

...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE
& DEMOCRACY
NEWS

IN THIS ISSUE: KATRINA AND INSURANCE

Dear Friend,

Just a little reminder that the Center for Justice & Democracy is the nation's only national public interest group that is dedicated exclusively to protecting the civil justice system.

Among our recent activities have been producing a series of state-based studies fighting back against the American Tort Reform Associations and the U.S. Chamber of Commerce's attacks on lawyers, judges, and juries.

We have also written the first law review article about constitutional questions surrounding so-called "Health Courts," which will be published by Pace Law Review this Spring. You can find that article reprinted in full on our web site.

And we are also now working on a major study about the failure of workers compensation systems around the country, and continue to publish studies and fact sheets on a range of topics. These can be found at <http://centerjd.org> and <http://insurance-reform.org>

If you would like to join CJ&D, please fill in the coupon on page 4.

Thanks so much.

Joanne Doroshow
Executive Director

Worsening the Suffering

Hurricane Katrina was one of the worst disasters in our nation's history, killing over 1,300 people (with thousands more still unaccounted for), displacing millions and leaving hundreds of thousands without jobs or income. With the impact compounded by Hurricane Rita shortly thereafter, hundreds of thousands of homes were destroyed or significantly damaged. In the days and first few weeks following the disaster, many individuals were left destitute, without food, water or a roof over their heads. There was no denying the magnitude and human suffering caused by this catastrophe.

In a disaster as devastating as Katrina, the availability of insurance can literally become a matter of life or

death, especially regarding the promise of temporary living expenses under "loss of use" clauses in homeowners' policies, which many residents in Louisiana and Mississippi had. Many homeowners policyholders, who were hungry, exhaust-



ed, traumatized and homeless, immediately looked to their insurance carriers to come to their aid with living expenses as they struggled to survive.

However, what many of these residents found was

not help, but rather resistance by their insurance carriers to pay them anything at all. It was soon after Katrina hit that insurance companies began looking for ways to escape responsibility to their homeowners policyholders altogether, publicly declaring that most, if not all, of the damage was due to flooding.

That meant that only those who carried separate flood insurance (far less than half the residents), which is underwritten by the federal government, would get any coverage, leaving insurers entirely off the hook for paying Katrina-related claims. This included payment of temporary living expenses, which flood insurance does not provide. This was despite the fact

(continued on page 2)

Flood Vs. Wind: Who's Right?

Many contentious legal issues have arisen in the aftermath of Hurricane Katrina, including whether the insurance industry or the federal government is responsible for paying for most of the damage, as well as the practical impact that resolution of these legal matters will have on insurers and policyholders.

Homeowners' policies cover damage caused by wind, wind-driven rain and possibly concurrent water dam-

age but contain a provision that excludes coverage for flood damage. Some (about 15 percent in Mississippi and up to 40 percent in New Orleans), but not most, homeowners in the Gulf Region carried separate flood insurance, which is underwritten by the federal government.

Immediately following Katrina, the insurance industry was quick to deny responsibility for most of the damage its policyholders were suffer-

ing, wasting little time disseminating the message that most damage was flood-related, whether or not it was, and claiming it would not be accountable for this. As a result, several lawsuits have been filed over whether homeowners' policies will be relieved of responsibility to cover loss where flooding was a concurrent cause, and, in some cases, a much less significant cause of the damage.

(continued on page 3)

Worsening the Suffering *continued...*

that neither the law nor the facts justified insurers' behavior.

J. Robert Hunter, who is Director of Insurance for the Consumer Federation of America, and former Federal Insurance Administrator and Texas Insurance Commissioner, said, "Insurance should be a policyholder's road to recovery at times of personal crisis. After Katrina many insurance companies have too often been more like stone walls, blocking the way for policyholders to recover."

As the scale of Katrina's destruction became more evident in the days following the storm, and news reports started indicating there were likely to be large numbers of policyholders in the Gulf Region who would be running into problems with their insurance carriers, Americans for Insurance Reform (AIR) decided to help.

AIR, a coalition of more than 100 public interest groups and a project of the Center for Justice & Democracy, took the extraordinary step of establishing a toll-free Insurance Hotline, intended as a clear-

After Katrina many insurance companies have too often been more like stone walls, blocking the way for policyholders to recover, said J. Robert Hunter

inghouse for complaints by Katrina and Rita victims who were being unfairly treated or denied claims by insurance companies on their hurricane-related claims. The Hotline received hundreds of calls.

