HURRICANE HARVEY: COMMENTS ON STATUTES OF INTEREST TO HELP HURRICANE VICTIMS

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CHAPTER 22
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He has also been a television guest on the KUHF television show “Know Your Rights” and has been interviewed by the CBS, ABC and NBC affiliates in Houston on various consumer topics. Mr. Aschermann has also been a visiting lecturer at the University of Houston School of Law on Debt Collection and the Consumer Credit Counseling Service session on Consumer law.

Reported opinion in Galveston County Fair and Rodeo, Inc. v. Kauffman, 910 SW2d 100 (Tex. App.-- El Paso 1995, writ denied), Eter v Crampton, 2009 TEX. APP LEXIS 299, (Tex. App.—Houston 1st District, 2009, no writ), and Hunsinger v. SKO Brenner Am., Inc., 2014 U.S. Dist. LEXIS 52029 (N.D. Tex. Apr. 15, 2014). Approved as Class Counsel in Cause No. 3:98-CV-2466-G Exzavior Rick McCulley, Individually and as a Representative of All Persons Similarly Situated vs. Great Southern Life Insurance Company; and First Madison Bank, a South Dakota State Bank; In the Federal District Court for the Northern District of Texas, Dallas Division; Approved as Class Counsel in Cause No. 1999-23886; Calvin Ray Onezine vs. Universal DTEC, Inc.; In the 11th District Court of Harris County, Texas. Approved as Class Counsel in the United States District Court for the Southern District of Texas, Houston Division. Cause No. H-05-0056; Beatrice Kuykendall vs. United Mortgage and Loan Investment, LLC and United Mortgage and Loan Investment Corporation; and approved as Class Counsel in Cause No. 2003-27596; George Lopez vs. C. E. Ratliff, Individually and dba Harris County Bureau of Investigations and Fairlane Credit, LLC; In the 113th District Court of Harris County, Texas.
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This is a paper that was put together after Hurricane Harvey hit the Texas Gulf Coast in late August 2017. I tried to balance the timeliness of the topic with enough source materials and case law on topics to balance the lack of editorial content. I also include a form petition to jump start your assistance of hurricane victims. Please use this as a starting point in your drafting, not as a finished product as there may be additional facts, statutes and claims that may pertain to your prospective client.

I chose three claims/situations which I have encountered in previous Gulf Coast floods. I am sure there are many other items and laws that can and should be covered. These three topics are meant to be a suggestion, not a comprehensive list. For that, please refer to materials from the State Bar of Texas and other relief agencies, as they may be of more practical assistance, particularly as it applies to FEMA claims, mortgage treatment of insurance proceeds, landlord tenant relationships and flood damaged vehicles.

I. INSURANCE CLAIMS

There have been many warnings about a change in the Texas law regarding insurance damage claims. The new law will be discussed below but the first analysis is whether your client suffered a windstorm claim, not a flood claim. Flood claims are a federal program and are not covered by Texas law.

Windstorm or Flood

Always check your client’s policy. These are some sample (but probably not universal definitions from a Louisiana 5th Circuit case, SEACOR Holdings, Inc. v. Commonwealth Ins. Co., 635 F.3d 675 (5th Cir. La. Mar. 10, 2011),

The [**5] policy defined Named Windstorm as "any Windstorm . . . or any atmospheric disturbance which have [sic] been declared [*679] to be a tropical storm and/or hurricane by the National Weather Service or the National Hurricane Center." Notably, this definition included "atmospheric disturbances" declared to be hurricanes, regardless of whether those disturbances met the policy's definitional requirements of a Windstorm. For Windstorm, the policy's definition section stated: "Windstorm shall constitute a single claim hereunder provided, if more than one
windstorm shall occur within any period of seventy-two (72) hours during the term of this Policy, such windstorm shall be deemed to be a single windstorm within the meaning thereof."

Lastly, Flood was defined to mean "waves, tide or tidal water, inundation, rainfall and/or resultant runoff, and the rising (including overflowing or breakage of boundaries) of lakes, ponds, reservoirs, rivers, harbors, streams, or similar bodies of water whether wind-driven or not." No separate provision in the policy denoted whether multiple deductibles could apply.

SEACOR, supra, at 678-679.

An example so why you should get your facts straight before filing a pleading or even making an insurance claim: Fortman v Allstate Cas. & Fire Ins. Co., 2017 US Dist LEXIS 126364 (S.D. Tex Aug 9, 2017).

And an example of why the distinction between a windstorm and a flood can be financially important from Underwriters at Lloyds Syndicate 242 v. Turtle Creek P'ship, Ltd., 716 F. Supp. 2d 633 (S.D. Tex. Jan. 14, 2010)

**FLOOD WARRANTY**

**THIS ENDORSEMENT CHANGES YOUR POLICY. PLEASE READ IT CAREFULLY.**

As a condition of Insurance provided under this policy, we will not pay for loss or damage caused by or resulting from Windstorm or hail or Named Windstorm if the Covered Property is located in a Special Hazard Flood Area (as designated by the Federal Emergency Management Agency) and you do not purchase and maintain insurance providing coverage for the peril of Flood, as defined in this policy, in an amount at least equal to the maximum limits available by the National Flood Insurance Program (NFIP).


