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## **Top 10 Commercial Hurricane Damage Claims Disputes – A Texas Perspective**

On September 13, 2008, Hurricane Ike made landfall in the U.S. and devastated the Texas and Louisiana Gulf Coast.<sup>1</sup> Ike's winds, wind driven rains, storm surge and run off waters devastated thousands of businesses in Texas and Louisiana located in the Ike's path.<sup>2</sup> Storm surge heights during the storm ranged from five to seventeen feet along the Texas coast.<sup>3</sup> With property damage estimated to exceed \$19 billion, Ike is expected to be 4<sup>th</sup> most costly hurricane in US history.<sup>4</sup>

Ike affected different sizes and types of businesses in Texas— from small “mom and pop” operations to large Fortune 100 corporations and across a broad spectrum of businesses from local restaurants and retail outlets to hotels, commercial office buildings, hospitals, manufacturing plants, warehouses, airports and government facilities.<sup>5</sup> The business claims arising from Ike damage also involved different structures, different businesses, different specific terms of each commercial property insurance policy,<sup>6</sup> and different facts and circumstances underlying each business' claim. Yet, the causes of the businesses' losses, the categories of their damages — real property, personal property and interruption of business income — and some of the general terms of commercial insurance policies<sup>7</sup> are similar.

To assist the Texas practitioner whose client is one of the many businesses facing a commercial property hurricane damage claim, we have prepared a brief overview of Texas law on the Top 10 areas of dispute in commercial hurricane damage claims. Anyone who has followed the news reports about the number of hurricane claim cases filed following Hurricane Katrina knows that a massive number of cases have been filed and that those cases are moving very slowly through the Louisiana and Mississippi courts. We expect the same thing to occur in Texas following Hurricane Ike. To prepare our overview, we asked a number of the nation's most experienced large loss insurance company adjusters, national public adjusters who represent policy holders and commercial property insurance brokers about the most recent and prevalent disputes in commercial hurricane damage claims. From our discussions, we developed our list of the Top 10 most prevalent disputes and then compiled brief overviews of Texas law on each area.<sup>8</sup>

Generally speaking, after a hurricane, most policyholders expect that their commercial property policy will pay for all of their hurricane damages. However, that is not always the case. With all claims, the threshold inquiry is whether the damage causing event is covered under the property policy—an inquiry that can be very complicated especially with hurricane claims. For instance, most commercial property policies provide coverage for the wind caused physical damage that allows wind driven rain to enter and damage the building.<sup>9</sup> But, those same policies often flatly exclude coverage for damages caused by rain without any physical wind damage and also exclude coverage for damages caused by flood water or surface water.<sup>10</sup> To complicate the determination even more, “flood”, “wind

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storm”, “surface water” and “physical damage” are terms of art and subject to interpretations by courts when resolving coverage disputes.<sup>11</sup>

## **Potential Dispute No. 1 - Whether the rain water that entered and damaged the property was the result of physical damage to the property caused by wind?**

It may seem fundamental that if rain caused interior damages to a business during a hurricane, then the business’ policy will cover and pay the claim to repair the damages. However, the determination is not quite as clear cut as simply having rain damage during a hurricane. Both Texas law and most commercial property policies are relatively clear that water damage to the interior of a building during a hurricane will only be covered (assuming that there is no flood coverage endorsement) when the water entered the building as the result of a covered cause of loss – i.e., if the wind (a covered peril) caused an opening in the building (physical damage) and permitted the entry of wind driven rain into the interior of the building.<sup>12</sup> When the rain damage to the property was not caused by wind, no coverage typically exists.<sup>13</sup> During a hurricane, it is not unusual to have water damage to the interior of a building without any actual physical damage to the exterior of the building. For example, wind driven rain can seep into apartment complex units around balconies, doors and windows even though there was no physical damage to the building that caused an opening.<sup>14</sup> Therefore, the important inquiry is not whether the rain damage occurred but whether that damage was the result of physical damage caused by the wind.

## **Potential Dispute No. 2 - Whether the property damage was caused by an excluded peril such as storm surge or flood waters?**

During almost every hurricane, storm surge and flooding cause significant damages. Yet, most commercial property policies contain a specific water exclusion that excludes coverage for flood and storm surge caused damages.<sup>15</sup> Therefore, unless the policy contains an additional flood endorsement to provide coverage, water damage caused to a building from flooding or storm surge during a hurricane is typically not covered.<sup>16</sup>

Following other hurricanes, insureds have resorted to creative arguments in an attempt to establish coverage for excluded flood losses. For example, one Texas case, *Valley Forge Ins. Co. v. Hicks Thomas & Lilienstern, LLP*, an insured sued its insurer contending that the water that damaged its property had “mutated from flood water to generic water after it entered the convention center, collapsed a wall and flowed into the pedestrian tunnel, i.e., the source of the water at that point was not from Buffalo Bayou, but from an artificial source;” and therefore, the water did not come under the flood exclusion.<sup>17</sup> The Houston Court of Appeals disagreed that the water had mutated and instead held that the damages were caused by a

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combination of flood and surface water and were excluded from coverage.<sup>18</sup> After Katrina, New Orleans property owners even contended that the flood damage resulted from the United States Corp of Engineers' negligence in maintaining the levees and not from natural causes and, therefore, should not be excluded from coverage.<sup>19</sup> The Attorney General for the State of Mississippi filed a lawsuit after Katrina claiming that policies containing hurricane deductibles should provide coverage for water and flood damage because the hurricane deductible implies that it will cover any hurricane damage.<sup>20</sup> To date, no Texas court has adopted the Mississippi Attorney General's position that a policy containing a hurricane deductible automatically provides insurance coverage for any hurricane damage.

