

TEXAS INSURANCE LAW NEWSBRIEF

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HOUSTON'S FOURTEENTH COURT OF APPEALS REVERSES HURRICANE IKE "WIND & FLOOD" DAMAGE AWARD

Last Thursday, Houston's Fourteenth Court of Appeals examined a \$4,000,000 jury award for Hurricane Ike damage to an apartment complex in Galveston caused by a combination of wind and flood and reversed the large trial court judgment for the insured concluding that the insured should take nothing against the insurer. In *Lexington Insurance Company v. JAW the Point, LLC*, No. 14-11-00881-CV (Tex.App. – Houston[14th Dist.] August 1, 2013), the insured owned several hundred apartment complexes, including a thirteen building complex in Galveston, TX which was damaged by a combination of wind and flood during Hurricane Ike. Because the combined damage exceeded 50% of the appraised value of the property, a City ordinance essentially required that the property be demolished and rebuilt. The insurer determined that \$1,278,000 in damage was caused by wind and paid \$817,940 after the deductible. However, the \$3.5 million in flood damage was excluded. The insured sued seeking damages for breach of contract and asserting common law and statutory bad faith claims.

At the trial court, a partial summary judgment was granted in favor of the insurer on the breach of contract action because the insurer had paid out its full \$10 million policy limit in payment of multiple covered claims on this complex and multiple other properties. The trial court also agreed the flood damage was excluded and granted summary judgment on those claims as well. But, the trial court allowed claims alleging a variety of "unfair or deceptive acts or practices" under the Texas Insurance Code to go forward resulting in the large jury verdict. This appeal followed.

On appeal, the Houston appellate court examined the "concurrent cause" provision in the policy precluding coverage for any loss caused by flood... "regardless of any other causes or event that contributes concurrently or in any sequences to the loss." The court also observed under Texas law the insured has the burden to present evidence to enable the jury to segregate loss or damage caused by covered causes of loss from that caused by excluded causes. It was undisputed in this case that the City's damage estimate that resulted in the demolition was "caused by a combination of wind and flood." "Nothing in the City's letter shows that the City based its substantial damage determination on a finding that the apartment damage was caused by wind alone, which is a Covered Cause of Loss – rather than by flood or a combination of wind and flood, which are excluded Causes of Loss." Accordingly, the court found no breach of contract and no coverage under the ordinance endorsement and, having resolved that issue in the insurers favor, the court determined that the bad faith and statutory claims must fail as well as a matter of law. The court reversed the trial court's large judgment and rendered a take nothing judgment against the insured.

INSURED DOES THEIR "BEST TO MAINTAIN HEAT IN THE BUILDING" WATER DAMAGE FROM FROZEN PIPE BURSTING IS COVERED

Last Wednesday, the El Paso Court of Appeals affirmed summary judgment in favor of a commercial property owner after finding that maintaining heat in an adjoining occupied unit was sufficient to meet an exception to a frozen plumbing exclusion *if* the insured does their "best to maintain heat in the building or structure" when a pipe over the adjoining, unoccupied and unheated unit burst, flooding both apartments. In *American National Property & Casualty Company v. Fredrich 2 Partners, Ltd.*, 2013 WL 3939931 (Tex.App. – El Paso July 31, 2013), the trial court granted summary judgment in favor of the insured and American National appealed.

The court focused on the insured's argument that even though heat was not maintained in the vacant unit, above which a frozen pipe burst, they did maintain heat in the building because an adjacent unit was occupied and heated during a four-day ice storm. The court observed that "the policy did not require Fredrich to maintain heat in each unit, but rather to heat the building – the property covered under the policy." As a result, the insured satisfied the exception to the frozen plumbing exclusion and summary judgment in favor of the insured was affirmed.