However, this exclusion does not apply if the loss or damage occurs within 45 days from the effective date of this Policy.

All other terms and conditions of this policy remain.

(Doc. No. 23, Ex. A, at ICAT NPNA 810 (01 07).) On September 13, 2008, Hurricane Ike struck the Houston area and allegedly damaged Turtle Creek's apartments. Turtle Creek submitted a windstorm claim to Plaintiff International Catastrophe Insurance Managers, [*4] LLC. (Doc. No. 18, P 2.2.)

During the investigation of the windstorm claim, Lloyds determined that the Turtle Creek apartments were located in a Special Hazard Flood Area as designated by the Federal Emergency Management Agency, that Turtle Creek failed to purchase and/or maintain flood insurance for its property, and that the windstorm damage occurred after 45 days from the effective date of the policy. (Id. P 2.3.) Turtle Creek does not dispute these facts.

Underwriters, supra, at 635.
HB 1774—The New Law

Media outlets and many attorneys have shared the impact of HB 1774 and urged flood victims to make immediate claims to preserve their rights under the old law. While it was clearly advantageous to the insurance industry (and therefore detrimental to consumers) it may not be as bad as some of the early press portrayed it.

This is my early commentary on the new insurance law. I invite responses from the attorneys of the Consumer and Commercial Law Section and the State Bar of Texas in general.

Prior hurricanes, tropical disturbances and even hailstorms have created a virtual specialization in insurance claims. The basics of such a claim have been:

a. the plaintiff was insured with a homeowner or business policy;
b. the policy covered a windstorm event such as a tornado, hurricane, hailstorm or extreme thunderstorm;
c. the plaintiff-insured was within the geographic area of the windstorm event and suffered a covered loss;
d. the insurer received and adjusted the claim of the plaintiff-insured;
e. the insurer rejected the claim in whole or part; and
f. the plaintiff-insured filed suit for the statutory claim of the failure of the insurance company to make a prompt payment of its claim pursuant to Texas Insurance Code § 542.058 and § 542.060.

The prevailing consumer obtained payment of his claim and assuming it was greater than the amount offered by the insurance company, also recovered 18% per annum interest and attorney’s fees.

In the recent legislature, insurance companies sponsored HB 1774 which significantly dialed back claims as described above. The insurance industry claimed to have leveled the playing field from such claims. There are at least three ways that HB 1774 weakened the prompt payment of claims statutory remedies:

a) The interest rate for a prevailing claim is reduced from 18% per annum to a rate that fluctuates with financial markets, less than 10% per annum at the current time;
b) A prerequisite to filing an insurance claim lawsuit is a 60 day notice to the insurance company. This allows the insurance company to spend additional time and effort on claims for which it receives such a statutory notice. The effect of this time period is that the insurance company can dedicate more capable adjustors to noticed claims and either bolster its earlier decision or offer additional money for under-adjusted claims;
c) In the notice, the insured must state the amount of its claim and there are penalties for making an excessively high demand. A ratio is created for claims with the litigated/negotiated amount as the numerator and the demand from the notice letter as the denominator. If that amount is less than 80%, the attorney’s fee award must be reduced to the percentage from that calculation. For instance: A demand is made for $100,000 with a settlement of $60,000 and an attorney fee claim for $30,000. The attorney fees would be reduced to $18,000 or 60% of the ratio of the settlement amount ($60,000) compared to the amount in the notice ($100,000);
d) Insurance companies will have the option to assume the liability for claims made against its representatives (mostly adjustors, occasionally an agent). Insurance Code chapter 542a. I assume there is a financial benefit to insurance companies for doing so, but I do not have the practical experience to explain how.
If you study this new statute, the KEY will be the notice letter to the Insurance Company on behalf of the insured.

Make sure you understand this statute and its practical effect, and the nature of an insurance property damage claim before you agree to represent an insured. A few comments about the early client contact and in particular the statutory Notice letter:

