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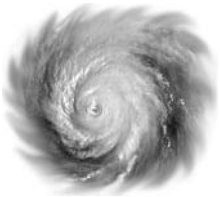

State Farm Not Acting as a "Good Neighbor"?

Woullard v. State Farm Fire & Casualty Co., No. 1:06cv1057 LTS-RHW (S.D. Miss. Jan. 26, 2007)

Allyson L. Vaughn, 3L, University of Mississippi School of Law

When Hurricane Katrina made landfall on August 29, 2005, it brought along a twenty-seven foot wall of water that crashed down on everything in its path, causing catastrophic damage along the Mississippi Gulf coast. Insurance companies, such as State Farm Fire and Casualty, maintained that their policies only covered wind damage, not damage resulting from the storm surge. The exclusion resulted in a controversy among home owners and their insurers and left thousands of Mississippians with insurance policies that do not compensate for the losses they suffered.

Background

State Farm insures more than one in five homes in the United States and in 2005 recorded a net profit of $3.24 billion.[1] Because it controls such a substantial piece of the market, the media has focused its attention on the "Good Neighbor" brand during the wind-driven water controversy. From articles in national newspapers to debate on the floor of Congress, the water versus wind fight has resonated throughout the country and centered itself on the policies written by State Farm.

The claim denials have not only resulted in media attention, but also in hundreds of lawsuits filed against the company. In *Woullard v. State Farm*, State Farm policyholders with insured property in Jackson, Harrison, and Hancock counties filed a motion in federal district court for class certification and for preliminary approval of a class action settlement.

On January 26, 2007, United States District Judge L.T. Senter, Jr. denied the settlement agreement, which would have settled hundreds of lawsuits and reopened thousands of disputed claims resulting from the catastrophic impact of Hurricane Katrina. In the order, Judge Senter held that without additional information the proposed settlement did not clearly establish a "procedure that is fair, just, balanced or reasonable."[2]

Settlement Agreement

The "*Woullard* Settlement Agreement" (settlement) contained two main components. In the

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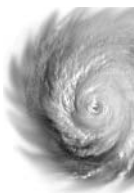

Katrina Edition

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Letter from the Editor

Have you noticed something different about *The Sandbar*? The April issue marks several changes to the National Sea Grant Law Center's legal reporter.

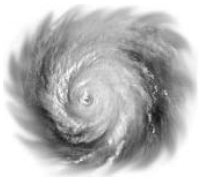
First, we have designated the issue as a special "Katrina edition" to cover some of the most significant cases stemming from the devastation of Hurricane Katrina. From the class action lawsuit against State Farm in Mississippi to the litigation surrounding the levee breaches in Louisiana, our research associates have provided a look at the wide range of legal issues surrounding Katrina and its aftermath. Additionally, Waurene Roberson, our publication designer, has compiled pictures that help tell the story of Hurricane Katrina.

On a lighter note, the issue recognizes the 40th anniversary of the law that created the Sea Grant program. Michael J. Thomas, an attorney in New Mexico, provides a brief history of the creation of the program and forecasts what might be on the horizon for Sea Grant.

Finally, I have enjoyed writing and acting as assistant editor for several previous issues, and I am excited and honored to now serve as editor of *The SandBar*. I will continue to work diligently to keep the Sea Grant community informed of important legal developments through the publication of *The SandBar*. In upcoming issues, we plan to include more special features and guest authors to highlight emerging legal issues.

And, as always, we welcome any thoughts and comments that you might have. We are here to serve you, so please let us know how we are doing. Enjoy the issue!

In the Wake of Katrina, Mississippi Approves Onshore Casinos



Jessica Ruthven, SGLC Research Associate

Prior to Hurricane Katrina, casinos on the Mississippi Gulf Coast were relegated to operating on offshore floating barges. When Hurricane Katrina devastated the Gulf Coast on August 29, 2005, most of the coastal casinos were damaged, and casino executives were left with the decision of whether or not to rebuild the gambling establishments. A heated debate ensued over whether to build shore-based casinos.

The casinos provide an important source of state tax revenue for Mississippi. It is estimated that the casinos generated $500,000 a day in state and local taxes before Katrina.[1] Due in part to the tax revenue generated on both the state and local levels, Governor Haley Barbour was unwilling to give casino executives a reason to leave the state.

In a bid to retain the sizeable tax revenue the state receives from the coastal casino industry, Barbour swiftly presented a proposal to Mississippi lawmakers suggesting that Gulf Coast casinos be allowed to rebuild inland. The new onshore gaming law was met with accolades from casino executives, builders, and members of the local population who had been left without jobs.

While many people in the state, including the governor, wanted to see the coastal region continue its reign as a prominent casino and resort destination, there were others who vehemently opposed the new gaming law. Many lawmakers saw the issue as a question of morality. The Mississippi Baptist Convention and its pastors protested the law and continued to assert that allowing the casinos inland would contribute to the moral decay of the state and should not be allowed.

Despite the controversy, on October 17, 2005, in a special legislative session, Mississippi lawmakers passed a new onshore gaming law that allowed casinos to move inland and build within 800 feet of the waterfront.[2] With the ability to move on land, comes the ability to expand the structural size of the casinos. Prior to Hurricane Katrina, the Gulf Coast casinos provided an estimated 17,000 jobs, and authorities expect the number will increase to 25,000 within several years of the passage of the new onshore gambling law.[3] The Imperial Palace was the first casino to reopen on December 22, 2005, and most have now followed suit.

Endnotes

1. Rogelio Solis, *Mississippi Casino Boats Are Moving onto Dry Land*, available at: http://www.usatoday.com/news/nation/ - 2005-10-18-casinos-miss_x.htm .
2. A copy of HB 45 is available at: http://index.ls.state.ms.us/isysnative/ (Click on "2005 Fifth Extraordinary Session" and search "gaming.")
3. Donna Blevins, *Rebuilding Mississippi Gulf Coast,* available at: http://www.pokerplayernewspaper.com/ - viewarticle.php?id=1010&sort=author .

Photograph of casino grounded across the highway from the beach in Biloxi, MS, courtesy of the Missouri State Highway Patrol (taken while assisting local police in Katrina's aftermath).

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first component, State Farm agreed to pay 639 claimants an average of $125,000 each, totaling $80 million. This aspect of the settlement only applied to those suits filed by the Scruggs Law Firm involving homes that were completely lost to the storm, referred to as "slab cases." This category includes United States Senator Trent Lott, who lost his home in Jackson County to the storm. It is unclear how this component of the agreement is affected by the order, as Judge Senter dealt exclusively with the other component; however, both State Farm representatives and Richard F. Scruggs agreed that the two elements are separate and the settlement procedures in the 639 cases would proceed.[3]

The second part of the settlement created an administrative process to reevaluate the denial of coverage for approximately 35,000 State Farm policyholders who live in Mississippi's three coastal counties but did not file lawsuits against State Farm. In order to adequately address these disputes, the agreement creates a damage matrix to assist in distributing policy benefits.

The matrix, the Mississippi Katrina Resolution Guideline Tool (MKRGT), divides the type of loss sustained by the proposed class members into five categories. The first category involves "slab cases" or "foundation only" cases and is defined as those cases involving the absence of a structure on the site of the insured property. Slab cases are guaranteed a minimum recovery. The other four categories are as follows: Total/Constructive Total (the damage to the insured structure is equal to or greater than 60 percent of the insured value), Severe (the damage to the insured structure is between 30 percent to 60 percent of the insured value), Moderate (the damage to the insured structure is between 10 percent and 30 percent of its insured value) and Minor (the damage to the insured structure is equal to or less than 10 percent of its insured value). Any property falling in these four categories is subject to maximum recovery but no minimum recovery requirements are set forth. The agreement called for a minimum of $50 million to be dispersed among these individuals with total costs estimated to reach around $500 - $600 million. Judge Senter's order deals exclusively with this aspect of the settlement agreement.