### **Potential Dispute No. 3 - Whether the water damage was caused by both a covered peril (wind) and an excluded peril (storm surge or flood water)?**

A common coverage dispute arises when the damages result from a combination of a covered peril and a non-covered peril. For example, assume that a business owner sustained damages during Ike from wind as well as from the storm surge. The wind caused openings in the roof that permitted rain to enter and damage the building including damage to the first floor (typically a covered peril), but the storm surge had also broken through the front door and windows and flooded the first floor (typically an excluded peril). A commercial policy that does not contain a flood endorsement would only cover the damages resulting from the wind and water that entered the building through the wind created openings. The policy would not cover the flood caused damages because the policy only covered damages caused solely by the covered peril and the flooding was excluded.<sup>21</sup> So, the dispute arises because the first floor water damages were caused by both a covered peril (wind) and an excluded peril (flood).

For such combination causes, Texas has adopted the doctrine of concurrent causation which provides that "where covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril."<sup>22</sup> The insured bears the burden to prove coverage<sup>23</sup> and must produce evidence that will afford a reasonable basis for determining the amount of damage and that proves the amount of the damages that were caused solely by a covered peril.<sup>24</sup> Where an insured cannot provide sufficient proof to distinguish between covered and non-covered damages, the insured will typically not have coverage for their loss.<sup>25</sup> In our illustration, if the business does not have a separate flood policy or flood endorsement to their commercial policy, the business must be able to prove the specific amount of their damages that were caused solely by physical damage to the building from wind (as opposed to the damages caused by the storm surge).<sup>26</sup>

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As a practical matter, in some parts of United States, including certain areas in Texas, many insurers simply do not offer flood or windstorm coverage. Business owners are forced to attempt to obtain policies brokered by The National Flood Insurance Program ("NFIP")<sup>27</sup> and Texas Windstorm Insurance Association ("TWIA").<sup>28</sup> NFIP (flood) and TWIA (wind) are organizations created to provide flood insurance policies and wind insurance policies in geographic areas where most insurers will only provide coverage that excludes flood and wind. Despite these programs, many business owners are still unable to insure against flood and wind damage. The NFIP only provides flood insurance in communities that adopt and enforce floodplain management ordinances to prevent future losses from flooding and the TWIA Commercial Windstorm and Hail Commercial Policy excludes coverage for flood and rain.<sup>29</sup> Further, NFIP's maximum available limit for flood insurance for a commercial structure is \$500,000 for the building and \$500,000 for the contents and its commercial flood policy does not provide coverage for business interruption or extra expense.<sup>30</sup> TWIA's maximum available limit in 2008 for commercial buildings was \$4,000,000 and its commercial wind policy expressly excludes coverage for business income and extra expense.<sup>31</sup> Following Ike, TWIA sparked protests from consumer groups in Texas when it announced that it only intended to pay Gulf Coast policyholders for wind damage, not for water surge damage, thereby leaving thousands of property owners without coverage for sizable portions of their damage.<sup>32</sup>

## **Potential Dispute No. 4 - Whether a wind deductible applies and reduces the damage claim?**

Even if a business' loss is clearly within their policy's wind coverage, the application and determination of wind deductibles can be another major area of disagreement. A wind deductible is an endorsement that typically (when compared to the policy's general deductible) provides a much higher specific dollar deductible amount for damage caused by wind. The deductible can dramatically affect the outcome of a business' claim.<sup>33</sup> There are also as many different types of wind deductibles as there are imaginations of underwriters and brokers. Wind deductibles range from flat dollar amounts (such as \$50,000 or \$100,000) to percentages based on the "total insured value" of a particular building, a particular location, or all property insured by the policy. There are also per occurrence based deductibles and "named storm" deductibles specifically for hurricanes. When procuring commercial property insurance in hurricane prone areas, the first negotiation is usually the type and amount of the wind deductible. A miscalculation or bad decision by an insured during insurance procurement (see the *Turner* case below) could render wind coverage effectively worthless upon application of a wind deductible. And, as you might expect, there can be great room for disagreement about the application and amount of wind deductibles.<sup>34</sup>

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No Texas case directly addresses how to apply a wind deductible even for a specific set of facts. However, in *Turner Construction Co. v. Ace Prop. & Casualty Ins. Co.*, the U.S. Court of Appeals for the Second Circuit applied Texas law to a dispute over the proper application of a wind deductible.<sup>35</sup> Not surprisingly, the insurer in *Turner* claimed that the policy's higher wind deductible applied to the damages caused by rain that entered the building through "wind-caused openings." Conversely, the insured claimed that the lower general deductible applied to its claim.<sup>36</sup> The amount of the wind deductible in question exceeded the insured's entire damage claim, and its application would have prevented the insured from recovering any indemnity payment.<sup>37</sup> The Second Circuit held that the wind deductible did not apply because the rain alone caused the damage at issue (the wind only indirectly caused the damage when it created the opening for the rain).<sup>38</sup> The Court noted that the policy did not define the term "wind deductible" to support the insurer's claim that "the wind deductible applies to damages only indirectly caused by wind."<sup>39</sup> The Court then construed the ambiguity in the policy (the failure to define the term "wind deductible") against the insurer and held that the lower general deductible applied to the insured's claim.<sup>40</sup>

