

Court Upholds Flood Exclusions In Katrina Canal Breaches Litigation, Adopting Arguments Wiley Rein Advanced for Insurer Trade Groups

August 2, 2007

Washington, DC - The United States Court of Appeals for the 5th Circuit today upheld the application of widely-used flood exclusions in homeowners and commercial insurance policies in *In Re: Katrina Canal Breaches Litigation*, No. 07-30119 (5th Cir. August 2, 2007).

The plaintiffs' had contended that the policies' flood exclusions did not unambiguously exclude coverage for losses from the inundation of water in New Orleans because the levee breaches releasing the water allegedly were caused by the negligent design, construction or maintenance of the levees. Adopting several arguments advanced by Wiley Rein LLP on behalf of the American Insurance Association, the National Association of Mutual Insurance Companies, the Property Casualty Insurers Association of America and the Reinsurance Association of America as amici curiae in this case, the Court found that the flood exclusions were unambiguous and, whether or not negligent design, construction or maintenance of the levees contributed to their failure in the wake of Hurricane Katrina, the water inundation of New Orleans fit squarely within the meaning of "flood." Slip op. at 31.

In particular, the Court rejected the plaintiffs' attempt to carve out of the policies' flood exclusions water inundation from man-made causes of loss, at least in the context of the levee breaks at issue. The Court noted that the plaintiffs' approach "would lead to absurd results," recognizing that "[a]ny time a flooded watercourse encounters a man-made levee, a non-natural component is injected into the flood, but

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that does not cause the floodwaters to cease being floodwaters."

On behalf of the amici, Wiley Rein had specifically criticized the "natural versus man-made" distinction in the context of flood control measures, arguing:

Indeed, in almost any setting involving flood mitigation efforts - which are increasingly used and required throughout the U.S. - the lower court's reasoning fails. If building code measures prove inadequate to protect a home against flood, would a homeowner's water damage loss be considered covered due to man-made error? The attempt to narrow what is excluded as flood produces absurd results inconsistent with the policy terms and intent.

Brief of Amici Curiae American Insurance Association, the National Association of Mutual Insurance Companies, the Property Casualty Insurers Association of America and the Reinsurance Association of America at 5.

The decision today of the three-judge panel of the United States Court of Appeals for the 5th Circuit means that under commonly-used terms of homeowners and commercial insurance policies there is no coverage for water damage resulting from the failure of the levees surrounding New Orleans after Hurricane Katrina.

Wiley Rein LLP attorneys Laura A. Foggan and Benjamin Theisman represented the insurer trade groups as amici in this appeal.