The court refused to accept this matrix as an adequate procedure because State Farm failed to present any information that new criteria had been established to reevaluate the claims of class members. It was the lack of detail in dispersing the funds that Judge Senter ultimately found the most problematic. "[T]here is no way I can ascertain how this sum compares to the total claims of the members of the proposed class. Nor can I fairly estimate, with even a minimum degree of accuracy, how thinly this large sum may be spread among the class members."[4] Judge Senter feared the payments from the matrix would be arbitrary and not fair and reasonable. He also found that the administrative process was too complex for the lay person and would require the assistance of legal counsel.

"[T]here is no way I can ascertain how this sum compares to the total claims of the members of the proposed class. . . ."

The agreement set forth mandatory and binding arbitration for any disputes arising from the revaluation of claims. Judge Senter found this arbitration procedure needing revision because it provides no right of appeal, a two hour time limit, and the State Farm-trained arbitrator had the power to award less than the initial offer by State Farm yet State Farm presented no information to the court as

to what training the arbitrator would receive and how State Farm would minimize their control over the claims resolution process.

The settlement also contained provisions providing attorneys' fees totaling $46 million. The fees were divided between the $26 million for settling the 639 lawsuits and $20 million for reopening the 35,000 claims. Judge Senter found no evidence to justify the payment for reopening the claims as the plaintiffs failed to provide information concerning the basis for calculation of the fee arrangement.

A final element of the settlement involved Mississippi Attorney General Jim Hood agreeing to drop a criminal investigation into State Farm's response to hurricane claims and the charge that the insurer fraudulently denied Katrina-related claims. A grand jury had been assembled and was hearing evidence only days before the settlement was announced.[5]

Certification of the Class

In addition to rejecting the settlement agreement, the order also denies the plaintiffs' motion to certify a class. In order for the district court to certify a group of plaintiffs as a class in federal court, the court must conduct a rigorous analysis to determine if all requirements of Federal Rule of Civil Procedure 23 are satisfied. The district court has great discretion in determining whether to certify a class. Rule 23(a) establishes four requirements: (1) numerosity, which requires a class so large that joinder of all members is impracticable; (2) commonality, which requires questions of law or fact to be common to the class; (3) typicality, which requires that the named parties' claims or defenses are typical of the class; and (4) adequate representation, which ensures that the representatives will fairly and adequately protect the interests of the class.

Judge Senter found that the plaintiffs failed to satisfy all of the Rule 23(a) requirements. "Neither the plaintiffs nor State Farm has given the Court any information from which the Court can determine with any reasonable degree of certainty how many policy holders are within the proposed class or how many policyholders have each of the eleven types of policies identified."[6] Thus, the plaintiffs failed to satisfy the numerosity requirement because the court requires a reasonable estimate of the number of purported class members. The court also found that the requirements of commonality,

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Photograph post-Katrina courtesy of Richard K. (Rick) Wallace, AUMERC/Sea Grant.

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typicality and adequate representation were not satisfied because "[t]here is insufficient information to support a finding that the plaintiffs, who are presumably owners of a State Farm homeowners policy, have a claim that is substantially similar to claims under the other ten categories of policies covered by the proposed agreement."[7] However, in denying certification, Judge Senter invited the plaintiffs to request certification again and present sufficient evidence that satisfies the requirements of F.R.Civ.P. Rule 23.

No New Policies

What does this mean for State Farm and its presence in Mississippi? On February 14, 2007, State Farm announced that it would no longer sell new homeowner policies in Mississippi and would be assessing how many current policies to renew this year.[8] Mike Fernandez, vice-president of public affairs for State Farm, said that State Farm cannot "write new policies under a contract that they are calling into question," referring to the challenge by homeowners to their policy that storm surge is wind-driven water and should be covered by policies that cover wind damage.[9] For now, Mississippians seeking to insure their homes from future storms will face increased obstacles.

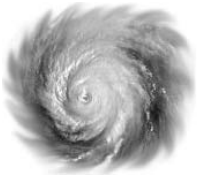
A New Deal

During the weeks following the rejection of Scruggs' settlement agreement, Mississippi Insurance Commissioner George Dale reached an out-of-court agreement with State Farm, and the Scruggs law firm removed its settlement agreement from court consideration. The new agreement appears very similar to the settlement agreement that was rejected in federal court but lacks some of the more controversial components.[10] The agreement calls for mediation for homeowners, renters, and commercial entities in the three coastal counties of Mississippi. State Farm has agreed to pay no less than $50 million to settle claims, and there is no limit in the agreement on how much State Farm could spend.

The new agreement takes the dispute between State Farm and a policy owner out of the court system. While the parties will likely avoid years of expensive and time-consuming litigation, they may lose the benefits of a judge's review. Ideally, this new agreement will speed the rebuilding process as homeowners begin to receive financial assistance to move forward with life.

Endnotes

1. Randy J. Maniloff, *Looking Under the Hood of State Farm's (Rejected, for Now) Mississippi Katrina Claims Settlement*, THE NATIONAL UNDERWRITER COMPANY, January 29, 2007.
2. *Woullard v. State Farm Fire & Casualty Co.*, No. 1:06cv1057 LTS-RHW (S.D. Miss. Jan. 26, 2007).
3. Joseph B. Treaster, *Judge Puts Settlement on Katrina in Question*, THE N.Y. TIMES, January 27, 2007, *available at* http://nytimes.com/ - 2007/01/27/business/27insure.html?ei= - 5070&en=d6af6e205a7ffab7&ei=5070 .
4. *Woullard*, at *6.
5. Michael Kunzelman, *Ex-State Farm Adjusters Tell Miss. Grand Jury of Katrina Claims,* THE ASSOCIATED PRESS, January 23, 2007, published at http://www.insurance - journal.com/news/southeast/2007/01/23/ - 76104.htm .
6. *Woullard*, at *1.
7. *Id.* at *2.
8. MSNBC, *State Farm: No new home policies in Miss.*, *Insurer to also stop writing commercial coverage amid Katrina litigation*, MSNBC.com, *available at* http:/www.msnbc.com/id/17150886/ (February 14, 2007).
9. *Id*.
10. Emily Wagster Pettus, *In Mississippi, Dale Moves In with State Farm Settlement as Scruggs Withdraws*, INSURANCE JOURNAL, March 21, 2007, *available at* http://www.insurancejournal.com/news/ - southeast/2007/03/21/77911.htm .



Federal Judge Rules Against State Farm in Katrina Case

Broussard v. State Farm Fire and Casualty Co., 2007 WL 113942 (S.D. Miss. Jan. 11, 2007)

Rick Silver, 3L, University of Mississippi School of Law

Originally published in Water Log: The Legal Reporter of the Mississippi-Alabama Sea Grant Consortium, *Volume 26.4 (Feb. 2007).*

On January 17, 2007, U.S. District Court Judge L.T. Senter granted a directed verdict in favor of a couple who sued State Farm for refusing to pay for any damage to their home caused by Hurricane Katrina. The ruling captured much attention not only around the region, but also nationally because of the potential impact on the insurance industry.

Background

Like so many other families along the Gulf Coast, Biloxians Norman and Genevieve Broussard suffered the complete destruction of their home during Hurricane Katrina. After the storm, all that remained of their house was a concrete slab. Since then, the Broussards and others like them have been insisting that the damage caused by Katrina should be covered by their homeowner's insurance policy.

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Photograph of Beach Blvd. Biloxi, MS, September 24, 2005, courtesy of Brendan Holder, http://www.photosfromkatrina.com/page01.htm .

Broussard, from page 7

However, under the terms of State Farm's and other insurers' homeowner policies, damage from wind is covered, but damage caused by water is not. The insurers argue that the policies exclude damages that could have been caused by a combination of both, even if the winds preceded the water.[1]

After having their claim refused by State Farm, the Broussards sued the insurer in federal court. In addition to the full insured value of their home ($211,222), the Broussards also sought $5 million in punitive damages against State Farm for unreasonably denying their claim.

The District Court's Decision

U.S. District Court Judge L.T. Senter found that under the terms of the homeowner's insurance policy, State Farm is liable for the full insured valued of the Broussard's home, unless it can prove that some or all of the loss was caused by water damage.

