

Lawyer Sees Flaw In Levee Breach Decision

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A Louisiana federal judge who stunned carriers last year by finding that many of their policy flood damage exclusions do not hold water, appears to have seen the law differently in 2005, according to a legal expert.

That appraisal comes from attorney Randy J Maniloff, with the White and Williams law firm, in a working paper written for the Washington Legal Foundation that examined decisions by U.S. District Court Judge Stanwood Duval Jr. in New Orleans.

If Mr. Maniloff is correct, and a flaw is seen in Judge Duval's reading of the law, it could impact an appeals court review that is pending, the attorney said in an interview.

Mr. Maniloff wrote that the judge's latest decision "is, plain and simple, an example of a court torturing policy language to find coverage that clearly did not exist, in an effort to bring much-needed financial resources to a wide-scale problem."

By some estimates, the decision, if upheld, would provide \$1 billion to property owners impacted by levee breaks in New Orleans during Hurricane Katrina.

In Mr. Maniloff's view, unlike the judge, appellate courts "are more likely to put blinders on and not be blinded by the sympathies of the case"--that is, thousands of policyholders

In November 2006, Judge Duval--when he ruled on the effects of Hurricane Katrina on the levee breaks--found that flood damage exclusion language in policies issued by Allstate and other carriers does not "exclude water damage caused by negligent or intentional acts of man."

The policy language, he said, "does not address the ambiguity of the term 'flood' and the fact that all of the listed 'causes' appear to be the result of natural occurrences--not the monumental civil engineering debacle that is alleged by plaintiffs."

Because several insurers' flood exclusions did not distinguish between man-made and naturally-occurring floods, Judge Duval found they are ambiguous and unenforceable, according to Mr. Maniloff's reading.

But in another ruling in 2005, according to Mr. Maniloff, Judge Duval took a different approach in addressing coverage for damage to a home that was flooded by Tropical Storm Allison. Contractors at work on repairs found the home had a defective exterior stucco system, which the homeowners argued had caused long-term, previously unknown water damage.

In the course of a ruling on the case, Judge Duval found "there is a material question of fact as to what extent the damage claimed by the plaintiffs is excluded under the homeowner's policy as flood water damage."

According to Mr. Maniloff, implicit in such a decision is that in that case, the Allstate flood exclusion would apply to some of the damage.

The attorney wrote that it was curious Judge Duval took the flood exclusion's applicability to a man-made flood for granted in that case, yet devoted 30 pages to the issue in arriving at a contrary conclusion in the Katrina Canal Breaches decision.

Allstate has appealed the Canal Breaches ruling, and a decision is pending from the 5th Circuit U.S. Court of Appeals, which heard arguments May 6 and said they would rule shortly.