

## UNRAVELING INSURANCE COVERAGE FOR HURRICANE KATRINA:

### NO *BIG EASY* TASK

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The pictures of destruction and despair caused by Hurricane Katrina are incomprehensible. While each one may be worth a thousand words, no descriptions are adequate to convey the tragic human suffering and loss of life and property that have taken place on the Gulf Coast since Katrina had her way.

But as hard to believe as it is, this ravaged region will rebuild. History is full of seemingly impossible comebacks after natural disasters, and the Gulf Coast will eventually make its way to that list. Of course, it will take a lot of time, will, and money to make that happen. One catastrophe modeling firm placed an estimate of the economic losses caused by Katrina at \$100 billion, with \$35 billion of that amount being insured. But at this infancy stage, catastrophe modeling may be no more accurate than wetting your finger and holding it in the wind. Katrina's final price tag—even an accurate preliminary assessment—is a long way off.

The money needed to rebuild Louisiana, Mississippi, and Alabama will come from several sources—principally government, charity, and insurance. The federal government has initially pledged \$10.5 billion in aid. And there will no doubt be a lot more where that came from. Relief organizations are moving heaven and earth to respond, as well as doing a superb job of getting Americans to open their wallets. And, lastly, many of the affected residents and businesses have surely begun to assess to what extent insurance may

cover their enormous losses. Indeed, some insurers announced their potential financial exposure from Katrina within days of their appreciation of the extent of destruction.

Some might call it selfish or callous to be thinking about insurance coverage at a time when caring for the dead and providing humanitarian relief for the thousands of evacuees are the principal tasks at hand. However, while food, water, medical treatment, and the like are the necessities of short-term humanitarian relief, the most important form of humanitarian relief will ultimately prove to be economic redevelopment. People can't live in the Astrodome forever. Once the short-term crisis is stabilized, getting people back to their homes and places of work will become the real humanitarian issue. There is no doubt that insurance will play a significant role in that process.

The insurance industry has substantial experience handling property losses from hurricanes. Last year alone the industry was required to respond to a hurricane trifecta in Florida—Charley, Frances, and Jeanne—as well as Ivan in Alabama. But Katrina is like no other hurricane. All hurricanes involve damage caused by wind and rain. But in Katrina's case, this was just the opening act. Many of the claims that are made for property damage caused by Katrina's destruction will involve a confluence of some of the following *additional* factors: flood, looting, vandalism, pollution, fire (arson and other causes), power failure, governmental action, mold, further deterior-

ration of property on account of its inaccessibility for weeks, if not months, and the list could surely go on. Katrina will also likely cause far more claims for business interruption than normally results from a hurricane, even a powerful one. Not to mention, the business interruption claims will involve unusually long periods of interruption.<sup>i</sup>

Given such a wide variety of causes of loss and that first-party property policies often significantly vary in their terms and conditions, it is difficult to describe a prototypical Katrina claim and what the insurance response may be. What's more, first-party property claims in general are often complicated by the need to determine the "proximate cause" of a loss—a concept that one legal scholar says has caused more disagreement *than any other in the entire field of law*.<sup>ii</sup> Considering all these factors, it is easy to see that the adjustment of property losses caused by Hurricane Katrina is shaping up to be an arduous and challenging process for all concerned.

Some of the causes of loss that will likely be at issue in Katrina claims are excluded by first-party property policies. For this reason, as claims evolve over the next few weeks and months, expect much discussion in coverage circles of the concepts of "efficient proximate cause" and "anti-concurrent causation" lead-in clauses. In the first-party property context, some courts have adopted the doctrine of efficient proximate cause, which provides that if a covered peril causes an excluded peril, coverage is available even for the damage caused by the excluded peril. This has been a commonly invoked doctrine in mold coverage cases, where sometimes a covered peril, such as a burst pipe, causes an excluded peril—mold.<sup>iii</sup> The Louisiana Supreme Court addressed the efficient proximate cause rule in *Lorio v. Aetna Insurance Company*, 232 So. 2d 490 (La. 1970), a Hurricane Betsy case, but not involving flood damage.