## **Potential Dispute No. 5 - Whether the coinsurance clause applies and, if so, how much does it reduce the claim?**

Coinsurance clauses are another area of great dispute between insurers and insureds. A coinsurance clause "requires the insured to maintain insurance on the insured property equal to its actual cash value or a certain percentage of it."<sup>41</sup> A coinsurance clause is designed to protect the insurer against under-insurance because it penalizes an insured who under reported the value of their property to pay lower premiums. The theory is that the coinsurance clause makes an insured a coinsurer to the extent of the omitted insurance.<sup>42</sup> If an insured has underinsured its property, the coinsurance clause will operate to decrease the amount recoverable under the policy by the percentage that the property was underinsured. Coinsurance penalties typically apply to both property damage claims and business income claims.<sup>43</sup> Texas law permits coinsurance clauses "if the insured is allowed a reduction in the premium rate for the policy or contract".<sup>44</sup> While some states restrict the operation of coinsurance penalties by imposing requirements to ensure that the insured has notice of the clause and its consequences,<sup>45</sup> Texas law only restricts the application of coinsurance clause to damages caused by fire.<sup>46</sup>

Disputes usually arise over the values used to determine whether the coinsurance clause applies and, if so, how much the clause reduces the claim. No Texas court has addressed the appropriate methodology for applying a coinsurance clause or the proper values upon application. However, courts in other jurisdictions have considered the effect of coinsurance clauses and valuation of property.<sup>47</sup> In *R&C Industries, Inc. v. Nationwide Mutual Ins. Co.*, the dispute centered on how to value the property to determine the amount of the coinsurance clause penalty. The

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policy had a coverage limit of \$1,100,000 and the insured contended that the property was only underinsured by \$200,000 because the actual replacement value of the property was \$1,300,000, the cost to replace it with a “functionally equivalent (and far superior) facility... made entirely from steel... without the more expensive concrete block [as used in its original construction].”<sup>48</sup> The insurer claimed that the building was underinsured by \$1,400,000 because the replacement cost was actually \$2,500,000 using materials of like kind and quality.<sup>49</sup> The court held that the replacement cost value claimed by the insured was proper, under the terms of the policy.<sup>50</sup> If the Court had used the insurer’s claimed replacement cost value, the insured would have recovered less than 50% of the original coverage limits.<sup>51</sup>

## **Potential Dispute No. 6 – What is a reasonable “period of restoration” for recovery of business income and extra expense loss?**

The determination of what constitutes a reasonable “period of restoration” for recovery of business income loss is another area of dispute. Commercial property policies provide for the recovery of actual loss of business income sustained during the period of restoration of business property when its business operations were suspended.<sup>52</sup> Typically, the period of restoration begins 72 hours after the loss and ends on the earlier of “the date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality **or** the date when the business is resumed at a new permanent location.”<sup>53</sup> The period of restoration can extend beyond the expiration of the insurance policy if repairs have not been completed and the limits have not been exhausted.<sup>54</sup> The period of restoration is not necessarily the **actual** period of time that it took to perform the repairs – it is merely the reasonable period of time in which the insured should have repaired or replaced the property with reasonable speed and similar quality.<sup>55</sup>

The “period of restoration” for any claim is fact specific and dependent upon the interpretation of the terms in the policy’s definitions. Disputes can arise between the insurer and insured regarding interpretation of fact specific terms in the “period of restoration” definition such as “reasonable speed,” “similar quality” and “resumption of business.” The application of these terms to the specific facts of a claim can also create disputes especially following a hurricane. For instance, everyone has experienced a contractor that has become non-responsive and does not perform its work in a reasonably speedy manner. After a catastrophe, merely finding a contractor to perform the work, and also able to obtain the materials to perform the work, may take a period of time that in other circumstances may be “unreasonable.”<sup>56</sup>

Texas courts have not yet interpreted the terms “reasonable speed” and “similar quality.” However, they have addressed the definitions of business income loss and business interruption.<sup>57</sup> In *Rimkus Consulting Corp. v. Hartford Casualty Ins. Co.*, the U.S. District Court for the Southern District of Texas denied the

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insured's claim for loss of business income finding that the business interruption coverage was never triggered.<sup>58</sup> Even though Rimkus' business increased dramatically after Hurricane Katrina, Rimkus claimed that it was entitled to recover for the loss of its pre-storm business.<sup>59</sup> Hartford contended that no business interruption had occurred because Rimkus continued to provide services after Katrina and actually experienced a significant growth in its business.<sup>60</sup> The Court found that Rimkus had not sustained a loss of business income under the terms of Rimkus' commercial policy but was entitled to recover for the extra expenses that they had incurred to staff and operate temporary offices. In *Lexington Ins. Co. v. Island Recreation Development Corp.*, Lexington contended that its insured's business interruption claim ended on the day that the restaurant reopened for business following completion of repairs.<sup>61</sup> Upon reviewing the business interruption endorsement, the Beaumont Court of Appeals held that, due to an ambiguity, the insured was entitled to recover for its business interruption losses until it had regained its previous level of business operations - seven (7) months beyond completion of repairs and reopened the restaurant.<sup>62</sup> Consequently, the "period of restoration" language determination is dependent on the language in the policy and the facts of the specific claim.

## **Potential Dispute No. 7 - Whether materials availability/shortages caused delays of the "period of restoration" are covered?**

As highlighted in our example above, another common dispute with regard to the period of restoration occurs when materials are unavailable or in short supply and cause delays and extend the period of restoration. Policy language typically does not address the effect of factors beyond the insured's control that delay the period of restoration, such as the unavailability of materials and shortages.<sup>63</sup> In cases involving disputes over delays, courts typically hold that any delay in the period of restoration due to factors outside of an insured's control should be covered, provided that the insured can document that it took reasonable measures to complete the repairs.<sup>64</sup> Therefore, the insured must not only prove its claimed loss of business income and the period of restoration but also the reasonableness of its actions during the period of restoration.<sup>65</sup> If the insurer disputes the claimed period of restoration, the insured should be prepared to establish any conditions that were beyond its control that affected the period of restoration, such as materials shortages, severe weather, shipping delays, manpower shortage and delays caused by the insurer.<sup>66</sup>

