

# TEXAS INSURANCE LAW NEWSBRIEF

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## Galveston Jury Returns Verdict in Hurricane Ike Case Against Texas Windstorm

After a month of trial and over 12 hours of deliberation, late last Friday, May 23<sup>rd</sup>, a Galveston County jury in *City of League City v. Texas Windstorm Insurance Association* returned a lengthy and complicated verdict in the first Hurricane Ike case to be tried to verdict by a municipality against TWA and which appears to be much more favorable to TWIA than League City.

While the jury found TWIA failed to comply with the insurance policy (i.e. breach of contract), that it violated one provision of the article 541 of the Texas Insurance Code by “failing to affirm or deny coverage within a reasonable time” (which was only one of the six violations it was asked to find), and that \$105,778 was owed for that failure to timely affirm or deny coverage, the jury also made multiple other findings in favor of TWIA. Initially, the jury found the \$3.25 million appraisal award was *not* in compliance with the policy and did not reflect Ike damage for each amount awarded, but every windstorm damage amount it awarded (except one location) was what TWIA originally estimated for Ike damage. Significantly, the jury found the insured League City failed to properly and timely provide notice its claims to TWIA and TWIA was prejudiced by that failure. The jury also found League City failed “to keep and provide to [TWIA] an accurate record of repair expenses” as to most of the damage locations (as required under the policy). The charge was unusually long and complicated due to the fact the commercial property policy at issue insured multiple buildings owned and operated by the municipality. **It is attached at the bottom of this report.** The jury made numerous findings of “no violation” or “no damage” which were remarkable given the fact that all of these findings were obtained in the context of a pre-trial ruling striking all of TWIA’s then-plead affirmative defenses.

By finding the \$3.25 million dollar appraisal award was not in compliance with the policy, the jury established that TWIA’s decision not to pay the award when it was issued (on the grounds that it was the result of mistake, fraud, or not in compliance with the policy) was correct. The finding presumably gives TWIA the ability to argue its refusal to pay the appraisal award cannot establish a breach of the policy and therefore also cannot be grounds for recovery of attorney’s fees.

By finding League City did not promptly provide the notice of its claims as provided for by the policy, TWIA was prejudiced by such failure, and League City failed to keep an accurate record of repair expenses as to most of the damage claimed, the jury may have established as a matter of law (1) League City breached the contract and is not entitled to any breach of contract damages or attorneys’ fees recovery on breach of contract grounds and (2) TWIA does not owe League City any 18% penalty for violations of the Prompt Payment of Claims Act (which also requires prompt written notice of a claim from the insured in order to trigger the statutory deadlines).

While League City’s lawyers were quick to publicize that the jury awarded over a million dollars, found a breach of contract and “bad faith”, and awarded \$770,561 (half of what was requested) in attorneys’ fees, it is what this Galveston County jury refused to find, did not award, and found regarding the insured’s failure to comply with the contract which are of particular interest to those who study the results of the handful of Texas’ Hurricane Ike bad faith cases taken to trial.

**The jury found that Hurricane Ike did not “cause the amount of windstorm damage set forth [as to each of the 30 buildings and locations] in the appraisal award” and that TWIA did not:**

- a) refuse to pay a claim without conducting a reasonable investigation of the claim;
- b) misrepresent to League City a material fact or policy provision relating to the coverage at issue;
- c) fail to submit a reservation of rights within a reasonable time;
- d) fail to promptly provide League City a reasonable explanation of the factual and legal basis in the policy for the insurer’s denial of a claim;

- e) fail to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim when the insurer's liability has become reasonably clear;
- f) knowingly engage in any of the foregoing conduct (for which League City's counsel asked the jury to award \$3,984,594 during closing argument);
- g) commit fraud (for which League City's counsel asked the jury to award \$333,203 during closing argument); and
- h) did not underpay the amount of windstorm damage as to 29 of 30 locations of damage claimed at trial.

The jury also refused to award the \$1,541,122 in attorneys' fees the League City team claimed to have incurred preparing this case for trial instead giving them \$770,000 in fees through trial. Significantly, the jury declined to award Plaintiff's counsel *any* of the \$85,000 in attorneys' fees sought for any post-trial appeals to either the Court of Appeals or the Supreme Court of Texas.

The jury declined to award any exemplary damages. The jury also declined to award the \$1,974,297 which League City argued as the measure of its damages for both the breach of the common law duty of good faith and fair dealing and for any violations of the Unfair Deceptive Trade Practices Act. As noted above, the only extra-contractual damage awarded was \$105,778 for TWIA's failure to timely affirm or deny coverage. It was unclear from the jury verdict where the jury came up with this amount, but it appears to be 5% of the amount argued for by League City's lawyers.