

Featured Article

Katrina's Still Making Waves: Hurricane Katrina Cases in the Fifth Circuit Court of Appeals

Article contributed by

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Hurricane Katrina was actually three storms: the real one, the surge of insurance litigation that followed it, and the media, political and public perception of the litigation and of the insurers' conduct. As difficult as it is, in order to learn anything really useful and lasting about Katrina's three storms, it is necessary to pick a discrete topic and deeply analyze it to get past some of the Katrina myth and mythology. The topic for this article is Katrina litigation in the U.S. Fifth Circuit Court of Appeals, a topic that is underexplored and therefore well deserving of close analysis.

Not everyone will agree with me, but in large measure, I believe that the standard narrative of Katrina litigation is entirely wrong. That narrative derived to a great extent from media reports about Katrina litigation, and from statements of policyholder attorneys, and, surprisingly, the insurance industry did not effectively counter the popular storyline. The standard narrative of Katrina litigation goes something like this: insurers used what is known as "anti-concurrent cause clause" in their policies to deny payment for covered wind damage, because they said uncovered hurricane storm surge flooding came along afterward. Even a little uncovered damage that happens "concurrently" or "in sequence" with covered damage means the policyholder is totally out of luck. That description is more or less the popular and media perception, but it is wrong on three counts.

First, it is completely inaccurate in describing what anti-concurrent cause language is and how it works. Second, the evidence from Katrina litigation is that insurers did not rely on anti-concurrent cause language to a significant degree. And third, the damage caused by Hurricane Katrina, in every instance and in every case I am aware of, is not the kind of damage covered by anti-concurrent cause language in the first place.

Before getting to the Fifth Circuit Katrina cases, it is necessary to explore these points a little further. Perhaps the best known, or most infamous, depending on one's point of view, of the anti-concurrent cause clauses at issue in Katrina litigation was that in State Farm policies. Even more than most insurance policy language, anti-concurrent cause language is industrial strength boilerplate that derives from specific words used in court precedent and is aimed at an audience of judges, not lay readers. Although it isn't pleasing to the eye or the ear, the only way to understand it is to stare right at it, and so, even though there is no surer narrative-killer than quoting insurance policy language, the State Farm anti-concurrent cause clause is reproduced below.

We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these *Tuepker v. State Farm*, 507 F.3d 346, 351 (5th Cir. 2007)

The word “these” in the last line refers to exclusions that come after this lead-in language, such as the Water Damage exclusion, commonly referred to as the flood exclusion, which was of great importance in Katrina cases.

Anti-Concurrent Cause Language

Based on my research into the origin and purposes of anti-concurrent cause language, having written two very long analytical articles on anti-concurrent cause language, and countless posts on my legal blog, I here provide a brief overview about how it works. For anti-concurrent cause language to even be a concern, “multiple causation” must be involved. This is where two or more forces combine to cause the exact same damage. If two or more forces cause only separate, divisible damage, only single causation exists, and the clause is not implicated. This point must be clearly understood or there is no hope of figuring anything out about anti-concurrent cause language.

The words “concurrently or in any sequence” are terms of art that bear no resemblance to their usage in common parlance. “Concurrent” means two or more causes that arise independently and combine their effects, such that a loss would not have happened if one was missing. An example is a rot-weakened garage being blown down in a strong wind. “In sequence” refers to multiple causes that are dependent on one another and follow each other like dominoes toppling. An example is a rain storm that causes a hillside to slide into a house.

Merely because a house is damaged by two or more physical forces does not mean the house has been hit by concurrent or sequential forces. That is because property insurance policies do not cover houses *per se*, but couch coverage in some phrase such as “accidental direct physical loss to property.” A property loss, then, has a specific, narrow meaning – it is possible that one house can suffer numerous losses, and with each item of damage being due to only a single force. The word “concurrent,” in this sense, really has nothing to do with timing of the forces, but instead has to do with whether the forces combined to cause the very same damage.