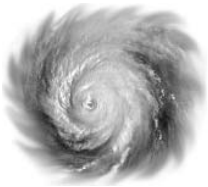
Both parties stipulated that the Broussard's home was completely destroyed by Hurricane Katrina. Judge Senter held that since it was clear that the Broussard's home sustained wind damage during the hurricane, the burden of proof shifted to State Farm to establish, by a preponderance of the evidence, what portion of the loss was attributable to flood damage and therefore not covered by the policy.[2]

State Farm argued that 100% of the damage to the Broussard's home was caused by rising water. However, State Farm's own expert witness testified that it was more probable than not that the property incurred at least some wind damage to its roof prior to the arrival of the storm surge. The key issue the court had to determine was how much damage was caused by the wind before the storm surge arrived. It did not matter that the storm surge was powerful enough to destroy the property regardless of the preceding wind damage.

Under its homeowners policy, State Farm must establish, by a preponderance of the evidence, that portion of the loss that was attributed

See Broussard, page 18

Photograph taken at Bayou La Batre courtesy of Richard K. (Rick) Wallace, AUMERC/Sea Grant



Several Insurance Policies Provide Coverage from Levee-Breach Flooding

In re Katrina Canal Breaches Consolidated Litigation v. Encompass Insurance Co., 2006 U.S. Dist. LEXIS 85777 (D. La. November 27, 2006)

Sarah E. Spigener, 2L, University of Mississippi School of Law

In November, the United States District Court for the Eastern District of Louisiana held that the "flooding" exclusion in several insurance policies is limited to flooding caused by a natural event. Because much of the flooding in New Orleans was caused by canal breaches and not solely by a natural event, some New Orleans residents' insurance policies were interpreted to grant coverage.

Background

The *In re Katrina Canal Breaches Consolidated Litigation* encompasses all of the cases concerning damages caused by flooding as a result of breaches or overtopping in the areas of the 17th Street Canal, the London Avenue Canal, the Industrial Canal, and the Mississippi River Gulf Outlet ("MRGO") in New Orleans.[1] Four individual cases that focus on the issue of insurance coverage are incorporated in this decision.[2]

The plaintiffs, residents of New Orleans, claimed that sometime between 10:00 and 11:00 a.m. on August 29, 2005, before the full force of Hurricane Katrina reached the city, a small section of the concrete canal wall, known as the 17th Street Canal, suddenly broke, causing water to enter the streets and their homes. The residents sued various insurance companies seeking coverage for damage caused by the collapse of the 17th Street floodwall and the resulting water damage, arguing that the insurance companies improperly failed to compensate them for the damage to their homes. The residents also claimed that the Board of Commissioners for the Orleans Levee District ("OLD") was negligent; however, the court severed the negligence allegations against the Board from this case.

Insurance Policies

The policies at issue were homeowner's policies. A homeowner's policy is considered a type of "all-risks" insurance. These policies generally allow recovery for all losses, unless the policy contains a specific exclusion expressly excluding the loss from coverage. Under Louisiana law, unless there is a specific exclusion stated, the presumption is that the policy covers all damage. In this case, the plaintiffs had the burden of proving that the water intrusion falls within their policies' terms; however, the defendants had to prove that the water intrusion falls within an exclusionary clause.

The policies issued by Standard Fire, Hartford, Hanover, and Unitrin all included provisions stating that they did not insure for loss caused directly or indirectly by water damage, which includes flooding. However, the word "flood" was not defined in the policies. State Farm's policies noted that they did not insure loss as a result of flooding that arises from nature or external forces. The Hartford policies also stated that they did not insure for loss as a result of flooding, which the policy defined to include "the release of water held by a levee or a flood control device."

Defining the Word "Flood"

The defendant insurance companies contended that all water damage caused by the canal breach was excluded from coverage because their policies exclude coverage for water damage resulting from a "flood." They maintain that all the claimed damage was a result of a "flood." They further argued that the definition of "flood" is not limited to natural events. The plaintiffs argued that with regard to the exclusions

See Levee-Breach, page 10

Levee-Breach, from page 9

included in their policies, "flooding" is limited to natural events. In addition, they argued that the "flooding" that occurred was not caused by the overtopping of the levees or by rainwater filling the city with surface water. They contended that Louisiana courts have construed the water damage exclusion to require a "rising over" of water; whereas, here, a "rising over" of water did not occur; rather, it was the negligence of OLD that caused the canal walls to collapse.

The issue for this court was whether in an all-risk policy, where coverage is provided for direct loss to property, these insurance provisions which exclude coverage for water damage caused by "flood" clearly exclude from coverage damages caused by the alleged negligence of OLD. In other words, the issue is whether it is reasonable to conclude that there are two definitions of "flood."

The majority of the definitions of the word "flood" found independently by the court required an "overflowing" or an "overtopping." The court further concluded that the definition of "overflowing" contemplates the occurrence of a natural event caused by rain or tide. Therefore, the court concluded that a reasonable interpretation of the word "flood" would be flooding caused by a natural event.

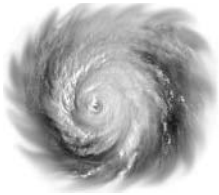
Conclusion

Because the word "flood" is not defined in the policies in question, the court found the exclusionary clauses of the policies ambiguous. Any exclusion listed in these "all-risk" policies must be clear and unambiguous; otherwise, the policy will be construed to give coverage. Consequently, the court held that the insurers must provide damages for the plaintiffs' losses, with the exception of State Farm and Hartford. The State Farm policies clearly exclude regardless of the cause of the flooding; therefore, they do not have to provide damages for the losses. Also, the court held that the Hartford policies expressly excluded the damages caused by negligently maintained levees and that Hartford is not liable for damages.

Endnotes

1. Another case entitled *Robinson v. United States* is also grouped under *In re Katrina Canal Breaches Consolidated Litigation* and is still pending; however this case can be distinguished from the cases here because the central issue is different. In *Robinson*, New Orleans residents are suing the Army Corps of Engineers, not their insurance companies, for the negligent construction and maintenance of the MRGO. *Robinson v. United States*, C.A. No. 06-2268, Document 2994 (E. D. La. Feb. 2, 2007).
2. These cases are: *Vanderbrook, et al. v. State Farm Fire & Casualty Co., et al.*; *Xavier University of Louisiana v. Travelers Property Casualty Co. of America*; *Chehardy, et al. v. State Farm, et al.*; and *Humphreys v. Encompass Insurance Co.*

Photograph of flooded Plaquemines Parish courtesy of NOAA.



Report Blames Corps for Levee Breaches

Sarah E. Spigener, 2L, University of Mississippi School of Law

Photograph of flooded New Orleans subdivision courtesy of NOAA.

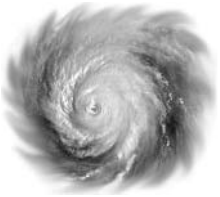
After Hurricane Katrina struck, the Secretary of the Louisiana Department of Transportation and Development (DOTD), Johnny B. Bradberry, commissioned "Team Louisiana," a team of Louisiana academic experts and engineers, to collect and document evidence related to the failure of levee systems in the Greater New Orleans (GNO) area. Team Louisiana submitted a final report, "The Failure of the New Orleans Levee System during Hurricane Katrina,"[1] in February 2006, which was released by the DOTD on March 21, 2007. The report focuses on the hurricane protection system (HPS) designed and constructed over a 40-year period by the U.S. Army Corps of Engineers (the Corps) for the East Bank of the GNO.

The report claims that decades of incompetence and neglect by the Corps allowed Hurricane Katrina's storm surge to devastate New Orleans. The report further alleges that the agency supervisors ignored increases in the threat level for their project, knowingly built levees and floodwalls lower than congressionally mandated, failed to detect or ignored obvious errors during the review process, underestimated the impact of the Mississippi River-Gulf Outlet (MRGO) on the city's defenses, and failed to properly maintain the system. The report also calls for the state and Congress to hold "8-29 Commissions" for a full investigation of the disaster to explain why decisions were made the way they were, passage of a "Katrina Recovery Bill" to ensure coastal restoration and flood protection are fully financed by the federal government, and more transparency on the part of federal and state authorities when discussing flood protection plans. Team Louisiana also recommends an investigation of the integrity and safety of all existing federal and state levee systems and of all existing federal navigation projects in coastal areas in Louisiana.

