WIND VERSUS WATER:
WHY "PROXIMATE CAUSE" SHOULD HELP, NOT HURT,
POLICYHOLDERS WHO SEEK COVERAGE FOR HURRICANE CLAIMS

By: Rhonda D. Orin[1]

When Hurricanes Katrina and Rita swept along the Gulf Coast, each one looked on television news like a cohesive whole. The swirling shape, with an eye in the center, was a single event – what most of us recognized as simply a hurricane.

But not so for the insurance industry. Insurance companies saw each hurricane as a series of wholly separate and unrelated events. One event was wind. Another was rain. Still others were high water, waves, storm surges, and so on.

The same is true for the consequences. To the "untrained" eye, the flooding of New Orleans, the power failures that rendered businesses inoperative, the evacuation orders that closed down entire communities, and the looting and thefts that followed the physical devastation all arose from single events: the hurricanes.

Here again, the insurance industry disagreed. It viewed each of the above as a separate event, rather than a collective consequence of the hurricanes.

There is a reason for the insurance industry to draw such distinctions. By parsing the hurricanes into the smallest possible parts, the insurance industry increases

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its chances of finding grounds for denying coverage. Sometimes, this approach enables insurance companies to deny coverage for the entirety of a claim. Other times, this approach enables them to deny coverage for various parts of a claim – after first placing the burden on policyholders to prove which parts are covered.

This entire system is fundamentally unfair to policyholders. When policyholders buy insurance policies that cover hurricanes, they think that they are buying coverage for, well, hurricanes. They think that if a hurricane roars through their area and leaves physical and economic devastation in its wake, the damages that result from that hurricane will be covered.

Another reason why this system is unfair is that the insurance policies are drafted solely by the insurance companies. The insurance companies get to define the key terms, such as "flood." The insurance companies get to draft the exclusions, even including draconian language that purports to exclude coverage whenever an excluded peril is among many causes of alleged harm. Finally, the insurance companies get the first crack at interpreting the provisions that they drafted, leaving the already-beleaguered policyholders to choose among costly legal alternatives if they disagree.

Certainly, there are checks and balances in this system. One of them is the role played by state insurance departments, which typically are empowered to review and approve the policy forms that the insurance companies propose to sell in their states. Another is the role played by state attorney generals and the courts in reviewing the insurance company denials.

In this regard, the responses of state insurance departments, state attorney generals and the courts to Hurricanes Katrina and Rita have been informative. Many of

these entities have made clear, through public statements and actions, that the parse-and-deny approach of the insurance industry is not going to work here.

The Texas Department of Insurance ("TDI") and the Texas attorney general, for example, have made clear that they are not going to allow insurance companies to deny insurance coverage to Texas residents who have been deprived of access to their property due to power failures. They have sought and obtained a court order against Allstate Insurance Company, providing this relief. [2]

The Mississippi Attorney General's office has made clear that it believes that insurance coverage provisions that attempt to exclude damage caused by water are unenforceable. On September 15, Attorney General Jim Hood filed a lawsuit in Hinds County, Mississippi, First Judicial District, alleging that insurance companies are interpreting their policies in an overly restrictive manner; that they are taking advantage of policyholders who do not understand their rights; and also that they are selling insurance policies that are so difficult to understand as to be unconscionable and therefore void.[3]

A related situation has arisen in Louisiana, where some 160,000 property and business owners have filed a class action lawsuit against the Commissioner of Insurance, Robert Wooley, and a number of insurance companies.[4] There, the plaintiffs are asking the court for an order requiring the insurance commissioner to nullify the exclusions for damage caused by rising water. They take the position that the flooding

[2] http://www.consumeraffairs.com/news04/2005/tx_rita_allstate.html.

[3] http://www.ago.state.ms.us/insurance.pdf.

