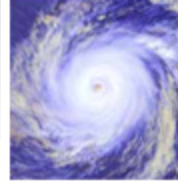




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## KATRINA/RITA INSURANCE LAW NEWSBRIEF



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### STATE AND FEDERAL COURT JUDGES ARE POISED TO ENTER SEPARATE WATER DAMAGE EXCLUSION RULINGS

Observers on both sides of the hurricane insurance litigation in southern Louisiana are anticipating separate state and federal court rulings concerning the scope and application of insurers' water damage exclusions sometime in the next week or so. On October 27, 2006, in the Eastern District of Louisiana, Judge Duval held the last hearing before ruling on water damage exclusions asserted by homeowners and commercial property insurers in the Insurance category of the consolidated Katrina Canal Breaches Litigation. In that hearing, Judge Duval considered argument in the *Chehardy*, *Humphries*, and *Xavier University* cases. Argument was largely limited to consideration of the relevance, if any, of any evidence that the flood waters following Hurricane Katrina were caused in whole or in part by third-party negligence. Relying on a West Virginia court's interpretation of an earth movement exclusion in the case of *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1 (W. Va. 1998), Plaintiffs in these cases have argued that the water damage exclusion should only apply to naturally occurring floods. Plaintiffs have cited no authority making this argument in the context of flood damage or the water damage exclusion, other than a line of cases refusing to apply the water damage exclusion where the insureds' damage was caused by a break in a water main or similar device. Judge Duval has indicated that he plans to issue his ruling and order around the middle of November. The order is expected to include his ruling on similar motions pending in the *Vanderbrook* case as well. Other insurance related matters pending in the consolidated litigation will also be impacted by Judge Duval's order.

The same issues predominate in a matter pending before Judge Medley in the Civil District Court for the Parish of Orleans. Judge Medley heard oral argument on a motion for partial summary judgment about three weeks ago in No. 06-4990, *Historic Restoration, Incorporated, et al. v. RSUI Indemnity Company, et al.*, in the Civil District Court for the Parish of Orleans, Div. 16, Sec. D. Judge Medley's decision and order are expected to be issued soon after Judge Duval's order from the Eastern District cases.

We will follow these matters and issue a supplemental newsbrief discussing the orders after their release.

### MISSISSIPPI UPDATE

- **Leonard v. Nationwide:** On October 24, 2006, Judge Senter denied Plaintiffs' post trial motions to replace the judgment, or to amend the findings of fact and conclusions of law, or for a new trial in the case of *Leonard v. Nationwide Mutual Insurance Company* (CA No. 05CV475) in the Southern District of Mississippi. Judge Senter rejected Plaintiffs' argument that the water damage exclusion is ambiguous because it does not include the term "storm surge." The court dismissed Plaintiffs' argument, citing "the fact that the water damage exclusion specifically applies to damages from flooding and from tidal waves." The court went further to acknowledge the historical perspective on this argument. Judge Senter wrote: "Substantially identical policy exclusions were considered and applied during litigation following Hurricane Camille, and none of the courts who considered this language found it to be ambiguous or otherwise unenforceable." In a separate order issued on the same date, Judge Senter also granted Nationwide's motion for judgment as a matter of law.

● **Severance Order Affirmed:** On October 25, 2006, Judge Senter affirmed Magistrate Judge Walker's September 6, 2006 order severing some 600 individual Hurricane Katrina claims brought against State Farm in CA 06CV466, *McFarland et al. v. State Farm Fire & Casualty Company and Unknown Defendants*, in the Southern District of Mississippi. The severance question had been raised *sua sponte* by the Court and a show cause order was issued on July 13, 2006. In the September order, Judge Walker found that although there may be some common issues of law and fact, "the Plaintiffs have not met the same transaction or occurrence prong of Rule 20(a)." Judge Walker explained; "In a superficial sense, the hurricane was a common occurrence; however, the storm was vastly different depending on the geographic location of each particular home. Although Plaintiffs each held basically the same standard homeowner's policy, each insurance contract is a separate transaction. Likewise, any alleged negligent or fraudulent misrepresentations by insurance agents constitute separate transactions or occurrences." (Citations omitted.) Judge Walker also ordered a separate filing fee for each new filed case following the severance.

Affirming Walker's order, Judge Senter recited deposition testimony from State Farm's Rule 30(b)(6) witness, and emphasized the testimony that each specific claim file was handled on an individual basis. Judge Senter called Plaintiffs' joinder argument "simplistic," but also admonished State Farm that severance did not preclude consolidation for trial as necessary pursuant to Rule 42. Judge Senter noted his expectation for "real cooperation" among the parties to identify "common questions of law or fact which may exist in separate cases." Recognizing the potential delay that might be occasioned by adding hundreds of new cases to the court's docket, Judge Senter wrote that the court "is construing and administering the Federal Rules of Civil Procedure to secure just, speedy, and inexpensive determination of every action." By way of example, Judge Senter referred to what he called his "successful pilot mediation program" and stated that he has "embarked on an expended next round." Judge Senter is using mediation orders in an attempt to reduce the number of cases that may require further judicial attention.

We will continue to monitor the cases discussed in this issue of the newsbrief as well as any other developing insurance issues arising from last season's two major hurricanes, Katrina and Rita.

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