This report, as well as previous national ones with similar conclusions, may benefit some New Orleans residents. In a pending case, *Robinson v. United States*, New Orleans residents are suing the Corps for the negligent construction and maintenance of the MRGO. They claim that the flooding that resulted in their area was a combination of failed levees and of a decrease in the natural wetland protection caused by the MRGO. The Louisiana District Court has recently upheld the plaintiffs' right to bring the suit by overruling a motion to dismiss initiated by the Corps.[2]

Endnotes

1. Team Louisiana, La. Dep't of Transp. and Dev., *The Failure of the New Orleans Levee System during Hurricane Katrina* (Mar. 23, 2007), available at http://www.publichealth. - hurricane.lsu.edu/TeamLA.htm .
2. *Robinson v. United States*, C.A. No. 06-2268, Document 2994 (E.D. La. Feb. 2, 2007).



FEMA Evicts Evacuees without Adequate Explanation

Association of Community Organizations for Reform Now v. FEMA, 463 F.Supp.2d 26 (D.D.C. Nov. 29, 2006)

Adam DeVrient, 2L, University of Mississippi School of Law

In August 2005, the Gulf Coast experienced the most ferocious natural disaster in U.S. history. Hurricane Katrina made landfall near Pass Christian, Mississippi, causing more than 1,000 deaths and over $100 billion dollars in property damage. Katrina also led to the eventual displacement of over 700,000 Gulf Coast residents, many of whom were left without adequate shelter.[1] Less than a month later, Hurricane Rita made landfall near Lake Charles, Louisiana, displacing approximately 70,000 more people.

After the hurricanes, the Federal Emergency Management Agency (FEMA) declared that evacuees from the Gulf Coast qualified for "short-term housing rental assistance" under Section 403 of the Stafford Act, 42 U.S.C. § 5170b. In February 2006, FEMA began transferring eligible evacuees to its "longer-term" Section 408 housing program, which provides up to eighteen months of housing assistance to disaster evacuees. However, in order to receive this longer-term assistance, the evacuees had to submit an application to FEMA and "meet certain statutory and regulatory criteria."

Thousands of evacuees who applied for Section 408 assistance were denied benefits and informed that their short-term 403 benefits would be terminated following a thirty-day notice period. FEMA used a computer program to automatically determine eligibility for benefits and sent out standardized form letters informing applicants of the denial of long-term housing assistance.

Each letter contained a numerical code or phrase that stated the reason for the denial of that person's application. Unfortunately for the applicants, the codes were cryptic and vague. Other than the code or phrase, there was either little or no individual explanation as to why FEMA denied that particular application. A notice was attached that provided "non-individualized" details for the appeal process. While FEMA did provide means for the applicants to resolve any misunderstandings which resulted from the letter, the plaintiffs claimed that the means were oftentimes no more helpful than the letter itself.

Other than the code or phrase, there was either little or no individual explanation as to why FEMA denied that particular application.

Due to the ensuing confusion, FEMA extended its deadline to terminate Section 403 benefits several times. The final date for the termination of Section 403 benefits was August 31, 2006. As a result of the elimination of the benefits, the Association of Community Organizations for Reform Now (ACORN) and several individuals filed suit against FEMA. ACORN asked the court for a restraining order to prevent FEMA from terminating the benefits. The court denied the request and scheduled a hearing to determine the appropriate-

ness of an injunction to prevent termination. The court warned FEMA not to terminate the evacuees' short-term housing benefits prior to its determination. FEMA ignored that order, canceling the benefits of thousands of evacuees that very day.

Procedural Analysis

On appeal, FEMA claimed that the court lacked subject matter jurisdiction to hear the case and that ACORN lacked standing to bring suit on behalf of the evacuees. First, FEMA argued that both the Stafford Act itself and the Administrative Procedures Act (APA) provide that "acts that are taken within the discretion of the federal agency are not reviewable in court."[2] In response, the plaintiffs stated that they were challenging the process by which FEMA made its decisions, not the decision itself. Neither the Stafford Act, nor its predecessor the Disaster Relief Act of 1974, barred judicial review of unconstitutional acts.

FEMA also argued that ACORN lacked standing to bring the claims on behalf of the evacuees. The court explained that in order for ACORN to have standing, it must pass a three-part test: first, its members must have standing to sue in their own right; second, the interest that ACORN seeks to protect must be germane to the organization's purpose; and, finally, neither the claim asserted nor the relief requested must require the participation of individual members. The court held that ACORN met all three prongs of the test and did in fact have standing to sue on behalf of its evacuated members.

Is the Court Going to Stop FEMA?

To obtain an injunction, plaintiffs must show several elements: a substantial likelihood of success on the merits of their case; that they would suffer irreparable injury should the injunction not be granted; that an injunction would not substantially harm either party; and, finally, that the injunction would advance the public interest. In balancing these factors, the court focused on whether the plaintiffs were substantially likely to succeed based upon the merits of their case.

The court explained that for the plaintiffs to show a likelihood of success, they would have to establish "that they possess a property interest in the housing assistance benefits that is protected by the *Due Process Clause*…" and "that FEMA's termination and denial letters were constitutionally insufficient notice of the reasons for FEMA's decisions and failed to provide the requisite opportunity for appeal."[3]

The court held that the evacuees did have a property interest protected by the Due Process clause, since the Fifth Amendment of the U.S. Constitution provides that the government will not deprive a person of his or her property without due process of law. The court recognized that government benefits create constitutionally protected property interests if an applicant can legitimately claim or show entitlement to it.

The court used a three-part test to determine whether the evacuees had been given adequate notice. First, the court considered whether there was a private interest that would be affected by FEMA's action. Since the discontinuation of benefits would deprive individuals of a place to live, they had a very strong interest in the official action. Next, the court considered whether an erroneous deprivation of property would occur through the use of FEMA's procedures. The court stated that, "the risk of erroneous deprivation . . . significantly increases as the

See Acorn, page 14

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notice being given becomes … more vague."[4] The court found FEMA's method of notifying evacuees of the denial of long-term benefits was inadequate and should have been more specific. Finally, the court weighed the increased burden and cost for FEMA to send out more detailed explanations. FEMA failed to demonstrate that sending out more detailed explanations to evacuees would result in too great a burden for the agency. After examining all three parts of this test, the court determined that the plaintiffs were likely to succeed on the merits of their case.

The court also briefly looked at the other three factors to determine if they would issue an injunction prohibiting FEMA from discontinuing evacuees' housing benefits. The court held that the plaintiffs would suffer irreparable harm. The court stated that FEMA failed to demonstrate that they would suffer substantial harm by having to provide more detailed explanations. Finally, the court held that the injunction would advance the public's interest, since the public has an interest in ensuring that the government's procedures are constitutional.