On the other hand, an anti-concurrent causation lead-in clause is prefatory language to a policy exclusion that is designed to override efficient proximate cause by precluding coverage for a certain peril, *even if* caused by an otherwise covered peril. For example, Insurance Services Office's current Causes of Loss – Special Form (CP 10 30 04 02), accompanying ISO's Building and Personal Property Coverage Form (CP 00 10 04 02), contains the following anti-concurrent causation lead-in clause to many of its exclusions, including those for flood, power failure, earth sinking, and mold: "We will not pay for loss or damage caused directly or indirectly by any of the following.

Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."<sup>iv</sup>

For a recent example of a Mississippi Appeals Court expressly relying on an anti-concurrent causation lead-in clause to preclude first-party property coverage, see *Boteler v. State Farm Casualty Insurance Company*, 876 So. 2d 1067 (Miss. App. 2004).

Compounding the causation complexity is that ISO form CP 10 30 04 02 also contains exclusionary lead-in clauses that do not use anti-concurrent causation language, as well as certain otherwise excluded causes of loss that provide coverage if they result in a defined "specified cause of loss."<sup>v</sup>

Examining Katrina claims in lay terms, it has been widely reported in the media that, in the case of a hurricane, private insurance covers damage caused by wind and rain, but that damage caused by flooding is not covered. Instead, flood damage is covered by policies issued by the National Flood Insurance Program. *The Wall Street Journal* has reported that, according to data from the NFIP, as of June 30, only one-fifth of homes and businesses in Mississippi in the areas most at risk for flooding were covered by flood insurance policies. In the case of Louisiana, the *Journal* reported that just less than half of such properties were covered.<sup>vi</sup>

There will no doubt be calls for insurers to simply disregard the terms and conditions of their policies and start writing checks. Recall that in the aftermath of September 11<sup>th</sup> some politicians sent a *Don't even think about it* message to insurers when it came to the potential applicability of the war risk exclusion. The problem with insurers ignoring the terms and conditions of their policies is that they have customers in forty-seven other states to whom they owe an obligation of financial preparedness for *their* potential losses. Not to mention that the 2005 hurricane season does not end until November.

While many property damage claims from Hurricane Katrina are going to be as unique as the storm's tales of survival, some insight into how these claims may be handled can be had by examining decisions of courts that have addressed coverage for past hurricanes and floods—albeit *without* Katrina's many complicating factors. One theme of these past cases—and one that will be prevalent in Katrina claims—is the inter-play between damage caused by wind and wind-driven rain versus flooding. In some cases, this will determine the extent to which damage is covered at all or shared between private insurance and the National Flood Insurance Program.

Standard and Poor's made this point in a statement released in Katrina's aftermath. The ratings agency said: "Traditionally, water damage from hurricanes is only covered if it is wind driven. In the aftermath of Katrina, however, claims adjusters will find it difficult to differentiate wind-driven water damage from true flooding, so it will remain unclear how these losses will be allocated. The NFIP covers residential flood damage but not hurricane wind-driven water damage. To complicate matters, commercial property policies might or might not cover flood damage, depending on the specific policy. Flood damage, however, is covered under most auto insurance."<sup>vii</sup>

What follows is a summary of how some courts, including several in Louisiana, have resolved coverage disputes when hurricanes have caused property damage by wind, rain and flood:

***Urrate v. Argonaut Great Central Insurance Company*, 881 So. 2d 787 (La. App. 2004).**

*Urrate* involved coverage for damage to a restaurant caused by Hurricane Georges in 1998. Brunings Seafood Restaurant was doing business in a wood frame building on pilings over Lake Pontchartrain in Jefferson Parrish, Louisiana. Hurricane Georges made landfall near Biloxi, Mississippi and the restaurant was severely damaged, with part of the building being swept away. Brunings was insured by a flood policy issued by Omaha Property and Casualty—which covered damages from flooding and tidal waves—and a property insurance policy issued by Argonaut, which excluded such damage. Each insurer calculated the damage that it believed to be caused by the peril that it insured. Not satisfied with Argonaut's determination, Brunings filed suit.