The Texas courts have not yet addressed the effect of a delay in the period of restoration on an insured's business interruption or extra expense claim due to factors outside an insured's control. Following Ike, the local workforce in some areas of Texas was displaced, building materials were in short supply, and prices for available materials rose dramatically due to increased demand. Some business owners were unable to inspect their property for damage, take action to safeguard

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property, or begin repairs for several days, if not weeks, following Ike. For example, the Galveston County Office of Emergency Management restricted access to all of Galveston Island until September 24, 2008 and to the west end of the island until October 23, 2008 due to health and human safety concerns.<sup>67</sup> These factors obviously delayed the period of restoration for these business income and extra expense losses. We anticipate that Texas courts will likely address the reasonableness of this delay in the context of “period of restoration.”

## **Potential No. 8 - Whether continuing business losses after the “period of restoration” are covered?**

Continuing business losses are typically covered only if the insured obtained additional extended business income coverage<sup>68</sup> and then only if the business losses resulted from direct physical loss or damage. Business losses that are attributable to depressed business conditions that resulted from a catastrophic event such as a hurricane will not covered.<sup>69</sup> Extended business income additional coverage begins on the date when that the property is actually repaired, rebuilt or replaced **and** operations are resumed<sup>70</sup> and extends the business income coverage up to an additional thirty (30) days beyond completion of repairs.<sup>71</sup> By its express terms, the extended business income additional coverage expires on the earlier of: (1) “the date you could restore your operations, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred;” **or** (2) thirty days after the end of the period of restoration.<sup>72</sup>

Disputes regarding continuing business losses after the period of restoration typically arise in cases where the insurer is claiming that the insured has failed to take reasonable steps to restore business operations to the pre-loss level. Consequently, disputes arise over the meaning of the terms “date you could restore,” “your operations,” “reasonable speed,” “the level which would generate,” and “business income amount that would have existed if no direct physical loss or damage had occurred” specifically in the context of each claim. For example, an insurer could deny a claim for extended business income coverage if the insured made no efforts to generate business by publicizing or informing its potential customers that it had reopened for business. The insurer could also deny a claim for extended business income coverage because the business’ losses were caused by depressed economic conditions as a whole rather than by the insured not yet being able to generate the business income that would have existed pre-loss. A dispute could also arise over the level of business income that would have existed if the physical loss or damage had not occurred.

Texas courts have not yet addressed the issues arising from the continuing business losses after the period of restoration. However, in any coverage dispute, the insured bears the burden to prove coverage.<sup>73</sup> Therefore, if the insurer denies

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the claim because the losses are due to local economic conditions, the insured has the burden to show that their losses resulted from the direct physical damage. Similarly, if the insurer denies the claim on the grounds that the insured failed to take reasonable measures to restore its operations, the insured must show that either: (1) they took all reasonable steps and that such steps would not have restored business operations; or (2) that such actions were not feasible given the insured's resources.

## **Potential Dispute No. 9 - Whether repairs necessary to comply with the current building code requirements are covered?**

Most commercial property policies do not cover the increased costs to upgrade the building to meet current code requirements (building, plumbing, electrical and/or fire codes etc...)<sup>74</sup> The "Ordinance Or Law" exclusion found in most commercial policies provides that the insurer will not pay for a loss or damage caused by an ordinance or law. Moreover, the exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."<sup>75</sup> If a building is repairable but current codes requirements increase the cost of repairs, the Ordinance Or Law exclusion typically operates to prevent the insured from recovering for the increased costs incurred to meet those requirements.

Businesses can obtain additional coverage for increased costs of construction through the purchase of an "Increased Cost of Construction" endorsement that specifically provides coverage for increased costs due to code compliance.<sup>76</sup> The endorsement is typically only available to insureds that have replacement cost coverage.<sup>77</sup> The endorsement also typically provides that the insurer will not pay the insured until the property is actually repaired or replaced.<sup>78</sup> Therefore, the insured will have to pay for the additional code upgrade cost and then seek reimbursement from the insurer.

Disputes can arise between an insurer and its insured after the insured incurs the increased construction costs, expecting those costs to be covered by their commercial policy, and the insurer either denies the claim for increased costs or only agrees to pay only a portion of the costs incurred. Only a few Texas cases that have discussed the Ordinance Or Law exclusion and Increased Cost of Construction endorsement. In *Commonwealth Ins. Co. v. Benihana of Tokyo, Inc.*, the United States District Court for the Northern District of Texas held that the insurer was liable for the replacement of all twenty (20) ventilation hoods even though the fire had only damaged four (4) hoods because a paid for bylaw endorsement in the policy specifically covered the increased cost of code enforcement for reconstruction or repair of the damaged and undamaged portions of the facility.<sup>79</sup> The Court reasoned that the replacement of all twenty (20) hoods was caused by the fire because the fire triggered the inspection of the facility and enforcement of the additional code requirements upon repair of the facility.<sup>80</sup>

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## **Potential Dispute No. 10 - Whether the delay caused by uninsured code upgrade repairs is covered?**

Disputes typically arise regarding the “period of restoration” about how to separate the amount of time (and corresponding business income loss) associated with the performance of covered repairs from the amount of time (and corresponding business income loss) associated with uninsured code upgrade repairs. The completion of necessary repairs and, consequently, the end of the period of restoration can often be delayed when an insured is required to take additional measures to comply with current code requirements. Delays (in the period of restoration) caused by code upgrade requirements are typically not covered if an insured has not elected to purchase the endorsement for increased cost of construction.<sup>81</sup> Moreover, the typical definition of “period of restoration” expressly excludes any increased time period “due to the enforcement of any ordinance or law that regulates the construction, use or repair, or that requires the tearing down of any property.”<sup>82</sup>

