HURRICANE IKE INSURANCE LAW NEWSBRIEF

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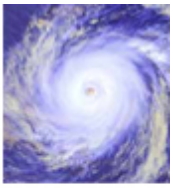

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HURRICANE IKE INSURANCE CLAIM & LITIGATION UPDATE - TENTH SPECIAL EDITION

This Tenth Special Edition of the Texas Insurance Law Newsbrief continues to provide our readers with brief updates related to coverage, claim, and litigation issues regarding damage caused by Hurricane Ike in the Texas Gulf Coast region. Our intent is to keep you apprised of legal 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 of our Newsbrief regarding Ike-related claims and when lawsuits are filed we will analyze and report the issues which gave rise to the litigation.

JEFFERSON COUNTY LITIGATION UPDATE

We previously reported that, in light of the high number of Hurricane Rita suits filed and high number of Ike suits expected, Jefferson County has implemented a plan to centralize all discovery matters in cases involving Ike, Rita, and Humberto claims. The judges of Jefferson County have assigned specific carriers to each judge; seven of the largest residential carriers are distributed amongst three of the district court judges and the fourth judge has all of the other carriers. Under the Jefferson County discovery plan for hurricane cases, once discovery in a suit is complete, it will return to the court in which it was filed for placement on the trial docket.

On April 3, 2009, Judge Bob Wortham in Jefferson County held a conference to obtain input regarding an initial stay order and to discuss further general orders pertaining to a consolidated case management order. On April 15, 2009, a general order was entered for Jefferson County which stays all pending deadlines in Hurricane Ike lawsuits for 60 days. This order includes lawsuits involving both residential and commercial litigation resulting from Hurricane Ike damage. Attorneys for both Plaintiffs and Defendants in Jefferson County Ike cases continue to have discussions in their attempts to work toward preparing a proposed agreed general order or case management order to submit to Judge Wortham for the Court's review and consideration. Issues of contention in these discussions include addressing the issue of appraisal and outlining items to be produced by Plaintiffs and Defendants in pre-mediation discovery during a fast-track plan for resolution, should neither party choose to opt out of this fast-track plan. It is anticipated that Jefferson County will issue another order pertaining to Ike litigation in the very near future.

GALVESTON COUNTY LITIGATION UPDATE

We recently reported that on March 13, Judge Susan Criss of Galveston County's 212th Judicial District Court entered a Standing Pre-trial Order on all Hurricane Ike residential insurance suits in Galveston County. Highlights include: (1) mandatory mediation within 100 days of either the insurance carrier's appearance in the suit or the date of the standing order, whichever is later; (2) abatement of the suit upon the insurer's filing of its Original Answer until 30 days after an unsuccessful mediation or 30 days after a party receives notice that another party desires to end the abatement period; (3) a pre-mediation inspection once the parties have agreed to a mediation date and mediator; if mediation is unsuccessful, a second inspection will be allowed; and (4) 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 the Original Petition was filed. The Order can be viewed here.

On June 2, 2009, Judge Criss entered a First Supplement Standing Pretrial Order Concerning Hurricane Ike Residential Property Claims. The supplemental order addressed waiver of statutory and contractual rights and stated: "if a party elects to participate in the mediation or any other provision of the Standing Pretrial Order or elects to opt out of the abatement, such actions alone will not affect any parties' statutory or contractual rights."

Lastly, the Galveston County Daily News reports that State Representative Craig Eiland, Democrat from Galveston, who holds the second highest position in the Texas House of Representatives, filed suit against Texas Windstorm Insurance Association arising from a claim for damage to his law office on the Strand. This case is among 50 others filed against TWIA.

HARRIS COUNTY LITIGATION UPDATE

On March 30, Judge Tracey Christopher of the 295th District Court held a conference for input from attorneys with Hurricane Ike cases pending in Harris County to discuss possible consolidation of those cases. There was little consensus from the 50 plus attorneys in attendance as to estimates of how many cases may be filed in Harris County (some guessed one thousand, some guessed several thousands); whether the cases could be consolidated before one judge; whether residential lawsuits should be separated from commercial lawsuits; whether consolidation should pertain to only discovery issues; and whether consolidation should be coordinated based upon insurance company groups. Allowing parties to opt out of a fast-track discovery and mediation plans, providing for potential appraisal and consistency were important topics of discussion.

On April 16, 2009, a Transfer Order was issued by Judge Christopher transferring (not consolidating) all Hurricane Ike residential cases to the 11th District Court, Judge Mike Miller presiding, for pre-trial management. Each of these cases will be transferred back to their original courts if they proceed to trial. Judge Miller held a conference on May 4, 2009, to allow both Plaintiffs' and Defendants' attorneys to discuss future pre-trial orders to be issued in these lawsuits, from initial stay orders to potential discovery and mediation orders.

On May 26, 2009**,** Judge Mike Miller entered a Standing Pre-trial Order on all residential Hurricane Ike insurance suits in Harris 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) with 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) a pre-mediation inspection once the parties have agreed to a mediation date and mediator; 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 180 days from the date first answer was filed.