Following a bench trial, the judge concluded that the glass damage, in excess of \$35,000, was caused solely by wind and, thus, covered only by the Argonaut policy. The trial judge also disagreed with Argonaut's determination that loss of business due to wind damage was limited to \$9,500, for three days while electricity in the area was out. Instead, the judge determined that the restaurant suffered a business loss for the last quarter of 1998 of \$80,000 and attributed 25 percent of that loss to wind damage. The judge also determined that the restaurant suffered a business loss for 1999 in the amount of \$70,000 and attributed 15 percent of that loss to wind damage.<sup>viii</sup>

The Court of Appeal of Louisiana affirmed the decision of the trial judge:

Based on the manifest error appellate standard of review we cannot find error in the trial court ruling. It was the consensus of the adjusters that the restaurant suffered both wind and water damages. The trial court found that the business loss attributable to wind damage in 1998 and 1999 was 25% and 15%, respectively. A large part of the back of the building was gone, including the window wall across the back. Other windows in the restaurant were also broken. The roof was damaged and part of it was blown back over itself by wind force. The winds reached the 50 mile per hour range during the storm. Upon review of the record, we conclude that the trial court findings concerning the business losses attributable to wind damage are supported by the record. Although it might not have been the factual finding we would have made, we cannot say, based on the record that it was clearly wrong or manifestly erroneous. *Urrate* at 790-791.

This recent decision from the Court of Appeal of Louisiana demonstrates that allocation of property damage and lost business income between that which was caused by wind versus flood is fact-intensive. While the trial court was no doubt presented with evidence of the damage, and each side's view of the cause, it is clear that the ultimate decision was far from a scientific certainty. Not to mention, consider how long the process took—nearly six years from the time of the hurricane (or seven and a half when you consider that the court's decision was appealed—by both sides—to the Louisiana Supreme Court, which denied both Writs of Certiorari.

***Kish, et al. v. The Insurance Company of North America*, 883 P.2d 308 (Wash. 1994).**

In *Kish*, the Supreme Court of Washington examined claims by several insureds against several insurers for damage to their homes when flood waters overtopped the protective dikes surrounding the Stanwood sewage lagoon in Stanwood, Washington. Each of the policies at issue contained an exclusion for loss resulting directly or indirectly from water damage, which was defined, in part, to include flood and overflow of a body of water. The coverage case went to trial on the issue of the "efficient proximate cause" of the damage to the plaintiffs' houses, which the jury concluded was "record breaking rainfall in the Stillaguamish basin."

The insurers argued on appeal that the trial court erred in ruling that rain was a distinct covered per-

il from the excluded peril of flood and, thus, sending the case to the jury for a finding of "efficient proximate cause" as between the two. The Supreme Court of Washington agreed and reversed the trial court.

The Washington high court stated that "The efficient proximate cause rule applies only where two or more independent forces operate to cause the loss. 'When, however, the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application.'" *Kish* at 311 (citation omitted). The *Kish* court held that rain and flood are not distinct perils, and, therefore, the trial court erred in sending the "efficient proximate cause" question to the jury. "We believe the average purchaser of insurance would expect that the term 'flood' would encompass rain-induced flood. Rain is a well-recognized and common part of a flood." *Kish* at 312.

In reaching this conclusion, the *Kish* court was also influenced by the fact that the plaintiffs lived on a nationally recognized flood plain and knew that flood would be excluded by any insurance they purchased, as exemplified by the existence of the National Flood Insurance Program. The court noted that one plaintiff had previously had flood insurance, another was advised of its existence, and a third had sued her agent for failing to advise her of the need for flood insurance. [Incidentally, for an example of a Louisiana court discussing an insurance broker's professional liability for failure to advise of the need for flood insurance for Hurricane Juan, see *Durham v. McFarland, Gay and Clay, Inc.*, 527 So. 2d 403 (La. App. 1988).]

Lastly, the *Kish* court made the following observation concerning its decision: "[A]ny application of the efficient proximate cause to the facts of this case would make it difficult for any insurer to ever exclude flood damage without excluding all rain damage. This would be an unfortunate occurrence for insureds because that could result in less coverage for insureds in this state." *Kish* at 313.

***Durkin v. Federal Emergency Management Agency*, 1987 U.S. Dist. LEXIS 6894 (E.D. La.).**

*Durkin* involved coverage under a Standard Flood Insurance Policy issued by the National Flood Insurance Program for property damage allegedly caused by Hurricane Juan in 1985. The adjusters assigned by the NFIP concluded that the damage to the insured's two-story structure was not caused by flood.

One adjuster testified that he inspected the property sixteen days after the flood and observed extensive deterioration of the structure. He testified that he found no evidence of flood water damage within the house, such as telltale water marks. He also testified that water marks on the structure's piers indicated that water did not enter the house. Another adjuster testified that he too was unable to find any water marks in the structure and that, in his opinion, the water damage was caused by broken windows and missing door frames.