Specifically, the disputes arise regarding how much time, if any, the uninsured code upgrade repairs extended the date when the property should have been repaired, rebuilt or replaced using reasonable speed and similar quality (the period of restoration). Insureds argue that code upgrade repairs caused little to no delay in the date when the property should have been repaired, rebuilt or replaced using reasonable speed and similar quality. Insurers will argue that the code upgrade repairs delayed the date by which repairs should have been completed using reasonable speed and similar quality, which would have decreased the insured’s business income loss claim. No Texas court has addressed this fact specific determination or even discussed this issue. Upon considering the issue, however, the Texas courts will require the insured to prove coverage – in this instance, the insured will have to prove that the end of the period of restoration was not delayed by the performance of uninsured code upgrade repairs.<sup>83</sup>

### **Summary**

As you can see, after a hurricane, there are an infinite number of areas of potential dispute between a commercial property insurer and its insured, including our Top 10 Claim Disputes detailed herein. Yet, there are many more bases for potential disputes such as the failure to preserve property from further damage following a loss, reasonableness of mitigation expenses, contractors’ pricing, failure to effect repairs, preexisting conditions and the necessity of matching of materials. We will address more of the top claims disputes in our next article.

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Since 1993, LaRoe PC has been dedicated to excellence in representing both commercial policyholders and insurers as plaintiffs in major commercial property insurance related disputes throughout the United States.

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<sup>1</sup> DIV. OF EMERGENCY MANAGEMENT, OFFICE OF THE GOVERNOR OF THE STATE OF TEXAS, HURRICANE IKE IMPACT REPORT, 1 (2008).

<sup>2</sup> *Id.* at pp. 1 and 3 (“Ike was an extremely large Category 2 hurricane with hurricane-force winds extending outwards up to 120 miles from the center and tropical-storm force winds extending outward up to 275 miles”).

<sup>3</sup> ROBBIE BERG, NATIONAL HURRICANE CENTER, TROPICAL CYCLONE REPORT: HURRICANE IKE, 6-7 (01/23/09) (Storm surge heights were approximately 10-13 feet long the extreme upper Texas coast near Sabine Pass to Port Arthur, up to 17 feet in isolated areas in Jefferson County, up to 17.5 feet along the Bolivar Peninsula and in parts of Chambers County, between 10 to 15 feet on Galveston Island and the west side of Galveston Bay and 5 to 10 feet in Brazoria County).

<sup>4</sup> *Id.* at 10.

<sup>5</sup> HURRICANE IKE IMPACT REPORT, *supra* note 1, at 3.

<sup>6</sup> Texas Dept. of Insurance, *Commercial Property Insurance* (12/07), <http://www.tdi.state.tx.us/pubs/consumer/cb021.html>. In fact, since there is no Texas Department of Insurance approved standard commercial property insurance policy form like the Texas Standard Homeowner’s Policy for residential property owners, each policy has different terms and conditions with unique working and grouping of terms and conditions and can be subject to different legal interpretations.

In considering any insurance coverage issue, Texas courts will look to the specific policy language to resolve disputes between the insurer and insured. Under Texas law, a court will apply general contract interpretation principles to determine the insurer’s obligations under the insurance policy. *See Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998); *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex. 1987). If the policy terms, as written, are not ambiguous, the words will be given their plain meaning and the contract will be enforced as written. *Id.* However, if the terms of the insurance policy are susceptible to more than one reasonable construction, the insurance policy will be strictly interpreted in a manner favoring the insured. *Id.* at 666.

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<sup>7</sup> Many commercial insurers use the policy language issued by Insurance Services Offices, Inc. (commonly referred to as ISO). ISO creates standardized policy language, rules, cost information and other products to ensure compliance with all statutory, judicial and regulatory requirements. Additionally, many major insurers like Travelers, Factory Mutual and Chubb write their own “standard” forms of insurance policies. Those “standard” policies, whether based on ISO form terms or the insurer’s own form, can be negotiated depending upon many factors including the respective bargaining positions of the business owner and insurer, global and regional circumstances and the abilities of the business owner’s agents/brokers.

<sup>8</sup> Every commercial property insurance policy is unique; therefore, the resolution of any claim is going to depend for the most part on the policy language and the facts regarding that specific cause of loss and resulting damages. The information contained herein is intended to be informative.

<sup>9</sup> ISO CP 10 10 & CP 10 20 provides for Windstorm or Hail coverage as follows:

4. Windstorm or Hail, but not including:
  - a. Frost or cold weather;
  - b. Ice (other than hail), snow or sleet, whether driven by wind or not; or
  - c. Loss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sand or dust, whether driven by wind or not, unless the building or structure first sustains winds or hail damage to its roof or walls through which the rain, snow, sand or dust enters.

<sup>10</sup> ISO CP 10 10 & CP 10 20 provides the following water exclusion:

- g. Water
  - (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
  - (2) Mudslide or mudflow;
  - (3) Water that backs up or overflows from a sewer, drain or sump; or
  - (4) Water under the ground surface pressing on, or flowing or seeping through;
    - (a) Foundations, walls, floors or paved surfaces;
    - (b) Basements, whether paved or not; or
    - (c) Doors, windows or other openings.

But if Water, as described in g.(1) through g.(4) above, results in fire, explosion or sprinkler leakage, we will pay for loss or damage caused by that fire, explosion or sprinkler leakage.

