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Paper Documents Judicial Redrafting of Property Insurance Contracts

An enormous amount of litigation and political maneuvering has swelled up over whether insurance companies are responsible for covering property damage related to flooding from Hurricane Katrina. Rather than be a fair arbiter of the law and rising above the political fray, a new Washington Legal Foundation (WLF) analysis argues that some courts are engaging in legal gymnastics to force insurance companies to cover damage which their contracts explicitly excluded.

This WLF WORKING PAPER, ***Judicial Redrafting of Contracts: A "Levee" on Insurance***, was authored *pro bono* by Randy J. Maniloff, a partner in the Philadelphia law firm White and Williams, LLP.

In the paper's first section, Mr. Maniloff explains how the Katrina-related adventurous judging is just the latest example in a growing trend of judges and other government officials trying to shift financial responsibilities for mass disasters or mass torts to insurers. He cites as other examples the aftermath of September 11th's terrorist attacks; mass liability in asbestos, lead, and mold; and liability under the federal Superfund statute. What these examples have in common, Mr. Maniloff notes, are insurance contracts with clear language excluding coverage for a specific occurrence which politicians or judges ignore or redraft.

The paper's second section closely scrutinizes insurance litigation involving flooding in Mississippi and Louisiana. Mr. Maniloff notes that in a case currently pending on appeal in the U.S. Court of Appeals for the Fifth Circuit, *Katrina Canal Breaches*, the central issue is the meaning of the term "flood" and whether there exists a flood exclusion in the coverage. He comments: "The court strives to discern the meaning – with the policyholder all the while arguing that the term is ambiguous and must be construed against the insurer as the drafter....But the decision involves much more than a typical coverage case. It is, plain and simple, an example of a court torturing policy language to find coverage that clearly did not exist, in an effort to bring much-needed financial resources to a wide-scale problem." The paper discusses in detail the efforts of the court to locate this coverage, including seemingly good faith efforts on the part of the judge to adhere to the relevant rules of insurance policy interpretation in Louisiana and a nod — inadequate in Mr. Maniloff's view — to the reasonable expectations doctrine. Nevertheless, the court moves to a seemingly "predetermined" outcome that broad coverage exists.

Mr. Maniloff notes in his conclusion that insurance companies are inherently unsympathetic litigants and, given the complex and seemingly ambiguous nature of insurance policies, the need for a social safety net when large-scale disaster occurs and

political pressure to effectively address the deep losses that such disaster inflicts, insurers are doomed to lose in the courts. As he states, "...the insurance industry finds itself being forced to pay more than its share to resolve a massive problem – not because it agreed to do so, but because it can."

Copies of this educational paper, WLF WORKING PAPER, Number 149 (June 2007), can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.