The court concluded that the government's testimony was credible and established as a matter of fact that the insured's property was in an advanced state of deterioration prior to the flood and that the flood waters did not enter the subject property. In support of its decision, the court made the following interesting observation about the credibility of the government's witnesses: "The Court places particular weight upon the testimony of both Mr. Deihl and Mr. Paige as both were paid by National Flood Insurance on a rising scale tied to the value of a given claim; that is, the higher the value of the claim, the higher the fee. In the instant case, both received the lowest possible fee for their inspections." *Durkin* at \*5.

***Southern Hotels Limited Partnership v. Lloyd's Underwriters at London Companies, et al.*, 1997 U.S. Dist. LEXIS 8384 (E.D. La.)**

The Travelodge Hotel in Harvey, Louisiana, a suburb of New Orleans, sustained wind, rain, and flood damage from Hurricane Andrew in 1992. The hotel was insured under a policy covering wind and water damage, but flood damage was subject to a \$200,000 deductible (the hotel was insured under a NFIP policy for \$200,000). The court was required to determine the availability of coverage for several aspects of damage, noting that the following burden of proof applied: "The plaintiff has the burden of proving both the damage and the causal connection between the damage and the covered cause of loss. This proof must be shown by a reasonable preponderance of the evidence, and with some detail and specificity. A mere possibility of causation and damage are insufficient." *Southern Hotels* at \*16 (citation omitted).

The insured sought the cost of replacing the entire roof, which was aged and had preexisting problems. The court concluded as follows:

While it is difficult to segregate the repairs necessitated by the storm damage from the complete roof replacement actually performed, the Court finds a logical starting

point for this task in the cost of the roof repairs which were done immediately after the [insured] purchased the hotel in order to remedy leaks and prevent future leaks, which is \$ 15,000. Certainly, as a result of the storm, this work would have been necessary to ensure that the roof membranes were sound and would have placed the roof back in the condition in which it was prior to the storm damage, in addition to emergency repairs. *Southern Hotels* at \*10 - \*11.

Turning to the claim for replacement of furniture, the court determined that no coverage was available as all such damage was caused by flood or sewer back-up as a result of a power outage originating off the premises, which was also excluded by the policy. "While certainly some water did leak through the roof as a result of high winds, and wet the ceilings, walls, and insulation, there were no walls blown away such that furniture was damage (sic) by wind-driven rain." *Southern Hotels* at \*11.

As for the insured's claim for interior repairs, the court concluded that 35 percent was caused by wind-driven rain, and, hence, covered, while 65 percent was caused by flood and excluded from coverage. "In fixing this amount, there is no mechanical rule which applies with exactitude, but instead the Court fixes the amount based upon the facts and circumstances shown by the evidence at trial." *Southern Hotels* at \*20.

***Loyola University v. Sun Underwriters Ins. Co. of New York*, 93 F. Supp. 186 (E.D. La. 1950), affirmed 196 F.2d 169 (5<sup>th</sup> Cir. 1952).**

In *Loyola University*, the Louisiana federal court examined coverage for several structures that were damaged when a hurricane struck the Shell Beach-Ysloskey area of St. Bernard Parish in September 1947. Under the policy at issue, the insured was entitled to recover "for all direct loss or damage caused by the hurricane winds and for all loss or damage caused by water or rain to the interior of the property and the contents thereof where such water or rain entered the property through openings in the roof or walls made by the direct action of the wind." *Loyola University* at 190.

The court held that the structures were destroyed by the direct action of the hurricane force winds. It reached this conclusion by determining that, at the time of their destruction, the water in the Shell Beach area, while rising, was still below the elevation of the structures. The *Loyola University* court set out the following evidentiary rules:

Where the insured produces an eye witness whose testimony proves that the wind, and not the waves, destroyed the insured property, proof is made of damage or destruction coming within the coverage of the policy, but where a witness testifies only to seeing a part of the insured property destroyed by the wind, that is not full proof of destruction of the other property by the wind, but such testimony is evidence to be considered with the other evidence in the case. *Ebert v. Pacific National Fire Insurance Co.*, La. App., 40 So.2d 40; *Pennsylvania Fire Insurance Co. v. Sikes*, 197 Okla. 137, 168 P.2d 1016, 166 A.L.R. 375; *Home Insurance Co. v. Sherrill*, 5 Cir., 174 F.2d 945.

