

**HURRICANE IKE AND FIRST PARTY LITIGATION  
“UPDATE ON FIRST PARTY INSURANCE”**



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## HURRICANE IKE AND FIRST PARTY LITIGATION

### I. HURRICANE IKE

#### A. Background

Hurricane Ike is likely the third most destructive hurricane to ever make landfall in the United States. It was a Cape Verde-type hurricane, as it started as a tropical disturbance off the coast of Africa near the end of August, then tracked south of Cape Verde and slowly developed. On September 1, 2008, it became a tropical storm west of the Cape Verde islands.<sup>1</sup> By the early morning hours of September 5, Ike was a Category 4 hurricane, with maximum sustained winds of 145 mph.<sup>2</sup> That made it the most intense storm in the 2008 Atlantic hurricane season. Ike also had the highest IKE (Integrated Kinetic Energy) of any Atlantic storm in history. Integrated Kinetic Energy is a measure of storm surge destructive potential, on a scale of 1 to 6, Ike reached a 5.6.<sup>3</sup> Ike made U.S. landfall at Galveston, Texas, on September 13 at 2:10am CDT as a very strong Category 2 hurricane with winds of 110 mph.<sup>4</sup>

Hurricane Ike hit the communities along the upper Texas Gulf Coast, including the large suburban areas of Galveston where it made landfall, and Houston. Thirty Four Counties were declared disaster areas.<sup>5</sup> Specifically, in

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<sup>1</sup> Michael Christie, Storm Ike Forms, Seen Growing Into Hurricane, *available at* <http://www.reuters.com/article/domesticNews/idUSN0133014420080901>.

<sup>2</sup> Leland Under Hurricane Watch as Hanna Takes Aim at N.C. Coast, *available at* <http://www.lelandtribune.com/default.asp?dismode=article&artid=1527>.

<sup>3</sup> *Available at* [ftp://ftp.aoml.noaa.gov/hrd/pub/hwind/2008/AL092008/0911/1330/AL092008\\_0911\\_1330\\_contour08.png](ftp://ftp.aoml.noaa.gov/hrd/pub/hwind/2008/AL092008/0911/1330/AL092008_0911_1330_contour08.png).

<sup>4</sup> Rob Gutro and Mike Taylor, Landsat Satellite Images Show How Texas was Scarred from Hurricane Ike, *available at* [http://www.nasa.gov/mission\\_pages/hurricanes/archives/2008/h2008\\_ike.html](http://www.nasa.gov/mission_pages/hurricanes/archives/2008/h2008_ike.html).

<sup>5</sup> FEMA-1791-DR, Texas, Disaster Declaration as of 11/21/2008

the five counties hardest hit (Orange, Harris, Galveston, Chambers, and Jefferson), the total real property losses are estimated to be over 100,000 properties, assessed as of December 3, 2008. There were over 100 total deaths (direct and indirect) from the hurricane as well. Hurricane Ike will likely go down as the most costly and destructive storm to ever hit Texas, and it is estimated to be the third costliest storm in United States history, behind only Hurricanes Andrew (1992) and Katrina (2005).<sup>6</sup>

The Property Claim Services of the Insurance Services Office estimates that the insured damage (not including inland flooding or storm surge) from Ike in Texas, Louisiana, and Arkansas is \$9.7 billion dollars. Using preliminary figures, it is estimated that the total damage estimates are around \$19.3 billion dollar, making it the fourth costliest hurricane to affect the United States behind Katrina, Andrew, and Wilma.<sup>7</sup>

The primary forms of damage were those typical of hurricanes: wind, flood, and surge.<sup>8</sup> The highest storm surge measured by any NOS (National Ocean Service) tide gauge was at Sabine Pass North, Texas, which was 12.79 ft.<sup>9</sup> In areas where tide gauge records were unavailable due to destruction of measurement devices, it is thought that the surge was even higher than this.<sup>10</sup> In Galveston Bay on the east side, it is thought that the surge reached somewhere between 15 and 20 feet, and on Galveston Island somewhere between 10 and 15 feet<sup>11</sup>. Coming in with the surge were huge amount of mud and debris, which caused further damage.

