



The Weekly Update of Texas Insurance News

# TEXAS INSURANCE LAW NEWSBRIEF



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A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, 20th Floor Houston, Texas 77002 713.632.1700 FAX 713.222.0101  
900 S Capital of Texas Hwy, Suite 425 Austin, Texas 78746 512.610.4400 FAX 512.610.4401  
16000 N Dallas Parkway, Suite 800 Dallas, Texas 75248 214.420.5500 FAX 214.420.5501

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## **HURRICANE IKE UPDATE: MONTGOMERY COUNTY DISTRICT COURT JUDGE ORDERS ABATEMENT, MASS MEDIATION & ROCKET DOCKET IN ALL HURRICANE IKE CASES PENDING IN MONTGOMERY COUNTY**

Montgomery County District Court Judge Fred Edwards held a status conference on October 28, 2011 regarding all Hurricane Ike cases pending in Montgomery County. Judge Edwards announced the abatement of all Hurricane Ike cases to be followed by a mass mediation of all cases beginning on December 15, 2011. Mediation will apparently be mandatory for all Hurricane Ike cases except those in which mediation has already occurred and failed. For those that have attempted mediation, the parties will have the option of participating in the mass mediation or continuing to trial. Judge Edwards announced he will try all of the hurricane cases in Montgomery County, regardless of whether the cases originated in his court or were transferred to his court from another.

As to the mass mediation, Judge Edwards appointed Jack Stibbs of Spring to serve as the Master Mediator. Judge Edwards will appoint additional mediators in the upcoming weeks and will create a list of court-approved mediators. The mediator and counsel will determine the location of each mediation. Judge Edwards also suggested that the time allowed for mediation should be proportionate to the amount in controversy and discussed mediator compensation. In order to reduce the exchange of paperwork, the court will create a "Master Drop Box" which will allow all mediators to access pleadings, expert reports, etc. relevant to each case. For all cases that do not resolve at mediation, docket control orders will be entered immediately with trial set within three months, if possible. Judge Edwards noted that parties may opt-out of the mass mediation process; however, trial will be set within three months upon opt out.

Judge Edwards announced he will adopt Master Discovery similar to those already adopted by courts in Harris and Galveston counties. All parties will be directed to issue the Master Discovery requests in cases where discovery has not begun. He further announced his intention of issuing a Standing Protective Order to protect information shared for trial purposes. Judge Edwards will hold another conference prior to December 15, 2011 (date TBA) with further updates regarding the Hurricane Ike docket. Judge Edwards said he would be posting orders on line but, as of press time, no orders had been posted. We will continue to update all developments in Montgomery County. For more information regarding Judge Edwards' status conference, please contact any member of the MDJW Insurance Team.

## **HURRICANE IKE UPDATE: TWO MANDAMUS PROCEEDINGS FILED IN TEXAS SUPREME COURT FOR REVIEW OF HARRIS COUNTY DISTRICT COURT'S FAILURE TO ABATE LITIGATION PENDING COMPLETION OF THE APPRAISAL PROCESS**

Last week, Cypress Texas Lloyds filed two mandamus proceedings requesting the Texas Supreme Court to determine whether Judge Mike Miller of the 11<sup>th</sup> District Court in Harris County (the Ike Discovery Judge) abused his discretion by failing to abate Hurricane Ike litigation pending completion of appraisal. The Texas Supreme Court has called for responses to both petitions for review. In *Knight v. Cypress Texas Lloyds*, No. 2009-33364, and *Shepard v. Cypress Texas Lloyds*, No. 2010-41195, Judge Mike Miller granted Cypress Texas's motions to compel appraisal, but declined to abate the cases during the appraisal process even though abatement was contractually required pursuant to the parties' insurance policies. The Fourteenth Court of Appeals denied Cypress Texas's petitions for writ of mandamus, precipitating the instant mandamus filings in the Texas Supreme Court. Cypress Texas is also party to three other mandamus proceedings pending in the First Court of Appeals on the same issue.

In its petitions for writ of mandamus, Cypress Texas highlighted the importance of abating a case during appraisal, stating that it is a recurring issue for many insurance carriers and warrants resolution by the Texas Supreme Court. In support of its requests for the Court's review, Cypress Texas argues that the insureds deprived Cypress Texas of its bargained-for contractual right to have an appraisal, an alternative dispute resolution mechanism, before engaging in the expense of litigation. The only remedy available to cure the fact that the insureds brought suit before appraisal is abatement of the litigation until the appraisal is completed; however, the trial court denied Cypress Texas of that remedy. Additionally, Cypress Texas argues that it will suffer irreparable harm if the contract is not honored as written since it will incur extensive costs if the litigation is permitted to continue while appraisal goes forward.

Cypress Texas is represented on appeal by Warren W. Harris of Bracewell & Giuliani LLP and by Thomas M. Fountain of Fountain & Associates. The Mostyn Law Firm represents Plaintiffs in both underlying state court actions.

**Editor's Note:** Cypress Texas Lloyds requests that any other carrier with an interest in these important appraisal issues to join it through amicus briefing to the Texas Supreme Court. For a copy of the mandamus pleadings filed by Cypress Texas Lloyds, or to discuss the amicus options available, please contact Chris Martin of our firm at [martin@mdjwlaw.com](mailto:martin@mdjwlaw.com) or at 713-632-1701.