If the cause of the damage or destruction by not the direct result of the wind alone, but the damage or destruction by (sic) caused by a combination of wind and water, and the damage by either cannot be separated, then, there can be no recovery under the burden of proving the cause of the damage, and if it fails to make that proof, it cannot recover. *National Fire Insurance Company v. Crutchfield*, 160 Ky. 802, 170 S.W. 187, L.R.A. 1915B, 1094. *Loyola University* at 190.

Given that many Hurricane Katrina claims will involve damage caused by both wind and flood, the *Loyola University* court's statement that coverage is not available if the damages cannot be separated could be a significant issue in the weeks and months ahead as claims are considered. See also *Constitution State Insurance Company v. Werner Enterprises, Inc.*, 1987 U.S. Dist. LEXIS 6023, \*1-\*2 (E.D. La.). (Citing *Loyola University*, the court stated: "If the cause of damage under a windstorm policy is not the direct result of wind alone, but caused by a combination of wind and water, then the insured bears the burden of proof and may not recover unless it proves that the damage can be separated and that the loss or damage was the direct result of wind.")

***Ludlow Corporation v. Arkwright-Boston Manufacturers Mutual Insurance Company*, 317 So. 2d 47 (Miss. 1975)**

*Ludlow* involved coverage for personal property that was damaged during Hurricane Camille in 1969. The personal property had been stored in a warehouse. The insured alleged that his losses were approximately \$2 million. The insurer argued that the damage was not covered because it resulted from flood, tidal waves, wave wash, or water

damage to property situated below the flooded high water mark. The jury returned a verdict in the amount of \$108,000. Addressing the evidence that the jury heard, the Mississippi Supreme Court stated:

It was appellant's contention that rain entered the buildings wherein its property was situated, through openings or holes created by wind damage. Hurricane Camille struck the Mississippi Gulf Coast on the night of August 17, 1969, and was accompanied by high velocity winds. Some of the winds were of near 200 miles per hour in gusts. As a part of this terrible storm, large quantities of water assaulted the buildings in the form of ocean waves and heavy rains. The jury heard testimony that water in the vicinity in question rose to about ten or twelve feet above the floor of the dock and as high as the top of the door of the warehouse. Other evidence heard by the jury indicated the physical conditions of the building after the storm, showing that the water had reached a height of ten to twelve feet above the warehouse floors. During the storm the roof of the transit warehouse was punctured in many places by flying missiles but in a large measure remained intact, although the walls were gone. There was also given the jury expert testimony (that given by Mr. Young, being challenged here) on behalf of the appellee that the walls were destroyed by flood water and that the valuable personal property (jute) which was damaged in the storm was washed out of the warehouse by the surging tide. *Ludlow* at 48.

While the issues in *Ludlow* were principally related to evidentiary rulings by the trial court, the Mississippi Supreme Court held that the inadequacy of the verdict, from the insured's perspective, was a direct result of the failure of the proof to establish an insured loss to the property. "[T]he jury verdict cannot logically be said to be unresponsive to the evidence." *Ludlow* at 51.

***State Fire and Tornado Fund of the North Dakota Insurance Department v. North Dakota State University*, 694 N.W. 2d 225 (N.D. 2005).**

In June 2000, a severe rainstorm—seven inches in seven hours—hit Fargo, North Dakota. Water on the surface of the ground outside the FargoDome began cascading through its loading dock doors and more than eight feet of water eventually covered the floors of the Dome. Significant amounts of water from the FargoDome (which is not owned by

North Dakota State University) made its way to a NDSU heating plant and computer center through a 4,295 foot-long steam tunnel. NDSU's insurers disclaimed coverage on the basis that the water damage was excluded by their policies' flood and surface water exclusions. NDSU challenged these determinations, arguing that the water lost its status as "surface water" when it entered the steam tunnel, heating plant, and computer center.

The Supreme Court of North Dakota did not agree. Instead, the court held that "surface water does not lose its character as surface water simply by being artificially channeled underground." *North Dakota State University* at 233. After examining several courts nationally that have confronted the surface water issue, the North Dakota high court agreed with the lower court's reasoning:

Similar to the Smith case, this Court finds that the water that entered the FargoDome was surface water. Prior to entering the FargoDome, the rainwater accumulated in the Fargo area without forming a definite body of water. The subsequent traverse into the Steam Tunnel did not change the water's character by following a defined watercourse, in part because the Steam Tunnel was never meant to carry water, unlike the trenches in Heller. It would be no different than if surface water had entered the first floor of a house and percolated into the basement through a stairwell. It would be absurd to classify a stairwell as a channel, or that the water's character had changed from surface water to water within a system. In the same fashion water entering the Steam Tunnel did not change the character of the surface water which inundated the FargoDome. *North Dakota State University* at 232-233.

