RIESS LEMIEUX

WHITE PAPER

Recent Hurricane Decisions and Insurance Legislation

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Recent legislation and case law arising from Hurricanes Laura, Delta, and Zeta are expected to have far-ranging impacts on how property insurance claims are adjusted and adjudicated in Louisiana, particularly for claims arising from Hurricane Ida. In this white paper, we will address the recent insurance legislation passed into law this summer and important judicial rulings on issues such as the application of forum-selection clauses, who is an insured under lender-placed insurance policies, appraisal as a condition precedent to filing suit, civil authority coverage in light of evacuation orders, and interpretation of policy sub-limits.

I. EMERGENCY ORDERS & PROCLAMATIONS - HURRICANE IDA

In the aftermath of Hurricane Ida, the Louisiana Department of Insurance (LDI) issued Emergency Rule 47, which provides for the suspension of certain statutes related to many types of insurance and affecting policyholders in the 25 parishes impacted by Hurricane Ida. Under Rule 47, insurers have 60 days to initiate loss adjustment of a property damage claim after notice of loss by the insured. This is extended from the usual 30 days under Louisiana law. If an insurer fails to initiate the loss adjustment timely, it may be subject to bad faith penalties and attorney's fees.

On September 7, 2021, LDI issued Directive 218 requiring insurers to pay claims for loss of use to policyholders who evacuated or were prohibited from using their premises because of Hurricane Ida. The order followed Bulletin 2021-07, which was issued September 3, 2021, and requested insurers to voluntarily pay claims for prohibited use even if parishes did not issue a formal mandatory evacuation order.

II. HURRICANE-RELATED DECISIONS

Numerous court rulings have recently been handed down arising out of the extensive damage caused by Hurricane Laura and the subsequent storms that impacted Louisiana, including Hurricanes Delta and Zeta. Although these decisions are primarily from the federal district court in Lake Charles—and thus have no precedential effect on state courts or other federal district courts—these rulings will likely influence claims and disputes that arise from Hurricane Ida, which impacted the New Orleans region on August 29, 2021.

A. ENFORCEABILITY OF FORUM-SELECTION CLAUSES

***Oak Haven Management, LLC v. Starr Surplus Lines Ins. Co.*, No. 21-01273, 2021 WL 4134033 (W.D. La. Sept. 9, 2021)**

***Priebe v. Advanced Structural Technologies, Inc.*, No. 21-01274, 2021 WL 4893614 (E.D. La. Oct. 20, 2021)**

In *Oak Haven*, the suit arose from a first-party insurance dispute following property damage allegedly caused by Hurricanes Laura and Delta in August and October 2020, respectively. The policy contained a forum-selection clause that required any suit, action, or proceeding against the insurer be brought solely and exclusively in a New York state court or a federal district court sitting within the State of New York. The plaintiff filed suit in the United States District Court for the Western District of Louisiana.

When challenging a forum-selection clause, a plaintiff bears the burden of showing that transfer to the bargained-for forum is unwarranted based on public interest considerations (i.e., the clause violates a "strong" or "fundamental" public policy of the forum state). La. R.S. § 22:868(A)(2) prohibits insurance contracts in Louisiana from depriving the courts of this state of the jurisdiction or venue of action against

the insurer. The Louisiana legislature's prohibition against forum-selection clauses in insurance contracts reflects a strong public interest in having disputes over policies covering Louisiana residents or property decided locally. Accordingly, the court held the forum-selection clause unenforceable.

The ruling in *Priebe* illustrates a limitation on the *Oak Haven* decision. Although it did not involve an insurance contract, it would likely apply when a policy contains an arbitration provision. In *Priebe*, an employment contract included a forum-selection clause requiring any disputes to be decided by arbitration in Minnesota. The plaintiff argued that a Louisiana statute, La. R.S. § 23:921, invalidated the forum-selection clause. However, the U.S. District Court for the Eastern District of Louisiana disagreed, concluding that the Federal Arbitration Act (FAA) preempted the state law. This follows a long line of jurisprudence acknowledging the supremacy of the FAA when contravened by a state law.

If an insurance policy contains an arbitration provision with a forum-selection clause, it could be upheld under this rationale. A court may find that the FAA preempts and supersedes the strong public interest underlying La. R.S. § 22:868(A)(2).

B. LENDER-PLACED INSURANCE POLICIES

***Davis v. American Security Ins. Co.,* No. 21-01700, 2021 WL 4269199 (W.D. La. Sept. 20, 2021)**

***Trahan v. Integon National Ins. Co.,* No. 21-02320, 2021 WL 4822132 (W.D. La. Oct. 15, 2021)**

In *Davis*, the plaintiffs alleged their property was damaged by Hurricane Laura on August 27, 2020. American Security Insurance Company (ASIC) issued a lender-placed policy to insure the plaintiffs' dwelling; the policy named the lender as the insured. The plaintiffs were not listed as named or additional insureds in the policy. ASIC filed a motion to dismiss the suit, arguing that the policy was a lender-placed contract for the benefit of the plaintiffs' lender, not the plaintiffs.