a. GET IT RIGHT THE FIRST TIME. You will regret it later if you don’t. See the above provision on attorney’s fees;
b. Healthy Skepticism. Have a healthy skepticism in dealing with clients. Ask the client to bring the policy, the binder, the coverage page, any correspondence with the insurance company, and any claims or proofs of loss filed by the potential client. Ask the client to bring photographs, estimates, measurements and lists of property. Get receipts or credit card statements to support recently purchased expensive personal property. Unless the client is disabled by age, physical or mental limitations, don’t do the first draft. Frankly, it is a PIA to compile an itemized list of loss of furniture, kitchen appliances, clothing and other household goods. Don’t do this for a client who is too lazy to do it themselves. You will regret it later;
c. Have an idea what a claim is worth. An alleged property damage claim of $100,000 on a home with an appraisal district valuation of $60,000 is probably not justifiable. Ask a lot of questions if the numbers don’t make sense;
d. Understand insurance coverages and limits and when they apply. Additional Living Expense (ALE) is the cost to live in a hotel or rental property while your home is being repaired. It is a great coverage, if it applies. Likewise, distinguish between property damage claims, replacement value, and contents coverage. A good notice letter will arrange a claim to conform with the coverage. Remember, it is not the job of the insurance company to search out every bit of claim to which you are entitled;
e. Understand how an insurance company adjusts a damage claim. There is a reason an insurance adjustor’s most important tool is a tape measure. Every room will be measured and diagrammed with exact specification. Areas (both horizontal and vertical) will be calculated and standard costs will be applied for sheetrock, painting, molding, and floor covering, etc. There will be some negotiation on the cost multiplier (say $2 sf vs $1.50 sf) but be ready to justify your claim if more than the insurance company offers;
f. Explain any distinctions in your claim. Example: Your client remodeled their home a year ago with expensive marble and custom wood cabinets that are significantly more expensive than the neighborhood. Retain a sample of that marble and some of the cabinets and show photos. The same standard should be applied to other non-standard items for which you want a premium.
g. Have an expert lined up. Have a capable contractor review the claim and KNOW who you will use as an expert if your notice letter becomes a lawsuit; And
h. Keep attorney time records for your work on the notice letter. An insurance company settlement offer must include an offer of reasonable and necessary attorney’s fees. **Texas Insurance Code §541.157l**

In short, plan your notice letter as the draft of your lawsuit. Your monetary demand should be in such form that it can be copied as a damage model in response to a Request for Disclosure.

A copy of HB 1774 (which I changed the legislative formatting to make it legible) is attached as Appendix A. I have also included a few cases on the distinction between windstorm and flood claims. This distinction is important as National Flood Insurance Program flood claims are not subject to these Texas laws.
Sample Pleading.

Appendix B is a sample pleading, which was filed in federal court after a previous Hurricane. DO NOT USE THAT AS A FINAL FORM. You should incorporate the changes of HB 1774 into your new pleading. In particular, plead that you complied with the new notice provisions.

Some important Insurance Code provisions on Lawsuits for Prompt Payment of Claims:

a. A violation of the insurance code is a DTPA violation; Texas Insurance Code §541.151;
b. Damages, attorneys’ fees and other relief are available; Texas Insurance Code §541.152;
c. Notice must be given 61 days before filing a lawsuit; Texas Insurance Code §541.154;
d. An insurance company may make a settlement offer during the notice period; Texas Insurance Code §541.156;
e. The settlement offer must offer a cash amount along with reasonable and necessary attorney’s fees (keep your time records!); Texas Insurance Code §541.157;
f. An insurance company settlement offer is rejected if not accepted within 30 days; Texas Insurance Code §541.158;
g. A settlement offer is not an admission of a violation of the insurance code or the DTPA; Texas Insurance Code §541.160;
h. There is a general 2 year limitations period on insurance code claims; Texas Insurance Code §541.162;
i. A "Notice of claim" means any written notification provided by a claimant to an insurer that reasonably apprises the insurer of the facts relating to the claim.; Texas Insurance Code §542.051;
j. The insurer must respond to the notice of claim within 15 days and request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant; Texas Insurance Code §542.055;
k. Except as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss. Texas Insurance Code §542.056;
l. Except as otherwise provided by this section, if an insurer notifies a claimant under Section 542.056 that the insurer will pay a claim or part of a claim, the insurer shall pay the claim not later than the fifth business day after the date notice is made. Texas Insurance Code §542.057;
m. Except as otherwise provided, if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statutes do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060. Texas Insurance Code §542.058;
n. If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees. Texas Insurance Code §542.060; and
The remedies provided by this subchapter are in addition to any other remedy or procedure provided by law or at common law. *Texas Insurance Code §542.061;*

This is the language of the recovery limit provision under the old law:

**Sec. 541.159. LIMIT ON RECOVERY AFTER SETTLEMENT OFFER.** (a) If the court finds that the amount stated in the settlement offer for damages under Section 541.157(1) is the same as, substantially the same as, or more than the amount of damages found by the trier of fact, the claimant may not recover as damages any amount in excess of the lesser of:

1. the amount of damages stated in the offer; or
2. the amount of damages found by the trier of fact.

(b) If the court makes the finding described by Subsection (a), the court shall determine reasonable and necessary attorney's fees to compensate the claimant for attorney's fees incurred before the date and time the rejected settlement offer was made. If the court finds that the amount stated in the offer for attorney's fees under Section 541.157(2) is the same as, substantially the same as, or more than the amount of reasonable and necessary attorney's fees incurred by the claimant as of the date of the offer, the claimant may not recover any amount of attorney's fees in excess of the amount of fees stated in the offer.