The *North Dakota State University* court also approvingly noted a recent decision from the Texas Court of Appeals, holding that the rain from Tropical Storm Allison that rushed into the convention center in downtown Houston, broke through an interior basement wall, flowed into a parking garage, then into the pedestrian tunnel system, and finally into the Bank of America building remained surface water. The damage from water that entered the building's electrical equipment and forced a law firm to relocate, causing it to seek coverage for lost business income and extra expenses, was excluded by the policy's exclusion for "losses due to flood, surface water, overflow of any body of water, or from water under the ground surface." See *Valley Forge Insurance Co. v. Hicks, Thomas & Lilienstern*, LLP, 2004 Tex. App. LEXIS 11301.

NDSU also argued that the lower court failed to consider all of the events in the chain of causation leading to water entering and damaging the steam tunnel, the heating plant, and the computer center. According to NDSU, there were four “links” in the “chain of causation:” (1) the “rain;” (2) the “accumulation of surface water that occurred on and around the NDSU campus;” (3) the “water diversion into the basement of the FargoDome, which could not be flood or surface water;” and (4) the “non-excluded water that suddenly entered NDSU’s otherwise dry, underground Steam Tunnel.” NDSU claimed that a jury should have been allowed to determine which of these events was the efficient proximate cause. *North Dakota State University* at 234.

Citing the Supreme Court of Washington’s decision in *Kish*, *supra* that rain and flood are not two separate perils, the *North Dakota State University* court rejected the insured’s argument that the lower court erred in failing to apply the “efficient proximate cause” doctrine. “The fact that the water took 9 to 10 hours to reach the IACC [computer center] and Heating Plant is irrelevant. The length of time was merely a result of one continuous flowing of the water. \*\*\* The undisputed facts establish that surface water, an excluded peril under both insurance policies, was the only cause of water damage to the steam tunnel, the heating plant, and the IACC.” *North Dakota State University* at 235.

***Morehead v. Allstate Insurance Company,*  
406 F.2d 122 (5<sup>th</sup> Cir. 1969)**

*Morehead* is a brief Louisiana federal court decision addressing coverage for a frame dwelling that was destroyed by Hurricane Betsy in 1965. At issue was the applicability of the policy’s exclusion for “loss caused by, resulting from, contributed to or aggravated by \*\*\* flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water \*\*\*.” The insured argued that the dwelling was destroyed by wind, a covered peril. The trial judge disagreed and the Fifth Circuit affirmed:

After a full hearing in which several “eye-witnesses” and expert witnesses testified, the Court found as a fact that the loss was occasioned by the house having floated from its piers and later having settled on the ground; that there was no evidence that the structure was damaged by wind; that the loss, therefore, was not due to one of the perils insured against.

\* \* \*

[W]e are unable to say that the choice which the Trial Court made, namely, that the evi-

dence showed that the loss occurred because of water damage rather than directly as the result of wind damage, is incorrect. *Morehead* at 122.

**Conclusion**

It is much too early to say how the principal first-party property coverage issues for damage caused by Hurricane Katrina will play out. A review of past cases addressing coverage for hurricane-related damage, including several from Louisiana, reveals that, when courts are required to allocate between damage caused by flood and that which was caused by wind and wind-driven rain—a task that will clearly be required for Katrina claims—the decisions are highly fact-intensive, are admittedly non-scientific, and sometimes take several years from the time that it stopped raining.

Coincidentally, less than one month before Katrina hit, the Louisiana Court of Appeals denied rehearing of its June 2005 decision in *Jean Boudreaux and the Victims of the Flood on April 6, 1983 on the Tangipahoa River v. The State of Louisiana, Department of Transportation, et al.*, 906 So. 2d 695 (La. App. 2005), *rehearing denied* 2005 La. App. LEXIS 1922 (August 2, 2005), in which it addressed claims for damages brought against the State of Louisiana by a class of individuals whose homes and businesses were flooded in 1983. It was alleged that the State designed and built the Interstate 12 Bridge over the Tangipahoa River in such a negligent and improper manner that it disrupted the natural flood plain, causing the river’s rising waters to flood the plaintiffs’ properties. Just twenty-two years after the flood, the Louisiana Court of Appeals issued a decision addressing and upholding various damage determinations made by the trial court, including for personal property losses, cost of repair, lost wages, psychological damages, depreciation in property value and business interruption.