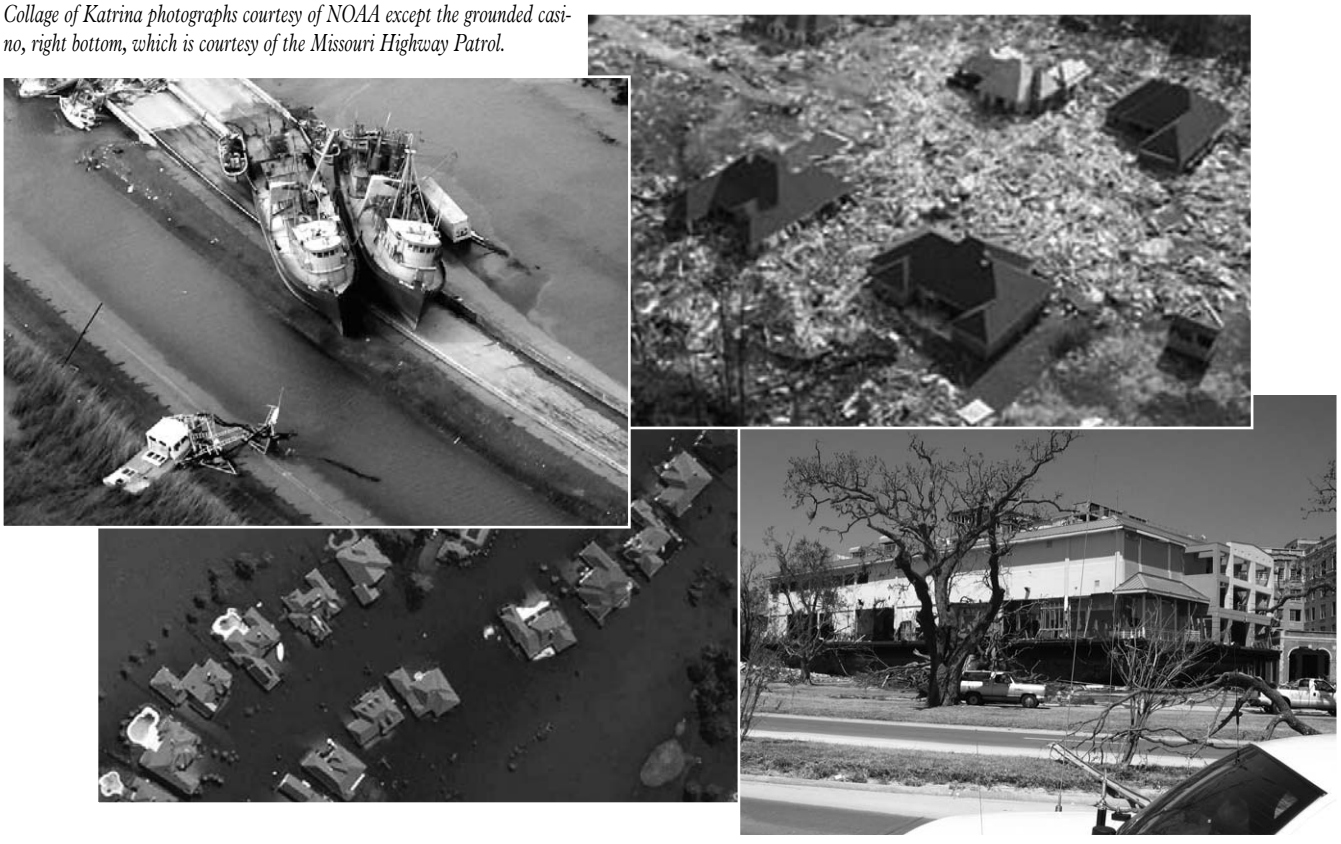
Conclusion

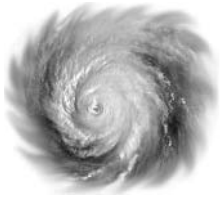
The court granted the plaintiffs' motion for an injunction and required FEMA to send more detailed explanations to evacuees. Furthermore, the court ordered FEMA to reinstate short-term housing benefits, and pay evacuees benefits that they would have received but for the discontinuation.

Endnotes

1. Kamilah Holder, Congressional Research Service, *Disaster Housing Assistance: A Legal Analysis of* Acorn v. FEMA (Jan. 5, 2007), available at http://www.opencrs.com/rpts/ - RS22560_20070105.pdf .
2. *Association of Community Organizations for Reform Now v. FEMA*, 463 F.Supp.2d 26, 31 (D.D.C. 2006).
3. *Id*. at 33.
4. *Id*. at 34.

Collage of Katrina photographs courtesy of NOAA except the grounded casino, right bottom, which is courtesy of the Missouri Highway Patrol.



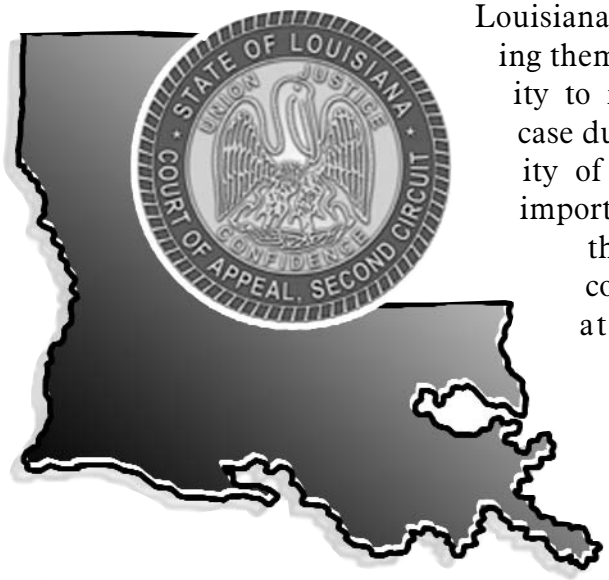


LA Supreme Court Finds Insurance Claims Extensions Constitutional

State of Louisiana v. All Property and Casualty Insurance Carriers Authorized and Licensed to do Business in the State of Louisiana, 937 So. 2d 313 (La. Aug. 25, 2006)

Jason M. Payne, 2L, University of Mississippi School of Law

In response to the extensive devastation of Hurricanes Katrina and Rita in August and September of 2005, the State of Louisiana enacted amendments extending the period that victims of the storm could file insurance claims. The amendments, Acts 739 and 802, also called for the Louisiana Attorney General to file a suit within ten days of the enactment of the amendments seeking a declaratory judgment to determine if the amendments were constitutional.



Background

Prior to Acts 739 and 802, Louisiana law held that no contract for insurance could set a period of less than twelve months within which to file a claim for damages. Due to the devastation of Hurricane Katrina on August 29, 2005, and Hurricane Rita a mere 27 days later, Governor Blanco of Louisiana issued several executive orders extending various legal deadlines, including filing periods for insurance claims. Most of these executive orders were taken up by the Louisiana legislature and made into state law. Among these were Acts 739 and 802, dealing with the insurance claims filing periods. These acts extended the old deadline for filing claims from one year from the date of the damage to September 1, 2007, for Katrina's victims, and October 1, 2007, for Rita's victims.

As required by the acts, the attorney general filed a claim for declaratory judgment on behalf of the State of Louisiana on July 10, 2006, listing all property and casualty insurance carriers authorized and licensed to do business in the state as defendants. All of the insurance carriers agreed to the extensions, except for Allstate Insurance Company, State Farm Insurance Company, and USAA Insurance Company (defendants).

On August 17, 2006, the attorney general filed papers with the Louisiana Supreme Court urging them to exercise their ability to immediately hear the case due to the time sensitivity of the material and its importance to the citizens of the state. The supreme court agreed with the attorney general and agreed to hear the case, but sent it first to a state district court for an expedited hearing. The district court judge heard the case, concluding that the insurance companies' arguments were without merit and the acts were constitutional. On August 24, 2006, the Louisiana Attorney General sought a review of the case with the Louisiana Supreme Court to receive a final judgment on the matter.

Louisiana Supreme Court

The supreme court first dealt with classifying the Acts as either substantive or interpretive law.

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Claims Extensions, from page 15

Louisiana law provides that unless there is legislative intent to the contrary, substantive laws can only be applied prospectively, while procedural and interpretive laws can be applied both prospectively and retrospectively. The court found legislative intent to have the act apply retroactively in order to cover the damage of Hurricanes Katrina and Rita. However, they did find the law to be substantive, since it either established new rules or changed existing ones. Upon this determination, the court had to decide if the new laws impaired contractual obligations or disturbed any vested rights to the point that they could not be applied retroactively.