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<sup>6</sup> Tropical Cyclone Report: Hurricane Ike. Robbie Berg, National Hurricane Center, 23 January 2009, updated March 18, 2009 for amended storm surge values.

<sup>7</sup> Towers Perrin, Hurricane Ike Damage Analysis: An Unusual Storm Leads to Heavy Losses, November 2008, p.1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

**B. Effect on Rating and Underwriting**

Texas Bulletins

The Texas Department of Insurance issued several bulletins to address the potential rate and underwriting effects from Hurricane Ike. These bulletins are listed as follows:

Bulletin No. B-0056-08 – (September 14, 2008) encourages carriers to use all available means to provide prompt and immediate relief to those residents and policyholders, including but not limited to the suspension of premium payments to allow continuing insurance coverage.<sup>12</sup>

Bulletin No. B-0060-08 – (September 14, 2008) requires that in instances where insureds or potential insureds are temporary participants in the relief effort of Hurricane Ike, it is inappropriate for insurers to re-rate, non-renew, or refuse to provide coverage due solely to that participation.<sup>13</sup>

Bulletin No. B-0062-08 – (September 14, 2008) provides that it is inappropriate for insurers to re-rate, cancel, non-renew, or refuse to provide coverage due solely to an individual’s status as a victim or evacuee of Hurricane Ike. Further, it is not reasonable to change policyholders’ rating classifications or increase their insurance rates solely because they are victims or evacuees of hurricane Ike.<sup>14</sup>

Bulletin No. B-0063-08 – (September 14, 2008) reminds carriers of their obligations pursuant to Section 559.103 of the Texas Insurance Code. This section requires insurers to provide reasonable exceptions to their rates, rating classifications, or underwriting rules for a consumer whose credit information has been directly influenced by certain factors such as temporary loss of employment which likely affected many of those impacted by Hurricane Ike.<sup>15</sup>

Bulletin No. B-0070-08 – (October 14, 2008) encourages the suspension of any vacancy provision contained in the policy forms to allow continuing insurance coverage. The Commission intends that the insurer grant the policyholder an extended grace period for the home or business due to temporary displacement.<sup>16</sup>

**C. Effect on Claims Handling Procedures**

The Texas Department of Insurance issued several bulletins to address potential effects on claims handling processes from Hurricane Ike. These bulletins are listed as follows:

Bulletin No. B-0058-08 – (September 14, 2008) reminds carriers that the Insurance Code authorizes carriers to immediately use nonresident and emergency adjusters to handle claims. The Department encourages carriers to use all available means to provide prompt and immediate relief to residents and policyholders.<sup>17</sup>

Bulletin No. B-0065-08 – (September 19, 2008) directs insurers to provide data in accordance with the HURRICANE IKE REPORTING REQUIREMENTS Memorandum. The 10-day time period otherwise required for responses to inquiries made by TDI is extended in this bulletin for the limited purpose of facilitating full compliance with the reporting requirements.<sup>18</sup>

Bulletin No. B-0066-08 – (September 24, 2008) provides that in accordance with Insurance Code §542.059 and 28 TAC 5.903, the Commissioner has determined that Hurricane Ike is a catastrophe for purposes of claims processing subject to conditions, which are that the insurer must: (1) establish quick contact with the claimant; (2) quickly survey and assess the claimant’s damage; (3) provide quick responses to claimants; (4) promptly provide payment for additional living expenses (ALE) and for temporary repairs after the assessment of the insured’s damage, and (5) quickly set

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<sup>12</sup> Available at <http://www.tdi.state.tx.us/>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

appointments with the claimant for examination and resolution of claims.<sup>19</sup>

Bulletin No. B-0068-08 – (September 29, 2008) reminds insurers of the Department’s position that the standard method for determining actual case value of a structure is replacement cost with proper deduction for depreciation. The insured continues to be entitled to reasonable and necessary expenses to repair or replace the damaged property, less proper deduction for depreciation. The Department expects all insurers to act in good faith and use fair claim settlement practices as required by Insurance Code section 541.060 and section 542.003 and Texas Administrative Code Title 28, section 21.203.<sup>20</sup>

