



## Insurance & Reinsurance Legal Update on Katrina Decision

### Louisiana Supreme Court Issues Critical Decision in Hurricane Katrina Property Damage Litigation

On April 8, 2008, the Louisiana Supreme Court issued a very important decision in property insurance litigation arising from Hurricane Katrina, ruling that water damage exclusions are enforceable as applied to the flooding that occurred in New Orleans following Hurricane Katrina. The Louisiana Fourth Circuit Court of Appeal had previously ruled against the insurer on this issue. According to estimates reported in the media, if the court of appeal decision had been upheld by the Louisiana Supreme Court, it would have cost the insurance industry more than \$1 billion. Although the U.S. Court of Appeals for the Fifth Circuit had previously ruled in favor of insurers on this issue, this was a question of Louisiana state law on which the state supreme court exercises final authority.

In *Sher v. Lafayette Ins. Co.*, the Louisiana Supreme Court issued a unanimous and strongly worded decision overturning the court of appeal. The supreme court rejected the court of appeal's conclusion that the word "flood" was ambiguous because it could be construed as limited to naturally occurring events and therefore inapplicable if the flooding of New Orleans was caused by faulty design or construction of levees. The supreme court explained that the court of appeal's failure to give the word flood its common, generally prevailing meaning was "without justification," "appears to be more result determinative than legally warranted," and "would lead to absurd results." The court stressed that "the entire English speaking world recognizes that a flood is the overflow of a body of water causing a large amount of water to cover an area that is usually dry land." The supreme court also upheld the court of appeal's ruling that a 2006 amendment to one of Louisiana's insurance bad faith statutes, which substantially increased the penalties for bad faith conduct, was not retroactive. The supreme court also concluded that the 2006 amendment was not applicable where the insured submitted his claim and the alleged bad faith first occurred before the amendment took effect on August 15, 2006. The supreme court also ruled that an insured cannot recover damages for mental anguish allegedly caused by an insurer's bad faith conduct unless the insured satisfies a burden of proving that the insurer knew or should have known that its failure to perform would cause the insured to sustain mental anguish damages or that the insurer intended to aggrieve the insured's feelings.

Robinson & Cole attorneys Stephen E. Goldman and Wytan M. Ackerman have been heavily involved in the flood exclusion litigation from its outset. They were instrumental in obtaining a favorable ruling from the U.S. Court of Appeals, which was quoted and relied upon by the Louisiana Supreme Court. Robinson & Cole also represented a major insurance industry association as *amicus curiae* in the *Sher* case and worked closely with the lawyers who represented Lafayette Insurance Company in *Sher*.

If you would like a copy of the *Sher* decision, please e-mail Wytan M. Ackerman at [wackerman@rc.com](mailto:wackerman@rc.com).



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