Contract Clauses

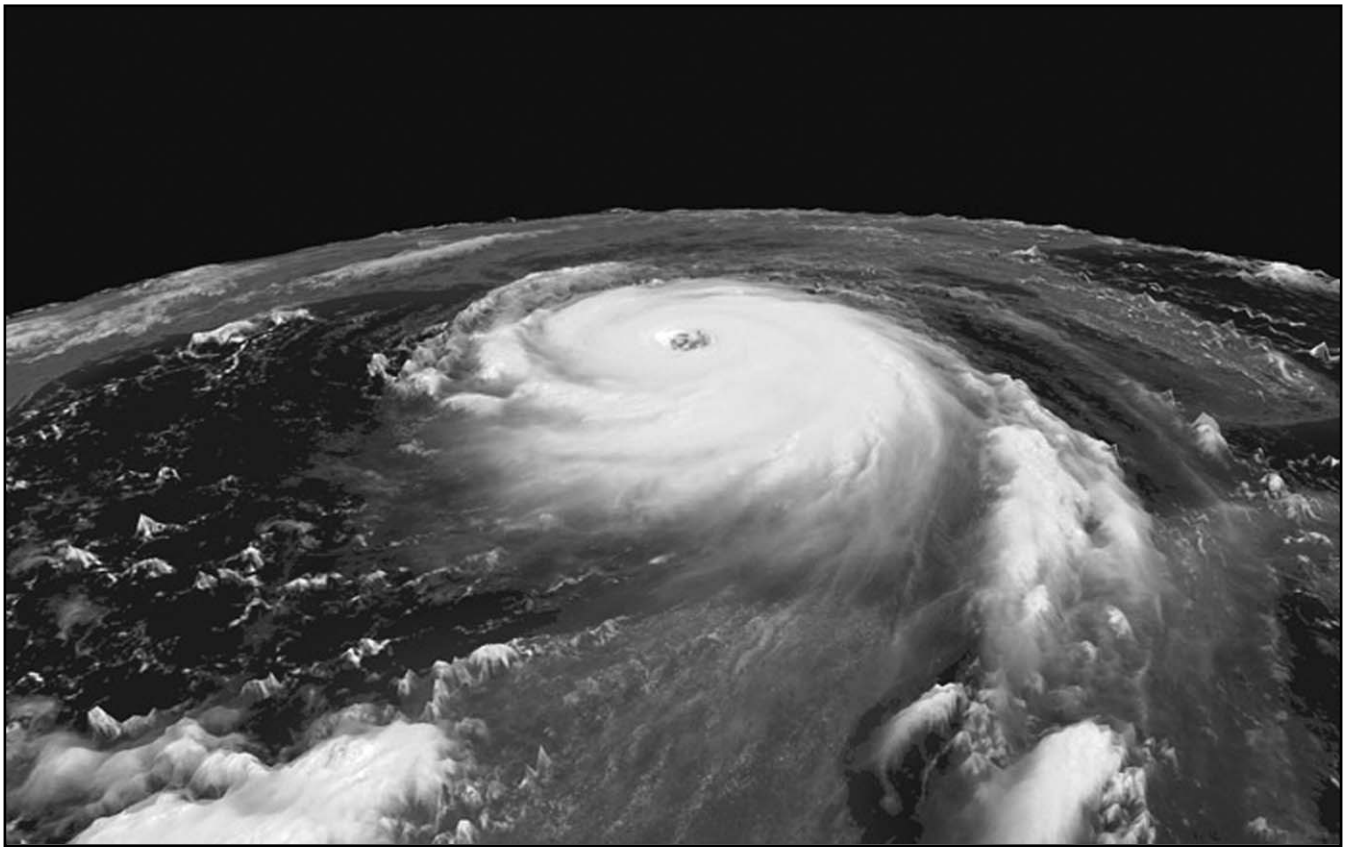
The insurance companies first argued that Acts 739 and 803 violate the Contract Clauses of both the Louisiana and United States Constitutions, which prohibit states from interfering with private contracts. Although the Contract Clause language seems absolute, the U.S. Supreme Court has found that "… the Contract Clause does not operate to obliterate the police powers of the States."[1] The police powers allow the states to make the necessary laws to protect their residents.

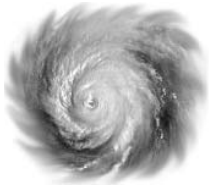
The Louisiana Supreme Court looked at the state's right "… to safeguard the vital interest of its people…"[2] in deciding that these acts did not violate the Contracts Clause. The supreme court also weighed the impairment to the insurance companies and determined that, although the insurance companies would be impaired by the extension, the filing extensions were justified since citizens of the state were displaced all over the country and a great quantity of legal documents, insurance policy papers included, were destroyed due to the wind and water. The court further justified the acts by pointing out they were limited in both time and scope to deal only with the two natural disasters that had occurred.

The defendants next claimed that the Louisiana Attorney General did not have the right to make a legal claim about the constitutionality of the acts. The insurance companies

See Claims Extensions, page 21

Aerial photograph of Hurricane Katrina over the Gulf of Mexico courtesy of NOAA.





Hospital Negligence Class Action Remanded to Louisiana State Court

Preston v. Tenet Healthsystem Memorial Medical Center, Inc., 463 F. Supp. 2d 583 (E.D. La. Nov. 21, 2006)

Kathryn L. Burgess, 2L, University of Mississippi School of Law

Background

After Hurricane Katrina hit, the conditions at Memorial Medical Center in New Orleans rapidly deteriorated. The hospital lost electrical power and the temperatures inside rose to over one hundred degrees. Sanitation systems backed up. When the levees broke, more than one thousand people were trapped inside the hospital as a result of the eight-foot-high flood waters. Teams used helicopters and boats to perform rescues, but some of the most vulnerable patients remained trapped inside, and an estimated thirty-five patients died during the crisis.

In October, relatives of the deceased and injured patients filed a lawsuit in federal district court against Memorial Medical Center and LifeCare Management Services, which operated an acute care unit inside the hospital. The plaintiffs also filed a class action suit asserting "various allegations of negligence and intentional misconduct" and reverse patient dumping under the Emergency Medical Treatment and Active Labor Act.[1]

Photograph of rescue from New Orleans hospital courtesy of FEMA.

Removal Claims

The plaintiffs filed a notice to remand the suit to state court, but later withdrew that request. Subsequently, Memorial resurrected the motion to remand. LifeCare filed a notice of removal to keep the case in federal court citing several bases for federal jurisdiction: (1) the Federal Officer Removal Statute; (2) the Multiparty, Multiforum Trial Jurisdiction Act; (3) the Class Action Fairness Act; and (4) the Emergency Medical Treatment and Active Labor Act.[2]

The purpose of the Federal Officer Removal Statute is to "provide a federal forum in cases where federal officials are entitled to raise a defense arising out of their duties."[3] Removal is only proper in the current case if LifeCare is a person that acted under color of federal authority when committing a tortious act and can assert a colorable defense. The court held that LifeCare failed to show that it acted under color of federal authority in failing to maintain hospital conditions and putting an evacuation plan in motion sufficient to keep its patients alive. No federal officer exercised "direct and detailed" control of the hospital at any time during the crisis.

The Multiparty, Multiforum Trial Jurisdiction Act creates original federal jurisdiction over "any civil action involving minimal diversity between adverse parties, where at least seventy-five natural persons have died in the accident at a discrete location and allows consolidation of cases relating to a common disaster."[4]

See Hospital, page 22

Broussard, from page 8

to water damage. State Farm is liable for all losses that it does not prove to have been caused by water.

At the conclusion of all the evidence presented by both sides, Judge L.T. Senter was asked by both parties for a judgment as a matter of law. Under Rule 50 of the Federal Rules of Civil Procedure, the court must grant a directed verdict "if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable jurors could not arrive at a contrary verdict."[3] Granting a Rule 50 motion takes the decision out of the jury's hands and assigns it to the judge.

Judge Senter granted the Broussard's motion for a directed verdict. The court felt that State Farm failed to meet its burden of proof as to the extent of the damage caused by water and therefore was liable to the Broussards for the full insured value of their home. Judge Senter also found that under Mississippi law and the terms of the policy, State Farm should have made an unconditional offer to the Broussards for the wind damage that their own expert estimated. Mississippi law requires an insurer to act reasonably and in good faith when investigating and paying legitimate claims under its policies.[4]

Judge Senter found that State Farm was unreasonable in trying to shift its burden of proof to the Broussards, when even its own expert believed that their property sustained at least some wind damage. The court found that State Farm did not act in good faith and left the Broussards no choice but to file a lawsuit in order to recover their losses. For that reason the court held that punitive damages against State Farm were appropriate and submitted the issue to the jury.

The Afterward

The jury punished State Farm for refusing to pay the claim by awarding the Broussards $2.5 million in punitive damages. Judge Senter later reduced the punitive damages to $1 million because he felt that an award of four to five times the value of the Broussards' home was more appropriate.

