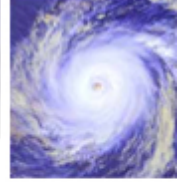




HURRICANE IKE INSURANCE LAW NEWSBRIEF



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HURRICANE IKE INSURANCE CLAIM & LITIGATION UPDATE - NINTH SPECIAL EDITION

This Ninth 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 recently reported that Jefferson County has implemented a plan to centralize all discovery matters in cases involving Ike, Rita, and Humberto claims. This occurred because of the high number of Rita hurricane suits filed and high number of Ike suits expected in Jefferson County. Since January 1, 2009, 456 new suits have been filed in Jefferson County District Court. This number is growing each day, with the Southeast Texas Record reporting that more than three dozen new Ike suits have been filed in March alone. In discussing the Jefferson County consolidated discovery plan, Judge Bob Wortham of the 58th District Court was recently quoted as saying the plan will ensure uniform rulings in hurricane cases as well as save costs. In an interview with the Southeast Texas Record, Wortham stated, "The four civil judges work well together...and share similar ideologies. We stand together. We seldom do anything different from one another when it comes to [case rulings]." 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.

The judges of Jefferson County have assigned specific carriers to specific judges with the seven largest residential carriers being assigned to 3 of the district court judges in Jefferson County and the fourth being assigned for all of the other carriers. Judge Bob Wortham has announced a meeting in his court for all concerned counsel regarding the consolidated hurricane discovery plan on April 3rd at 2:00 p.m. We will be attending this meeting and will report on the results in the next issue of our *Hurricane Newsbrief*.

GALVESTON COUNTY LITIGATION UPDATE

We recently reported that Judge Susan Criss of Galveston County's 212th Judicial District Court held a public hearing on March 3rd to finalize a pre-trial order on all Hurricane Ike residential insurance suits in Galveston County. Judge Criss entered the Standing Pre-trial Order on March 13th. The Order mandates

mediation and sets several deadlines pertaining to the mediation as well as the exchange of information prior to mediation. Of note, the parties are required to agree on a 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; however, the actual mediation may take place outside of the 100-day period. Additionally, the suit is immediately abated 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. In preparation for mediation, the parties must "use their best efforts" to exchange information pertaining to the claim (including expert reports, damages estimates, the policy, non-privileged portions of the claim and underwriting files, and flood claim payments) within 60 days of the insurer's answer date or the Order, whichever is later. The Order also requires that the carrier be permitted 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. Finally, after the abatement period expires, the parties must enter into an Agreed Scheduling Order (including a trial date), and the Court will set a Status Conference 150 days from the date the Original Petition was filed. The Order can be viewed [here](#).

HARRIS COUNTY LITIGATION UPDATE

Judge Tracey Christopher of the 295th District Court in Houston has announced a meeting in her courtroom for all counsel interested in hurricane litigation in Harris County for March 30, 2009 at 8:30 a.m. The purpose of the meeting was not stated but it appears Judge Christopher has been encouraged to evaluate for the civil courts of Harris County what has been done in Galveston County and in Jefferson County for the hurricane insurance cases. We will be attending this meeting and will report on the results in the next issue of our *Hurricane Newsbrief*.

FIFTH CIRCUIT OPINES ON CAUSATION TESTIMONY NEEDED TO SUSTAIN A BAD FAITH VERDICT IN A HURRICANE KATRINA CASE

The Fifth Circuit Court of Appeals recently issued its opinion on a carrier's appeal of an adverse Hurricane Katrina judgment. In *Kodrin v. State Farm Fire and Casualty Co.*, Cause Nos. 08-30092, 08-30169, 2009 WL 614521 (5th Cir. La., Mar. 11, 2009), the Fifth Circuit rejected State Farm's arguments that instructions to the jury regarding wind damage and burden of proof were erroneous, maintaining that when the instructions and interrogatories were taken together and in context, they correctly stated the applicable law. However, the Court did reiterate its prior holding that when the homeowner's policy provides coverage for wind damage but not flood damage, the insured may recover under the homeowner's policy only when wind is the exclusive cause of damage. Although Court acknowledged tension between its recent decisions and that of the Louisiana intermediate appellate courts on this issue, it maintained it was bound by its own precedent. Significantly, however, the Court vacated the district court's award of bad faith damages and attorneys' fees to the homeowners holding that the claim denial and the plaintiffs' expert testimony on causation, without more, was not evidence of the insurer's bad faith.

TEXAS LEGISLATURE CONSIDERS NATURAL DISASTER CAT FUND

On the Texas Legislature's agenda during the current session is a proposal to create the Texas National Disaster Catastrophe Fund, which would act as a reinsurance fund for residential property insurance carriers. Under the proposal set forth by House Bill 2487 and Senate Bill 1379, the Legislature would invest an initial amount into the fund, and all companies selling residential property insurance in the state,

as well as the Texas Windstorm Association, would pay into the fund. As the Houston Chronicle recently reported, Democratic Representative Craig Eiland, sponsor of the House version of the bill, stated that property insurance companies would save money by not having to buy reinsurance each year from private companies based mostly in Europe or Bermuda, which are not regulated by the state, and those savings would be passed along to consumers. Senators Juan “Chuy” Hinojosa (D-McAllen) and Tommy Williams (R-Woodlands) are sponsoring the Senate legislation.