[4] While this class action is the largest one filed thus far, other class action lawsuits have been filed in Louisiana and Mississippi and more such filings are anticipated.

in New Orleans was caused by negligence in the construction and maintenance of the levees, rather than an excluded "Act of God." Accordingly, they contend that the high water exclusions were not intended to apply to the flooding.[5]

Against this backdrop of current events, the following is a brief review of the standard policy language on wind, water and hurricanes and the legal issues about causation under these policies. It is followed by a review of important court decisions on causation-related issues in the states most affected by Hurricanes Katrina and Rita, namely Texas, Louisiana and Mississippi.[6]

I. STANDARD-FORM POLICY LANGUAGE

Insurance for losses caused by hurricanes typically is provided under property policies, which are available to businesses as part of comprehensive or package policies, and to residents in such forms as homeowners' policies and renters' policies.

Commercial property insurance policies generally fall into two types. The first type covers losses caused by "all risks of direct physical loss or damage," except risks that are specifically excluded in the policy. In these broad policies, known as "all risk" policies, once an insured proves that it has suffered a loss, the insurance company has the burden of proving that the loss is not covered.[7]

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[5] http://www.consumeraffairs.com/news04/2005/katrina_scruggs.html.

[6] The attached list of cases obviously is not exhaustive. There are many important decisions regarding hurricane losses in all three of these jurisdictions. Because this area of law is fact-intensive, any policyholder facing a coverage question should find search for the legal precedent that is factually apposite to its own situation.

[7] 13A George J. Couch, Couch on Insurance 2d § 48:142 (2d ed. revised 1982).

The other type of commercial property policy takes the opposite approach. It covers property damage or loss caused by listed perils, such as: fire, wind, hail or vandalism. Known as a "named perils" policy, it typically contains a wide variety of exclusions, including exclusions for many different types of weather conditions. The policyholder typically is found to have the burden of overcoming these exclusions, in accordance with basic principles of insurance law.[8]

Both types of property insurance policies contain provisions insuring personal property. This coverage usually provides coverage for specified types of personal property contained within the covered premises. Often the coverage extends to property found within a certain distance from the covered premises.

Useful examples of this policy language can be found in the standard commercial policy of the Texas Windstorm Insurance Association ("T.W.I.A.").[9] With regard to buildings, labeled "Coverage A," the policy expressly states that it covers:

> 1. Building or structure, meaning everything which is legally part of the building or structure described in the Declarations. However, we do not cover machinery which is not used solely in the service of the building.
> 2. Personal property owned by you that is used for the service of and located on the described location . . . .

Next, with regard to personal property, labeled "Coverage B," the policy expressly states that it covers:

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[8] Id.

[9] See T.W.I.A. Commercial Policy/Windstorm and Hail, available from the Texas Windstorm Insurance Association, 5700 South MoPac Expressway, Building C, Suite 300, Austin, Texas 78749. Comparable language can be in the T.W.I.A. Dwelling Policy/Windstorm and Hail, available from the same association.

> Business personal property located in or on the building described in the Declarations, or in the open on the described location, or in a vehicle or railroad car located within 100 feet of the described building, . . ."

These coverage agreements are followed by sections that delineate what types of personal property are and are not covered. Then comes a section called "Covered Causes of Loss," in which the policy specifies:

> We insure for direct physical loss to the covered property caused by windstorm or hail unless the loss is excluded in the Exclusions.

The next section – and the most important one, for purposes of this article – includes, but is not limited to, the following exclusions:

> The following exclusions apply to loss to covered property:
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> 1. Flood.
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> We will not pay for loss or damage caused by or resulting from flood, surface water, waves, tidal water of tidal waves, overflow of streams or other bodies of water or spray from any of these whether or not driven by wind.[10]
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> * * *
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> 5. Power Failure.
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> We will not pay for loss or damage resulting from the failure of power or other utility service supplied to the described premises, if the failure occurs away from the described premises. However, we will pay for loss resulting from physical damage to power, heating or cooling equipment located on the described premises if caused by windstorm or hail.

[10] There are many other standard-form flood exclusions. For example, the standard form published by the Insurance Services office has one subsection similar to the exclusion above, then includes other subsections pertaining to sewer back-up and below-ground seepage.

6. Rain.

> We will not pay for loss or damage caused by or resulting from rain, whether driven by wind or not unless wind or hail first makes an opening in the walls or roof of the described building. Then we will only pay for loss to the interior of the building, or the insured property within, caused immediately by rain entering through such openings.

