⁷

⁹⁴ King, *supra* note 1, CRS-3 (citing Steve Tucker, State Farm Halts New Mississippi Business, National Underwriter Online News Service, Feb. 14, 2007).

⁹⁵ Proposal for Legislation to Force New Insurance Underwriting, State Farm Insurance, Feb. 16, 2006. Available at: http://www.statefarm.com/about/media/media_releases/msinsunder.asp (last viewed May 3, 2007).

⁹⁶ See also King, *supra* note 1, CRS-26 (discussing the Department of Homeland Security Appropriations Act of 2007 which directs the investigation and report to Congress on “whether insurers under the NFIP’s WYO program improperly attributed damages from Hurricane Katrina to flooding covered under the NFIP rather than to windstorms covered by such insurers).

⁹⁷ King, *supra* note 1, CRS-26.

S. 618/H.R. 1081 “would ... give the Federal Trade Commission and the Justice Department oversight over ensuring that insurers comply with federal antitrust laws.”⁹⁸ S. 292/H.R. 537 would “create a federal bipartisan commission to study catastrophe insurance markets in Katrina’s aftermath and make recommendations to Congress regarding the availability of insurance for catastrophic risks.”⁹⁹

⁹⁸ Id.

⁹⁹ Id.