

Fifth Circuit Upholds Homeowner's Policy Exclusions Barring Coverage for Concurrent Water and Wind Damage Due to Hurricane Katrina

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Applying Mississippi law and relying upon two of its prior decisions, the Fifth Circuit Court of Appeals recently found that State Farm Fire & Casualty Company may refuse to cover concurrent water and wind damage caused by Hurricane Katrina, pursuant to certain exclusions in State Farm's policy.

In *Tuepker v. State Farm Fire & Casualty Company*, ___ F.3d ___, available at 2007 WL 3256829 (5th Cir. Nov. 6, 2007), State Farm had issued a homeowner's policy to John and Claire Tuepker, whose residence and the property within were completely destroyed by Hurricane Katrina. After State Farm denied the Tuepker's claim under the homeowner's policy, the Tuepkers brought suit in the United States District Court for the Southern District of Mississippi seeking, among other things, a declaratory judgment with respect to certain exclusions contained in the State Farm policy.

State Farm subsequently brought a motion to dismiss the Tuepker's complaint, essentially arguing that their claims were barred by the plain language of the State Farm policy's Water Damage Exclusion and Anti-Concurrent-Causation Clause. The district court denied State Farm's motion to dismiss, and an interlocutory appeal followed.

Despite denying State Farm's motion, the district court found that the water damage exclusion in the State Farm policy was valid and enforceable. The water damage exclusion excludes coverage for damage caused by "flood, waves, tidal water, and overflow of a body of water, . . . all whether driven by wind or not." On appeal, the Tuepkers sought a declaration that the water damage exclusion did not apply to damage caused by Katrina's "storm surge." In affirming the district court, the Fifth Circuit relied upon its previous interpretation of "storm surge," as found in *Leonard v. Nationwide Mutual Insurance Company*, 499 F.3d 419 (5th Cir. 2007). The court in *Tuepker* noted that, in *Leonard*, it had concluded that a "storm surge" is a synonym for a "tidal wave" or "wind-driven flood" and that the policy's failure to use the term "storm surge" did not render the water damage exclusion ambiguous.

With respect to the anti-concurrent-causation clause in the State Farm policy, the district court had concluded that this provision was ambiguous. State Farm's Anti-Concurrent-Causation Clause (ACC clause), excludes coverage for any loss that would not have occurred in the absence of certain excluded events, including water damage. The district court found the ACC clause ambiguous because "where there is damage caused by both wind and rain (covered losses) and water (losses excluded from coverage) the amount payable under the insurance policy becomes a question of which is the proximate cause of the loss." The theory relied upon by the district court is referred to as the Efficient Proximate Cause Doctrine.

On appeal, the Tuepkers argued that the ACC clause was ambiguous on its face and because it conflicted with a hurricane deductible endorsement to the State Farm policy. The Fifth Circuit squarely rejected any argument that the ACC clause was ambiguous on its face, again relying upon its decision in *Leonard*. The court in *Tuepker* stated that in *Leonard*, it had considered a similar ACC clause and found it unambiguous under Mississippi law, directing that, pursuant to the language of the ACC clause, coverage is excluded for damage caused by wind acting concurrently or sequentially with water.

Regarding the hurricane deductible endorsement to the State Farm policy, the Tuepkers argued that the endorsement would lead a reasonable policyholder to expect that their homeowner's policy would provide coverage for loss due to a storm surge. However, the Fifth Circuit also rejected this argument, relying on its prior interpretation of hurricane-deductible endorsements as "do[ing] nothing more than alter[ing] the deductible for damage caused by a hurricane." (quoting *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 220 (5th Cir. 2007)). Based upon its ruling in *Leonard* regarding the ACC clause and in *In re Katrina* regarding the hurricane deductible endorsement, the Fifth Circuit reversed the district court's holding that the State Farm ACC Clause was ambiguous.

The Tuepkers also argued on appeal that the ACC clause was unenforceable because it conflicted with the Efficient Proximate Cause Doctrine, as determined by the district court. The Fifth Circuit noted that the Mississippi courts have yet to determine whether a homeowner's policy would preclude recovery of damages that result from the concurrent action of wind and water in a hurricane. In *Leonard*, however, the Tuepker court stated that it had made an "Erie guess" regarding how the Mississippi Supreme Court would rule on this issue. The Fifth Circuit concluded that, under Mississippi law, ACC clauses are enforceable and that they trump the Efficient Proximate Cause Doctrine. As a result, the Fifth Circuit reversed the district court's determination that the State Farm ACC clause was invalid to the extent that it conflicted with the Efficient Proximate Cause Doctrine.

The Fifth Circuit's decision in *Tuepker* will have a significant impact on the interpretation and application of water damage exclusions, ACC clauses and the Efficient Proximate Cause Doctrine to hurricane claims.

FIFTH CIRCUIT UPHOLDS HOMEOWNER'S POLICY EXCLUSIONS BARRING COVERAGE FOR CONCURRENT WATER AND WIND DAMAGE DUE TO HURRICANE KATRINA Cont.

Should you have any questions about the *Tuepker v. State Farm* decision, or about insurance coverage for hurricane claims in general, please feel free to contact any member of Plunkett Cooney's Insurance Practice Group or the Insurance Practice Group co-leaders, Chuck Browning at 248-594-6247 or Ken Newa at 313-983-4848. A practice group directory can be found on the firm's web site.

For a complete copy of *Tuepker v. State Farm Fire & Casualty Company*, [click here](#).