The structure of this policy places causation directly into question. The problem is that, while some events are covered and others are not, damages often arise after a series of events take place. Hurricane Katrina is a perfect example. It involved a wide variety of perils, including wind, wind-driven water, flooding, levee breaches, sewage overflows, power failures, court-ordered evacuations, fire, looting, pollution and mold.

The courts have developed various tests for determining whether there is coverage when a covered peril and an excluded peril combine in some proportion to cause a loss. Most prominent among them is the doctrine of "efficient proximate cause." This doctrine provides for coverage if the covered cause is the efficient and dominant cause: the one that sets the loss into motion.[11]

The highest courts of two of the states most affected by Hurricanes Katrina and Rita – Louisiana and Mississippi – have adopted the doctrine of efficient proximate cause.[12] The Texas Supreme Court has no clear authority on this question.[13]

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[11] See Sidney I. Simon, Proximate Cause in Insurance, 10 Am. Bus. L.J. 33, 37 (1972).

[12] See Louisiana and Mississippi cases cited in Section III, infra.

[13] The Texas Supreme Court came close to addressing this question when it decided Hardware Dealers Mut. Ins. Co. v. Berglund, 393 S.W.2d 309 (Tex. 1965), but made clear that its decision did not resolve the issue. Id. at 314 ("Cases in which an insurer has been held liable for a loss proximately caused by a peril insured against, although a hazard not covered by the policy was also involved, are not apposite here").

The "efficient proximate cause" generally is defined as the "dominant" cause. If the dominant cause of the loss is a covered peril, there is coverage; if the dominant cause of the loss is an excluded peril, there is no coverage or, in some instances, reduced coverage. Although the "efficient proximate cause" doctrine most commonly has been applied where a loss was caused in part by a covered peril and in part by an excluded or non-covered peril, it is equally applicable where, as here, different limits of liability and deductibles may apply depending on what is determined to be the cause of the loss.

The "efficient proximate cause" doctrine sounds simple on paper. In practice, though, it is complicated to apply. One helpful explanation of "efficient proximate cause" offered in a respected treatise on insurance, and followed by many courts, is that it is the "risk [that] set[s] the other causes in motion which, in an unbroken sequence, produced the result for which recovery is sought." [14]

This definition of "efficient proximate cause" may be helpful in arguing that the damages at issue with respect to Hurricanes Katrina and Rita were caused by wind, and not by flood, since it was the hurricanes that set in motion all the other events that led to the property damage at issue. Policyholders will argue (and insurance companies no doubt will disagree) that all subsequent events, including the breaches of the levees in New Orleans, were set in motion, in an unbroken sequence, by the hurricanes.

The insurance company's response to this coverage-friendly doctrine seems to be the addition of language designed to defeat coverage. Although not used by the

[14] 7 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 101:57 (3d ed. 1997) (footnotes omitted).

T.W.I.A. in the sample policy highlighted above, many insurance policies contain a prefatory clause to the exclusions section, generally known as the "anti-concurrent causation" provision.

As published by the Insurance Services Offices ("ISO"), a typical anti-concurrent causation lead-in provision states as follows: "We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." [15]

This provision is significant because, if enforceable, it has the capacity to alter substantially the scope of coverage under a policy. Accordingly, many challenges have been raised to its enforceability. The lawsuit filed in September by Mississippi's Attorney General is one example.

Mississippi business owners and homeowners can take heart in the knowledge that the issues raised in that lawsuit have prevailed in other courts. The highest court in Washington State, for example, has held that as a matter of public policy, insurance companies may not use such provisions to avoid the efficient proximate cause doctrine.[16] West Virginia's highest court has held that anti-concurrent causation clauses

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[15] See ISO's current Causes of Loss – Special Form (CP 10 30 04 02), accompanying ISO's Building and Personal Property Coverage Form (CP 00 10 04 02), cited in Unraveling Insurance Coverage for Hurricane Katrina: No *Big Easy* Task at 2, The National Underwriter (October 2005), http://cms.nationalunderwriter.com/cms/fcsbulletins/product%20content/Account%20and%20Risk%20Management/Miscellaneous%20Discussions/Claims%20Management/Hurricane%20Katrina%20coded.