## **FIRST HURRICANE IKE TRIAL IN HARRIS COUNTY SET TO START ON THURSDAY**

On Thursday of this week, the first residential Hurricane Ike bad faith trial against a carrier is expected to start trial in Houston. Cypress Texas Lloyd's will be starting trial this week before Judge Steven Kirkland of the 215<sup>th</sup> District Court of Harris County. Randy Cashiola and Amber Mostyn of The Mostyn Law Firm will be representing the homeowners at trial. Tom Fountain of Fountain & Associates will represent Cypress Texas Lloyds at trial. MDJW is *not* involved in this case but will be observing the trial and will report next week on it. Trial is expected to last 5 days.

## **SOUTHERN DISTRICT OF TEXAS COURT HOLDS THAT APPRAISAL PROVISION OF THE STANDARD FLOOD INSURANCE POLICY IS LIMITED TO MATTERS WHERE COVERAGE IS NOT AT ISSUE**

On October 13, 2011, Judge Nancy Atlas in the federal District Court for the Southern District of Texas (Houston Division) denied Plaintiffs' motion to compel appraisal under the appraisal clause of the Standard Flood Insurance Policy ("SFIP") holding that the appraisal provision is limited to matters where coverage is not contested. In *Sam, et al v. National Lloyds Insurance Company*, cause No. 4:10-cv-02521, Plaintiffs submitted a claim for flood damages following Hurricane Ike to their apartment building

under the SFIP - the insurance policy issued to Plaintiffs by National Lloyds pursuant to the National Flood Insurance Program. National issued payment to plaintiffs for repairs to the damaged property. Plaintiffs subsequently submitted a request for supplemental payment beyond the amount offered by National, including costs for hiring a commercial superintendent for three months. Plaintiffs then moved for appraisal under the policy as to the supplemental claim. According to the SFIP policy terms and case law interpreting the scope of the appraisal clause, the SFIP appraisal provision may only be invoked to resolve disagreements between the parties regarding the actual cash value or replacement cost of the damaged property to which coverage is not disputed. The Court held that because the parties disputed whether the expense was covered (not whether the cost for the superintendent was reasonable), the dispute did not implicate the appraisal clause. Accordingly, Plaintiffs' motion was denied.

## **COURT HOLDS INSURERS HAVE NO DUTY TO DEFEND OR INDEMNIFY WHERE APPLICABLE POLICIES DO NOT PROVIDE COVERAGE FOR CLAIMS MADE IN AND UNDERLYING SUIT**

Last Thursday, on October 27, 2011, Judge Harry Hudspeth of the federal District Court for the Western District of Texas granted a declaratory judgment in favor of Plaintiffs, National Fire Insurance of Hartford and Continental Casualty Company, holding that they did not owe a duty to defend or indemnify their commercial policyholders in an underlying lawsuit pending in state court. *National Fire Insurance Co., et al v. C. Hodges & Associates, PLLC, et al*, Cause No. SA-10-CA-579, Doc. 35 (October 27, 2011). The underlying suit involved claims of misrepresentation asserted by tenants of a shopping center against the developers. The tenants claimed the shopping center did not realize the level of traffic and business allegedly promised by the developers.

Turning to the terms of the policies, the court found that in order to trigger the Plaintiffs' duties to defend Defendants against claims made by the tenants, the underlying suit must include allegations of an "occurrence" which resulted in "bodily injury" or "property damage." The Court found that the underlying petition alleged none of these elements. Applying Texas precedent, the court held that allegations of negligent misrepresentations did not constitute an "occurrence." The court further held that the claimed economic loss in the underlying suit did not constitute "physical injury" or "loss of use of tangible property." Regarding Plaintiffs' duty to indemnify, the Court determined that since neither of the policies at issue provided coverage for the losses alleged in the underlying suit, there was no duty to indemnify Defendants on the part of either Plaintiff.

## **MDJW UNIVERSITY: TEXAS INSURANCE SEMINAR (NOVEMBER 15, 2011)**

The lawyers of MDJW will host a free continuing education seminar in Dallas on November 15, 2011 covering the latest developments in Texas insurance law, litigation management, and trial strategy. Lawyers from the firm's tort trial group and its insurance trial team will provide updates on a host of cutting edge topics for those in the insurance industry who handle claims or manage litigation. This free one-day program will cover the latest claims handling issues, coverage issues, and litigation strategies arising out of auto and HO claims, construction defect claims, responsible third party claims, and primary/excess issues. We will also be examining the implication of the 2011 Texas "Tort Reform" Legislation, the future of Texas bad faith litigation, continuing *Stowers* exposures, and much more. A special lunch presentation from one of the nation's best jury science researchers will examine recent discoveries from Texas jury research projects.

David Disiere, Mark Dyer, Barrie Beer, Andrew Schulz and many of the other lawyers of MDJW will be speaking at this program. CE credit from the Texas Department of Insurance (including consumer protection hours) and CLE credit from the State Bar of Texas will be available for each attendee. The program will be held from 9:00 a.m. to 3:30 p.m. on November 15, 2011 in the large auditorium at the **Studio Movie Grill, 4721 W. Park Boulevard Plano, TX 75093**. The venue is located in north Dallas just off the Dallas North Tollroad, one mile north of the George Bush Turnpike. The venue is easy to reach from Love Field and any location in the DFW metroplex. Although attendance is free, we do need each attendee to register in advance so we can get an accurate count for lunch. Registration can be completed by emailing [teresai@mdjwlaw.com](mailto:teresai@mdjwlaw.com) or calling Teresa Ivory-Jones at **214-420-5534**. Space is limited and the attendance is filling up rapidly, so please RSVP at your earliest opportunity.

We hope to see many of our friends and clients in the insurance industry on November 15<sup>th</sup> in Dallas for the **2011 MDJW Texas Insurance Seminar**.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.  
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