

Homeowner Has Ultimate Burden to Identify Wind vs. Flood Damages

Insurance Law Update

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In *Bayle v. Allstate Ins. Co.*, ___ F.3d ___, 2010 WL 3155921 (5th Cir. (La.) Aug. 11, 2010), the U.S. Fifth Circuit Court of Appeals, interpreting Louisiana law, addressed a “recurring question” in hurricane-related property insurance disputes: Who has the burden of identifying the portion of damages caused by a covered risk as opposed to the portion caused by a non-covered risk?

In 2005, Hurricane Katrina caused considerable damage to the homeowners’ property. The majority of the damage was caused by flooding, which was not covered under the homeowners’ policy at issue. Wind damage, which was covered under the policy, contributed to some missing shingles and broken windows. The insurer paid a sum to the homeowners for the wind-caused damages and the homeowners filed suit, alleging, among other things, that the insurer’s payment was inadequate. The district court granted the insurer’s motion for summary judgment based on the homeowners’ failure to proffer sufficient evidence to support their claim that additional, uncompensated damage was caused by wind, not flooding. The homeowners appealed.

The Fifth Circuit Court of Appeals noted that the parties “vociferously” disagreed on which party – the insurer or the insured – must bear the burden of proving that the damage was caused by wind as opposed to flooding. The court held that, at the summary judgment stage, the insurer has the burden of producing evidence regarding any coverage exclusion. Once an insurer’s burden is satisfied, the burden of production shifts to the homeowners to put forth specific evidence demonstrating the existence of remaining damages caused by a

covered risk. Here, the insurer had met its burden by producing specific evidence (adjusters' and expert reports as well as the homeowners' deposition testimony) concerning the various items of damage and the amounts it had paid for the portion of damage to those items caused by wind. The homeowners' proffered expert reports did not opine as to the causes of damages to any items. Thus, the court held that the homeowners had not met their burden to show which allegedly remaining damage was caused by wind as opposed to flooding, and affirmed the summary judgment for the insurer.

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