[16] Safeco Ins. Co. of Am. v. Hirschmann, 773 P.2d 413, 414-16 (Wash. 1989) (en banc).

are ambiguous and that it offends the reasonable expectations of a policyholder to read them as precluding coverage for damage proximately caused by a covered peril.[17]

On the other hand, this favorable response has not been universal. The highest court of Utah held that provisions like the anti-concurrent causation provision are enforceable, as insurance companies are entitled to contract around any applicable causation rule.[18]

Notably, there is no state law yet in Texas, Louisiana and Mississippi as to the enforceability of this provision, as the highest courts of these states have not had occasion to examine it.[19]

II. APPLICABLE DOCTRINES AND STATUTES

Historically, the courts have considered a number of additional matters when called upon to decide insurance coverage disputes.

Principal among these is the doctrine of *contra proferentem*.[20] This doctrine requires ambiguities in insurance policies to be interpreted against the insurance companies that drafted the policies, and in favor of coverage.[21]

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[17] Murray v. State Farm Fire & Cas. Co., 509 S.E. 2d 1, 14 (W. Va. 1998).

[18] Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272, 1277 (Utah 1993).

[19] One federal court in Mississippi, while attempting to apply Mississippi law, applied an anti-concurrent causation clause to exclude coverage for a loss involving earth movement. But this decision was based on the erroneous determination that Mississippi had not adopted the doctrine of "efficient proximate cause." Rhoden v. State Farm Fire & Cas. Co., 32 F. Supp. 907, 912 (S.D. Miss. 1998). The Mississippi Supreme Court had adopted that doctrine back in 1972, in Grace v. Lititz Mut. Ins. Co., 257 So.2d 217 (Miss. 1972). Because bad rulings make bad precedent, a state court in Mississippi recently relied on the erroneous decision in Rhoden to find that the anti-concurrent causation clause barred coverage for property damage to a home. Boteler v. State Farm Casualty Ins. Co., 876 So. 2d 1067 (Miss. Ct. App. 2004). But Boteler is a lower court decision and accordingly does not set forth the law of Mississippi.

Courts typically agree that ambiguities are proved when courts adopt different interpretations of the same provision.[22] Thus, the mere existence of a dispute over the meaning of the flood, rain and water exclusions, and the citation of supportive – yet contrary – authority by both policyholder and insurance company, should be sufficient to prove ambiguity, and tip the scales in favor of coverage.

Another important resource for the courts has been state statutes, which often are policyholder-friendly. For example, all three of the states being studied here – Texas, Louisiana and Mississippi – have statutes designed to protect policyholders against bad faith practices by insurance companies, particularly including unfair settlement practices and late payment practices.[23] As shown in Section III, these statutes have been used affirmatively in protecting hurricane victims from insurance company attempts to shortchange them. These statutes are likely to prove useful and important in the battlefields over Hurricanes Katrina and Rita.

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[20] 1 George J. Couch, Couch on Insurance 2d § 7:11 (2d ed. revised 1982).

[21] McMaster v. N.Y. Life Ins. Co., 183 U.S. 25, 40, 22 S. Ct. 10, 16 (1901) ("the rule is that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract").

[22] See, e.g., Murray, 509 S.E.2d at 9, n. 5 ("[a] provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance").

[23] E.g., LA. REV. STAT. ANN. § 22:658 (2005) (payment and adjustment of claims); LA. REV. STAT. ANN. § 22:1214 (2005) (unfair or deceptive insurance practices); LA. REV. STAT. ANN. § 22:1220 (2005) (bad faith claims settlement practices); TEX. INS. CODE ANN. §§ 541.001 and 542.001 (2005) superseding TEX. INS. CODE ANN. art. 21.21 (1951) (unfair trade practices) and TEX. INS. CODE ANN. art. 21.55 (1951) (unfair claims payment practices); TEX. BUS. & COM. CODE ANN. § 17.46 (deceptive trade practices); MISS. CODE ANN. §§ 83-5-29, 83-5-33, 83-5-51 (2005) (unfair methods of competition and deceptive practices in the business of insurance).