The punitive damages award was instrumental in encouraging State Farm to enter into settlement negotiations involving a class action suit brought by 640 policyholders in Mississippi whose claims have also been denied. The initial agreement called for State Farm to pay the 640 claimants $80 million. The agreement also called for State Farm to allocate at least $50 million to the settlement in order to reopen the claims of thousands of policyholders whose claims were denied but did not sue.

On January 26, 2007, Judge Senter rejected the initial settlement offer because he wanted more information from the parties before he would agree to a deal that could affect up to 35,000 policyholders. This settlement negotiation is still pending. However, by agreeing to settle, Jim Hood, Mississippi's Attorney General, has agreed to drop a civil suit and a criminal probe related to allegations that State Farm fraudulently denied claims related to Hurricane Katrina. Because State Farm is the largest insurer in Mississippi, its decision to settle could encourage other insurers to do the same.

Conclusion

Having determined that State Farm did not meet its burden of proof with respect to the amount of damage caused by water, it is liable to the Broussards to the full value of their insured home. Also, because State Farm acted unreasonably in denying the plaintiffs' claim and left them no choice but to file a lawsuit, punitive damage were appropriate.

Endnotes

1. Gary Mitchell, *State Farm Losses Katrina Claim Case*, ABC News, January 12, 2007.
2. *Broussard v. State Farm Fire and Casualty Co.*, 2007 WL 113942 (S.D. Miss. 2007).
3. *Id*.
4. *Gregory v. Continental Insurance Co.*, 575 So.2d 534 (Miss. 1990).

From Sea to Shining Sea (Grant) - Forty Years of Research through the National Sea Grant College Act

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> *One thing we cannot escape — forever afterward, throughout all our life, the memory of the magic of water and its life, of the home which was once our own — this will never leave us.*
>
> William Beebe, American naturalist and author

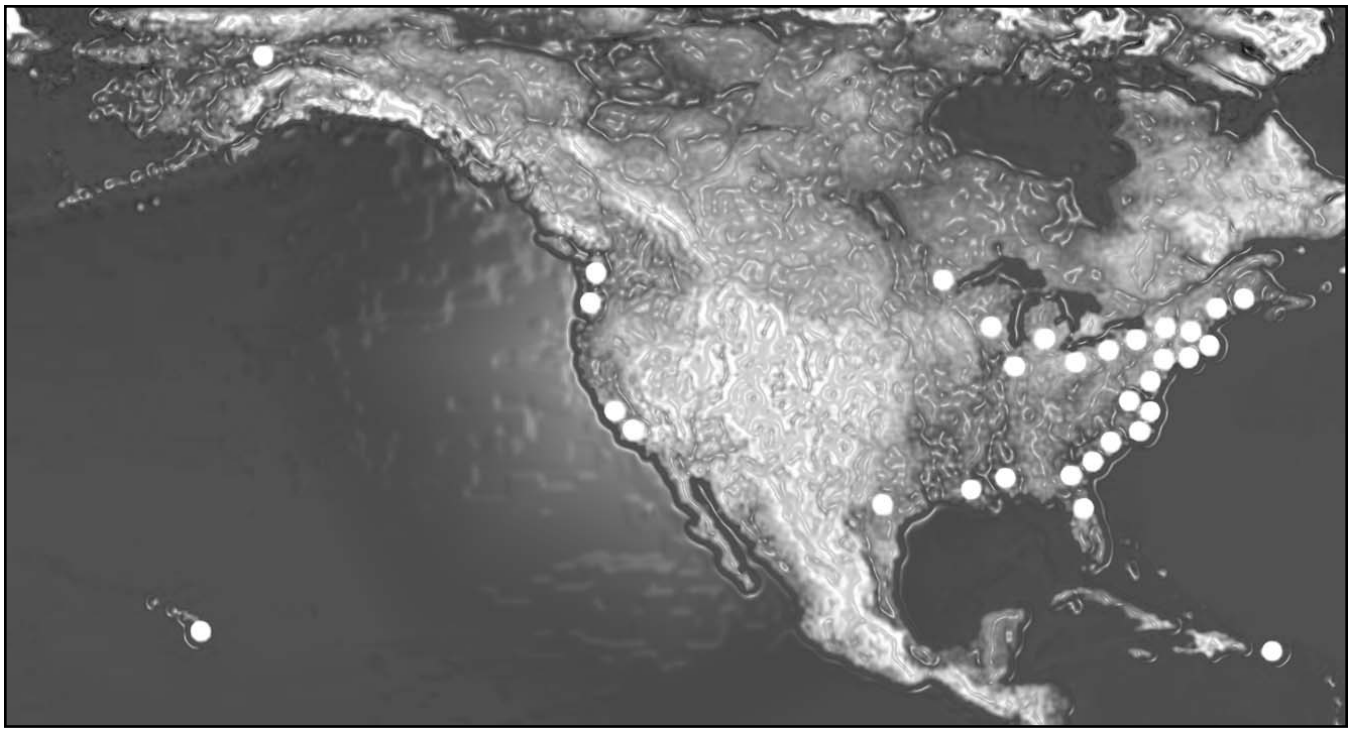
Last year marked the fortieth anniversary of the law which created the Sea Grant program, the National Sea Grant College and Program Act of 1966 ("Act").[1] The Act's main purpose was to establish and help fund a network of "sea grant" colleges among universities in marine and coastal areas to promote development of their programs in ocean and coastal research. The Sea Grant program forms a network between state research institutions conducting ocean and coastal research and the federal government, in recognition of the importance of those resources to the nation.[2] This article highlights the history of Sea Grant and its continuing importance forty years after it began.

Background

The Morrill Acts of 1862 and 1890 established the "land grant" university system in which federal lands provided to the states were to be used to fund colleges of agriculture and mechanical arts in the states receiving such land. Examples of land grant colleges include Texas A & M Uni-

See Sea Grant, page 20

Graphic created from map on opening page of the National Sea Grant College Program website: http://www.seagrant.noaa.gov/colleges/colleges.html



Sea Grant, from page 19

versity and Michigan State University. The original land grant concept has led to not only the Sea Grant program, but also the Space Grant and Sun Grant programs.

The roots of the Sea Grant program are found in the early 1960s during a period of increased interest in science.[3] America was in the heart of the post-World War II economic boom and there was an increased realization that scientific research could lead to responsible economic development. Specifically, Dr. Athelstan Spilhaus suggested that a Sea Grant program could bring benefits, economic and otherwise, from research in coastal and marine matters, just as the "land grant" college program had done for agricultural and engineering research in the early 1900s. In 1965, the legislation creating the Sea Grant program was introduced by Senator Pell of Rhode Island.

Development of the program

Originally, the responsibility for implementation of the Act was charged to the National Science Foundation, with the intent that it would be administered by the proposed National Oceanic and Atmospheric Administration (NOAA).[4] NOAA, formally established in 1970 by placing many related research agencies under one umbrella, includes many important components such as the National Weather Service, National Geodetic Survey, and the National Marine Fisheries Service. The agency is housed within the U.S. Department of Commerce due to the importance of the ocean to the commerce and trade of the United States. In 1970, Sea Grant moved to NOAA due to NOAA's large focus on oceanic research.

In 1971, four universities were the first to achieve Sea Grant College status. They were Oregon State University, University of Rhode Island, Texas A & M University, and University of Washington. Many other institutions were later granted such status throughout the 1970s and onwards. Today, there are thirty university programs that have been designated Sea Grant institution status.

