KATRINA / RITA INSURANCE LAW NEWSBRIEF

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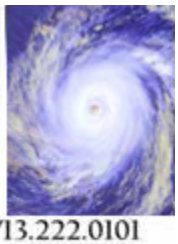

August 7, 2006

FEDERAL DISTRICT COURT JUDGE GRANTS INSURER DEFENDANTS' RULE 12 MOTIONS IN LOUISIANA VALUED POLICY LAW LITIGATION

Late last week, U.S. District Court Judge Sarah Vance from Eastern District of Louisiana, granted the Insurer Defendants' Rule 12 motions to dismiss Plaintiffs' claims in the consolidated litigation over application of Louisiana's Valued Policy Law ("VPL"). La. R.S. § 22:695. The ruling dismisses claims asserted by various Plaintiffs in 36 different lawsuits, many of them class action lawsuits, in which Plaintiffs claimed that Louisiana's VPL "entitles them to the full face value of their policies (in the event of a total loss), regardless of the proximate cause of their losses, so long as a covered peril caused some loss to their property." *See* "Order and Reasons," p. 3.

In relevant part, the VPL provides that "*Under any fire insurance policy insuring inanimate, immovable property in this state*, if the insurer places a valuation upon the covered property and uses such valuation for purposes of determining the premium charge to be made under the policy, *in the case of total loss the insurer shall compute and indemnify or compensate any covered loss of, or damage to, such property which occurs during the term of the policy at such valuation without deduction or offset* . . ." La. R.S. § 22:695(A) (emphasis as employed by Judge Vance at page 7 of the memorandum order). Judge Vance accepted the Defendants' argument that even if the VPL does apply to non-fire losses under the homeowner policies (which she assumed arguendo), the "total loss" must be caused by a "covered loss" before the statute would require payment of the full face value of the policy. Under this interpretation of the statute, "'total loss' and 'covered loss' would not be construed as separate events, but rather as different descriptions of a single event with two crucial characteristics, i.e., that the loss be both total and covered." *See* "Order and Reasons," p. 13 (citing *Turk v. Louisiana Citizens Prop. Ins. Corp.*, 2006 WL 1635677 (W.D. La. 2006).

Finding that the statute is susceptible of at least two equally consistent but contrary interpretations, the Court applied basic statutory construction rules before concluding that Plaintiffs' interpretation was unsupportable. Judge Vance first applied the rule that a court must avoid applications that lead to absurd results. La. Civ. Code art. 9. The Court concluded that Plaintiffs' interpretation fails this basic rule:

> Because plaintiffs' proposed interpretation would lead to such absurd consequences, the Court must reject it. If the VPL has the meaning plaintiffs ascribe to it, an insured holding a valued homeowner's policy that covered wind damage but specifically excluded flood losses could recover the full value of his policy if he lost 20 shingles in a windstorm and was simultaneously flooded under 10 feet of water. The insurer would thus have to compensate the covered loss of a few shingles at the value of the entire house. In effect, the insurer would be required to pay for damage not covered by the policy and for which it did not charge a premium. Such a result would be well outside the boundaries of any party's reasonable expectation of the operation of an insurance contract.

See "Order and Reasons," at pp. 13-14 (emphasis added).

Second, the Court applied the rule that if a statute is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. La. Civ. Code at. 10. The Court reviewed the sparse judicial discussions of the legislative purpose of the VPL and concluded that the statute was "designed to regulate the valuation of a covered loss, not to create coverage for perils not covered by the policy." *See* "Order and Reasons," at p. 15; relying on *Atlas Lubricant Corp. v. Fed. Ins. Co.*, 293 So. 2d 550 (La. Ct. App. 1974). Judge Vance also addressed Plaintiffs' reliance on non-Louisiana case law – most particularly the opinion concerning Florida's valued policy law statute in *Mierzwa v. Fla. Windstorm Underwriting Ass'n*, 877 So. 2d 774 (Fl. Dist. Ct. App. 2004) – and found these cases unpersuasive. Regarding the *Mierzwa* decision, Judge Vance made note of the fact that the decision had been "repudiated" by a sister court – *Citizens Property Ins. Corp. v. Ceballo*, 2006 WL 1331504 (Fla. Dist. Ct. App. 2006) as well as by the Florida legislature. The Court concluded that "Louisiana's Valued Policy Law does not apply when a total loss is not caused by a covered peril. *See* "Order and Reasons," at p. 21.

In the memorandum opinion, Judge Vance discussed the Defendants' argument that the VPL is inapplicable to non-fire losses, but reserved judgment because she had concluded that resolution of this issue was not necessary in light of her determination that the total loss must also be a covered loss. She did not comment on other arguments raised in the Defendants' Rule 12 motions, including: 1) plaintiffs' interpretation of the VPL would violate Louisiana's filed rate doctrine; 2) plaintiffs' interpretation of the VPL would violate both the Louisiana and United States constitutions; and 3) Plaintiffs' VPL claims are necessarily preempted by federal law under the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4129.