While AIR could not directly solve victims' insurance problems, it was able to monitor complaints, refer them to government officials such as state insurance departments where appropriate and keep records of hurricane-related insurance problems. Among the most common problems were:

Companies attempting to avoid any liability under homeowners' policies, or at least providing an incredibly slow response, with one caller typifying the problem: "Our money is running out and our insurance companies can't tell us when or if any help is on the way." This phenomenon affected policyholders covered by several different insurance carriers.

Insurance carriers being unreachable or simply refusing to respond to their policyholders at all, leaving them extremely frustrated and in tremendous need. As one caller ignored by her carrier put it, "I'm a 70-year-old woman, I need to pay rent at the place I'm living and I just don't have any money."

Homes further damaged by Hurricane Rita when companies failed to send adjusters after Katrina, which would have allowed victims to make repairs. "There wouldn't be half as much water damage if they had been able to get an adjuster out here in a reasonable amount of time," explained one Hotline caller.

Said J. Robert Hunter, "It is vital that the states of Mississippi, Louisiana, Alabama and Texas take firm steps now to assure homeowners that insurance will be available and affordable as the next hurricane season approaches." Among the measures AIR has called for are: a moratorium on cancellations and non-renewals of homeowners insurance policies to give states time to develop plans for insuring homes that could not get or keep private insurance; a freeze on home insurance prices; mitigation measures that prohibit or control construction in high risk zones; and market conduct examinations by states to determine if insurers have been engaging in unfair claims practices in violation of state law.

Intervention by the federal government is also necessary. Congress must require that FEMA update outdated flood maps, directly responsible for much of the carnage and destruction, by January 2007. Moreover, the federal government should invest in loss prevention measures, providing grants and loans to state and local governments as well as consumers and businesses.

Many things went terribly wrong in the insurance



Louisiana

industry's response to Katrina. If major changes aren't implemented, the same tragic stories could unnecessarily repeat themselves.



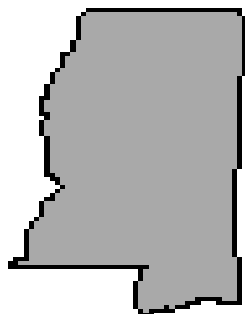
90 Broad Street
Suite 401 New York, NY 10004
Phone: 212.267.2801
Fax: 212.459.0919
E-mail: centerjd@centerjd.org
Web: <http://centerjd.org>

IMPACT

Editor:
Natalie Rose

Contributor:
Joanne Doroshov
Emily Gottlieb

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Mississippi

Flood Vs. Wind: Who's Right? *continued...*

Mississippi's Attorney General is pursuing a case against five major insurers in the state in an effort to pre-empt any misuse of so-called "flood exclusions" in dismissing homeowners' claims. Mississippi-based attorney Richard "Dickie" Scruggs, whose own house was destroyed by Katrina, has also filed suit challenging the insurers' position on flood exclusions.

In mid-December 2005, Scruggs also filed suit on behalf of his brother-in-law, Senator Trent Lott (R-MS), and wife Tricia. The case is against State Farm over the



carrier's refusal to cover the loss of their Pascagoula, MS home. (Ironically, Sen. Lott has long been at the forefront of attempts by the U.S. Congress to limit the ability of individuals to sue insurance companies in court.)

Based on precedent, it seems clear that the insurance industry's position flatly denying some of these claims will not hold up in court. As Tim Destri of the National Weather Service told the *Biloxi Sun-Herald* in late December 2005, "It's always the wind no matter what insurance (companies) try to tell people. You almost always get some damaging winds before the water starts coming." And after Hurricane Camille in 1969, Mississippi's highest state court affirmed that "it is sufficient to show that wind was the proximate or efficient cause of the loss or damage notwith-

standing other factors contributed to the loss." In that case, and two companion cases reviewing the same issue, jurors found the insurers liable.

Another legal issue that policyholders may win concerns the ambiguity of some insurance clauses. Ambiguous policy language is usually construed in favor of the policyholder, since it is drafted by the insurer and presented to the consumer on a take-it-or-leave-it basis.

For example, in Mississippi, as Senator Lott's case seems to illustrate, many policyholders were asked to sign "hurricane endorsements" with clearly labeled "hurricane deductibles," while flood damage connected to hurricanes was purportedly excluded elsewhere in the



policy. Hurricane deductibles are usually for some percentage of the property value. This misleading language was often compounded by the fact that the flood exclusion was never explained to the policyholder or that many people were told by their insurance agents that they did not need to purchase federal flood insurance because their homes were not in flood zones.

Insurance companies were aware of the law when they drafted their insurance contracts and they should pay claims for which they have received premiums.