The Act originally focused on funding national strategic investments, through research and programs by sea grant colleges, in fields relating to "ocean and coastal resources." Amendments in 1976 clarified what requirements applied to determine eligibility for Sea Grant institution status and also established the Sea Grant review panel, which reviewed applications for Sea Grant status designation and for grants and contracts.[5]

Amendments in the 1980s expanded the Act to apply not only to ocean and coastal resources, but to Great Lakes resources as well.[6] This encouraged universities in the Great Lakes area to expand their programs or seek Sea Grant status.[7] The Ohio State University, for example, achieved Sea Grant College status in 1988. Although the primary motivation behind Sea Grant was and continues to be classical marine and ocean or coastal related research, the inclusion of the Great Lakes as part of the research mission is logical. The Great Lakes contain one-fifth of the world's freshwater supplies and are a tremendously important economic engine in the Midwest, for shipping of goods, resource extraction (fishing, e.g.), and tourism. The Great Lakes have rightly been referred to as "inland seas"[8] due to their size, influence on the weather and climate of the region, and other factors that render them more like oceans than traditional lakes. As the Great Lakes drain to the Atlantic Ocean through the St. Lawrence Seaway, there likely remains much opportunity for cross-beneficial research in the oceans and Great Lakes.[9]

Conclusion

The objective of Sea Grant continues to be to:

> increase the understanding, assessment, development, utilization, and conservation of the Nation's ocean, coastal, and Great Lakes resources by providing assistance to promote a strong educational base, responsive research and training activities, broad and prompt dissemination of knowledge and techniques, and multidisciplinary approaches to environmental problems.[10]

The continuation of the Sea Grant program is vital, not only for its own importance, but also in conjunction with other federally fostered protection of, and research on, marine and coastal resources and ecosystems. For example, NOAA also administers the National Marine Sanctuaries Program, which currently contains thirteen marine sanctuaries designed to protect selective marine ecosystems in the United States. The most recently established sanctuary protects an area in Lake Huron in the Great Lakes. Such programs form a comprehensive research base, with Sea Grant at its core, promoting the nation's long term interests.

Endnotes

1. 33 U.S.C. §§1121 et seq.
2. 33 U.S.C. §1121(a) (Congressional findings concerning the importance of the ocean, coastal and Great Lakes resources).
3. *See* http://www.seagrant.noaa.gov/history-ofsg.html .
4. *See* http://www.history.noaa.gov/legacy/ - noaahistory_3html .
5. *See* 33 U.S.C. §§1126, 1128.
6. *See*, e.g., history notes under 33 U.S.C. §§1122, 1123.
7. *See* http://history.noaa.gov/legacy/noaahis - tory_9.html .
8. *See* Jerry Dennis, *The Living Great Lakes: Searching for the Heart of the Inland Seas*, at 1-3 (2003).
9. *See* http://ciler.snre.umich.edu/about. *See* http://www.glsc.usgs.gov .
10. 33 U.S.C. §1121(b).

Claims Extensions, from page 16

claimed that the suits should be filed on an individual basis. The court stated that the legislature authorized the attorney general to bring the suit, thus giving him standing. The court also felt that innumerable individual suits would cause too great a strain on the courts and that the attorney general's suit worked toward judicial efficiency as well.

The insurance companies also claimed Act 803 violated the Supremacy Clause of the United States Constitution, which states the U.S. laws "… shall be the supreme Law of the Land."[3] The defendants claim that Act 803, by changing the claim deadlines of flood insurance policies, interferes with the claims deadlines of the federally-run National Flood Insurance Program (NFIP). The court said it must interpret legislation in ways that make it effective, rather than meaningless. In doing this, they recognized Act 803 as referring to all flood insurance programs except the federally run NFIP.

The defendants' final argument was that the hurried nature of the court proceeding interfered with their procedural due process by not giving them adequate time to prepare their defense. The court found that they had been given ample time, since they were served papers notifying them of the declaratory judgment action more than a month before the trial began.

Conclusion

On August 25, 2006, the Louisiana Supreme Court confirmed the district court's decision that Acts 739 and 803 are constitutional. The court decided even though the new laws were substantive in nature, they should still be applied retroactively since the damage to the insurance companies was minor in contrast to the benefits provided to the Louisianans in need. The decision gave the displaced, storm-ravaged people of Louisiana an extra year to file claims with their private insurance carriers, while also confirming that the extensions do not pertain to the federally run NFIP.

Endnotes

1. *State of Louisiana v. All Property and Casualty Insurance Carriers Authorized and Licensed to do Business in the State of Louisiana,* 937 So. 2d 313, 323 (La. Aug. 25, 2006).
2. *Id*. at 324.
3. *Id*. at 328.

Hospital, from page 17

Many courts have refused to consider Hurricane Katrina as an accident, although some have reserved judgment on whether the levee breaches are accidents. Regardless, seventy-five people were not killed at the hospital itself, which precludes federal jurisdiction.

The Class Action Fairness Act allows a defendant to move an action to federal court if the threshold amount in controversy and minimal diversity exist. Diversity of citizenship was at issue in this claim. The court held that the lack of diversity precluded the removal of the case, citing the nexus between the plaintiffs, the defendants, and the state of Louisiana. For instance, all of the injuries took place in New Orleans at a defined moment in time. Additionally, ninety-seven percent of the patients and the hospital are Louisiana citizens. Although there was a mass displacement of most of the residents after Katrina, many of them express a desire to remain citizens of the state of Louisiana.

Finally, the plaintiffs claimed that reverse patient dumping brought the Emergency Medical Treatment and Active Labor Act into play. Reverse patient dumping refers to the claim that LifeCare evacuated some patients out of the hospital after the levees broke and abandoned others due to the lack of an effective evacuation plan. Under federal law, this is not a viable cause of action. The main purpose of the statute was to prevent doctors and hospitals from refusing to treat people who lacked the money to pay for medical treatment.

Conclusion

The court held that state law claims predominate over the issues in the case. The district court concluded that in its entirety, it lacked jurisdiction to hear the matter and remanded it to the Civil District Court for the Parish of Orleans.

Endnotes

1. *Preston v. Tenet Healthsystem Mem. Med. Ctr., Inc.*, U.S. Dist. LEXIS 85381 at *6 (E.D. La. Nov. 21, 2006).
2. *Id*. at *9.
3. *Id*. at *11.
4. *Id*. at *19.

Photograph of rescue helicopter courtesy of NOAA.

Fearing the worst, organizers of a migratory project were elated recently to receive a transmitter signal from a young male whooping crane believed to be dead. The crane was part of an eighteen-member whooping crane migratory project housed in Citrus County, Florida, at the Chassahowitzka National Wildlife Refuge. When violent storms hit the area in February, the entire flock was thought to have perished. The young male whooping crane escaped the fatal effects of the storm and was sighted in the company of two sandhill cranes several days after the storm. Although the loss of the experimental migratory flock was devastating, organizers will continue to monitor the male survivor as well as the 64 non-migratory whooping cranes also located in Florida.

Three Northern Pacific killer whale pods, totaling 85 whales, located in western Washington state's inland waters near Puget Sound, were recently the subject of a lawsuit when local building and farm groups challenged the decision to list Puget Sound's orca population as an endangered species. The farmers claimed that recognizing the orca population as endangered would harm their livelihoods by resulting in unnecessary water and land use restrictions. The judge dismissed the suit stating that the plaintiffs did not present evidence to prove that they would be harmed.

The Michigan Department of Natural Resources recently confirmed that viral hemorrhagic septicema (VHS) has been found in Lake Huron. VHS is a highly contagious virus that affects some of the region's most popular commercial fish species, and its presence in Lake Huron is expected to widely impact Michigan's aquaculture industry. VHS had previously been found only in Lakes Ontario and Erie, but officials now predict the virus will spread through the entire Great Lakes system. VHS was originally a saltwater virus, but it was first discovered in the Great Lakes in 2005. Fishery managers suspect that ballast water from ocean freighters was the culprit in introducing the virus to the Great Lakes region.

In Navy ranges off the coast of Hawaii, Southern California, and the East Coast, the Defense Department granted the Navy permission to continue using sonar for the next two years, despite the outcry of activists who fear that the sound waves may harm marine animals. The Navy has stated that it will produce environmental impact statements to provide better information on how sonar use in underwater training ranges affects the environment.

The source of the ocean's distinct smell was recently discovered by scientists. Dimethyl sulfide (DMS), a gas produced by genetic activity recently identified by researchers in ocean-dwelling bacteria, produces the tangy sea air smell. A research team headed by Andrew Johnston of the University of East Anglia was able to use marine plant decay samples to isolate in one form of bacteria the genetic sequence responsible for converting plant decay products, dimethylsulfoniopropionate (DMSP), into the gas DMS. Although the gene sequence found is not the only mechanism for conversion of DMSP into DMS, the discovery is an important step in understanding environmental interactions in the ocean.

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