Obviously this decision is significant for the continuing litigation over the scope of coverage for the deluge of claims arising from Hurricanes Katrina and Rita. Virtually all observers anticipate that this ruling will be challenged in the 5th Circuit, and we will continue to monitor the case. Our firm was fortunate to have the opportunity to participate in the consolidated briefing of these motions before Judge Vance, and we applaud the level of cooperation and the outstanding work efforts of the many excellent lawyers who represent the various insurers who are named as defendants in these cases.

DEVELOPING STORIES

As always, we continue to monitor developments affecting the insurance industry in connection with last season's Hurricanes Katrina and Rita. Following are updates on several developing stories which will be of continuing interest:

- **Louisiana's Prescriptive Period for Insurance Claims.** Two new Louisiana statutes were signed into law on June 29 and June 30, 2006, legislatively amending the prescriptive period for filing homeowner insurance lawsuits for Katrina and Rita related claims by adding approximately one year to the existing one year period. Prior to these statutes, the prescriptive period for Katrina claims would have expired by the end of this month, and for Rita claims the period would have expired near the end of September. Act 739, signed on June 29, extends the prescriptive period for Katrina lawsuits to September 1, 2007, and for Rita lawsuits to October 1, 2007. Similarly, Act 802 which was signed on June 30, extends the time for filing Katrina lawsuits to August 30, 2007 and Rita lawsuits to September 25, 2007. Because these new laws have obvious constitutional implications, Act 739 specifically requires the Louisiana Attorney General to file a lawsuit to seek a declaration that the statute is constitutional. That lawsuit has been filed and was removed to the United States District Court for the Middle District of Louisiana on July 20, 2006 by Allstate Insurance Company. *See* Civil Action No. 3:06-cv-00529; *State of Louisiana v. All Property and Casualty Insurance Carriers*. The Attorney General's motion for expedited proceedings on a motion to remand was originally denied by the magistrate judge, but on August 4, 2006, U.S. District Judge James J. Brady vacated the prior ruling and has ordered the defendants' response to the remand motion to be filed by August 14. Plaintiff will be allowed a reply which will be due on August 16, and oral argument is set for August 17, 2006.

Meanwhile, Louisiana's Commissioner of Insurance, James Donelon, issued Directive 199 to require insurers to "voluntarily" extend the prescriptive periods relating to Katrina and Rita lawsuits to two years (generally consistent with the statutory changes). Directive 199 was amended on July 28, 2006 extending the insurers' deadline for compliance until August 11, 2006. In the Amended Directive 199, Commissioner Donelon states that the intent of the directive was to "provide for insurers to unequivocally verify that the insurer will not raise prescription . . . as an exception, bar or defense to any suit or legal action taken by a Hurricane Katrina and/or Hurricane Rita claimant that is filed within the new time frame set forth in Directive 199." Directive 199 – Amended, at p. 2. The Amended Directive 199 uses the same dates as Act 802 – August 30, 2007 for Katrina suits and September 25, 2007 for Rita suits. Directive 199 – Amended can be found on the LDI website, http://www.ldi.state.la.us. The LDI website also has a list of insurance companies who have "agreed to change the prescription deadline." The list is updated frequently.

- In Gulfport, Mississippi, the non-jury trial of the *Leonard* case was completed before United States District Judge L. T. Senter, Jr. on July 19, 2006. *See* Civil Action No. 1:05-cv-00475; *Leonard, et al. v. Nationwide Mutual Insurance Company*, U.S. District Court, Southern District of Mississippi. Although frequently referred to as the first Katrina or Rita related wind/water controversy insurance case to go to trial, reports of trial testimony and closing arguments reveal that the case has often focused on the alleged contact of the insurance agent who is alleged to have discouraged the Plaintiffs from obtaining separate flood insurance and to have misrepresented the effect of a hurricane deductible endorsement to their homeowners policy. Both Nationwide and the adjuster have flatly denied these allegations. At the end of the trial, Judge Senter ordered post-trial briefing from the parties and now has the case under advisement. Local newspaper accounts indicate that Judge Senter has promised to make his ruling soon.

- Briefing is now complete in the *Vanderbrook* case, which remains on track to be the first insurance matter to reach oral argument on the pending Rule 12 motions in the Katrina Canal Breaches Consolidated Litigation pending before Judge Stanwood Duval. *See*, Civil Action No. 05-4182; *In Re: Katrina Canal Breaches Consolidated Litigation*, U.S. District Court, Eastern District of Louisiana. The insurer defendants' Rule 12 Motions are set for oral argument on August 25, 2006.

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