HURRICANES AND PROFIT

Immediately after Katrina, while people were still be rescued, insurers were already discussing how they might profit off the tragedy. At a September 7, 2005, industry conference, insurance officials were reportedly heard saying, "[O]ur loss will leave us with enough capital to really thrive in the market opportunity that's going to follow at Jan. 1" and "[w]e think there's a lot of profitability left in the cycle, and we think that the hurricane will in fact extend that."

In fact, the dirty little secret is that the property/casualty insurance industry came out of 2005 with huge breaking profits - \$ 44.8 billion, the

most-most profitable year in the history of the industry, despite the hurricanes. And that follows a three-year period when profits exceeded \$100 billion. In fact, 2004 had been the biggest year ever to that point, despite the four hurricanes that ravaged Florida. In commenting to the *Los Angeles Times*, Frank W. Nutter, president of the Reinsurance Association of America said, "We've been through some of the worst natural disasters and man-made catastrophes in our history, and had some of the best earnings in the last 20 or 30 years"

Likewise, in an article from the January 2, 2006, *National*

Underwriter entitled, "Despite Disaster Losses, Industry Profits Higher Through Nine Months," the paper reported on a study from the Insurance Services Office and the Property Casualty Insurers Association of America that said, "Through nine months, net income rose 4.4 percent to \$28.8 billion, and the year-to-date combined ratio-at 100-was the second best nine-month ratio on record.... In a commentary published in conjunction with the figures, Robert Hartwig, senior vice president and chief economist for the Insurance Information Institute in New York, noted that the \$20.4 billion surplus increase-attributable mainly to the \$28.8 billion of net income

and to new capital of \$6.3 billion-was not expected' in the wake of this year's hurricanes. ...Commenting on the combined ratio result, Mr. Hartwig characterized it as 'uncanny,' adding that the 'surprisingly low' level stands as 'stunning proof of the resilience of the industry.'"

The hard facts show that the property/casualty insurance industry continues to produce record profits, while viewing tragedies like the hurricane that destroyed the city of New Orleans as little more than a business opportunity.

At the Tipping Point in Florida

The scale of destruction caused by the hurricanes of 2005 may have been the worst in recent history, but the pattern of insurance industry response to policyholders in the wake of these devastating events, worsening the suffering of many, is something that Florida residents have known well for years.

In 1992, Hurricane Andrew became a seminal event in Florida history not only in terms of the amount of destruction it caused, with about \$25 billion worth of damage, but also how the industry decided to respond to hurricanes. Following Andrew, the industry threatened massive non-renewals of homeowners insurance as they tried to dump as much risk as possible. Had lawmakers and regulators not stepped in following Andrew and thwarted the industry's actions, the blow to the Florida's residents and to the state's economy resulting from insurance carriers' abandonment of homeown-

ers would have been crushing.

As recent events demonstrate, nothing much has really changed in the way the insurance companies respond to disasters. More and more private carriers have left the state, others are again threatening massive cancellations and prices are through the roof.

Arguing that "traditional fixes" are not working, Americans for Insurance Reform (AIR) released a major report in April calling for the complete removal of the private sector from the hurricane insurance business in Florida. AIR called on the Florida legislature to establish a privately run state plan for the hurricane wind portion of homeowners insurance coverage.

The report, *At The Tipping Point: The Homeowner Insurance Mess In Florida and How to Fix It*, finds,



Florida

"More and more private carriers have left the state, others are again threatening massive cancellations and prices are through the roof. Companies have dumped high-risk properties into the state-run 'insurer of last resort,' Citizens

Property Insurance Corp, and have kept the lower risk business for themselves. Continuing to try to fix the problem by placating the private market, giving in

to their demands in a desperate effort to keep them in the state, is a road to continuing disaster."

The report asks, "Have we reached the tipping point where the reliance on the private sector is no longer warranted? Has the coverage become too little and the prices too high and the instability too great for Florida to continue to rely on the system that is in place? How

long can Florida stand to see homeowners' insurance offer less and less coverage for more and more money, with many people unable to afford premiums and having to live in fear of filing legitimate claims?"

AIR answers these questions by proposing creation of a privately run state insurer for the hurricane wind portion of homeowner's insurance coverage, with all of the wind business in Florida put in this state plan. Private companies would service the plans, selected by competitive bids. Policyholders would benefit immediately, with huge drops in premiums by the private home insurers, with hurricane wind rates set by fair use of scientific models that would be actuarially sound so that, over time, the program will be self-sustaining. This plan would eliminate both the profit motive, as well as overreaction at times of crisis, lowering prices and assuring both stable prices and coverage.

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Center for Justice & Democracy
90 Broad Street
Suite 401
New York, NY 10004
Phone: 212.267.2801
Fax: 212.459.0919
Email: centerjd@centerjd.org
Web: <http://centerjd.org>