(c) This section does not apply if the court finds that the offering party:

1. could not perform the offer at the time the offer was made; or
2. substantially misrepresented the cash value of the offer.

(d) The court shall award:

1. damages as required by Section 541.152 if Subsection (a) does not apply; and
2. attorney's fees as required by Section 541.152 if Subsection (b) does not apply.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

End Insurance Section

**II. PUBLIC ADJUSTORS**
Many attorneys may not be familiar with public adjustors. These are adjustors that represent claimants, not insurance companies, in the claims process. A good honest public adjustor is worth their fee and then some. A bad public adjustor is a wolf in sheep’s clothing. In particular BEWARE of a public adjustor which is referred by a contractor. There is a good chance they are more interested in helping the contractor than in helping the insured.

Also BEWARE the contractor who seeks a contractual provision designating a contractor employee as the designated representative for the insurance claim. THIS IS A VERY QUESTIONABLE PRACTICE THAT MAY VIOLATE THE PUBLIC ADJUSTOR LICENSING PROVISONS.

Public adjustors are highly regulated as great trust is placed in them by the insured. A few of these laws are:

It is a DTPA violation for a public insurance adjustor to refer an insured to a particular attorney. 
*Tex. Bus. Com. Code §17.46 (27).* Also beware the related public adjustor/contractor as noted in Lon Smith & Assocs. v. Key, 2017 Tex. App. LEXIS 7365, *4-6, 2017 WL 3298391 (Tex. App. Fort Worth Aug. 3, 2017).* This recent case lost a class certification, but it illustrates the possible issues between public adjustors and contractors:

**B. Chapter 4102 of the Texas Insurance Code**


Chapter 4102 expressly prohibits a "person" from acting as a public insurance adjuster in Texas without a license. See Tex. Ins. Code Ann. § 4102.051(a) (providing that "[a] person may not act as a public insurance adjuster in this state or hold himself or herself out to be a public insurance adjuster in this state unless the person holds a license issued by the commissioner"). The term "person" is defined as including a corporation. Id. § 4102.001(a)(2). And a "public insurance adjuster" is "a person who, for direct, indirect, or any other compensation... acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims" while acting as a public insurance adjuster and "also includes advertising, soliciting business, and holding oneself out to the public as an adjuster of claims." Id. § 4102.001(3)(A)(i), (ii). A licensed public insurance adjuster is expressly prohibited from participating directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder; acting as a public insurance adjuster and a contractor on the same claim is a statutorily-defined conflict of interest. Id. § 4102.158(a)(1). Any contract for services regulated [*6] by chapter 4102 that is entered into by an insured with a person in violation of the chapter's licensing requirements "may be voided at the option of the insured." Id. § 4102.207(a). If a contract is so voided, "the insured is
not liable for the payment of any past services rendered, or future services to be rendered, by the
violating person under that contract or otherwise."

Id.

Smith, supra at 4-6

The Texas Insurance Code also has requirements for a contract between an insured and a public insurance
adjustor:

a. A public adjustor may not act on behalf of an insured until there is a written contract with the
insured, in a form approved by the Texas Insurance Commissioner; 

Texas Insurance Code §4102.103(a);

b. The contract must contain a provision allowing the client to rescind the contract by written
notice to the license holder within 72 hours of signature, and must include a prominently
displayed notice in 12-point boldface type that states "WE REPRESENT THE INSURED
ONLY."

The commissioner by rule may require additional prominently displayed notice
requirements in the contract as the commissioner considers necessary. 

Texas Insurance Code §4102.103(b);

c. A license holder may not enter into a contract with an insured and collect a commission as
provided by Section 4102.104 without the intent to actually perform the services customarily
provided by a licensed public insurance adjuster for the insured. 

Texas Insurance Code §4102.103(d);

d. Except as provided by Subsection (b), a license holder may receive a commission for service
provided under this chapter consisting of an hourly fee, a flat rate, a percentage of the total
amount paid by an insurer to resolve a claim, or another method of compensation. The total
commission received may not exceed 10 percent of the amount of the insurance
settlement on the claim. 

Texas Insurance Code §4102.104(a); and

e. 72 hour rule- An insurance company that pays within 72 hours of receipt of a claim eliminates a
public insurance adjustor’s commission. 

Texas Insurance Code §4102.104(b);

In short, BEWARE any client situation that involves a public insurance adjustor.
III. DISASTER ADVANTAGE

The second wave of a flood is the number of opportunistic contractors that descend upon a damaged area. A large devastation like Harvey requires many laborers to rebuild the damaged area—far greater than the number of skilled workers in the area.

A. Price Gouging

First, the easy part. It is a DTPA laundry list violation to: take advantage of a disaster declared by the governor under Chapter 418, Government Code, by: (A) selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or (B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity. Texas Bus. Com. Code §17.46 (27).