Needless to say, somebody, somewhere, is already thinking about potential litigation over the breaches in the New Orleans levee system.

**End Notes**

- i A discussion of business interruption coverage issues is well-beyond the scope of this article. For a Louisiana decision on this subject, following a flood that caused a furniture showroom to be closed for 67 days, see *Levitz Furniture Corporation v. Houston Casualty Company*, 1997 U.S. Dist. LEXIS 5883 (E.D. La). The Levitz court addressed whether business interruption loss earnings

may include sales Levitz would have made in the aftermath of the flood on account of increased consumer demand and whether the period of interruption is limited to the actual period of business closure. The decision also contains some other causation issues, but not related to wind and rain versus flood.

- ii See *In re Estate of Eliassen*, 668 P.2d 110, 119 (Ida. 1983) (Describing proximate cause as “exceedingly complex and difficult,” the Idaho Supreme Court went on to cite a leading scholar on the subject: “There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the proper approach.” *W. Prosser, Handbook of the Law of Torts*, at 236 (4th ed. 1971).
- iii *Bowers v. Farmers Insurance Exchange*, 991 P.2d 734 (Wash. App. 2000) is a classic example of a court’s use of “efficient proximate cause” to find coverage for damage caused by an excluded cause of loss. In *Bowers*, the insured sought coverage under a Landlord’s Protection policy for mold damage to her home that resulted when tenants converted the home into a marijuana growing operation. The policy at issue provided coverage for vandalism and malicious mischief, but excluded coverage for mold. The insured argued that while mold growth was the immediate cause of her loss, the “efficient proximate cause” of the loss was not the mold, but the vandalism of her tenants. The court agreed, holding that when the insured can identify an insured peril as the proximate cause, there is coverage, even if subsequent events in the causal chain are specifically excluded from coverage. The *Bowers* court concluded that, “It was the tenants’ acts, which ‘in an unbroken sequence ... [produced] the result for which recovery is sought[.]’” *Bowers* at 738.
- iv *Dablke v. Home Owners Insurance Company*, 2003 Mich. App. LEXIS 3424 provides a clear illustration that insurers are free to contract around the “efficient proximate cause” doctrine. In *Dablke*, homeowners sought coverage for mold damage caused by melting snow and ice that leaked

into their house. The insureds argued that, despite the mold exclusion, coverage should be afforded because the mold damage was caused by an otherwise covered event. The *Dablke* court rejected this argument, on the basis that the policy language did not support it. The court stated: “In our opinion, this interpretation is contrary to the clear and unambiguous terms of the insurance policy which excludes losses caused ‘directly or indirectly’ by any of the named conditions or events, ‘whether or not any other cause or event contributes concurrently or in any sequence to the loss.’ The language of the exclusion is typically referred to as ‘anticoncurrent causation’ because it expressly excludes coverage for losses directly or indirectly caused in whole or in part by one of the listed causes of loss. As applied in this case, the ‘anticoncurrent causation’ language of the policy excludes coverage for damage resulting from mold even though the mold itself may have formed as the result of a covered event.” *Dablke* at 10.

- v ISO’s Causes of Loss – Special Form (CP 10 30 04 02) defines “Specified Causes of Loss” as “Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage [as the result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance located on the described premises].”
- vi Theo Francis, “Many in Areas Hit by Flooding Lack Insurance,” *The Wall Street Journal*, August 31, 2005, at A5.
- vii “S&P Says Insurers Face Post-Katrina Uncertainty,” September 1, 2005 Statement of Standard & Poor’s, reported in *Insurance Newscast*, September 2, 2005, available at [www.insurancebroadcasting.com](http://www.insurancebroadcasting.com).
- viii The *Urrate* court also found that Argonaut lacked a good faith basis to deny coverage and awarded penalties of double the insured loss. The penalties were reduced by the Court of Appeal to \$10,000 — \$5,000 for the breach concerning the glass damage and \$5,000 concerning the business income.