To have standing to enforce an insurance policy under Louisiana law, the claimant must be: (1) a named insured; (2) an additional named insured; or (3) an intended third-party beneficiary of the policy. Since the plaintiffs were not named or additional insureds, they argued they qualified as intended third-party beneficiaries. Lender-placed policies are designed to insure the lender's collateral whenever the borrower fails to maintain adequate insurance. A stipulation *pour autrui*—the Louisiana terminology for a third-party beneficiary relationship—is never presumed; the party claiming the benefit must show that such a stipulation in its favor exists.

In this instance, the policy identified the borrowers/plaintiffs but contained no language that would designate the borrowers/plaintiffs as a named or additional insured. Importantly, the policy stated that "all loss will be made payable to the named insured." The court found that the policy did not provide a stipulation *pour autrui* in favor of the plaintiffs because there was no "direct benefit" for the plaintiffs. Thus, the plaintiffs could not recover under the policy.

In *Trahan*, another recent case involving a lender-placed policy, the insurer similarly argued that the plaintiff was not listed as a named or additional insured on the policy. Based on language in the policy, the insurer also argued it would never be required to provide coverage in excess of the lender's insurable interest because payment was limited to the "unpaid principal balance," i.e., the remaining amount of the loan. The plaintiff argued that the "Loss Payment" and the "Automatic Coverage Endorsement" directly contradicted one another and created an ambiguity in the policy that should be interpreted in plaintiff's favor. The court disagreed, finding that the policy clearly limited the insurer's liability to the unpaid principal balance.

C. APPRAISAL AS CONDITION PRECEDENT TO LITIGATION

***Angerstein v. American Southern Home Ins. Co.,* No. 21-02147, 2021 WL 4255435 (W.D. La. Sept. 17, 2021)**

This lawsuit arose from damage to the plaintiffs' home allegedly caused by Hurricane Laura. The insurer, American Southern Home Insurance Company (ASHIC), issued initial and supplemental payments after inspection and reinspection of the property. The plaintiffs were dissatisfied with the amount paid and invoked the appraisal process on January 14, 2021. Both parties designated their respective appraisers on February 2, 2021. In late February 2021, the plaintiffs told ASHIC they wished to withdraw their request for appraisal, but the insurer's representative responded that he was not willing to withdraw from appraisal. The appraisers thereafter conducted a joint inspection of the property on June 11, 2021. The plaintiffs filed suit on July 22, 2021, asserting claims of breach of insurance contract and bad faith against ASHIC.

Under Louisiana law, failure to fulfill policy requirements that are conditions precedent to coverage precludes suit under a policy. An insured's failure to cooperate with an insurer and failure to fulfill his or her obligations under the policy may be considered a material breach and a complete defense to suit. However, a cooperation clause is not an escape hatch that an insurer may use to avoid liability. Dismissal of a claim on these grounds is only appropriate where the insurer can establish actual prejudice. In this case, the court interpreted the policy to require completion of the appraisal process, once invoked, to be a valid condition precedent to filing suit, but it did not justify dismissal. The court denied the insurer's motion to dismiss but granted its motion to compel appraisal.

D. CIVIL AUTHORITY COVERAGE

***Pathology Laboratory Inc. v. Mt. Hawley Ins. Co.,* No. 21-01558, 2021 WL 3378596 (W.D. La. Aug. 3, 2021)**

In this case, the plaintiff filed suit against its insurer to recover business income losses allegedly sustained as a result of Hurricane Laura because its commercial property was inaccessible after the storm. The plaintiff argued that access was prohibited by several executive orders issued by the government in anticipation of, and as a result of damage and dangerous physical conditions resulting from, the hurricane. The insurer argued that the claim should be dismissed because the plaintiff could not establish that the access was prohibited.

The insurer made several arguments why civil authority coverage was not triggered. First, the insurer argued that the government orders did not by their explicit terms close the business because closure was entirely dependent on the condition of the described premises itself and whether it was safe to occupy. The insurer further argued that the mandatory evacuation order was issued in anticipation of—not because of—property damage and therefore did not trigger coverage under the policy's civil authority provision. Finally, the insurer argued that the orders did not "completely prohibit" access to the property as required to invoke coverage.

The court rejected each of the insurer's arguments and ruled that civil authority coverage was triggered. The most interesting aspect of the decision is the court's determination that the initial mandatory evacuation order issued in anticipation of the hurricane did not trigger civil authority coverage. But the court held that the coverage was triggered when that "anticipated" damage became a reality and, additionally, because the evacuation order was mandatory and continuing after the storm.

E. INTERPRETATION OF WATER DAMAGE AGGREGATE LIMIT

***Cappel v. Beazley America Ins. Co. Inc.,* No. 21-00221, 2021 WL 3378539 (W.D. La. Aug. 3, 2021)**

This suit arose from damage to the plaintiffs' home allegedly caused by Hurricanes Laura and Delta. The plaintiffs alleged that their insurer failed to properly adjust the claim and filed suit asserting claims of breach of contract and bad faith. The insurer argued that the plaintiffs' storm-related water damage was subject to a $25,000 cap under the policy's Water Damage Aggregate Limit. The plaintiffs filed a motion for summary judgment, arguing that the defense should be stricken because that policy provision did not apply to storm-related water damage.