B. Disaster Remediation Contractors

A lesser known law is Chapter 58 of the Texas Bus. And Com. Code which regulates Disaster Remediation Contractors from outside the affected area. The law applies to a disaster contractor who:

a. Does not maintain for at least one year prior to the disaster a physical business address in the county (or an adjacent county) where the affected property is located; Texas Bus. Com. Code §58.002
b. A contract subject to this chapter must be in writing. Texas Bus. Com. Code §58.003(a);
c. A disaster remediation contractor may not require a person to make a full or partial payment under a contract before the contractor begins work; Texas Bus. Com. Code §58.003(a);
d. A disaster remediation contract may not require that the amount of any partial payment under the contract exceed an amount reasonably proportionate to the work performed, including any materials delivered; Texas Bus. Com. Code §58.003(b);
e. A disaster remediation contract shall include in any contract for disaster remediation services the following statement in conspicuous, boldfaced type of at least 10 points in size: "This contract is subject to Chapter 58, Business & Commerce Code. A contractor may not require a full or partial payment before the contractor begins work and may not require partial payments in an amount that exceeds an amount reasonably proportionate to the work performed, including any materials delivered." Texas Bus. Com. Code §58.003(b);
f. A violation of Chapter 58 is a DTPA laundry list violation; Texas Bus. Com. Code §58.005; and
g. The provisions of Chapter 58 may not be waived. Texas Bus. Com. Code §58.005;

C. Texas Constitution—Homestead

This is too important NOT to include, even memorize, for the consumer law practitioner. The Texas homestead law :

Sec. 50. HOMESTEAD; PROTECTION FROM FORCED SALE; MORTGAGES, TRUST DEEDS, AND LIENS. (a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:
(1) the purchase money thereof, or a part of such purchase money;
(2) the taxes due thereon;
(3) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding;
(4) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner;
(5) work and material used in constructing new improvements thereon, if contracted for in writing, or work and material used to repair or renovate existing improvements thereon if:
   (A) the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead;
   (B) the contract for the work and material is not executed by the owner or the owner's spouse before the fifth day after the owner makes written application for any extension of credit for the work and material, unless the work and material are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner or person residing in the homestead and the owner of the homestead acknowledges such in writing;
   (C) the contract for the work and material expressly provides that the owner may rescind the contract without penalty or charge within three days after the execution of the contract by all parties, unless the work and material are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner or person residing in the homestead and the owner of the homestead acknowledges such in writing; and
   (D) the contract for the work and material is executed by the owner and the owner's spouse only at the office of a third-party lender making an extension of credit for the work and material, an attorney at law, or a title company;

Some of these homestead provision are restated and/or enhanced by *Tex. Property Code §53.252* Notice to the Owner and *Tex. Property Code §53.254* Homestead. You should review those provisions as well.

**D. Removing the Improperly Filed Lien**

If a contractor (regardless of whether the work is fraudulent or the contractor is from out of state) files a lien in the Real Property records, Texas Property Code §53.160 is a remedy to remove that improper lien.

**Sec. 53.160. SUMMARY MOTION TO REMOVE INVALID OR UNENFORCEABLE LIEN.**

(a) In a suit brought to foreclose a lien or to declare a claim or lien invalid or unenforceable, a party objecting to the validity or enforceability of the claim or lien may file a motion to remove
the claim or lien. The motion must be verified and state the legal and factual basis for objecting to the validity or enforceability of the claim or lien. The motion may be accompanied by supporting affidavits.

(b) The grounds for objecting to the validity or enforceability of the claim or lien for purposes of the motion are limited to the following:

(1) notice of claim was not furnished to the owner or original contractor as required by Section 53.056, 53.057, 53.058, 53.252, or 53.253;

(2) an affidavit claiming a lien failed to comply with Section 53.054 or was not filed as required by Section 53.052;

(3) notice of the filed affidavit was not furnished to the owner or original contractor as required by Section 53.055;

(4) the deadlines for perfecting a lien claim for retainage under this chapter have expired and the owner complied with the requirements of Section 53.101 and paid the retainage and all other funds owed to the original contractor before:

(A) the claimant perfected the lien claim; and

(B) the owner received a notice of the claim as required by this chapter;

(5) all funds subject to the notice of a claim to the owner and a notice regarding the retainage have been deposited in the registry of the court and the owner has no additional liability to the claimant;

(6) when the lien affidavit was filed on homestead property:

(A) no contract was executed or filed as required by Section 53.254;

(B) the affidavit claiming a lien failed to contain the notice as required by Section 53.254; or

(C) the notice of the claim failed to include the statement required by Section 53.254; and

(7) the claimant executed a valid and enforceable waiver or release of the claim or lien claimed in the affidavit.

c) The claimant is not required to file a response. The claimant and any other party that has appeared in the proceeding must be notified by at least 21 days before the date of the hearing on the motion. A motion may not be heard before the 21st day after the date the claimant answers or appears in the proceeding.

d) At the hearing on the motion, the burden is on:

(1) the claimant to prove that the notice of claim and affidavit of lien were furnished to the owner and original contractor as required by this chapter; and

(2) the movant to establish that the lien should be removed for any other ground authorized by this section.
(e) The court shall promptly determine a motion to remove a claim or lien under this section. If the court determines that the movant is not entitled to remove the lien, the court shall enter an order denying the motion. If the court determines that the movant is entitled to remove the lien, the court shall enter an order removing the lien claimed in the lien affidavit. A party to the proceeding may not file an interlocutory appeal from the court's order.

