HURRICANE IKE INSURANCE LAW NEWSBRIEF

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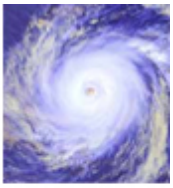

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HURRICANE IKE INSURANCE CLAIM & LITIGATION UPDATE - ELEVENTH SPECIAL EDITION

This Eleventh 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.

UPDATE ON LITIGATION AND STANDING ORDERS IN JEFFERSON COUNTY, GALVESTON COUNTY AND HARRIS COUNTY

Since our last report on June 3rd, Hurricane Ike lawsuits have continued to be filed at a high rate. The District Court Clerks in Jefferson County, Galveston County and Harris County have reported that the number of Hurricane claims filed in each county to date is:

Harris County: 619 suits (residential only)
Galveston County: 205 suits
Jefferson County: 145 suits against TWIA (others not tracked)

There have been a few significant changes recently to the **Galveston County** standing order. The most significant change is that the County Courts at Law in Galveston have now agreed to be subject to the standing order and have Hurricane Ike cases transferred to and put under the control of the standing order previously issued by the 212th Judicial District Court. Additionally, a hearing was held and an order was entered on June 29th extending the procedures applicable to residential claims (set out in the initial Ike standing order in Galveston County) to commercial coverage and bad faith suits involving Ike. Although some deadlines were extended for the commercial cases, the procedural framework for the discovery disclosures and early mediation of each case remained unchanged from the residential Ike order.

There have been no significant changes or additions to the orders issued by either **Jefferson County** or **Harris County**. The Harris County order predominantly tracks the order originally entered by Judge Susan Criss in Galveston County. It is unknown at this time whether Harris County will follow the lead

in Galveston County and attempt to have the order extended to include commercial coverage and bad faith cases as well. Jefferson County is the least restrictive of the orders in that it only provides that cases will be consolidated to specific courts according to the carrier involved in the case for determination of discovery disputes. The Court in which the case is originally filed will continue to handle all other matters, including dispositive motions. It is unknown whether this order will be expanded at any point in time.

Following court instructions from both **Galveston** and **Jefferson Counties**, the plaintiff and defense bar are attempting to reach an agreement on the initial "master" discovery which each party will have to answer in every hurricane insurance cases. Following initial disclosures and mediation, the parties will then have to seek permission from the court on a case-by-case basis to send more detailed or expansive discovery. Discussions are continuing to date. At this initial discussion stage, the information that the policyholder bar seeks from the carriers in the initial master discovery continues to be fairly broad and include procedural claims manuals and claims handling guidelines, adjuster training materials, personnel files for the adjusters, complaint logs and information pertaining to complaints or other actions taken by the Texas Insurance Board relating to homeowners' claims. At this time, the previously sought discovery regarding other lawsuits is not part of the information being sought by the plaintiff bar. That is not to say that they will not request this information in follow-up discovery.

Jefferson County recently entered a supplement to the previous standing Ike order requiring the carrier to advise the claimants of "other claim information" that can be obtained regarding each policyholder plaintiff through the various claim history tracking services to which some carriers have access. To the extent such information exists, the recent order requires carriers to provide any other information in possession of that carrier regarding any prior claim history of the insured policyholder. The order presents some significant practical problems for carriers and compliance issues are just now starting to be addressed.

For your assistance in understanding how the various local consolidation and discovery orders work, we have attached a link to a chart which outlines the similarities and differences between the orders in Harris County, Galveston County, and Jefferson County.

Brazoria County has now entered an order dated June 29, 2009 consolidating all pre-trial matters in Hurricane Ike claims in the 412th Judicial District Court. No formal standing order setting out procedures similar to those in Harris and Galveston has been issued but a hearing is in the process of being scheduled.

To date, **Fort Bend County, Montgomery County, Liberty County and Chambers County** have not entered standing orders. These are all counties surrounding Harris and are sufficiently close to the coast that Hurricane Ike claims are being filed. It is unknown whether there is any intent on their part to make the same effort to streamline the handling of these claims.

To date, there has been no noticeable movement on the part of any of the firms that are actively pursuing coverage and bad faith claims on behalf of insured policyholders to "opt out" of the process. We are early in the litigation process so it is unknown whether or when any mass opt outs will occur. As noted above, there have been a number of lawsuits filed but to date we have not seen very much of the mandatory discovery exchanges and disclosures occurring to date. This has the potential to create a huge log jam for getting homes inspected and mediation dates scheduled.

FIRST HURRICANE IKE CLASS ACTION FILED AGAINST TWIA IN GALVESTON COUNTY

On June 17, 2009, in a suited styled *Louis Burkhart & Stephen Earnhart v. Texas Windstorm Insurance Association;* Cause No. 09CV0998 in the 212th District Court of Galveston County, the Buzbee Law Firm in Galveston filed the first Hurricane Ike class action. The class is defined as those persons who owned TWIA policies who were tendered 11.2% of the value of their property as determined by TWIA in full and final settlement of their wind damage claims. We will continue to keep you abreast as to whether the class is successfully certified.