Bulletin No. B-0071-08 – (October 21, 2008) reminds all persons that Insurance Code section 543.001 requires insurers or any other person may not misrepresent the terms and provisions of a policy. As further stated in 28 Texas Administrative Code section 5.9970(d) and (e), persons insured under a homeowners or dwelling policy are entitled to have their home repaired by the person of their choice. Further, under Insurance Code 542.003(a) an insurer may not engage in an unfair claim settlement practice. Not attempting in good faith to effect a prompt, fair, and equitable settlement of a claim submitted in which liability has become reasonably clear constitutes an unfair claim settlement practice.<sup>21</sup>

Bulletin NO. B-0012-09 – (March 16, 2009) relates to the bulletin which provided that insurers have an additional 15 days for claims handling services, which was necessary because of the large number of claims resulting from Hurricane Ike. This bulletin notes that the Commissioner is not extending the bulletins beyond March 6, 2009. However, it is the Commissioner’s continuing expectation that insurers, their representatives, and agents will efficiently, effectively, prudently, and timely provide services to their policyholders that their

customers expect and deserve. Insurers should not take advantage of the bulletin extending of claims handling time unless the extension is absolutely necessary.<sup>22</sup>

#### **D. Ike Litigation**

Numerous lawsuits have been filed in connection with coverage disputes arising in the aftermath of Hurricane Ike. Among the common issues which have arisen include allegations of violation of the Texas Insurance Code provision on Unfair Settlement Practices.<sup>23</sup> Other allegations by insureds include violations of the Prompt Payment of Claims provision of the Insurance Code.<sup>24</sup> Some insureds are also bringing the common law cause of action for breach of the duty of good faith and fair dealing and breach of contract.<sup>25</sup>

#### **E. Ike Legislation**

There is a volume of pending Ike and hurricane related legislation. When hurricane season arrives in June, the Texas Windstorm Insurance Association (“TWIA”) will be funded largely by insurance company assessments and state revenues.<sup>26</sup> The storms of 2008 cost TWIA six times the premium collected in the previous year.<sup>27</sup> In just one year, 2008 storms depleted a 36-year surplus of reserves and recent scientific storm models estimate damage from another large storm in Texas as high as \$8 billion.<sup>28</sup>

The danger is in insurers pulling out of the market after a series of damaging storms, which would leave the state’s taxpayers and

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See TEX. INS. CODE ANN. §§ 541.060(a)(1), (a)(2), (a)(3), (a)(4), (a)(7), and 541.151 (Vernon 2009).

<sup>24</sup> See TEX. INS. CODE ANN. §§ 542.055, 542.056, 542.058 (Vernon 2009).

<sup>25</sup> Special thanks to Marc Gravely of Gravely & Pearson, L.L.P. for providing pleadings from Hurricane Ike related cases.

<sup>26</sup> Independent Insurance Agents of Texas Discuss Challenges with Windstorm Funding, *available at* [http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news\\_view&newsId=20090326006023&newsLang=en](http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20090326006023&newsLang=en)

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

policyholders to foot the bill.<sup>29</sup> If insurers are charged an unlimited amount of assessments aren't allowed to recoup their losses, they'll have to charge policyholders higher premiums or stop writing policies in Texas.<sup>30</sup> Either way, that's bad news for homeowners and businesses throughout Texas, not just on the coast.<sup>31</sup> Recognizing that coastal policyholders cannot pay all of the losses themselves, legislators are working on a solution to maintain a healthy insurance market for the state.<sup>32</sup>

Currently public securities, such as bonds, have been proposed as an appropriate means of re-funding TWIA and building up its reserves to protect the state from the financial consequences of another major storm.<sup>33</sup> It has also been proposed that the state lend \$1.5 billion from its Rainy Day Fund to help pay for claims.<sup>34</sup> Bills filed to date suggesting a new means of funding for TWIA include HB 911 by Rep. John Smithee (R-Amarillo), HB 3853 by Rep. Craig Eiland (D-Galveston) and SB 14 by Sen. Troy Fraser (R-Horseshoe Bay).<sup>35</sup>

## II. RECENT CASES INVOLVING FIRST-PARTY CLAIMS

“[A] first-party claim is stated when 'an insured seeks recovery for the insured's own loss, whereas a third-party claim is stated when 'an insured seeks coverage for injuries to a third party.’”<sup>36</sup> In addition to the contractual claims brought in first-party situations, another common first party claim is a “bad faith” claim alleging violation of settlement practices.<sup>37</sup> The Texas Insurance Code provides:

(a) It is an unfair method of

competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:

(1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;

(2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:

(A) a claim with respect to which the insurer's liability has become reasonably clear; or

(B) a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion. . . .<sup>38</sup>

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<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 n.2 (Tex. 1997).

