

Katrina cases like nothing veteran attorney's ever seen before

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By John O'Brien

WASHINGTON, D.C. (Legal Newline) - Even for an accomplished attorney like Sheila Birnbaum, Hurricane Katrina litigation in Mississippi offers a learning experience.

Birnbaum was one of two attorneys from Skadden, Arps, Slate, Meagher & Flom to participate Sept. 23 in the **Washington Legal Foundation's** Web seminar on legal issues raised by 2005's Katrina, a devastating storm that led to a bitter fight in Mississippi against the insurance industry.

Skadden Arps is representing State Farm in cases against it, brought by policyholders whose homes and businesses were lost or damaged.

"You had to be dogged to get to the truth despite the obstacles put in front of you," said Birnbaum, who has been named by the National Law Journal as one of the 100 most outstanding members of the legal profession and one of the 50 most powerful women in American business by Fortune.

"You know you're going to lose on the trial level because of the emotional issues."

After she and colleague Hayden Coleman went over the highlights, Birnbaum, one of the heads of Skadden's Complex Mass Tort and Insurance Group, shared what she has learned so far. One lesson, she said, was that sometimes a good offense can be best for the defense.

She learned that from her opponent.

"You cannot, sometimes, be cautious. You need to be proactive in your responses when in this type of legal environment," Birnbaum said. "Otherwise, you're always playing catch-up and you never define what is happening to you."

As noted during the seminar, it didn't take long after Katrina for the court papers to start piling up.

Hood sued State Farm and four other insurance companies weeks after Katrina, claiming that they intentionally misrepresented to policyholders the amount of damage done by wind (covered by their policies) and water (covered by a federal program).

A proposed settlement with State Farm had the potential to affect more than 35,000 policyholders, but a federal judge did not approve of it for procedural reasons. A separate successful settlement of 640 claims was coupled with a \$5 million payment to Hood with the agreement his criminal investigation would cease, the company says.

Hood eventually sued State Farm again for not making the rejected settlement work. State Farm claims he threatened it with the prospect of another criminal investigation and sued him.

"In revealing that (last) subpoena, it seemed remarkably like if not identical to the previous subpoenas," Coleman said.

"State Farm, looking at this, decided it had to be proactive in this arena and sued Attorney General Hood in federal court, claiming the renewed prosecution violated its Constitutional rights and the letter and spirit of the agreement."

Birnbaum cited the strategy as a successful offensive, as the suit was settled after a judge found that a previous agreement forbidding Hood from criminally prosecuting State Farm was enforceable.



Birnbaum

At the same time, State Farm battled with famed (and now jailed) plaintiffs attorney Richard "Dickie" Scruggs, who grouped together a handful of firms for the purpose of filing Katrina claims. The 640-case settlement provided \$26 million for the Scruggs Katrina Group.

Scruggs admitted that he tried to manipulate the political and legal aspects of the cases, as well as public opinion, to force settlements.

"He coordinated with state and federal officials to try to vilify the insurance industry, and State Farm in particular," Birnbaum said, noting he and some of his associates were campaign contributors of Hood's.

"In our opinion, there was some quid pro quo for the activities going on."

An FBI report released this year says Scruggs offered \$500,000 to two of his alleged co-conspirators in a judicial bribery scheme to attempt to convince Hood not to indict State Farm on criminal charges regarding Hurricane Katrina claims because Scruggs feared it would put an end to a possible settlement with his Scruggs Katrina Group.

Hood said he is too hard-headed to be influenced by outside forces.

Federal prosecutors also said Scruggs and Hood worked closely to preserve confidential documents stolen from State Farm by a pair of sisters who worked at a company that teamed with State Farm after Katrina.

Scruggs was charged with contempt for allegedly violating a Dec. 2006 order from a federal judge that told Scruggs to return the insurance documents.

Instead, Scruggs gave them to Hood, claiming he was permitted to hand them over to law enforcement officials. Though Scruggs beat the criminal contempt charge, a federal judge found him and the sisters in civil contempt.

Scruggs had promoted the sisters to the media as whistleblowers who would reveal the insurance industry's treacherous practices and gave them \$150,000 salaries as litigation consultants.

Embracing the roles of the media and the growing number of blogs that followed the stories was important Birnbaum said.

"In today's world, you have to be able to respond to the media in a quick manner to tell your story," she said. "This is especially so when the plaintiff is trying to use them to affect the jury pool or pressure settlements.

"The era of 'no comment' in litigation just doesn't work anymore."

Ultimately, State Farm reached a claims-revisiting policy with the state's Insurance Department, while Scruggs, son Zach and law partner Sidney Backstrom pleaded guilty in March to attempting to bribe a state judge in a dispute with a former partner over the \$26 million in Katrina fees.

Scruggs is serving a five-year prison sentence, and the case attracted heavy media attention for months.

His former associates changed their name to the Katrina Litigation Group, but Coleman was one of the attorneys who crafted a gameplan to have them disqualified from all Katrina cases, which they were.

It was Birnbaum's final lesson -- sometimes nothing is as important as luck.

"The bribery indictments helped change the playing field," she said. "People began to listen to State Farm's side of the story as to how all this was being manipulated and how no fraud had taken place, and State Farm had done what they should've done as a good insurer trying to handle claims under very, very difficult circumstances."

From Legal Newsline: Reach John O'Brien by e-mail at john@legalnewsline.com.

John O'Brien