LOUISIANA FEDERAL COURT DISMISSES KATRINA VPL CLASS ACTION BASED SOLELY ON CLASS DEFINED AS PERSONS WHOSE CLAIMS WERE NOT PROPERLY INVESTIGATED AND PAID

The Honorable Carl J. Barbier, United States District Court Judge in the Eastern District of Louisiana, recently dismissed a class action suit against Lexington Insurance Company in *Mel Hibbets et al. v. Lexington Insurance Company*; Civil Action No. 07-5169, Section: "J" (5). The case was originally filed on August 29, 2007 and the putative class of plaintiffs was defined as "plaintiffs whose properties were damaged in Hurricane Katrina and whose claims for damage were denied in whole or in part or were misadjusted by Lexington." The plaintiffs also alleged that they were entitled to payment of the full value of the policies under Louisiana's Valued Policy Law, Louisiana Revised Statute 22:695 and that they were entitled to penalties under Louisiana's bad faith statutes, Louisiana's Revised Statute 22:658 and 22:1220. Lexington initially filed a motion to dismiss the plaintiff's valued policy law claims. The court initially determined that the plaintiffs had not asserted a viable claim under the Valued Policy Law based upon the recent ruling by the Louisiana State Supreme Court in *Landry v. Louisiana Citizens Property Insurance Company*, 983 S.2d 66 (La. 2008) which held that the Valued Policy Law only applied to fire insurance policies. In an attempt to salvage the class action, the plaintiffs filed for Motion for Leave to Amend and were allowed to do so. The amended complaints continued to fail to provide any factual information concerning the details of how the claims of the named plaintiffs were improperly handled, how the contracts were breached and how the plaintiffs were entitled to recover under the extra-contractual theories provided by the Louisiana Statutes. The amended complaints contained nothing but conclusions or allegations of failure to properly and adequately investigate and pay the claims without any substantive facts being provided in support of those allegations. The court pointed out that the Louisiana Supreme Court has instructed that plaintiffs pleading obligation requires that the plaintiff provides the grounds of his entitlement to relief requested and must contain more than labels and conclusions and formulaic recitation of the elements of the cause of action will not do. The court dismissed the class action complaint based upon these deficiencies that continued in the First Amended Complaint that the plaintiffs had been granted leave to file and denied the plaintiff's motion for leave to file a second amended class action complaint.

The case is encouraging, not only because of the dismissal of the class action but because the holding of the court would presumably apply to individual claims as well and would require that the individual claims provide the same type of specificity as to the basis of the allegations and various causes of action

asserted and not merely allow plaintiff to file broad and conclusionary petitions in the hope that they will be able to develop facts to substantiate those at some point during the discovery process.

LOUISIANA FEDERAL COURT DENIES WIND/FLOOD BAD FAITH CLASS CERTIFICATION IN KATRINA CASE

In an opinion dated June 16, 2009, the Honorable Stanwood R. Duvall, Jr., United States District Court Judge for the Eastern District of Louisiana held that a wind/flood class action should be dismissed because the remaining claims were rife with individual issues and not proper for class action. *In re: Katrina Canal Breaches Consolidated Litigation*, Civil Action No. 05-4182, Section "K"(2): pertains to insurance master class action complaint (recd doc. 3413). The initial allegation claimed that the insurers had improperly denied coverage to policyholders, contrary to the terms of the policy and in bad faith when the claims were denied based upon the flood exclusion. In the initial class allegations it was claimed that the flood exclusion did not apply when the inundation resulted from a levee breach. There was an additional allegation the class members were entitled to recover under the provisions of the Valued Policy Law as well. The class action was broken into three types of policies: Homeowners Insurance, Commercial Insurance and Renters Insurance. It was suggested that the homeowners class be broken into 63 separate subclasses corresponding to one class per insurer. The defendants initially asserted that the claims regarding flood exclusions and the Valued Policy Law should be dismissed since those matters had already been addressed in a ruling upholding that the flood exclusion did apply in a breach of levee case and that the Valued Policy Law only applied to fire insurance. *See Sher v. Lafayette Insurance Company*, 988 S.2d 186 (La. 2008) and *Landry v. Louisiana Citizens Property Insurance Company*, 983 S.2d 66 (La. 2008), respectively.