Once these points are understood, it is relatively easy to see that Katrina did not involve concurrent or sequential damage. Where wind and water both acted upon a house, they were separate forces that caused separate damage. The fact that uncovered water damage happened does not cancel out covered wind damage. For example, suppose wind-driven rain shattered a window pane and caused \$100 in damage to an \$800 couch. If flood surge later came along and took away the remaining \$700 value, the insurer still owes the \$100, because the \$100 loss would have happened “in the absence of” the excluded water damage.

Now that we’ve gone through the rudiments of how this language works, another point needs to be made. Insurers, by and large, and contrary to public perception, accept the explanation and examples I have given here. So what? Well, this means that insurers did not develop anti-concurrent cause language to take covered damage and make it uncovered. Anti-concurrent cause language was developed to prevent courts from creating new causes of loss, and from exercising a tendency in loss causation analysis to get around exclusions by finding several concurrent or legally significant causes, and picking the uncovered ones as the most important or dominant causes.

This has been a long-winded precursor to talking about the cases themselves, but, if we hadn’t covered these points, there is not much point to talking about the Fifth Circuit cases at all.

The Fifth Circuit Cases

Four important Katrina cases have been appealed from trial courts to the Fifth Circuit, and because of the breadth of the court’s rulings, four is likely to remain the number of significant Fifth Circuit Katrina cases. Although dozens, perhaps hundreds, of Katrina cases remain in litigation in federal district courts (insurers routinely remove these cases to federal court whenever possible),

all the main issues will have been settled by these four cases. As of this writing, three have been decided, *Tuepker v. State Farm*, 507 F.3d 346, *Leonard v. Nationwide Mutual*, 499 F.3d 419 (5th Cir. 2007), and *In Re Katrina Canal Breaches*, 495 F.3d 191 (5th Cir. 2007). Although oral arguments have been heard on the fourth, *Broussard v. State Farm*, Docket No. 07-60443 (Jun. 08, 2007), the opinion has not yet been handed down.

The Fifth Circuit cases are largely a story of insurer success, perhaps greater success than they would have hoped for. After initial losses at the trial court level on some key policy provisions, namely anti-concurrent cause language in two major cases, and the flood exclusion in another, insurers not only reversed these losses, but also ran up the score in *Tuepker* and especially in *Leonard*. In *Tuepker* and *Leonard*, the trial court upheld flood exclusions but found anti-concurrent cause language ambiguous and unenforceable. The lower court's holding in these cases was incorrect, in my opinion, but the causation analysis was quite close to being right.

In contrast, the Fifth Circuit's rulings on anti-concurrent cause language extended the interpretation of such language even beyond that advocated by insurers at the trial court level, and suggested a much broader application of anti-concurrent language than insurers had actually employed in adjusting Katrina claims. In one of the greatest ironies of Katrina litigation, policyholders mounted a full-scale charge against anti-concurrent cause language, which was not really a significant issue in Katrina claims adjusting, and in the end the Fifth Circuit not only rebuffed these assaults but gave insurers an interpretation they had not really asked for and had little right to expect. Anti-concurrent cause language was not rendered null, as policyholders had hoped, but instead was validated and emerged stronger than ever.

The Fifth Circuit decided *Leonard* before *Tuepker*, and in some ways *Leonard* is an unfortunate decision that will cause problems for years to come. In *Leonard*, the court upheld the Nationwide flood exclusion, which was not very surprising or controversial, but provided a rather loose causation analysis. The *Leonard* opinion implied that anti-concurrent cause language actually works like the media stereotype – to cancel out an obligation to pay covered wind damage merely because of the fortuitous occurrence of uncovered flood water acting on the same part of the house or even merely on the same house. The *Tuepker* decision featured a more focused and more accurate discussion of how anti-concurrent cause language works, but, because it followed *Leonard*, there was not a lot of room for the *Tuepker* court to work with. Although *Tuepker* does not replicate the faults of *Leonard*, it does not correct them either.