PUBLIC ADJUSTERS: WHAT ROLE DO THEY PLAY?

With the growing number of claims filed in response to Hurricane Ike, insureds are consulting and hiring public adjusters to assist in the presentment of their claims and efforts to recover policy benefits. The Texas Insurance Code defines a public adjuster as one who “*for direct, indirect, or other compensation: 1. acts on behalf on an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance ...; or 2. on behalf of any other public insurance adjuster, investigates, settles, or adjusts or advises or assists an insured with a claim or claims for loss or damage under any policy of insurance.*” However, no public adjuster can participate in the unauthorized practice of law (as prohibited by the Texas Administrative Code §19.713) and public adjusters cannot participate in the reconstruction, repair or restoration of the damaged property that is the subject of the claim they assisted in negotiating/settling (*Texas Insurance Code § 4102.158*). Moreover, despite the public adjuster’s acting on the insured’s behalf, the insurer must continue to communicate with the insured, and the insured must comply with his/her duties pursuant to the insurance contract. Thus, even though public adjusters are hired to act as conduit of information from the insured to the insurer, they cannot provide legal advice to insureds and conveying information to the public adjuster will not absolve the insurer of its duties under the contract to its insured.

WIND REPAIRS UP TO CODE

The Texas Windstorm Insurance Association is reportedly requiring that all repairs made to homes insured under the TWIA waiver program must be in compliance with the current catastrophe area wind code requirements. The waiver only exempts code deficiencies that pre-date the application for coverage with the TWIA. Further, a WPI-8, a building code certificate of compliance issued by the TDI, must be issued for all repairs, additions and alterations to remain insurable with the TWIA. Hurricane Ike repairs to homes insured under the TWIA waiver program will require repairs in compliance with the current catastrophe area wind code to remain insurable with the TWIA.

PROOF OF LOSS: WHAT IS ENOUGH?

A recent decision from the Fifth Circuit Court of Appeals in a Hurricane Katrina case held that a question of fact existed as to whether an insurer’s own inspection of the insured premises provided sufficient notice of the loss, irrespective of requests for documentation evidencing estimates from the insured. The Court noted that “a satisfactory proof of loss is only that which is sufficient to fully apprise the insurer of the insured’s claims” and that the proof of loss is a “flexible requirement” which can be fulfilled either verbally or in writing. “Under Louisiana law,” the Court went on to say “an insurer can, at least in some cases, obtain a satisfactory proof of loss as a result of its adjuster’s inspection.” Though the Court did not provide a list as to what circumstances would be included in “at least some cases,” it appears that an adjuster preparing her own estimate for repairs after a site inspection of the insured premises is sufficient to raise a fact questions as to whether the insured provided a satisfactory proof of loss. To read the entire

opinion on this matter, please see *Todd M. Korbel v. Lexington Ins. Co.*, No. 07-31111, 2009 WL 190691 (C.A.5 La.) January 28, 2009.

BURDEN ON INSURED TO SHOW “DIRECT LOSS” TO PREVAIL ON SUMMARY JUDGMENT

In *SJD-CC, LLC v. Marsh USA, Inc. d/b/a Marsh USA Risk Services and Travelers Indemnity Company of Connecticut*, a federal District Court Judge for the Eastern District of Louisiana recently held that to prevail on summary judgment, it is the insured’s burden to show Hurricane Katrina caused or resulted in a direct loss or damage to the insured’s roof. The Court reasoned that “direct loss” “... means the dominant and efficient cause of the loss, as distinguished from a remote cause;” and because the policy of insurance maintains that Travelers will pay for the “direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of loss” it is the insured’s burden to prove the direct physical loss was caused by Hurricane Katrina. As there was uncontroverted evidence in this case to suggest that the dominant and efficient cause of the loss was the improper installation and repair of the roof prior to Hurricane Katrina, the Court ruled against the insured and denied the insured’s motion to reconsider.

NO MENTAL ANGUISH FOR COMMERCIAL ENTITIES & ASSIGNED BAD FAITH CLAIM IS LIMITED TO INSURED’S ORIGINAL BAD FAITH CLAIM

In another recent Hurricane Katrina decision where an insured brought suit arising from a claim for wind damage to an apartment complex in Slidell, Louisiana, a federal District Court Judge for the Eastern District of Louisiana held, among other things, that commercial entities cannot maintain mental anguish claims. Also, though the Court ruled that bad faith claims are assignable, the scope of the assigned claim is limited to the bad faith claim possessed by the original policyholder. The Court held that one who is assigned a bad faith claim of an insured cannot assert or recover under a broader bad faith claim than the original insured possessed. Moreover, the assignee’s rights are limited to damages incurred as of the date of the assignment. Thus, when a commercial entity obtains the right to recover the insurance proceeds from a commercial entity selling an apartment complex (i.e. the original insured), the buyer can only maintain that cause of action that the original insured could have maintained. To read the entire opinion on this matter, please see *Pontchartrain Gardens, Inc., et al. v. State Farm General Ins. Co., et al*, No. 07-7965, 2009 WL 86671 (E.D.La.) January 13, 2009.

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