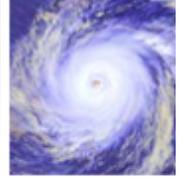




# HURRICANE IKE INSURANCE LAW NEWSBRIEF



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## TEXAS INSURANCE LAW NEWSBRIEF - SPECIAL EDITION HURRICANE IKE INSURANCE UPDATE

This Special Edition of the Texas Insurance Law Newsbrief is designed to provide a quick reference and essential information for insurers responding to the catastrophic damage 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 next as the wind and flood carriers of the state deal with hundreds of new legal and regulatory issues. We recognize that the brief issues outlined herein are just the tip of the proverbial iceberg and we will continue to provide more detailed updates in future issues of our Newsbrief regarding Ike-related claims and (when they are filed) lawsuits, as well as the many coverage-related issues and legal questions that will undoubtedly arise.

### WILL IKE LITIGATION MIRROR KATRINA LITIGATION?

While all of the hurricanes hitting the Gulf Coast in the last six years generated claims and litigation involving many of the same issues, Hurricane Katrina generated a greater volume of coverage and bad faith suits, more class actions, and more mass actions. With Hurricane Ike hitting Houston and the surrounding areas hard, many carriers are wondering whether Ike will be "*Katrina II*" in terms of the legal circus seen in Mississippi and Louisiana over the last three years. For several reasons, we don't think so.

First, in Katrina the residents and business owners of New Orleans and the surrounding parishes saw much more extensive flood damage than Houston and its surrounding counties. Certainly Galveston, Orange and Jefferson Counties experienced significant flooding in Ike, but it didn't involve anywhere near the numbers seen in Katrina. Second, the insurance laws have developed differently in Texas than in Louisiana or Mississippi. Texas, unlike Louisiana, has much better developed case law on flood coverage, wind damage, concurrent causation, and burden of proof issues. Texas has an extensive body of established case law on bad faith in contrast to Louisiana and Mississippi. Texas has two year (extra-contractual) and four year (contractual – for most contracts) limitations periods in contrast to Louisiana's one-year prescription period (that was extended by the Louisiana Legislature for Katrina claims). This will not only allow for the more "orderly" progression of the filing new suits, it will also lead to less suits being filed prematurely (which we saw in Louisiana with Katrina suits in the days before the running of the prescription period.) The required Texas Windstorm Coverage in coastal counties will result in more concentrated efforts to separate wind from flood damage than was seen in Katrina. Texas won't have the "VPL" coverage fight we underwent in Katrina. Texas has more stringent class action requirements so less class action lawsuits are likely in Texas than we saw in Katrina. Texas has also utilized the Multi-

District Litigation Panel concept much more than in Louisiana or Mississippi, including recently in Hurricane Rita litigation which might result in more easily managed individual litigation (at least at the pre-trial stage).

The differences in Ike litigation, however, may not all be considered good by carriers. The scope of litigation will be more geographically widespread. Most of the Katrina suits were centered in the state and federal courts New Orleans and Gulfport, MS. The Ike litigation will be extensive in the 14 Texas counties declared federal disaster areas as well as in as many as a dozen other Texas counties which were not declared disaster areas but which still experienced wind damage. Far more commercial property suits (including business interruption issues) seem likely given the larger number of commercial entities impacted by Ike. Suits in traditionally pro-policyholders venues such as Galveston, Beaumont, and Orange could make individual Ike lawsuits more expensive to resolve than their New Orleans and Gulfport counterparts. The wide diversity in policy forms among homeowner policies in Texas will likely lead to both more issues and more lawsuits as policyholder lawyers attempt to exploit such policy differences.

So, while there will be many similarities in the litigation, it is more likely that there will be significant differences between the types, amounts, geographic diversity and costs of Ike lawsuits in comparison to the Katrina lawsuits. The goal of this publication is to track and report on those differences as they arise over the next year.