<sup>11</sup> See *Valley Forge Ins. Co. v. Hicks Thomas & Lilienstern, L.L.P.*, 174 S.W.3d 254, 258 (Tex. App.—2004, review denied) (discussing difference between surface water and flood water); *Fireman’s Ins. Co. of Newark v. Weatherman*, 193 S.W.2d 247, 248 (Tex. Civ. App.—Eastland, 1946, writ ref’d n.r.e.) (coverage dispute regarding definition of windstorm).

<sup>12</sup> ISO CP 10 10 & CP 10 20 regarding Windstorm or Hail coverage *supra* at note 9.

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

<sup>14</sup> See, e.g., *Florida Windstorm Underwriting v. Gajwani*, 934 So.2d 501 (Fla. 3DCA 2005).

<sup>15</sup> ISO CP 10 10 & CP 10 20 regarding Water Exclusion *supra* at note 10. However, many large commercial policies do cover floods but provide sublimits by location and specifically, lower limits and higher deductibles for flood-prone zones.

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

<sup>17</sup> 174 S.W.3d 254, 258 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2004, review denied).

<sup>18</sup> *Id.* at 259.

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<sup>19</sup> *In re: Katrina Canal Breaches Litigation*, 493 F.3d 191, 196 (5<sup>th</sup> Cir. 2007).

<sup>20</sup> Jay R. Sever, *The Storm After the Storm: Hurricane Katrina Coverage Litigation*, New Jersey State Bar Association, Atlantic City, New Jersey (May 2006).

<sup>21</sup> ISO CP 10 10 & CP 10 20 regarding Windstorm or Hail coverage *supra* at note 9.

<sup>22</sup> *Travelers Indemnity Co. v. McKillip*, 469 S.W.2d. 160, 163 (Tex. 1971). See also *All Saints Catholic Church v. United Nat'l Ins.*, 257 S.W.3d 800, 802 (Tex. App.—Dallas 2008, *n.w.h.*).

<sup>23</sup> *Comsys Info. Technology Serv. V. Twin City Fire Ins. Co.*, 130 S.W.2d 181, 188 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, *pet. denied*); *Evergreen Nat'l Indem. Co.*, 111 S.W.3d 669, 676 (Tex. App.—Austin, *n.w.h.*).

<sup>24</sup> *Travelers Indemnity Co.*, 469 S.W.2d at 163.

<sup>25</sup> See generally *Travelers Indemnity Co.*, 469 S.W.2d. at 163; *All Saints Catholic Church*, 257 S.W.3d at 802; *Page v. State Farm Lloyds*, 259 S.W.3d 257, 270-71 (Tex. App.—Waco 2008, *pet. filed*); *Wallis v. United Serv. Auto. Assoc.*, 2 S.W.3d 300, 320-21 (Tex. App.—San Antonio 1999, *review denied*). In other states, insureds have raised some numerous arguments to support claims for coverage after sustaining damages, in part, from an excluded risk. See, e.g., *Leonard v. Nationwide Mutual Ins. Co.*, 499 F.3d 419 (5<sup>th</sup> Cir. 2007) (damage resulting from storm surge that occurred during Hurricane Katrina not covered despite hurricane/wind deductible); *In re Katrina Canal Breaches Litigation*, 495 F.3d 191 (5<sup>th</sup> Cir. 2007) (flood exclusions in commercial and homeowners' policies exclude coverage for flooding that occurred when levees ruptured during Hurricane Katrina; hurricane deductible does not automatically mean that any damages sustained during a hurricane will be covered); *Smith v. Allstate Indemnity Co.*, 2007 WL 4259194 (5<sup>th</sup> Cir. 2007) (hurricane endorsement does not expand coverage to include all damages resulting from storm surge during Hurricane Katrina).

<sup>26</sup> *Travelers Indemnity Co.*, 469 S.W.2d at 163.

<sup>27</sup> The National Flood Insurance Program ("NFIP"), administered by the Federal Emergency Management Agency ("FEMA"), makes federally-backed flood insurance available to persons and businesses in communities that adopt and enforce floodplain management ordinances to reduce future losses from flooding. The NFIP does not provide insurance coverage for business interruption or extra expense. <http://www.fema.gov/business/nfip/>.

<sup>28</sup> TEX. INS. CODE §2210.001 *et seq.* Homeowners and business owners located in the 14 counties along the Texas Gulf Coast and in parts of Harris County can only obtain wind and hail coverage through the TWIA when not available from private insurers.

<sup>29</sup> See <http://www.fema.gov/business/nfip/>. See also <http://www.twia.org>, TWIA Commercial Windstorm and Hail Commercial Policy contains the following exclusions:

1. Flood – We will not pay for loss or damage caused by or resulting from flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water or spray from any of these whether or not driven by wind.
- ...
6. Rain – We will not pay for loss or damage caused by or resulting from rain, whether driven by wind or not unless wind or hail first makes an opening in the walls or roof of the described building. Then we will only pay for loss to the interior of the building, or the insured property within, caused immediately by rain entering through such openings.

<sup>30</sup> *Myths and Facts about the National Flood Insurance Program*, FEMA (03/07).

<sup>31</sup> Randy Wipf, *Commercial & Residential Rate Changes*, TWIA (November 25, 2008). [http://www.twia.org/pdf/uw\\_bulletins/Revised\\_Limits\\_Nov\\_2008.pdf](http://www.twia.org/pdf/uw_bulletins/Revised_Limits_Nov_2008.pdf).

<sup>32</sup> *Storm brewing in Texas over wind insurance*, Associated Press (September 18, 2008).

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<sup>33</sup> Marc M. Schneier, *Under Texas Law, "Wind Deductible" Endorsement Does Not Apply Unless Wind is Direct, i.e. Immediate, Cause of an Otherwise Insured Loss*, 27 No. 2 CONSTRUCTION LITIGATION REPORTER 6 (2006).

