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********** SPECIAL REPORT **********

FIFTH CIRCUIT RULES ON FLOOD EXCLUSIONS IN HURRICANE KATRINA LEVEE BREACH CLAIM CASES

Yesterday afternoon, a United States Fifth Circuit Court of Appeals panel issued its much anticipated opinion in the consolidated appeal of the *Vanderbrook*, *Chehardy*, *Xavier University*, and *Humphreys* cases, holding that the Louisiana homeowners and commercial policies at issue in the appeal unambiguously exclude coverage for the levee breach flooding that occurred in New Orleans during and after Hurricane Katrina. (Click here to view the opinion.) Writing for the panel, Judge Carolyn D. King, concluded that "even if the plaintiffs can prove that the levees were negligently designed, constructed, or maintained and that the breaches were due to this negligence, the flood exclusions in the plaintiffs' policies unambiguously preclude their recovery." *Opinion* at 3 of 46.

Finding that the various flood exclusions applied to prevent recovery in these cases, the Court's ruling was unequivocal. The Court flatly rejected Plaintiffs' contention that the term "flood" is ambiguous because a flood could be the result of either "natural" or "non-natural" causes. "That a levee's failure is due to its negligent design, construction, or maintenance does not change the character of the water escaping through the levee's breach; the waters are still floodwaters, and the result is a flood." *Opinion* at 31-32 of 46. Making the obvious apparent, Judge King noted that "a levee is a *flood*-control structure; its very purpose is to prevent the floodwaters of a watercourse from overflowing onto certain land areas, i.e., to prevent floods from becoming more widespread." *Opinion* at 31 of 46.

"In sum," the Court concluded, "the flood exclusions in the plaintiffs' policies are unambiguous in the context of the facts of this case. In the midst of a hurricane, three canals running through the City of New Orleans overflowed their normal boundaries. The flood control measures, i.e., levees, that man had put in place to prevent the canal's floodwaters from reaching the city failed. The result was an enormous and devastating inundation of water into the city, damaging the plaintiffs' property. This event was a 'flood' within that term's generally prevailing meaning as used in common parlance, and our interpretation of the exclusions ends there. The flood is unambiguously excluded from coverage under the plaintiffs' all-risk policies, and the district court's conclusion to the contrary was erroneous." *Opinion* at 41-42 of 46. The panel clearly had no difficulty reaching its conclusion that the term "flood" is unambiguous in the context of these policies, and accordingly also denied Plaintiffs' motions to certify a question to the Louisiana Supreme Court.

Martin, Disiere, Jefferson & Wisdom has had the privilege of representing several of the major insurers in the Hurricane Katrina litigation and we were also privileged to take a leadership role along with some of the nation's best insurance lawyers in preparing the briefs submitted at both the District Court and the Fifth Circuit Court of Appeals. This win for the carriers is the result of a tremendous team effort which we were thrilled to be a part of and all of the insurers involved should be congratulated for their collective efforts to make this win possible.