Another particularly important state statute, in the context of hurricane losses, is the Louisiana Valued Policy Law, LA. REV. STAT. ANN. § 22:695(A). This statute essentially provides that when there is a total loss, the insurance company must pay to the policyholder the actual cash value of the policy, namely the policy limits.[24]

Mississippi also has a Valued Policy Law, which provides:

> . . . When buildings and structures are insured against loss by fire and, situated within this state, are totally destroyed by fire, the company shall not be permitted to deny that the buildings or structures insured were worth at the time of the issuance of the policy the full value upon which the insurance is calculated, and the measure of damages shall be the amount for which buildings or structures were insured.[25]

Texas, while lacking an equivalent statute, comes close, through the existence of Texas Insurance Commissioner's Bulletin No. B-0045-98.[26] That bulletin addresses the calculation of actual cash value under the Texas Standard Homeowners' Policy. It was directed to all property and casualty insurance companies doing business in Texas, and holds as follows:

> The Department has concluded that an insurer providing property coverage under replacement cost residential policies that allow for the adjustment of covered losses to structures on an actual cash value basis may not calculate actual cash value on the basis of replacement cost with proper deduction for depreciation, less contractor's overhead

[24] The exact language is: "Under any fire insurance policy, . . on any inanimate property, immovable by nature or destination, situated within the state of Louisiana, the insurer shall pay to the insured, in case of total destruction, without criminal fault on the part of the insured or the insured's assigns the total amount for which the property is insured, at the time of such total destruction, in the policy of such insurer."

[25] MISS. CODE ANN. § 83-13-5.

[26] http://www.tdi.state.tx.us/bulletins/b-0045-8.html.

> and profit, nor may the insurer deduct sales tax on building materials. Any insurer that determines actual cash value on this basis may be subject to disciplinary action for violations of the Texas Insurance Code, including unfair claims practices pursuant to Article 21.21 Section 4(10)(a) and Article 21.21-2. [27]

But a celebration about the Louisiana statute and the Texas directive is not necessarily in order. For 106 years, Florida residents and business owners used to enjoy the benefits of a substantially similar statute, known as the "valued policy law." That statute required insurance companies to pay the full amount of an insurance policy if a property is deemed a total loss.[28]

In the aftermath of Hurricane Irene, an appellate court in Florida ordered insurance companies to pay their full claims, based on this statute. It overruled an argument by the insurance company that the statute must yield to contrary language in the policy's anti-concurrent causation clause. In that case, the evidence showed that the loss was only partially caused by a covered peril, yet the court ordered full coverage regardless.[29]

The insurance industry responded by lobbying the Florida state legislature to change the law. They threatened that rates would skyrocket and homeowners' policies

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[27] TEX. INS. CODE ANN. art. 21.21 and 21.21-2 have been repealed and superseded. See n.23, supra.

[28] The Valued Policy Law ("VPL"), set forth in FLA. STAT. § 627.702(1)(a), stated: "In the event of the total loss of any building . . . located in this state and insured by any insurer as to a covered peril . . . the insurer's liability under the policy for such total loss, if caused by a covered peril, shall be in the amount of money for which such property was so insured as specified in the policy . . . ."

[29] Mierzwa v. Florida Windstorm Underwriting Ass'n, 877 So.2d 774, 778 (Fla. Dist. Ct. App. 2004), reh'g denied, ("If FWUA has any liability at all, even a fractional share of the total damage, under the VPL it is liable for the face amount").

would become difficult to obtain without the change.[30] The Florida legislature gave in and changed the law just a few months ago, on the last day of the 2005 legislative session.[31] The insurance industry perceives the new law as limiting their obligations to only a proportionate share of the loss.[32]

III. RELEVANT STATE CASES

The following is a summary of relevant court decisions in the three states that are the subject of this article: Louisiana, Mississippi and Texas.