<sup>34</sup> Mark E. Miller & Tab R. Turano, *Changing Winds: Federal Court Strikes Down Common Insurance Company Practice*, ANDREWS DISASTER RECOVERY LAW REPORT Vol. 2, Issue 1 (2007).

<sup>35</sup> 429 F.3d 52 (2d Cir. 2005).

<sup>36</sup> *Id.* at 53.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 55-56.

<sup>39</sup> *Id.* at 54.

<sup>40</sup> *Id.* at 55.

<sup>41</sup> Edward K. Esping, *Coinsurance*, 46 TEX. JUR. 3D INSURANCE CONTRACTS AND COVERAGE §644 (2009).

<sup>42</sup> Lee R. Russ, *Coinsurance Requirement*, 7 COUCH ON INSURANCE §98.17 (2008). *See also* ISO CP 10 00 Additional Conditions – Coinsurance (coinsurance clause typically provides that the insurer “will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property.”); ISO CP 00 30 – Coinsurance for business income loss.

<sup>43</sup> *Id.*

<sup>44</sup> TEX. INS. CODE §2002.005(a) and (d).

<sup>45</sup> Under Florida law, coinsurance clauses are permitted only if: (1) the policy contains specific language stating that “the rate charged in this policy is based upon the use of the coinsurance clause attached to this policy, with the consent of the insured”; (2) the coinsurance clause is clearly identifiable; and (3) the rate for the insurance with and without the coinsurance clause is furnished the insured upon his or her request. FLA. STAT. §627.701(1)(2008).

<sup>46</sup> TEX. INS. CODE §2002.005(a) and (d).

<sup>47</sup> *See, e.g., R&C Industries, Inc. v. Nationwide Mutual Ins. Co.*, 735 N.W.2d 204 (Iowa Ct. App. 2007); *Evanston Ins. Co. v. Cogswell Properties, LLC*, 2009 WL 198745 (W.D. Mich. 2009); *Wenrich v. Employers Mut. Ins. Co.*, 132 P.3d 970 (Kansas Ct. App. 2006).

<sup>48</sup> *R&C Industries, Inc.*, 735 N.W.2d at 204.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Business income loss coverage is the insurer’s agreement “to pay the actual loss of business income that the insured sustains because of the necessary suspension of the insured’s options, during the period of restoration and caused by the direct physical loss of or damage to property at the described premises as a result of a covered cause of loss.” *See* Jerome Trupin and Arthur L. Flitner, *Commercial Property Risk Management and Insurance* 9.4 (American Inst. for Chartered Prop. Casualty Underwriters/ Ins. Inst. Of America 2003).

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<sup>53</sup> ISO CP 00 30 defines “period of restoration” as the period of time that:

- a. Begins:
    - (1) 72 hours after the time of direct physical loss or damage for Business Income coverage; or
    - (2) Immediately after the time of direct physical loss or damage for Extra Expense coverage;
  - b. Ends on the earlier of:
    - (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
    - (2) The date when the business is resumed at a new permanent location.
- “Period of restoration” does not include any increased period required due to the enforcement of any ordinance or law that:
- (1) Regulates the construction, use or repair, or requires the tearing down of any property; or
  - (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants.”

The expiration date of this policy will not cut short the “period of restoration.”

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> There are no Texas cases involving a dispute between an insured and insurer regarding the period of restoration being extended by the insured’s inability to obtain manpower or materials to complete repairs. In *Meadowcrest Living Center, LLC v. Hanover Ins. Co.*, the U.S. District Court for the Eastern District of Louisiana denied plaintiff’s motion for summary judgment on when the period of restoration for a nursing home ended. The Court found that a material issue of fact existed regarding “when the property should have been repaired with reasonable speed” despite the deposition testimony of plaintiff’s contractor that repairs actually took an additional three (3) months due to the difficulty in obtaining manpower, labor and materials after Hurricane Katrina. 2008 WL 2959707 \*3 (E.D. La. 2008).

<sup>57</sup> *Rimkus Consulting Group, Inc. v. Hartford Casualty Ins. Co.*, 552 F.Supp.2d 637 (S.D. Tex. 2007); *Quality Oilfield Products, Inc. v. Michigan Mutual Ins. Co.*, 971 S.W.2d 635 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, *n.w.h.*).

<sup>58</sup> *Rimkus Consulting Group, Inc.*, 552 F.Supp.2d at 642-43.

<sup>59</sup> *Id.* at 642.

<sup>60</sup> *Id.* at 643.

<sup>61</sup> 706 S.W.2d 754 (Tex. App.—Beaumont 1986, *writ ref’d n.r.e.*).

<sup>62</sup> *Id.* at 756.

<sup>63</sup> ISO CP 00 300 regarding Period of Restoration definition *supra* at note 53.

<sup>64</sup> See e.g. *Pontchartrain Gardens, Inc. v. State Farm Gen. Ins. Co.*, 2009 WL 86671 (E.D. La. 2009)(even though repairs had been completed to some apartments and the apartments could be occupied, period of restoration did not end until repairs to common areas were completed); *Eureka-Security Fire & Marine Ins. Co. v. Simon*, 401 P.2d 759 (Ariz. Ct. App. 1965, *n.w.h.*)(court held that insured was entitled to recover for its business interruption for claimed period of restoration because insurers’ delay in adjusting the insured’s claims and the insured’s landlord’s delay in completing repairs were outside of insured’s control); *The Urology Clinic of New Orleans, Inc. v. United Fire & Casualty Co.*, 993 So.2d 803 (La. App.

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4<sup>th</sup> Cir. 9/10/08)(even though clinic had resumed some operations, period of restoration did not end until the Fire Marshal approved repairs to the fire alarm system).