<sup>37</sup> See TEX. INS. CODE ANN. § 541.060(a) (Vernon 2009).

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<sup>38</sup> See *id.*

**A. Underinsured/Uninsured Motorists**

A common first-party claim situation involves underinsured/uninsured motorist claims. A recent case out of Dallas federal court applying Texas law illustrates this type of claim.<sup>39</sup> In *Stoyer*, plaintiff claimed State Farm breached the contract by failing to pay her underinsured motorist claim under the policy's provisions.<sup>40</sup> The plaintiff's “policy contained a provision for uninsured/underinsured motorists (“UIM”), providing coverage for ‘damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by a covered person, or property damage caused by an accident.’”<sup>41</sup> State Farm contended in a motion to dismiss that plaintiff had failed to establish her legal right to recover by failing to prove a condition precedent to establishing a legal right to pursue her UIM claim—the third party's liability through a judgment.<sup>42</sup> A condition precedent is an act or event that must exist or occur before a duty to perform something promised arises.<sup>43</sup> If the condition does not occur and is not excused, the promised performance need not be rendered.<sup>44</sup>

The court observed that in the *Brainard* case, the Texas Supreme Court stated that neither filing suit against the UIM insurer nor demanding UIM benefits will trigger a contractual duty of the insurer to pay.<sup>45</sup> The Texas Supreme court held in *Brainard*, “that an insurer in Texas has ‘no contractual duty to pay benefits [on a UIM claim] until the insured

obtains a *judgment* establishing the liability and underinsured status of the other motorist.”<sup>46</sup>

The court stated that it could find no previous determination of the driver's liability and plaintiff did not direct the court to any such evidence.<sup>47</sup> The court, relying on the *Brainard* opinion, noted that no contractual duty can arise for the insurer until an insured obtains a judgment proving the other motorist's liability and underinsured status.<sup>48</sup> Because there is no such judgment here, the court could not conclude that State Farm breached a contractual duty that never was triggered.<sup>49</sup>

The plaintiff also alleged State Farm knowingly failed to act in good faith to effectuate a prompt, fair, and equitable settlement of their claim once liability became reasonably clear.<sup>50</sup> State Farm moved the court to dismiss these claims on the basis that the plaintiff failed to prove the condition precedent to establish her legal right to pursue a UIM claim.<sup>51</sup> “Texas law provides that an insurer is liable for bad faith in denying or postponing a claim the insurer was reasonably clear was covered under the policy.”<sup>52</sup> A bad faith claim cannot survive absent the insurer's liability under the policy; however, if the insurer's conduct is extreme and causes injury in tort independent of the claim against the policy, the insurer's conduct may be deemed to be in bad faith.<sup>53</sup>

The court found that the plaintiff might still be entitled to and recover UIM damages under the policy.<sup>54</sup> As such, the court concluded State Farm's liability under the policy for UIM

<sup>39</sup> *Stoyer v. State Farm Mut. Auto. Ins. Co.*, 2009 U.S. Dist. LEXIS 15571, at \*4 (N.D. Tex. February 24, 2009)(mem. op.).

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See id.* (citing TEX. INS. CODE ANN. § 1952.106 (Vernon Supp. 2007); *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006)).

<sup>43</sup> *See* BLACK'S LAW DICTIONARY 289 (7TH ed. 1999).

<sup>44</sup> *See id.*

<sup>45</sup> *See Stoyer*, 2009 U.S. Dist. LEXIS 15571, at \*5 (citing *Brainard*, 216 S.W.3d at 818).

<sup>46</sup> *See id.* (citing *Brainard*, 216 S.W.3d at 818; *Henson v. Southern Farm Bureau Cas. Ins. Co.*, 17 S.W.3d 652, 653 (Tex. 2000)) (emphasis added).