## **PLAINTIFFS' LAWYERS FOCUS MEDIA ATTENTION IN HOUSTON BUT THE MOST CRITICAL DAMAGE IS TO THE EAST**

Although Plaintiffs' attorneys are receiving national media attention while they comb the streets in the greater Houston and Harris County area, the most significant property damage, and the area of greater anticipated litigation, is east of Houston where billions of dollars of damage are estimated. The total damages from Ike are presently estimated as high as \$18 Billion. Over 76,000 damage claims have been filed as of this week with the Texas Windstorm Insurance Association alone, which insures coastal counties not underwritten by many insurers. Several hundred thousand claims have already been filed with the P&C carriers of the state. Ike's damage was not just wind damage, however. In Orange County, Bridge City suffered nearly complete flooding with reports of up to 12 feet of water in certain parts of the city. Only 14 homes in Bridge City were reported as being unaffected by the surge. In Jefferson County, Sabine Pass received over 14 feet of storm surge, while Port Arthur received an estimated 15 foot surge. In Galveston County, the West End received an estimate 14-18 foot surge. While the damage estimates have yet to be fully calculated, partial estimates suggest that number may exceed \$500 Million just on Galveston Island alone. Damage estimates in Brazoria County are already peaking \$120 Million. While much of Harris County suffered wind damage, downed trees, and even some flooding, we anticipate the greatest number of lawsuits will be filed in those areas east of Houston which were harder hit by Ike's devastating winds and storm surge. In addition to damage in Texas, Hurricane Ike caused significant destruction in Louisiana as well, with estimates of damage approaching \$1 Billion. Ike's effects were so widespread it even caused more than \$500,000 in damage as far away as Ohio after moving inland from the Texas Gulf Coast.

The geographic diversity looks like it will be one of the most difficult aspects of Ike litigation to coordinate. For a variety of reasons, it appears unlikely that Ike will result in the creation of a litigation "Umbrella" which we saw in Katrina from those cases pending in the federal courts of New Orleans.

While it is expected that some carriers will try to make use of an MDL (similar to what is now used in asbestos and silica litigation in Texas) for their Hurricane Ike lawsuits, those efforts will be resisted by the policyholder bar and it is too early to predict whether they will be successful. In the heavily populated areas such as Harris County as well as in the Eastern and Southern Federal District Court Districts in Texas, the courts themselves are highly likely to develop their own case management orders if the number of Ike suits become significant. Until then, the prospect of as many as ten thousand Ike coverage and bad faith lawsuits spread out across as many as 20 Texas counties have many carriers worried about litigation management issues. As these issues develop, we will track them and report on the trends we see.

### **TEXAS DEPARTMENT OF INSURANCE IKE BULLETIN: HANDLE CLAIMS “QUICKLY” AND PAY THEM “PROMPTLY”**

Two weeks after Hurricane Ike made landfall, the Texas Department of Insurance issued Bulletin #B-0066-08 regarding claim handling under Texas Insurance Code Section 542.051 et. seq. (known as The Prompt Payment of Claims Act). In addition to confirming the deadlines imposed by Section 542.059 of the Code will extend all standard claim handling deadlines by an *additional* 15 (calendar) days, the Bulletin states that upon receiving notice of a claim, an insurer must:

1. *establish quick contact with the claimant;*
2. *quickly survey and assess the claimant’s damage;*
3. *provide quick responses to claimants;*
4. *promptly provide payment for additional living expenses (ALE) and for temporary repairs after the assessment of the insured’s damage; and*
5. *quickly set appointment with the claimant for examination and resolution of claims.*

(Insurers or CAT adjusters needing more information on the interpretation and application of the Prompt Payment of Claims statute should contact any of our lawyers.)

### **POLLUTION/ENVIRONMENTAL LITIGATION IS IN THE PIPELINE TOO**

News reports last week confirmed that an estimated 500,000 gallons of crude oil was spilled into the Gulf of Mexico which affected the bays and wetlands of Louisiana and Texas. Hurricane Ike severely damaged several dozens oil platforms, storage tanks and pipelines. Precautionary burning in anticipation of the storm released organic compounds and toxic chemicals, and subsequent power outages caused releases of ammonia into the atmosphere. The number of reported releases of oil, gasoline and other substances exceeded 400. There were also 3,000 pollution reports filed with the Environmental Protection Agency and other state entities regarding hazardous materials turning up in wetlands, backyards, and other properties. This week the estimated number of sites remaining to be cleaned up was 1,500. It is our understanding that lawsuits are already “in the pipeline” related to liability claims, clean-up claims, and subrogation claims resulting from the widespread pollution and environmental damage caused by Hurricane Ike.