<sup>65</sup> See, e.g., *Comsys Information Tech. Serv., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.2d 181, 188 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, *pet. for review denied*); *Evergreen Nat'l Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 676 (Tex. App.—Austin 2003, *n.w.h.*).

<sup>66</sup> See, e.g., *Pontchartrain Gardens*, 2009 WL 86671; *Simon*, 401 P.2d 759; *The Urology Clinic of New Orleans, Inc.*, 993 So.2d 803.

<sup>67</sup> The Galveston County Office of Emergency Management imposed a mandatory evacuation of Galveston Island on September 11, 2008. The mandatory evacuation was lifted on September 24, 2008 for all areas with the exception of the west end of Galveston Island. The Office of Emergency Management instituted a "look and leave" policy for the west end of Galveston Island from September 24, 2008 through October 23, 2008. Under the "look and leave" policy, people were only permitted into the area to view the damage. Therefore, business and home owners were not permitted to begin repairs to property located on the west end of Galveston Island until after October 23, 2008 – 6 weeks after Ike.

<sup>68</sup> ISO CP 00 30 provides that extended business income coverage as follows:

(1) Business Income other than "Rental Value"

If the necessary suspension of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

(a) Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and

(b) Ends on the earlier of:

(i) The date you could restore your "operations", with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or

(ii) 30 consecutive days after the date determined in (1)(a) above.

However, Extended Business Income does not apply to loss of Business Income incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., *Comsys Information Tech. Serv., Inc.*, 130 S.W.2d at 188; *Evergreen Nat'l Indem. Co.*, 111 S.W.3d at 676.

<sup>74</sup> ISO CP 10 30 provides the following exclusion for Ordinance Or Law:

The enforcement of any ordinance or law:

(1) Regulating the construction, use or repair of any property; or

(2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance Or Law, applies whether the loss results from:

(a) An ordinance or law that is enforced even if the property has not been damaged; or

(b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

<sup>75</sup> *Id.*

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<sup>76</sup> ISO CP 10 00 provides the following for the endorsement for increased cost of construction:

e. Increased Cost of Construction

- (1) This Additional Coverage applies only to buildings to which the Replacement Cost Optional Coverage applies.
- (2) In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with enforcement of an ordinance or law in the course of repair, rebuilding or replacement of damaged parts of that property, subject to the limitations stated in e.(3) through e.(9) of this Additional Coverage.
- (3) The enforcement or law referring to in e.(2) of this Additional Coverage is an ordinance or law that regulates the construction or repair of buildings or establishes zoning or land use requirements at the described premises, and is in force at the time of the loss.
- (4) Under this Additional Coverage, we will not pay any costs due to an ordinance or law that:
  - (a) You were required to comply with before the loss, even when the building was undamaged; and
  - (b) You failed to comply with.
- (5) Under this Additional Coverage we will not pay for:
  - (a) The enforcement of any ordinance or law which requires demolition, repair, replacement, reconstruction, remodeling or remediation of property due to contamination by "pollutants" or due to the presence, growth, proliferation, spread or any activity of "fungus", wet or dry rot or bacteria; or
  - (b) Any costs associated with the enforcement of an ordinance or law which requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, assess the effects of "pollutants", "fungus", wet or dry rot or bacteria.
- (6) The most we will pay under this Additional Coverage, for each described building insured under this Coverage Form is \$10,000 or 5% of the Limit of Insurance applicable to that building, whichever is less. If a damaged building is covered under a blanket Limit of Insurance which applies to more than one building or item of property, then the most we will pay under this Additional Coverage, for that damaged building, is the lessor of: \$10,000 or 5% times the value of the damaged building as of the time of loss times the applicable coinsurance percentage.

The amount payable under this Additional Coverage is additional insurance.

(7) With respect to this Additional Coverage:

- (a) We will not pay for the Increased Cost of Construction:
    - (i) Until the property is actually repaired or replaced, at the same or another premises; and
    - (ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.
  - (b) If the building is repaired or replaced at the same premises, or if you elect to rebuild at another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of e.(6) of this Additional Coverage, is the increased cost of construction at the same premises.
  - (c) If the ordinance or law requires relocation to another premises, the most we will pay for the Increased Cost of Construction, subject to the provisions of e.(6) of this Additional Coverage, is the increased cost of construction at the new premises.
- (8) This Additional Coverage is not subject to the terms of the Ordinance or Law Exclusion, to the extent that such Exclusion would conflict with the provisions of this Additional Coverage.
  - (9) The costs addressed in the Loss Payment and Valuation Conditions, and the Replacement Cost Optional Coverage, in this Coverage Form, do not include the

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increased cost attributable to enforcement of an ordinance or law. The amount payable under this Additional Coverage, as stated in e.(6) of this Additional Coverage, is not subject to such limitation.

<sup>77</sup> *Id.*

<sup>78</sup> ISO CP 10 00 *supra* note 78, at (7).

<sup>79</sup> 1997 WL 361617 (N.D. Tex. 1997).

<sup>80</sup> *Id.* (The insurer had claimed that under the endorsement it should only be responsible for replacement of and code upgrades for the four (4) damaged ventilation hoods.)

<sup>81</sup> See ISO CP 00 30 *supra* at note 53 that provides:

“Period of restoration” does not include any increased period required due to the enforcement of any ordinance or law that:

- (1) Regulates the construction, use or repair, or requires the tearing down of any property;  
or
- (2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants.”

<sup>82</sup> *Id.*

<sup>83</sup> *Comsys Info. Technology Serv.*, 130 S.W.2d at 188; *Evergreen Nat’l Indem. Co.*, 111 S.W.3d at 676.