<sup>47</sup> *See id.*

<sup>48</sup> *See id.* (citing *Brainard*, 216 S.W.3d at 818).

<sup>49</sup> *See id.* at \*5-6.

<sup>50</sup> *See id.* at \*6 (citing TEX. INS. CODE ANN. § 541.060(a)(2)(A) (Vernon 2008); TEX. BUS. & COM. CODE ANN. §§ 17.46(b), 17.50 (Vernon 2008)).

<sup>51</sup> *See id.* (citing *Brainard*, 216 S.W.3d at 818).

<sup>52</sup> *See id.* (citing *Giles*, 950 S.W.2d at 56).

<sup>53</sup> *See id.* at \*7 (citing *Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005)).

<sup>54</sup> *See id.*

damages should be determined first, then the bad faith claims should be addressed.<sup>55</sup> The Court noted that with its granting of the motion to abate<sup>56</sup>, State Farm represented that it waived its right to a judicial determination of the motorist's negligence for causing the collision and that the parties agreed to a trial on the issue of damages, if any, to determine the third party's status as an underinsured motorist.<sup>57</sup>

## B. Worker's Compensation

Another first-party situation deals with worker's compensation claims. In *Texas Mutual Insurance Company v. Ruttiger*, the First District court of appeals in Houston analyzed a situation involving first-party claims related to worker's compensation coverage.<sup>58</sup> Texas Mutual challenged the trial court's judgment, entered after a jury trial, in favor of plaintiff, in plaintiff's suit for violations of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and violations of the Texas Deceptive Trade Practices Act ("DTPA"). Texas Mutual raised several issues on appeal, including its contention that the evidence was legally insufficient to support the jury's findings that Texas Mutual violated the Insurance Code by engaging in unfair and deceptive acts or practices, breached the common law duty of good faith and fair dealing, violated the DTPA, and "knowingly" engaged in unfair and deceptive acts or practices and that no cause of action exists in Texas for breach of the duty of good faith and fair dealing in the context of a workers' compensation claim.<sup>59</sup>

As part of its common law duty, and as codified in the Insurance Code, an insurer has an obligation to conduct an adequate investigation

before denying a claim.<sup>60</sup> “An insurer will not escape liability merely by failing to investigate a claim so that it can contend that liability was never reasonably clear.”<sup>61</sup> The court reasoned that an insurer does not act in bad faith when a reasonable investigation reveals the claim is questionable, and an insurer maintains the right to deny questionable claims without being subject to liability for the erroneous denial of the claim.<sup>62</sup> “There can be no claim for bad faith when an insurer has denied a claim that is, in fact, not covered and the insurer has not otherwise breached the contract.”<sup>63</sup>

The court observed that the Texas Supreme Court highlighted the appropriate legal sufficiency standard of review to be applied in insurance bad-faith cases.<sup>64</sup> The court stated that, based on the *Vasquez* opinion, appellate courts should look at all the evidence, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.<sup>65</sup> The court went on to espouse that “[w]hether there is a reasonable basis for denial, . . . must be judged by the facts before the insurer at the time the claim was denied.”<sup>66</sup> However, the court recognized that Texas Mutual's post-denial evidence may be relevant because there can be no claim for bad faith when an insurer has denied a claim that is, in fact, not covered and the insurer has not otherwise breached the contract.<sup>67</sup>

<sup>55</sup> *See id.*

<sup>56</sup> Abatement is the suspension of a pending action (or part of a pending action) for a reason unrelated to the merits of the claim. *See* BLACK'S LAW DICTIONARY 2 (7TH ed. 1999).

<sup>57</sup> *See Stoyer*, 2009 U.S. Dist. LEXIS 15571, at \*6.

<sup>58</sup> 265 S.W.3d 651, 655 (Tex.App.—Houston [1st Dist.] 2008, pet. filed).

<sup>59</sup> *See id.*

<sup>60</sup> *See id.* at 661 (citing *United Servs. Auto. Ass'n v. Croft*, 175 S.W.3d 457, 472 (Tex. App.—Dallas 2005, no pet.); *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 449 (Tex. 1997)).

<sup>61</sup> *See id.* (citing *Giles*, 950 S.W.2d 48, 56 n. 5 (Tex. 1997)).