There is currently a hearing set for June 15, 2009 in Judge Miller's court to discuss discovery propounded in the Hurricane Ike cases. At the hearing, Judge Miller will allow both sides of the bar to provide input and suggestion as to proposed written discovery requests in these matters. We will provide an update to the information learned from this hearing and any orders entered thereafter in our future newsbriefs.

2009 HURRICANE SEASON FORECAST

The Weather Research Center in Houston reports that the forecast for the 2009 Hurricane Season is not good for the Gulf of Mexico and the Gulf coast from Louisiana to Alabama, projecting a 70% chance of tropical storm or hurricane landfall. According to the Weather Research Center, the 2009 Hurricane Season will have at least seven named storms with four of these tropical storms intensifying into hurricanes.

LEGISLATIVE UPDATE: WINDSTORM BILL HB 4409 PASSES

On June 1, 2009, the last day of session, the Texas House unanimously passed HB 4409, the "windstorm bill", which has been labeled as less punishing than HB 911 and SB 14. House Bill 4409 provides for the recapitalization of the Texas Windstorm Insurance Association. Two point five billion dollars in funding was allowed in the bill. This figure is comprised of $1 billion in claims that will be covered by post-event bonds, funded by TWIA policyholders; the next $1 billion will be covered by bonds paid on a 70/30 proportional basis between TWIA and coastal policyholders and a non-recoupable assessment on statewide carriers (not to exceed $300 million); and the remaining $500 million will be covered by statewide assessments on carriers (who have the option of financing, re-insuring or self-insuring their assessments). Other notable features of the bill reportedly include: (1) no upfront rate increases or surcharges; (2) a requirement of proof of flood insurance for properties at risk for storm surge; (3) a legislative TWIA oversight committee; and (4) a restriction on TWIA of raising rates by more than five percent without prior approval of the Texas Department of Insurance. The bill must now pass in the Texas Senate before moving on to Governor Rick Perry.

WYO COMPANY CANNOT WAIVE THE TERMS OF SFIP, INCLUDING PROOF OF LOSS REQUIREMENT

In the recent *Vela* decision issued by the United States District Court, Southern District of Texas, McAllen Division, on May 8, 2009, Judge Randy Crane held Plaintiff's failure to timely submit a signed and sworn Proof of Loss for damages allegedly arising from a flood-related loss on or about July 24, 2008 to Plaintiff's property located in San Juan, Texas, precluded recovery pursuant to Plaintiff's Standard

Flood Insurance Policy ("SFIP"). The Court noted that the SFIP provides that "an insured cannot file a lawsuit seeking benefits . . . unless he can show prior compliance with all policy requirements, including the Proof of Loss requirement." Plaintiff, while conceding he never filed a Proof of Loss, alleged that Standard Fire waived the requirement of the Proof of Loss; Plaintiff substantially complied with the Policy; and Standard Fire should be estopped from asserting the Proof of Loss requirement as a defense. Because the policy provisions of the SFIP cannot be changed without the express written consent of the Federal Insurance Administrator, the Court held that a Write Your Own ("WYO") company cannot waive the terms of the SFIP. The Court further noted there is no legal substitute for a signed and sworn Proof of Loss; thus, the substantial compliance argument proffered by Plaintiff must fail. With regard to the estoppel argument, the Court cited the repeated holdings of the Fifth Circuit that "equitable estoppel is unavailable in a claim by an insured against a WYO carrier asserting a Proof of Loss defense" because monies paid to an insured are a "direct charge on the public treasury" (i.e. federal funds), and estoppel cannot grant a money remedy that Congress has not authorized.

FIFTH CIRCUIT: POLICY HOLDS STORM SURGE NOT COVERED AND ANTICONCURRENT CLAUSE NOT AMBIGUOUS

In an April 2 opinion written by Edith Jones, the Fifth Circuit held in *Arctic Slope Regional Corp. v. Affiliated FM Ins. Co.*, 2009 WL 860037, that under Louisiana law, applying the general rules of strict contract construction, even if a storm surge fell within the policy's definitions of both and excluded peril (i.e. flooding) and a covered peril (i.e. wind/hail), the policy was not ambiguous and did not provide coverage for the excluded storm surge. The Court also held that the policy's anticoncurrent causation clause was not ambiguous in providing that the hurricane storm surge "whether driven by wind or not" was not covered by the policy.

NFIP DOES <u>NOT</u> PREEMPT NEGLIGENT MISREPRESENTATION CLAIMS AGAINST WRITE-YOUR-OWN INSURER

On March 17, the Fifth Circuit determined that negligent misrepresentations made by an insurer and its representatives that allegedly caused the insured to not renew his flood policy, were not preempted by FEMA and were actionable against a write-your-own flood insurer. In *Campo v. Allstate Insurance Co.*, 2009 WL 682619 (5th Cir. (La.) March 17, 2009), the insured failed to pay his flood insurance premium due before Hurricane Katrina destroyed his home. He could have avoided a lapse in coverage by paying the premium during the grace period. During this time, however, he received $2,500 advance and a letter from Allstate advising that they had requested a check from the program for his policy limits of $98,200. But they failed to tell him that the payment was contingent upon his paying the $1,237 past due premium. After the policy lapsed, Allstate denied the claim and requested a refund of the $2,500 advance. The district court granted summary judgment to the insurer and the appeal followed.

