

LESSONS FROM THE PAST: SEMINAL HURRICANE KATRINA CASES
GUIDE SUPERSTORM SANDY CLAIM ANALYSIS

Anti-concurrent Causation and Water Damage Exclusions Held Enforceable

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In the wake of the devastation wrought by Superstorm Sandy, insurers and insureds up and down the East Coast are reminded of the implications of water damage and anti-concurrent causation exclusions. These exclusions, destined to remain key fixtures in first-party storm-based claims analysis for the foreseeable future, will factor significantly in the claim disputes arising out of this latest catastrophic weather event. In evaluating claims, it is appropriate to consider the seminal Hurricane Katrina cases which determined that anti-concurrent causation clauses and water damage exclusions were enforceable and not ambiguous. These cases, summarized below, offer valuable insight into the probable outcome of the expected storm-based insurance litigation.

In Corban v. United States Auto Ass'n, 20 So. 3d 601 (Miss. 2009), the Mississippi Supreme Court considered whether an anti-concurrent causation clause in a homeowners policy excluded coverage for loss caused by flood (excluded) and wind (covered).¹ The Corbans' two-story home in Long Beach, Mississippi, was within several hundred feet of the Gulf Coast and suffered substantial damage during Hurricane Katrina. The Corbans submitted claims to USAA under their flood and homeowners policies and in turn USAA retained an engineer who determined that a majority of the damage to their home occurred due to flooding. USAA paid up to the limits of the flood policy (\$350,000.00) and also paid an additional \$83,903.77 under the homeowners policy, including \$39,971.91 in wind damages. USAA did not make any payment for flood damages under the homeowners policy relying on the policy's "water damage" exclusion. The Corbans subsequently filed suit seeking \$1,174,022.23 in unsatisfied losses under their homeowners policy.

¹ Anti-concurrent causation provisions disclaim coverage for losses deriving from a combination of covered and excluded risks. Thus, if a peril covered by an insurance policy causes damage, but an excluded peril combines to directly or indirectly cause that damage, an anti-concurrent cause provision may operate to preclude coverage.

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The Circuit Court of Harrison County, Mississippi, First Judicial District, held that, “‘storm surge’ is an ‘excluded peril’ within the ‘water damage definition of the subject policy’; that the ‘water damage’ exclusion and [anti-concurrent cause] clause [in the homeowners policy] are ‘unambiguous’; and that, although expressing a contrary interpretation of the policy language, ‘the anticoncurrent causation clause will be applied herein as interpreted by the United States Fifth Circuit Court of Appeals, thereby barring coverage under the homeowner’s policy for any damage caused by water as defined in the policy or caused concurrently or sequentially by wind and water in combination.’” *Id.* at 605.

On interlocutory appeal, the Mississippi Supreme Court affirmed that storm surge fell within the water damage exclusion. The court also affirmed that the anti-concurrent causation clause would disclaim coverage *if* the loss stemmed from a combination of flood (excluded) and wind (covered). However, the Court reversed the circuit court’s finding that these two perils did in fact combine to cause the loss. The Court held that genuine issues of material fact existed as to whether the wind damage “caused or concurrently contributed to” the loss. The Court remanded the case for further proceedings to determine whether the wind damage was separate and distinct from the flood damage, or whether they acted in unison. The Court noted that USAA would bear the burden of proving that the loss was “caused or concurrently contributed to” by flood and thereby excluded by the anti-concurrent causation clause.



In *In re Katrina Canal Breaches Litig.*, 495 F.3d 191 (5th Cir. 2007), the United States Court of Appeals, Fifth Circuit considered whether water damage exclusions precluded coverage for forty consolidated hurricane-related claims under homeowners, renters, and commercial policies. The claimants argued massive inundation of water had resulted from negligent design, construction, and maintenance of levees, and that the water damage exclusions did not exclude coverage for negligence. The trial court found for the policyholders, holding the term “flood” was ambiguous because it was susceptible to two reasonable definitions: natural flood v. man-made flood. The Fifth Circuit reversed, holding the distinction between natural and man-made flooding was immaterial based on the ordinary definition of flood: an “overflowing of water onto land that is normally dry.” *Id.* at 221. The Court held the exclusions enforceable because it

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found the water damage exclusions unambiguous and the result of Katrina fit the definition of flood under the policies. *Id.* at 211-21.²

Similarly, in *Sher v. Lafayette Ins. Co.*, 988 So.2d 186 (La. 2008), the Louisiana Supreme Court concluded that a water damage exclusion was enforceable and did not depend on whether the flooding was natural or man-made. *Id.* at 194-195. The insured argued that his commercial policy's water damage exclusion was vague and ambiguous because it did not exclude all forms of flooding and covered "man-made events." The Court found that such distinctions were immaterial because a flood is ordinarily understood to occur when "a large amount of water covers an area that is usually dry." *Id.* at 194. The Court held that the water damage exclusion was unambiguous. In addition, because the damage resulted from a large amount of water inundating a previously dry area, the Court concluded that the damage resulted from a flood, and, therefore excluded from coverage. *Id.* at 194-195.³

The valuable lessons gleaned from Hurricane Katrina will prove essential for first-party claims handling in aftermath of Superstorm Sandy. The impending influx of claims based on flood damage will almost certainly implicate water damage exclusions and anti-concurrent causation clauses. The two key takeaways are (1) "flood" can be expected to fall within the purview of water damage exclusions and (2) when a policy contains an anti-concurrent causation clause and the loss derives from the combined effect of a covered and excluded peril, coverage may be denied.⁴

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² The Court further noted that there was no need to rule on anti-concurrent causation clauses because there was only one cause of damage: flood.

³ The *Sher* Court also declined to rule on anti-concurrent causation because flooding was the one and only cause of the damage.

⁴ Each claim requires a separate factual analysis because, at times, as was the case in *Corban v. United States Auto Ass'n*, 20 So. 3d 601 (Miss. 2009), a loss event may be separated into two separate and distinct causes of loss – one covered and one not covered.