<sup>62</sup> *See id.* (citing *Croft*, 175 S.W.3d at 471; *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988)).

<sup>63</sup> *See id.* (citing *Lundstrom v. United Servs. Auto. Ass'n-CIC*, 192 S.W.3d 78, 96 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)).

<sup>64</sup> *See id.* (citing *Minnesota Life Ins. Co. v. Vasquez*, 192 S.W.3d 774, 777 (Tex. 2006)).

<sup>65</sup> *See id.* (citing *Vasquez*, 192 S.W.3d at 777).

<sup>66</sup> *See id.* at 666 (citing *Viles v. Security Nat. Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990)).

<sup>67</sup> *See id.* (citing *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 340-41 (Tex. 1995)).

### C. Commercial Property

Yet another first-party scenario involves commercial property coverage. In *In Re Acceptance Indemnity Insurance Corporation*, plaintiff sued Acceptance for breach of contract, breach of the duty of good faith and fair dealing, violations of the Texas Insurance Code, and DTPA.<sup>68</sup> The plaintiff claimed commercial property damage for two properties under his commercial lines insurance policy with Acceptance.<sup>69</sup> After an investigation, Acceptance issued two checks for the two properties.<sup>70</sup> On two separate occasions, plaintiff informed Acceptance that the estimates were too low, and each time, Acceptance obtained estimates and issued supplemental payments for each property.<sup>71</sup> Plaintiff requested an additional amount of money and Acceptance denied the claim.<sup>72</sup> The trial court ordered separate, or bifurcated, trials of the contractual claim and the extra-contractual matters.<sup>73</sup> The court refused to abate discovery or sever the claims into separate lawsuits, and plaintiff filed for a writ of mandamus.<sup>74</sup>

The court found that the Texas Supreme Court held that in certain circumstances a severance may be required when a policyholder asserts a breach of contract claim and extra-contractual claims against an insurer who has made a settlement offer on the disputed contract claim, or when there are other compelling circumstances.<sup>75</sup> The Supreme Court “explained that an insurer may be unfairly prejudiced by

having to defend the contract claim at the same time and before the same jury that would consider evidence that the insurer offered to settle the entire dispute.”<sup>76</sup> When the insurer merely pays the portion of the claim it does not dispute, severance is not necessarily required.<sup>77</sup>

Acceptance argued that each time payments were issued to the plaintiff, the payments were offers of settlement on the entire disputed contract claim, and plaintiff accepted the settlements by signing sworn proofs of loss.<sup>78</sup> The plaintiff argued that the payments were on claims the insurer did not dispute, were not settlement offers, and only a portion of the contract claim remained in dispute.<sup>79</sup> Acceptance alleged that while bifurcation would ensure that settlement offers Acceptance made to plaintiff would not be introduced to the jury on the contractual claims but that bifurcation and refusal to abate discovery does not remedy the prejudice, expense, and effort on the extra-contractual claims.<sup>80</sup>

Abatement of the discovery on a bad faith claim necessarily accompanies severance because the scope of permissible discovery differs in the two types of claims, this is true when the extra-contractual claim is based solely on an alleged bad faith denial.<sup>81</sup> The record in this original proceeding is unclear, however, as to whether plaintiff’s extra-contractual claims are based solely on an alleged bad faith denial of his claim, on some other conduct, or both.<sup>82</sup> The court held that, based on this record before it, it did not appear that a judgment for Acceptance on the breach of contract claim would

<sup>68</sup> 2008 Tex. App. LEXIS 1795, at \*1 (Tex.App.—Corpus Christi March 13, 2008, pet. denied)(mem. op).

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See id.* A mandamus is an order issued by a superior court to compel a lower court to perform mandatory duties correctly—in the this case to abate discovery or sever the claims into separate suits. *See BLACK’S LAW DICTIONARY* 973 (7TH ed. 1999).

<sup>75</sup> *See In Re Acceptance*, 2008 Tex. App. LEXIS 1795, at \*2 (citing *Liberty Nat’l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996)).

<sup>76</sup> *See id.* (citing *Akin*, 927 S.W.2d at 630).

<sup>77</sup> *See id.* (citing *Akin*, 927 S.W.2d at 630).

