

THOUGHT LEADERSHIP

News

## HOUSTON APPEALS COURT SIDES WITH AGENTS IN HURRICANE IKE FAILURE-TO-PROCURE DISPUTE

Newsbrief

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In *Houstoun, Woodard, Eason, Gentle, Tomforde & Anderson, Inc. v. Escalante's Comida Fina, Inc.*, 01-11-00746-CV (Tex. App. – Houston [1st Dist.], June 3, 2014), the Houston First Court of Appeals reviewed a jury finding against insurance agents concerning damages related to Hurricane Ike. Escalante's sued its former insurance agent, Houstoun, Woodard, Eason, Gentle, Tomforde and Anderson d/b/a Insurance Alliance for breach of contract and violations of the DTPA and the Texas Insurance Code. The breach of contract claim was based on the failure to procure an insurance policy with coverages allegedly requested and the DTPA and Insurance Code claims were for alleged misrepresentations and non-disclosure of information about the policy and the coverage afforded thereunder. In the trial court, the jury returned a verdict in favor of Escalante's and awarded actual damages and additional damages for a "knowing" violation of the DTPA and the Insurance Code, attorney's fees, costs, and pre- and post-judgment interest. Insurance Alliance appealed.

Between 2003 and 2008, Escalante's owned and operated four restaurants in the Houston area. Between 2003 and 2006, the property and casualty insurance policy on the restaurants was with Ohio Casualty Group. The Policy provided coverage against the loss of business income caused by an off-premises power or utilities outage. In 2005, Hurricane Rita struck Houston. Escalante's subsequently made a claim against the policy and Ohio Casualty paid the claim.

Patrick Torres, the president of Escalante's, testified that during this same time period, Insurance Alliance was seeking to regain Escalante's as a client. Escalante's provided Insurance Alliance with a copy of its then-current policy and agreed to purchase coverage under a new policy only if the coverage matched the current coverage. Torres emphasized that the coverage he sought had to be the same as that provided by the current Policy. Torres allegedly asked if the coverage under the new policy matched the current policy "apples to apples" and was allegedly assured that it did.

In reliance upon Insurance Alliance's assurances, Escalante's claimed later that it declined to renew its then-existing policy and, instead, purchased a new insurance policy issued by Allied Property & Casualty. In September 2008, Hurricane Ike caused a temporary loss of electrical power at all four Escalante's restaurants and Escalante's lost revenue as a result of the interruption. Apart from minor damage suffered at one location, none of the other restaurant locations suffered any physical damage, but all experienced food spoilage and some business

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interruption loss. Escalante's complained that it never recovered for these losses under the new policy because losses caused by an off-premises power failure were expressly excluded from coverage.

Escalante's maintained that had the new policy's coverage been identical to the prior policy, as Insurance Alliance had allegedly assured, the restaurants' losses would have been presumably covered. The parties agreed that to establish causation for its DTPA, Insurance Code, and breach of contract claims, Escalante's had the burden to show that its business interruption losses from Hurricane Ike that were not covered by the new policy would have been covered by the former one. Undertaking a sufficiency of the evidence review, the court found that because the former policy had an exclusion for "direct physical loss or damage to overhead transmission lines" and the evidence at trial conclusively established that the off-premises power failure did result from direct physical loss or damage to overhead power lines, the jury's finding otherwise (i.e., that the former policy's exclusion did not apply), was not supported by legally sufficient evidence. The court reversed the judgment and rendered a new judgment in favor of Insurance Alliance.