In the third major case, *In Re Katrina Canal Breaches*, a consolidated opinion addressing the appeal of four property owners, the Fifth Circuit reversed the lower court's ruling that the flood exclusions of several insurers were ambiguous and unenforceable. This case features the Fifth Circuit's best understanding of causation analysis, although it was an easier analysis than that involved in either *Leonard* or *Tuepker*. The basis for the lower court's finding of ambiguity was that a number of insurers' flood exclusions, when applied to damage caused by the collapse or overtopping of man-made levees, did not expressly exclude human negligence as a cause.

As you may recall, this type of creative search for causes led to the development of anti-concurrent cause language in the first place, although *In Re Katrina Canal Breaches* was not about anti-concurrent cause, because it was obvious that only one cause – water – was at issue. The Fifth Circuit correctly determined that the anti-concurrent language was not relevant, because only single causation was present. This made for a cleaner causation analysis by the court, which stated that, given the ubiquitous hand of man, virtually any flood could be said to involve human negligence to some degree.

A fourth important case, *Broussard v. State Farm*, has not yet been decided by the Fifth Circuit. However, both policyholder attorneys and insurer-side lawyers sensed the wind was blowing strongly the insurer's way during oral argument before the three-judge panel, to the degree it will

be a great surprise if the Fifth Circuit rules against State Farm¹. *Broussard* is about neither anti-concurrent cause language nor the flood exclusion. Instead, *Broussard*'s central issue is the allocation of the burden of proof of damages, one that received little attention in Katrina litigation. This dull sounding phrase is, unlike anti-concurrent cause language, the real key to the most controversial Katrina cases, namely those cases in which homes were eradicated by hurricane damage, making it difficult to say whether covered wind or uncovered storm surge was the agent of destruction. With these so-called "slab" cases, the evidence is scattered or gone, and rulings regarding which side has the burden of proving what damage occurred, what caused it, and what that damage is worth, usually will determine which side wins. This statement is all the more true because insurers have thus far uniformly faced hostile juries in Katrina cases that had little patience for insurers' arguments, and hammered them with a vengeance at any opportunity over perceived foot-dragging and improper treatment of homeowners².

In private and candid interviews with me, some Katrina policyholder lawyers admitted that the outlook for their side was bleak if the Fifth Circuit returned a decision in *Broussard* as favorable to insurers as they expect. Not only is the burden of who has to prove damages at stake, but State Farm has also appealed the denial of its motion for change of venue from the jury pool of southern Mississippi, where almost everyone either suffered Katrina destruction or knew someone who did, to northern Mississippi, which not only has a less favorable jury pool but presents logistical difficulties for Gulf Coast firms to open new offices for pre-trial and trial work.

If *Broussard* goes as expected, the history of Katrina appeals will be one of complete insurer success. Yet, in another sense, perhaps policyholders won after all. There were far too many Katrina cases filed – probably more than 2,000 – for there to be any realistic chance that more than a relative few could come to trial. Some guideline had to be used for settlement of these cases. Adverse legal rulings in cases like *Tuepker* and *Broussard*, along with the generally horrendously adverse verdicts in most cases that went to juries, undoubtedly played a role in insurers' decision to settle and the price they were willing to pay. Whether insurers overpaid or underpaid is a topic that is still much in debate, but if it had not been for policyholders' victories in legal rulings at the district court level in the four major cases, temporary though those victories may have been, the price of settlement for policyholders would have been significantly lessened.

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¹ David Rossmiller has written a great deal about the *Broussard* case on his legal blog, perhaps more than any other of the Katrina cases. See <http://www.insurancecoverageblog.com/archives/first-party-insurance-fifth-circuit-hears-oral-arguments-heard-in-broussard-v-state-farm.html> for analysis of oral arguments in the case.

² For a good example of juror sentiment, read an interview with one of the jurors in *Kodrin v. State Farm*, No. 2:06-cv-08180-CJB-ALC (Oct. 16, 2006), a case in federal court in Louisiana. See <http://www.insurancecoverageblog.com/archives/first-party-insurance-juror-in-kodrin-v-state-farm-we-all-agreed-that-the-insurer-didnt-do-right-by-the-insureds-and-they-were-treated-very-poorly.html>.