<sup>78</sup> *See id.* at \*2-3.

<sup>79</sup> *See id.* at \*3.

<sup>80</sup> *See id.* at \*5.

<sup>81</sup> *See id.* at \*5-6 (citing *Akin*, 927 S.W.2d at 631 (noting that while a judgment for an insurer on a coverage claim may prohibit recovery premised only on the bad faith denial of a claim, it does not necessarily bar all claims for bad faith)).

<sup>82</sup> *See id.* at \*6.

necessarily render the extra-contractual claims moot.<sup>83</sup>

#### D. Homeowner’s

The final common scenario for first-party claims in Texas involves homeowner’s insurance. In *State Farm Lloyd’s v. Hamilton*, Lloyds appealed the trial court’s judgment in favor of its insureds.<sup>84</sup> In four issues State Farm challenged the sufficiency of the evidence to support the jury’s findings of breach of contract, cost of repair damages, extra-contractual violations, and mental anguish damages.<sup>85</sup> The key dispute in the case involving dueling expert opinions over whether foundation damage was caused by a plumbing leak.<sup>86</sup> That policy provided coverage to the plaintiffs for foundation damage if and only if the damage was caused by a plumbing leak.<sup>87</sup> The court agreed that State Farm breached its contract with the plaintiffs.<sup>88</sup> The court then turned to the extra-contractual claims noting that an insurer does not breach its duty of good faith merely by erroneously denying a claim.<sup>89</sup> “[A]n insurer’s reliance on an expert report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer’s reliance on the report was unreasonable.”<sup>90</sup> The court found that:

[i]n this case, the fact-finder concluded that State Farm acted in bad faith by failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim

when its liability had become reasonably clear. State Farm argues the evidence is both legally and factually insufficient to support the jury’s findings of extra-contractual liability. According to State Farm, the [plaintiffs] extra-contractual claims are based on a single allegation: that State Farm hired a biased and non-independent engineer...to investigate the claim. State Farm, of course, disputes that [the expert] was biased in favor of State Farm when he performed his investigation. It points to the testimony of [the claims representative], [the expert], [the expert’s employee], and [State Farm’s claims team manager], all of whom testified to [the expert’s] independence and to the fact that they did not keep track of ‘outcomes’ or ‘percentages’ when it came to [the expert’s] opinions. The jury could have believed or disbelieved any part of that testimony. There was also evidence that: [the expert] was on the list of State Farm’s approved engineers; more than fifty percent of [the expert’s] business came from State Farm; [the expert] investigated 1440 claims for State Farm; State Farm had paid [expert’s] company

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<sup>83</sup> See *id.*

<sup>84</sup> 265 S.W.3d 725, 727 (Tex.App.—Dallas 2008, pet filed).

<sup>85</sup> See *id.*

<sup>86</sup> *Id.* at 728-29.

<sup>87</sup> See *id.* at 730.

<sup>88</sup> See *id.* at 734.

<sup>89</sup> See *id.* (citing *U.S. Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex. 1997); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994)).

<sup>90</sup> See *id.* (citing *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997)).

more than \$ 3 million between January 1999 and December 2003; [the claim representative] had been using [the expert] for ten years; and [the expert] had never testified against State Farm 's interests. All of the witnesses who were asked testified that independence was important in this kind of investigation. Thus, if jurors believed [the expert] was not independent, they could have reasonably concluded his report was not objectively prepared and that it was not reasonable for State Farm to rely on it.<sup>91</sup>

The court further found that the jury could have perceived conflict within the expert's report and perceived an incomplete basis for some of the report's conclusions.<sup>92</sup>

### III. CONCLUSION

The insurance industry will be closely scrutinized as a result of various coverage disputes which have arisen in the aftermath of Hurricane Ike. Though it is unlikely that courts will rewrite the policies and construe them in favor of coverage, the courts may be more inclined to address the uninsured losses by other remedies, such as extra-contractual liability for alleged unfair underwriting and claims handling efforts on the part of the insurance industry. Undoubtedly, the affects of Hurricane Ike could be not only catastrophic in loss of lives and property, but also a driving force in changing the insurance industry.

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<sup>91</sup> *See id.*

<sup>92</sup> *See id.* at 735.