Louisiana:

Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v. Cont'l Ins. Co. of N.Y., 112 So. 2d 680 (La. 1959). The Louisiana Supreme Court affirmed a lower court decision that interpreted the efficient proximate cause rule in a manner that allowed the policyholder to recover for hurricane-related losses. The Court found coverage because the evidence showed wind to be the efficient proximate cause of the damage, even though other factors had contributed to the loss. As stated: "[I]t is sufficient, in order to recover upon a windstorm insurance policy not otherwise limited or defined, that the wind was the proximate or efficient cause of the loss or damage, notwithstanding other factors contributing thereto." Id. at 683.

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[30] Mark Hollis, Insurers Close to Payout Relief, S. Fla. Sun-Sentinel, Apr. 27, 2005.

[31] http://www.independentagent.com/VU/NonMember/DisasterFAQs.htm. The revised statute is set forth at § 627.702(1)(b)).

[32] Insurance Information Institute, Catastrophes: Insurance Issues, November 2005, available at http://www.iii.org/media/hottopics/insurance.

Lorio v. Aetna Ins. Co., 232 So. 2d 490 (La. 1970). The Louisiana Supreme Court addressed the efficient proximate cause rule in the context of Hurricane Betsy. There, the damages arose after the hurricane was over. That case involved the death of a champion racehorse, who had been put in a temporary stall after the storm. Because the wall of the stall was weakened, the horse was able to get unlimited access to horse feed, and died from overeating. The Court placed the burden of proof on the policyholder, finding that the policyholder would have been entitled to insurance if he had proved that the winds had been a proximate cause of the horse's death. The immediate cause of death, however, was overeating, so the policyholder failed to meet its burden.

Urrate v. Argonaut Great Cent. Ins. Co., 881 So. 2d 787 (La. Ct. App. 2004), writ denied, 891 So. 2d 686 (La. 2005). This Louisiana appellate court affirmed a ruling of a trial court that Hurricane Georges in 1998 had caused both wind and water damage to a restaurant. Under the property policy, the court apportioned the damages, awarding coverage for the property damage that it deemed attributable to the wind, and also for the business losses that it attributed to the wind for the remainder of 1998 and continuing into 1999. The appellate court also affirmed a ruling that the insurance company had lacked a good faith basis to deny coverage, giving rise to monetary penalties.

Southern Hotels Ltd. P'ship v. Lloyd's Underwriters at London Cos., No. Civ. A. 95-2739 (E.D. La.), 1997 WL 325972. This decision runs the gamut of policy analyses. When a Travelodge Hotel suffered losses from Hurricane Andrew in 1992, the district court awarded partial damages for the total replacement of its roof, on the reasoning

that the roof was old and the entire replacement cost could not be attributed to the hurricane. The court rejected a claim for replacement of furniture, reasoning that the damage to the furniture arose from an excluded peril (either flood or sewer back-up originating from an off-premises power outage). Finally, the court awarded coverage for 35% of a claim for interior structural repairs, acknowledging that "there is no mechanical rule which applies with exactitude." Id. at 6.

LaHaye v. Allstate Ins. Co., 570 So. 2d 460 (La. Ct. App. 1991). The Louisiana appellate court reversed a lower court decision that failed to enforce Louisiana's Valued Policy Law. The court held, "Finding Louisiana's Valued Policy Law applicable, we pretermit LaHaye's argument and award him recovery to the extent of the policy limits established in the insurance contract." Id. at 464. The Court also found that the policyholder was entitled to an award of penalties and attorneys' fees under the Louisiana claims settlement practices statute, LA. REV. STAT. ANN. § 22:658, for late payment of undisputed portions of the claim.

Real Asset Mgmt., Inc. v. Lloyd's of London, 61 F.3d 1223 (5th Cir. 1995). The Fifth Circuit affirmed a decision finding a violation of the Louisiana Valued Policy Law and also found that the violation was in bad faith, supporting an award of penalties and attorney's fees under the Louisiana bad faith statute, LA. REV. STAT. ANN. § 22:1220.

