HURRICANE IKE INSURANCE LAW NEWSBRIEF

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HURRICANE IKE INSURANCE CLAIM & LITIGATION UPDATE - TWELFTH SPECIAL EDITION

This Twelfth Special Edition of the Texas Insurance Law Newsbrief is designed to provide our readers with brief updates related to coverage and claim issues related to the damages caused by Hurricane Ike in the Texas Gulf Coast region. Our intent is to keep our readers apprised of legal issues emerging as a result of Hurricane Ike and to keep them informed about the issues we see coming as the carriers of the state deal with numerous new legal and regulatory issues. We will continue to provide more detailed updates in future issues regarding Ike-related claims and, when Ike lawsuits are filed, we will analyze and report on the issues which gave rise to the litigation.

TRIAL COURT GRANTS INSURED'S MOTION TO COMPEL APPRAISAL DESPITE CAUSATION AND SCOPE ISSUES

Relying on the Texas Supreme Court's decision in *State Farm Lloyds v. Johnson*, 2009 WL 1900538 (Tex. July 3, 2009), in which the Texas Supreme Court held that insurers cannot avoid appraisal invoked by an insured pursuant to the terms of the policy merely because there is a causation question that exceeds the scope of appraisal, the Southern District of Texas (Judge Rosenthal) in *Molzan, Inc. v. United Fire and Casualty Company*, 2009 WL 2215092 (July 23, 2009) (Rosenthal, J.) recently granted an insured's motion to compel appraisal. We reported the Texas Supreme Court's decision in *Johnson* in our Texas Insurance Law Newsbrief July 14, 2009.

In *Molzan*, the insured, Molzan, Inc., sought to compel appraisal under the terms of its insurance policy issued by United Fire and Casualty Company, which provided coverage for loss or damage to certain property, including The Ruggles Grill, a restaurant in Houston, Texas, and resulting loss of business income. There was no dispute that the policy covered at least some of Molzan's losses. United Fire had paid Molzan approximately $277,012 for damage to the building and property and $300,000 for lost business income. Molzan claimed additional property loss to the building and business personal property and also asserted its business income loss totaled $780,000.

Molzan made a written demand for appraisal, which United Fire rejected asserting that the policy did not cover the additional claimed property losses or lost business income. United Fire contended the additional lost business income was the result of Molzan's failure to resume operations as quickly as possible and the additional property damage claim was caused by Molzan's failure to preserve the property from further damage. Drawing parallels to *Johnson*, the court granted Molzan's motion to

compel appraisal finding that Molzan was entitled to an appraisal under the policy on both the lost business income claim as well as the property damage claims.

JEFFERSON COUNTY LITIGATION UPDATE

On July 7, 2009, the judges of Jefferson County entered a Standing Pretrial Order that applies to all residential Hurricane Ike insurance suits in Jefferson County. Highlights include: (1) mandatory agreement as to mediator and mediation date within 100 days of either the insurance carrier's appearance in the suit or the date of the standing order, whichever is later (the mediation date can be set outside of the 100 day time period); (2) abatement of the suit upon the insurer's filing of its Original Answer until 30 days after the date of the letter from the mediator declaring an impasse or 30 days after a party receives notice that another party desires to end the abatement period; (3) parties may propound discovery during the abatement period; however, responses and objections will not be due until 30 days after the earlier of an impasse letter from the mediator or a party's termination of the abatement period; (4) within 60 days of the carrier's Original Answer, or the date of the order, whichever is later, the parties will exchange information and documentation pertaining to the residence (e.g. expert reports, engineering reports, damage estimates, etc.); (5) once the parties have agreed to a mediation date and mediator, the defendants are permitted one pre-mediation inspection; if mediation is unsuccessful, a second inspection will be allowed; and (6) after the abatement expires, the parties must enter into an Agreed Scheduling Order, and the Court will set a Status Conference 150 days from the date first answer was filed.

The Standing Pretrial Order in Jefferson County also provides that should a carrier identify a claim made by the plaintiff after January 1, 2005, which would include a Hurricane Rita claim, the carrier should provide notice of the claim within 60 days of the carrier's Original Answer, or the date of the order, whichever is later. Upon receipt of notice of a prior claim, counsel for the plaintiff should provide, within a reasonable period of time, a brief description of the claim, the name of the carrier upon which the claim was made, and, if that carrier is not the defendant, the claim number, notification of whether litigation arose out of the claim, and any repair estimates, photographs, documents evidencing payment by the carrier, and documents evidencing repairs.

BRAZORIA COUNTY LITIGATION UPDATE

We previously reported that on June 29, 2009, an order transferring all Hurricane Ike residential cases from the 149th and 239th District Courts to the 412th District Court, Judge Denman presiding. The order applies to both pending case and cases not yet filed. The order does not, however, affect cases filed in the 23rd District Court. Judge Denman held a status conference on August 7, 2009, to receive input from attorneys on the entry of a preliminary order for the exchange of information and early mediation, as well as other pretrial issues. At the status conference, Judge Denman provided copies of the Standing Pretrial Order Concerning Residential Hurricane Ike Cases, which he indicated he will sign and post on the court's website.

The Brazoria County Standing Pretrial Order will be similar to the standing pretrial orders in effect in other Ike-affected counties. The order will include: (1) mandatory agreement as to mediator and mediation date within 100 days of either the insurance carrier's appearance in the suit or the date of the standing order, whichever is later (the mediation date can be set outside of the 100 day time period); (2) abatement of the suit upon the insurer's filing of its Original Answer until 30 days after the date of the letter from the mediator declaring an impasse or 30 days after a party receives notice that another party

desires to end the abatement period; (3) parties may propound discovery during the abatement period; however, responses and objections will not be due until 30 days after the earlier of an impasse letter from the mediator or a party's termination of the abatement period; (4) within 60 days of the carrier's Original Answer, or the date of the order, whichever is later, the parties will exchange information and documentation pertaining to the residence (e.g. expert reports, engineering reports, damage estimates, etc.); (5) once the parties have agreed to a mediation date and mediator, the defendants are permitted one pre-mediation inspection; if mediation is unsuccessful, a second inspection will be allowed; and (6) after the abatement expires, the parties must enter into an Agreed Docket Control Order.

Unlike other Ike-related standing pretrial orders, the Brazoria County Standing Pretrial Order mandates that mediations take place in Brazoria County and the mediator's office must be within 35 miles of either the location of the damaged residence or the current residence of the insured. Also of note, the court has already set aside several weeks for Hurricane Ike trials beginning in June 2010.

LEGISLATIVE UPDATE

We previously reported that HB 4409, which provides for the recapitalization of the Texas Windstorm Insurance Association, passed the Texas House. The bill has since passed the Texas Senate, was signed by Governor Perry, and became law effective July 21, 2009. The new law provides a new funding structure for TWIA losses up to $2.5 billion, which includes allowance for rate increases up to 10%, issuance of public securities, and authorization to purchase reinsurance. The new law also allows for rating territories to be adopted, limited to no more than a 5% variance within a county, which will increase 1% annually until it is capped at 8% in 2012. There is, however, no limitation on the variance of rates between rating territories in different counties. Also of note, the TWIA may now use catastrophe models in determining rates. The law is the result of a compromise by coastal legislators, who believed an alternative bill, SB 14, which required TWIA rates to migrate to actuarially sound rates by 2012, would have meant rate increases of up to 35% over the next three years.

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