(f) Any admissible evidence offered at the hearing may be admitted in the trial of the case. The court's order under Subsection (e) is not admissible as evidence in determining the validity and enforceability of the claim or lien.

Added by Acts 1997, 75th Leg., ch. 526, Sec. 17, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 499 (H.B. 1390), Sec. 8, eff. September 1, 2011.

**Conclusion,**  This is not an exhaustive list of all the laws (prominent and overlooked) that may aid a consumer in a bad spot. Past versions of this seminar have included a Presentation called *DTPA Tie-In Statutes.* This may be a very good time to peruse one of those old papers to see what old law may provide a new approach for a consumer.
H.B. No. 1774

AN ACT

relating to actions on and liability associated with certain insurance claims.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 541.156(a), Insurance Code, is amended to read as follows:
(a) A person who receives notice provided under Section 541.154 or 542A.003 may make a settlement offer during a period beginning on the date notice under Section 541.154 or 542A.003 is received and ending on the 60th day after that date.

SECTION 2. Section 542.060, Insurance Code, is amended by amending Subsection (a) and adding Subsection (c) to read as follows:

(a) Except as provided by Subsection (c), if an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable and necessary attorney's fees. Nothing in this subsection prevents the award of prejudgment interest on the amount of the claim, as provided by law.

(c) In an action to which Chapter 542A applies, if an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy, in addition to the amount of the claim, simple interest on the amount of the claim as damages each year at the rate determined on the date of judgment by adding five percent to the interest rate determined under Section 304.003, Finance Code, together with reasonable and necessary attorney's fees. Nothing in this subsection prevents the award of prejudgment interest on the amount of the claim, as provided by law. Interest awarded under this subsection as damages accrues beginning on the date the claim was required to be paid.

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CHAPTER 542A. CERTAIN CONSUMER ACTIONS RELATED TO CLAIMS FOR
PROPERTY DAMAGE

Sec. 542A.001. DEFINITIONS. In this chapter:

(1) "Agent" means an employee, agent, representative, or adjuster who performs any act on behalf of an insurer.

(2) "Claim" means a first-party claim that:
   (A) is made by an insured under an insurance policy providing coverage for real property or improvements to real property;
   (B) must be paid by the insurer directly to the insured; and
   (C) arises from damage to or loss of covered property caused, wholly or partly, by forces of nature, including an earthquake or earth tremor, a wildfire, a flood, a tornado, lightning, a hurricane, hail, wind, a snowstorm, or a rainstorm.

(3) "Claimant" means a person making a claim.

(4) "Insurer" means a corporation, association, partnership, or individual, other than the Texas Windstorm Insurance Association, engaged as a principal in the business of insurance and authorized or eligible to write property insurance in this state, including:
   (A) an insurance company;
   (B) a reciprocal or interinsurance exchange;
   (C) a mutual insurance company;
   (D) a capital stock insurance company;
   (E) a county mutual insurance company;
   (F) a farm mutual insurance company;
   (G) a Lloyd's plan;
   (H) an eligible surplus lines insurer; or
   (I) the FAIR Plan Association, unless a claim-related dispute resolution procedure is available to policyholders under Chapter 2211.

(5) "Person" means a corporation, association, partnership, or other legal entity or individual.

Sec. 542A.002. APPLICABILITY OF CHAPTER. (a) Except as provided by Subsection (b), this chapter applies to an action on a claim against an insurer or agent, including:

(1) an action alleging a breach of contract;

(2) an action alleging negligence, misrepresentation, fraud, or breach of a common law duty; or

(3) an action brought under:
   (A) Subchapter D, Chapter 541;
   (B) Subchapter B, Chapter 542; or
   (C) Subchapter E, Chapter 17, Business & Commerce Code.

(b) This chapter does not apply to an action against the Texas Windstorm Insurance Association or to an action relating to or arising from a policy ceded to an insurer by the Texas Windstorm Insurance Association under Subchapter O, Chapter 2210. This chapter applies to an action that relates to or arises from a policy renewed under Section 2210.703.

Sec. 542A.003. NOTICE REQUIRED. (a) In addition to any other notice required by law or the applicable insurance policy, not later than the 61st day before the date a claimant files an action to which this chapter applies in which the claimant seeks damages from any person, the claimant must give written notice to the person in accordance with this section as a prerequisite to
filing the action.