## **SIGNIFICANT PLAINTIFFS' FIRMS STIRRING UP IKE CLAIMS ALREADY, CLAIMING LEGAL DISPUTES WILL BE MORE COMPLICATED AND CONTENTIOUS THAN HURRICANE RITA CLAIMS**

Two weeks after Hurricane Ike made landfall, multiple local Beaumont lawyers announced what they perceive as “big” insurance issues needing attention as claims for damage from Hurricane Ike unfold, and they predicted that the disputes will be more complicated and contentious than Hurricane Rita claims. In speaking with the media, several Beaumont lawyers noted that hundreds of insurance claim lawsuits remain unresolved three years after Hurricane Rita, and many of those claims will now overlap with Hurricane Ike claims. In addition to the overlap claims, as with both Hurricane Rita and Hurricane Katrina, they agree that the “wind versus flood” concurrent causation issue will be a common legal dispute. Construction companies are already proclaiming they may have a role in providing evidence of causation to “bolster a court case if it’s necessary.” Other Plaintiffs’ lawyers are predicting that lawsuits resulting from Hurricane Ike will likely not be limited to disputes over damage, but will extend to legal disputes regarding claims for expenses prompted by damage causing property to be uninhabitable, claims for living expenses prompted by evacuation alone, and claims for living expenses while an undamaged home was without power. In addition to the legal forecast we are hearing from the Plaintiff’s Bar, we further anticipate that business interruption claims and ensuing mold claims will lead to significant disputes resulting in litigation. Multiple prominent Plaintiffs’ lawyers from Texas and as far away as New York are already holding “town hall meetings” and “consumer conferences” to “assist” local Ike victims with their claims issues in the affected counties. When the Anderson Kill firm from New York and the Provost Umphrey firm from Beaumont, among many others, are hosting community conferences and policyholder meetings in Houston, Beaumont and across southeast Texas, a wave of lawsuits is likely to follow.

We are seeing more major traditional plaintiffs’ firms getting involved in Ike claims and interested in Ike lawsuits than any other insurance event in Texas since Tropical Storm Allison in 2001. The regional and national policyholder firms have been working on Ike claims for some of their clients since the week after the storm. The number of adversely affected policyholders, and the decline in many types of tort litigation in Texas over the last 4 years, has created an incredible interest in Ike claims and lawsuits among plaintiff and policyholder lawyers who otherwise would be focusing on other work. As they continue to host town meetings, conferences and other consumer outreach efforts, we will continue to monitor their efforts and the trends that it might signal.

## **GOT SIGNATURE? UNCERTAINTY REGARDING WHETHER WINDSTORM EXCLUSION ENDORSEMENT SIGNED BY INSURED MUST BE LOCATED TO DENY COVERAGE**

Revisiting a still unresolved issue in Texas, we are aware that there remain questions regarding whether a TDI-approved windstorm exclusion (whether HO-140 or some other disclosure and waiver of coverage form) is enforceable if the actual endorsement bearing the insured’s signature cannot be located. While the declarations page of the policy may list the endorsement and reflect the reduction in premium based upon its application, it is still unclear whether the exclusionary provisions may be applied to deny a wind claim in the absence of a signed copy of the exclusionary endorsement. The Eastern District Court in Louisiana recently allowed the application of the windstorm exclusion notwithstanding the inability of an insurer to produce the signed exclusion. *See Pierce v. Allstate Ins. Co.*, 542 F. Supp 2d 495 (E.D. LA,

2008). However, it remains unclear how this issue will be decided upon in Texas. The Texas Department of Insurance and the Texas Attorney General are both receiving queries regarding this issue, and we will report any developments as they arise.

## **THE FUTURE OF IKE CLAIMS AND LAWSUITS**

Ike was a huge storm and the claims and lawsuits are going to make it one of the most costly storms in US history. Our goal is to update our readers periodically on the hot claim issues, regulatory responses and policy arguments we hear from “the trenches” where the claims handling will be taking place over the next few months. When the lawsuits start, we plan to track those and report on trends, new arguments, and new issues as they develop.

*If you do NOT want to receive any future of issues of our Hurricane Ike Newsbrief, or if others in your office DO want to receive all future issues of our Hurricane Ike Newsbrief, please send an email requesting to be added or deleted to our Hurricane Ike Newsbrief to [tin@mdjwlaw.com](mailto:tin@mdjwlaw.com)*

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