After successfully having the flood exclusion and Valued Policy Law portions of the claims dismissed, the defendants asserted that the remaining claims which included the allegations of breach of contract, breach of the implied covenant good faith and fair dealing and violation of Louisiana law for bad faith by insurers were not proper for a class certification in that the individual claims and individual issues pertaining to those claims predominate over any common class allegations that could support a class certification. In a well-reasoned and well-documented opinion that cited other class action dismissals that were based on findings that the individual issues predominated over class issues, the court determined that the putative plaintiffs could not establish predominant class issues and dismissed the entire matter.

LOUISIANA FEDERAL COURT EXCLUDES EXPERT TESTIMONY OF POPULAR POLICYHOLDER EXPERT IN KATRINA CASE

In *Russell Tardo, et al. v. State Farm Fire and Casual Company*, Civil Action No. 08-1165 Section "I"/1, the Honorable Lance M. Africk excluded the proposed trial testimony of Plaintiff's purported cost and scope of repair expert, Kenneth Savage. The Tardos suffered damage to their home in Chalmette, Louisiana as a result of Hurricane Katrina. The damage to the downstairs unit of the property was denied based upon the flood exclusion in the policy. Mr. Savage first visited the property in July of 2008 after the property had been repaired. Mr. Savage attempted to base his expert report on the repair estimate and his interview with the insured, Russell Tardo. Savage did not review photographs of the property taken before the repairs were completed and did not take into account the actual repair receipts when preparing his own estimate of the reasonable cost of the repair. Even more troubling to the court was the fact that

Tardo did not recall whether he had any conversation with Savage, "let alone what he told Savage about the damage to his property." Savage did not document his conversations with the insured and was unable to produce all of his notes reflecting his interview with Tardo. In addition, under cross-examination, the defendant was able to document several significant mistakes that Savage made during the course of his preparation of his report and estimate. The Court thus barred Savage from testifying at trial.

APPRAISAL UPDATE REGARDING HURRICANE IKE CLAIMS

In *Johnson v. State Farm Lloyds*, 204 S.W.3d 897 (Tex.App.—Dallas 2006, review granted), the Dallas Court of Appeals issued a controversial opinion holding the appraisal process under a homeowners insurance policy was not limited to placing a dollar value on an agreed scope of loss but included the ability to have the appraiser address the extent of the loss. Specifically, the appraiser in the Johnson case was allowed to make a determination as to whether the entire roof needed replacing versus a partial repair and was not restricted to merely setting a dollar value as to the cost of replacing individual shingles. The Court pointed out that requiring that the parties actually agree as to the exact scope of the repairs necessary and the items that had been damaged would effectively allow one party to the insurance contract to avoid the appraisal process by claiming that there was no agreement on the items to be repaired.

The case has currently been fully briefed and argued to the Texas Supreme Court and it is hoped that ruling will come down in the next few weeks as the high court prepares for its summer break. For any carrier interested in these important appraisal issues, we have attached a link to the briefs filed by the parties to that dispute as well as a link to at least one of the amicus briefs that has been filed. Brief 1, Brief 2, Brief 3

One of the potential advantages to use of the appraisal process is the ***potential*** to limit the insured's ability to assert a breach of contract claim as well as seek a recovery under the prompt payment provision of the Texas Insurance Code. In the case of *Breshears v. State Farm Lloyds*, 155 S.W.3d 340 (Tex.App.—Corpus Christi, pet. denied), the Court held that an appraisal award that was greater than the amount of the initial payment by the insurer was neither a breach of contract nor basis for an award under the provisions of the Prompt Payment Act found in the Texas Insurance Code even though the ultimate payment following the appraisal award was made well after the 60 day time limit found in the policy and the Texas Insurance Code. It is important to note that the payment of the appraisal award does still have to be timely after the appraisal process which will likely require that it be made within 60 days of the award.

Support for this ruling the Corpus Christi court is arguably found in a statement by the Texas Supreme Court in the case of *In re Allstate County Mutual Insurance Company*, 85 S.W.3d 193 (Tex. 2002), at page 196, where the court stated as follows:

> A refusal to enforce the appraisal process here will prevent the defendant from obtaining the independent valuations that could c***ounter at least the plaintiff's breach of contract claim.*** We conclude that the failure to order the appraisals will vitiate or severely compromise the defendant's defenses to those claims.

Those statements were taken from and based upon a previous Supreme Court Case, *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). Because the attorneys' fee claim and the 18% penalty claim (which conceivably

could be eliminated by dismissal of the breach of contract and prompt payment cause of action) are often huge obstacles to getting the claims resolved, use of the appraisal provision may narrow the issues and be used to get a definitive cost of repair when the scope of the damages are not significantly in dispute and also eliminate the potential for the policyholder to recover extra-contractual damages and attorneys fees. It should also be noted that the primary ruling in the *Allstate County Mutual Insurance Company* case was that a party's right to invoke the appraisal process is absolute and it is an abuse of discretion for the court to deny a motion to enforce that provision in the insurance contract.

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