Mississippi:

Grace v. Lititz Mut. Ins. Co., 257 So. 2d 217 (Miss. 1972). The Mississippi Supreme Court found that building owners could be entitled to coverage for complete loss of building under windstorm policy, even though policy excluded coverage for loss caused by tidal water. The Court held that "the entire question of proximate cause is

treated as one of fact independent of the explicit application of any rule of law. It is sufficient to show that wind was the proximate or efficient cause of the loss or damage notwithstanding other factors contributed to the loss." Id. at 224.

Lititz Mut. Ins. Co. v. Boatner, 254 So. 2d 765 (Miss. 1971). The Mississippi Supreme Court affirmed a verdict in favor of the policyholder whose home had been destroyed by Hurricane Camille. Nothing was left except for the concrete slab on which the home once stood. The Court found that, while a tidal wave clearly covered the slab to a depth of more than seven feet, still the evidence showed that the house had been destroyed before the wave came ashore. In language eerily reminiscent of recent news stories about Hurricane Katrina, the Court stated:

> The pictures showing the devastation of the hurricane called Camille stagger the imagination. The tidal wave that washed about the debris in this case could not have deposited the debris above the water level of the tidal wave, and there was no way for it to have gotten there except by the terrific force of the wind.

Id. at 766.

Glens Falls Ins. Co. of Glens Falls, N.Y. v. Linwood Elevator, 130 So. 2d 262 (Miss. 1961). The Mississippi Supreme Court rejected an insurance company's argument that coverage should be denied because the damages resulted, at least in part, from a cause other than a covered fire. The Court held that even if "the nearest efficient cause of the loss [was] not a peril insured against," there was coverage here because the fire was the direct proximate cause of the loss of the soybeans at issue.

Texas:

Hardware Dealers Mut. Ins. Co. v. Berglund, 393 S.W.2d 309 (Tex. 1965). The Texas Supreme court strictly construed exclusions in a homeowners' policy against the policyholder, but expressed discomfort while doing so. Id. at 314 ("it is our duty to construe and enforce contracts and not to make them"). The Court stated that it was bound by the express exclusionary language in the contract, and by precedent in a 1920 decision by the Commission of Appeals, Coyle v. Palatine Ins. Co., 222 S.W. 973 (Tex. Comm'n App. 1920). On rehearing, the Court appeared to leave a door open to revisiting the issue: "In deference to the motion it should be stated that we do not hold nor did we intend to infer that Rule 94 'binds this Court to freeze forever the burden of proof' relating to the exclusionary clauses of an insurance policy. . . . The question of the burden of proof has been settled by the holdings of this Court and must remain so until numerous prior decisions are overruled or otherwise abrogated."

McDonald v. N.Y. Cent. Mut. Fire Ins. Co., 380 S.W.2d 545 (Tex. 1964). The Texas Supreme Court affirmed a trial court judgment that a house had been destroyed by wind, rather than a tidal wave. The Court found that the first-hand testimony of a neighbor was sufficient to sustain a jury finding in favor of coverage.

Dean v. Quincy Mut. Fire Ins. Co., 392 S.W.2d 897 (Tex. Civ. App. 1965). The appellate court in Waco affirmed a judgment in favor of coverage, holding that there was sufficient evidence to show that 90 percent of the damage sustained by the homeowners had been caused by hurricane winds alone, as distinguished from damage caused by water.

Nat'l Union Fire Ins. Co. v. Cox, 393 S.W.2d 939 (Tex. Civ. App. 1965). The appellate court in Houston reversed a judgment for the policyholder, finding that the trial court erred by failing to instruct the jury that the burden was on the policyholder to prove that damage to their residence during a hurricane was not directly caused by excluded risks in a homeowners' policy.

IV. CONCLUSION

The principle of "buyer beware" extends all the way through the claims process. As shown above, policyholders must remain wary until their claims are fully and finally paid, in the correct amounts. There are many possible slips in recovering insurance coverage for Hurricanes Katrina and Rita. But, for policyholders who are vigilant about asserting their rights, and who have a clear sense of what their rights are, they ultimately should succeed in recovering their just due.