The Water Damage Aggregate limit broadly referred to "any other peril that may lead to physical damage caused by water." The court held the emphasis of the provision is to burst pipes and the like—not to wind-driven rain. Under Louisiana law, ambiguities within an exclusionary provision must be construed against the insurer and in favor of coverage. The court noted the ambiguity from the "any other peril" reference in the Water Damage Aggregate limit must be construed in favor of coverage. Ultimately, the court granted summary judgment in favor of the plaintiffs upon finding that no reasonable purchaser would have construed the clause as limiting their storm damages in such a manner.

III. LEGISLATION

A. APPRAISAL PROCEDURE

Act 345 enacts La. R.S. § 22:1892(B)(6) and (E) through (G). The new law requires residential insurance policies issued after January 1, 2022, to contain the appraisal provision set forth in La. R.S. § 22:1892(G). The amendment codified existing procedures for appraisal and established a uniform standard for appraisal on all residential insurance policies. Although the effect of this provision on the use of appraisals is currently unknown, it appears the legislature is encouraging insurers and homeowners to use appraisal to resolve disputed claims.

Under the amended law, if a lawsuit is filed prior to demand for appraisal, the lawsuit may be held in abatement until the execution of an appraisal award. Once in effect, this provision will seemingly require courts to hold the suit in abatement until the insurer and policyholder complete appraisal. The legislative change to residential insurance policies will likely make appraisal more common in Louisiana. Effective January 1, 2022.

B. NAMED-STORM DEDUCTIBLES

Act 164 enacts La. R.S. § 22:1267.1. The new law applies to commercial property insurance policies and commercial multi-peril insurance policies. Any separate deductible applicable to direct physical loss or damage resulting from a named storm or hurricane shall be applied on an annual basis to losses that are subject to a separate deductible during the calendar year. If an insured suffers direct physical loss or damage resulting from more than one named storm or hurricane during a calendar year, the insurer may apply a deductible that is equal to the remaining amount of the separate deductible or the amount of the deductible that applies to all other perils, whichever is greater. If an insured is responsible for a named-storm or hurricane deductible for a covered loss, but changes insurance companies during the calendar year or renews a policy that includes a deductible of a different amount, the insured is subject to a new named-storm or hurricane deductible under that policy. Effective August 1, 2021.

NOTE: This new law would prevent a ruling such as in *Pats of Henderson Seafood & Steaks, Inc. v. Wesco Insurance Co.*, No. 21-470, 2021 WL 4929334 (W.D. La. 10/20/21), wherein the court held that the insured's three separate claims arising from Hurricanes Laura, Delta, and Tropical Storm Beta were each subject to a separate 5% named-storm deductible in the policy.

C. BAD FAITH

Act 344 amends La. R.S. § 22:1892(B)(1) and enacts La. R.S. § 22:1892(A)(5). Under the new law, an insurer must issue a copy of the insurer's field adjuster report to the insured within 15 days of receiving a request from the insured. The remainder of the original law has not been amended. In the case of a declared disaster, an insurer may be subject to penalties if it fails to make payment or a written offer to settle within 30 days after satisfactory proof of loss, or failure to make payment within 30 days after written agreement when the failure is found to be arbitrary, capricious, or without probable cause. In addition to the amount of loss, the insurer is subject to a penalty of 50% on the amount due to the insured, or $2,500, whichever is greater. If partial payment or tender has been made, the insurer is subject to a penalty of the difference between the amount paid and the amount owed, as well as reasonable attorney's fees and costs, or $2,500, whichever is greater. Effective August 1, 2021.

D. INSURANCE CLAIMS ADJUSTERS

Act 402 enacts La. R.S. § 22:1674.1 and repeals La. R.S. § 22:1674. The new law adds several additional standards of conduct for claims adjusters beyond the requirements of the original statute. Approximately a dozen new requirements are now imposed on claims adjusters, such as: (1) adjusters must treat all claimants fairly and may not provide favored treatment to any claimant; (2) adjusters shall adjust all claims strictly in accordance with the policy; (3) an adjuster shall not approach investigations, adjustments, and settlements in a manner prejudicial to the insured; (4) an adjuster shall make truthful, unbiased reports after completing a thorough investigation; (5) an adjuster must handle every adjustment and settlement with honesty and integrity and shall act with dispatch and due diligence in achieving a proper disposition of a claim; (6) an adjuster shall not negotiate a settlement directly or indirectly with any third-party claimant represented by an attorney; and (7) an adjuster shall not advise a claimant to refrain from seeking legal counsel.

Violation of any of the standards of conduct is grounds for administrative action against the claims adjuster. In addition to administrative action, a claims adjuster who violates the provisions in the statute shall be deemed to have committed an unfair trade practice pursuant to La. R.S. § 22:1964, and the penalties contained in La. R.S. § 22:1969 may be enforced by the commissioner. Effective August 1, 2021.