(b) The notice required under this section must provide:

(1) a statement of the acts or omissions giving rise to the claim;

(2) the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property; and

(3) the amount of reasonable and necessary attorney's fees incurred by the claimant, calculated by multiplying the number of hours actually worked by the claimant's attorney, as of the date the notice is given and as reflected in contemporaneously kept time records, by an hourly rate that is customary for similar legal services.

c) If an attorney or other representative gives the notice required under this section on behalf of a claimant, the attorney or representative shall:

(1) provide a copy of the notice to the claimant; and

(2) include in the notice a statement that a copy of the notice was provided to the claimant.

d) A presuit notice under Subsection (a) is not required if giving notice is impracticable because:

(1) the claimant has a reasonable basis for believing there is insufficient time to give the presuit notice before the limitations period will expire; or

(2) the action is asserted as a counterclaim.

(e) To ensure that a claimant is not prejudiced by having given the presuit notice required by this chapter, a court shall dismiss without prejudice an action relating to the claim for which notice is given by the claimant and commenced:

(1) before the 61st day after the date the claimant provides presuit notice under Subsection (a);

(2) by a person to whom presuit notice is given under Subsection (a); and

(3) against the claimant giving the notice.

(f) A claimant who gives notice in accordance with this chapter is not relieved of the obligation to give notice under any other applicable law. Notice given under this chapter may be combined with notice given under any other law.

(g) Notice given under this chapter is admissible in evidence in a civil action or alternative dispute resolution proceeding relating to the claim for which the notice is given.

(h) The giving of a notice under this chapter does not provide a basis for limiting the evidence of attorney's fees, damage, or loss a claimant may offer at trial.

Sec. 542A.004. INSPECTION. Not later than the 30th day after receiving a presuit notice given under Section 542A.003(a), a person to whom notice is given may send a written request to the claimant to inspect, photograph, or evaluate, in a reasonable manner and at a reasonable time, the property that is the subject of the claim. If reasonably possible, the inspection, photography, and evaluation must be completed not later than the 60th day after the date the person receives the presuit notice.

Sec. 542A.005. ABATEMENT. (a) In addition to taking any other act allowed by contract or by any other law, a person against whom an action to which this chapter applies is pending may file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the action is pending if the person:

(1) did not receive a presuit notice complying with Section 542A.003; or
(2) requested under Section 542A.004 but was not provided a reasonable opportunity to inspect, photograph, or evaluate the property that is the subject of the claim.

(b) The court shall abate the action if the court finds that the person filing the plea in abatement:

(1) did not, for any reason, receive a presuit notice complying with Section 542A.003; or

(2) requested under Section 542A.004 but was not provided a reasonable opportunity to inspect, photograph, or evaluate the property that is the subject of the claim.

(c) An action is automatically abated without a court order beginning on the 11th day after the date a plea in abatement is filed if the plea:

(1) is verified and alleges that the person against whom the action is pending:

(A) did not receive a presuit notice complying with Section 542A.003; or

(B) requested under Section 542A.004 but was not provided a reasonable opportunity to inspect, photograph, or evaluate the property that is the subject of the claim; and

(2) is not controverted by an affidavit filed by the claimant before the 11th day after the date the plea in abatement is filed.

(d) An affidavit described by Subsection (c)(2) controverting whether the person against whom the action is pending received a presuit notice complying with Section 542A.003 must:

(1) include as an attachment a copy of the document the claimant sent to give notice of the claimant's action; and

(2) state the date on which the notice was given.

(e) An abatement under this section continues until the later of:

(1) the 60th day after the date a notice complying with Section 542A.003 is given; or

(2) the 15th day after the date of the requested inspection, photographing, or evaluating of the property is completed.

(f) If an action is abated under this section, a court may not compel participation in an alternative dispute resolution proceeding until after the abatement period provided by Subsection (e) has expired.

Sec. 542A.006. ACTION AGAINST AGENT; INSURER ELECTION OF LEGAL RESPONSIBILITY. (a) Except as provided by Subsection (h), in an action to which this chapter applies, an insurer that is a party to the action may elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant.

(b) If an insurer makes an election under Subsection (a) before a claimant files an action to which this chapter applies, no cause of action exists against the agent related to the claimant's claim, and, if the claimant files an action against the agent, the court shall dismiss that action with prejudice.

(c) If a claimant files an action to which this chapter applies against an agent and the insurer thereafter makes an election under Subsection (a) with respect to the agent, the court shall dismiss the action against the agent with prejudice.

(d) If an insurer makes an election under Subsection (a) but, after having been served with a notice of intent to take a deposition of the agent who is the subject of the election, fails to make that agent available at a reasonable time and place to give deposition testimony, Sections
542A.007(a), (b), and (c) do not apply to the action with respect to which the insurer made the election unless the court finds that:

1. it is impracticable for the insurer to make the agent available due to a change in circumstances arising after the insurer made the election under Subsection (a);

2. the agent whose liability was assumed would not have been a proper party to the action; or

3. obtaining the agent's deposition testimony is not warranted under the law.

