

TEXAS INSURANCE LAW NEWSBRIEF

MAY 26, 2016

INSUFFICIENT COVERAGE FOR HURRICANE IKE CLAIMS DEEMED "RELATED WRONGFUL ACTS" UNDER INSURANCE BROKER'S PROFESSIONAL-LIABILITY POLICY

Last week, the United States District Court for the Southern District of Texas granted summary judgment in favor of a professional-liability insurer after finding in part that insureds claims of insufficient coverage against the insurance broker were "related wrongful acts" and not covered under the policy. In *Southwest Risk, L.P. v. Ironshore Specialty Insurance Company*, 2016 WL 2898040 (S.D. – Tex. May 18, 2016), an insurance broker specializing in securing property and casualty insurance for construction projects created an entity through which it insured various apartment projects for third-party property owners in Houston, Texas. The broker represented that it would provide \$100 million in coverage and signed up thirty-four property owners with a combined property value of \$1.1 billion. After securing two layers of coverage of \$25 million and \$10 million, Hurricane Ike emerged as a threat and the broker was unable to secure the additional \$65 million in coverage as promised. Ike struck, the \$35 million was exhausted and significant damages went uninsured.

On September 10, 2010, after the policy limits were exhausted, one insured presented a demand for \$1.2 million in hurricane related property damage and filed suit that same day. Southwest was sold later that year, on December 27, 2010, to ClearView Risk Holding, L.L.C. and the entities purchased a professional-liability on that same date. The policy at issue in this lawsuit was a claims made policy covering "only claims first made against the insured during the policy period," which ran from February 15, 2012 to February 15, 2013. On May 4, 2012, another insured filed suit against Southwest for uninsured Hurricane Ike damages. Southwest's former owner funded the \$6.9 million settlement of this latest lawsuit and Southwest and Clearview then filed suit against their professional-liability insurer, Ironshore seeking coverage for the \$6.9 million and an additional \$20.7 million in damages under the Texas Insurance Code.

Ironshore moved for summary judgment asserting in part that the 2012 lawsuit asserted claims for "related wrongful acts" as defined under its policy and those claims were first made against the insured in September 2010. The policy defined "related wrongful act" to include wrongful acts "that arise from a common nucleus of facts" even if "such claims involve the same or different claimants, insured[s] or legal causes of action." The court examined whether the first demand and 2010 lawsuit asserted "claims" as defined in the 2012 policy, and related issues and arguments asserted by the insured. Applying Texas law, the court determined that the 2012 claims were "claims" and related to those first asserted against the insured in 2010. The court also determined that Southwest's previous owner's indemnity for the \$6.9 settlement of the 2012 lawsuit was a "related transaction", the insureds in the pending coverage action suffered no pecuniary loss and, payment of the claim would result in a double recovery by the insured. And because the court found no coverage under the policy, the Texas Insurance Code claims against Ironshore also failed as a matter of law. Summary judgment on all claims was granted in the insurer's favor.

HARRIS COUNTY JURY REJECTS BREACH OF CONTRACT CLAIMS AGAINST TEXAS FAIR PLAN

On Tuesday May 17, 2016, a six person Harris County Jury rendered a unanimous verdict that Texas Fair Plan did not fail to comply with the insurance policy issued to its insured, Rosa Broussard. Ms. Rosa Broussard asserted a March 1, 2014, date of loss, but the claim was not presented until August 21, 2014 (170 days later). The insured initially claimed "water damage" without reference to a specific cause. It was investigated without a clear cause of loss, and no hail or wind damage was found. There was significant mechanical damage due to the foundation of the home settling - causing a 6-inch gap in the roof system. There was also un-repaired Hurricane Ike damage (which was the subject of a prior claim payment by TFPA). The 2014 claim was denied, and the insured requested a re-inspection through a roofing contractor who was working in the neighborhood named Lee Leal. Mr. Leal claimed he was working in the area replacing roofs as a result of an April 2013 storm. He also named several other possible dates of loss, all associated with hail and all outside the policy term. An engineer, Jarrod Burns, conducted a re-inspection and found no wind or hail damage. The claim was denied again. The insured told the TFPA Claims Examiner that she agreed there was no hail damage, but insisted there was wind damage.

Ms. Broussard sued Texas Fair Plan Association when she was dissatisfied with its adjustment of her claim for wind/hail damage to her residence. After trial in Harris County Court at Law No. 1 before Judge Clyde Raymond Leuchtag, the jury rendered a unanimous verdict that Fair Plan did not breach the contract; thereby awarding no recovery to Plaintiff Rosa Broussard and her counsel Eric Dick. A courtroom observer reported the jury completed their deliberations in the time it took the bailiff to return to the courtroom, gather the exhibits compiled by counsel, and deliver them back to the jury. The case was tried by Rogelio "Roger" Garcia and Chris Carmona for the Plaintiff. Eric Dick only participated in the trial outside the presence of the jury, primarily in bench conferences and the charge conference. Fair Plan was represented by James R. Old Jr., and Lori Daves of Jay Old & Associates, PLLC and MDJW congratulates them on this significant win.

**MDJW OFFICES WILL BE CLOSED MONDAY MAY 30TH - MEMORIAL DAY
NEWSBRIEF TO RESUME MONDAY, JUNE 6TH**

Our offices will be closed and our research and writing team will be taking the weekend off as we observe the Memorial Day Holiday - in recognition of all those who have served this great country and made the ultimate sacrifice for the freedom we enjoy. And we also take this opportunity to thank all who have served, or currently serve in our country's armed forces and the sacrifices made by them and their families to keep our country secure.