On appeal, the Fifth Circuit observed that federal law preempts "state law tort claims arising from *claims handling*" against a write your own carrier. But the FEMA legislation did not preempt "*policy procurement*" based claims and the fiscal reasons for preemption did not apply to procurement based claims because FEMA does not reimburse carriers for them. And in this case, the court held that the claims asserted were procurement based and were thus actionable by the insured. Summary judgment was reversed and the lawsuit remanded for further proceedings.

LOUISIANA SUPREME COURT DENIES WRIT ON CASE ALLOWING LIMITATIONS TO BE TOLLED ON NEW SUITS AGAINST CARRIERS NAMED IN CLASS ACTIONS

Recently, the Louisiana Supreme Court denied writs on the decision in *Pitts v. Louisiana Citizens Property Ins. Corp.,* 2009 WL 103979**,** letting stand the 4th Circuit's opinion concerning the tolling of prescription. The Court of Appeals had previously held that the prescription period on action against a property insurer, brought by an insured to recover for damages sustained during Hurricane Katrina, was interrupted by a class action petition against the insurer in which the insured was a putative class member and which was filed within the two-year statutory prescriptive period on property insurance claims arising from Katrina, and prescription did not begin to run again until notice was given to insured that she was excluded from the class. As such, it appears that new Katrina suits may be considered timely filed if the insured was part of a class action suit in which the class was not certified. This is a major development which gives new life to policyholders and their attorneys and will likely reopen the floodgates for individual suits against carriers, previously believed to be barred by prescription.

APPEAL OF LOUISIANA CLASS CERTIFICATION

In September 2008, Judge Manuel A. Fernandez of the 34th Judicial District Court of Parish of St. Bernard, Louisiana Amended his Judgment for Class Certification in *Charles Dupree v. Lafayette Insurance Company*. The general adjusting class action was brought by Dupree as class representative to represent all citizens of Louisiana who suffered damage and losses from windstorm under their homeowners' policies issued by Lafayette, whose claims were denied totally or partially, and whose claims were misadjusted. Plaintiffs focused on the alleged use of pre-Katrina pricing in repair estimates resulting in inadequate payments to insureds; failure to include overhead and profit for repair of roof damage; failure to include costs of permits and sales taxes; and failure to pay ALE. Later, Plaintiffs agreed to reduce the class to those who brought claims in the eight parishes around the New Orleans area. Rejecting the holdings in the federal court cases as non-binding on the state court and distinguishing other holdings on their facts, Judge Fernandez issued a new order several days ago wherein the court referred to other class certifications in Louisiana state courts and referenced the common issues which existed, the resolution of which would affect all or a significant number of putative class members. The court's recent order also rejected Lafayette's argument that any class should be limited to policyholders from St. Bernard Parish. The court's latest order defines the class as all persons whose property is located in the eight parishes and covered by a Lafayette homeowners policy, sustained wind damage from Katrina, and had wind claims denied in whole or in part or were misadjusted by Lafayette by: (1) using pre-Katrina pricing in repair estimates; (2) failing to include overhead and profit for repair of roof damage; (3) failing to include costs of permits and sales taxes; (4) failing to pay ALE; (5) failing to properly adjust civil authority claims prohibiting entry or occupancy; and (6) failing to pay claims within 30/60 days after satisfactory proof of loss when arbitrary, capricious and without probable cause. Lafayette is appealing the judgment.

LOUISIANA COURT HOLDS: NO AWARD FOR COSMETIC MATCHING OF VINYL SIDING; AND EIGHT DAY LATE PAYMENT INSUFFICIENT TO MAINTAIN ARBITRARY AND CAPRICIOUS ACT AGAINST INSURER

After a four-day bench trial in the *Weiser v. Horace Mann Insurance Company* case, Judge Lance Afrik, United States District Judge for the Eastern District of Louisiana, recently issued his 38-page opinion containing his findings of fact and conclusions of law regarding the Hurricane Katrina claim of Mr. Weiser for his property located in Chalmette, Louisiana. (Civil Action No. 06-9080). After determining that rain water did not enter the Property through various portions of the residence, Judge Afrik held that the water damage exclusion applied to all interior water damage of the Property. Although Judge Afrik held that there was damage caused by wind to the vinyl siding of the Property, the Court would not award payment for "cosmetic matching" of the replacement siding to the home's existing siding. Furthermore, despite a payment which was eight days late, the court ruled Plaintiff could not prevail on his allegation that this gave rise to an arbitrary and capricious act on the part of Horace Mann. Judge Afrik ultimately awarded $4,079.42 in damages, plus interest, and possible future reimbursement for any repairs to the property if made within 180 days of the order and submitted within 210 days of the order to Horace Mann for payment. The Order did not allow Plaintiff to recover for bad faith.

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