(e) An insurer's election under Subsection (a) is ineffective to obtain the dismissal of an action against an avoiding liability for any claim-related damage caused to the claimant by the agent's acts or omissions.

(f) An insurer may not revoke, and a court may not nullify, an insurer's election under Subsection (a).

(g) If an insurer makes an election under Subsection (a) and the agent is not a party to the action, evidence of the agent's acts or omissions may be offered at trial and, if supported by sufficient evidence, the trier of fact may be asked to resolve fact issues as if the agent were a defendant, and a judgment against the insurer must include any liability that would have been assessed against the agent. To the extent there is a conflict between this subsection and Chapter 33, Civil Practice and Remedies Code, this subsection prevails.

(h) If an insurer is in receivership at the time the claimant commences an action against the insurer, the insurer may not make an election under Subsection (a), and the court shall disregard any prior election made by the insurer relating to the claimant's claim.

(i) In an action tried by a jury, an insurer's election under Subsection (a) may not be made known to the jury.

Sec. 542A.007. AWARD OF ATTORNEY'S FEES. (a) Except as otherwise provided by this section, the amount of attorney's fees that may be awarded to a claimant in an action to which this chapter applies is the lesser of:

1. the amount of reasonable and necessary attorney's fees supported at trial by sufficient evidence and determined by the trier of fact to have been incurred by the claimant in bringing the action;

2. the amount of attorney's fees that may be awarded to the claimant under other applicable law; or

3. the amount calculated by:

   (A) dividing the amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy for damage to or loss of covered property by the amount alleged to be owed on the claim for that damage or loss in a notice given under this chapter; and

   (B) multiplying the amount calculated under Paragraph (A) by the total amount of reasonable and necessary attorney's fees supported at trial by sufficient evidence and determined by the trier of fact to have been incurred by the claimant in bringing the action.

(b) Except as provided by Subsection (d), the court shall award to the claimant the full amount of reasonable and necessary attorney's fees supported at trial by sufficient evidence and determined by the trier of fact to have been incurred by the claimant in bringing the action if the amount calculated under Subsection (a)(3)(A) is:

1. greater than or equal to 0.8;
(2) not limited by this section or another law; and
(3) otherwise recoverable under law.

(c) The court may not award attorney's fees to the claimant if the amount calculated under
Subsection (a)(3)(A) is less than 0.2.

(d) If a defendant in an action to which this chapter applies pleads and proves that the
defendant was entitled to but was not given a presuit notice stating the specific amount alleged to
be owed by the insurer under Section 542A.003(b)(2) at least 61 days before the date the action
was filed by the claimant, the court may not award to the claimant any attorney's fees incurred
after the date the defendant files the pleading with the court. A pleading under this subsection
must be filed not later than the 30th day after the date the defendant files an original answer in the
court in which the action is pending.

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(BACK TO LEGISLATIVE BILL FORMATTING)

SECTION 4. (a) Section 541.156, Insurance Code, as amended by this Act, and Chapter
542A, Insurance Code, as added by this Act, apply only to an action filed on or after the effective
date of this Act. An action that is filed before the effective date of this Act is governed by the law
as it existed immediately before the effective date of this Act, and that law is continued in effect
for that purpose.

(b) Section 542.060(c), Insurance Code, as added by this Act, applies only to a claim, as
defined by Section 542A.001, Insurance Code, as added by this Act, made on or after the effective
date of this Act. A claim made before the effective date of this Act is governed by the law as it
existed immediately before the effective date of this Act, and that law is continued in effect for
that purpose.

SECTION 5. This Act takes effect September 1, 2017.
COMES NOW, Ike FLOOD and Irma FLOOD ("Plaintiffs"), and file this Plaintiffs' Original Petition, complaining of GECKO LLOYDS ("GECKO") and Errol AGENT ("AGENT") (to whom will be collectively referred as "Defendants"), and for cause of action, Plaintiffs would respectfully show this Honorable Court the following:

DISCOVERY CONTROL PLAN

1. Plaintiffs intend for discovery to be conducted under Level 3 of Rule 190 of the Texas Rules of Civil Procedure. This case involves complex issues and will require extensive discovery. Therefore, Plaintiffs will ask the Court to order that discovery be conducted in accordance with a discovery control plan tailored to the particular circumstances of this suit.

PARTIES

2. Plaintiffs Ike FLOOD and Irma FLOOD are individuals residing in Harris County, Texas.
3. Defendant GECKO is an insurance company engaging in the business of insurance in the State of Texas. This defendant may be served with personal process, by a process server, by serving its Registered Agent.

4. Defendant Errol AGENT is an individual residing in and domiciled in the State of Ohio. This defendant may be served with personal process by a process server at his place of residence.

**JURISDICTION**

5. The Court has jurisdiction over this cause of action because the amount in controversy is within the jurisdictional limits of the Court.

6. The Court has jurisdiction over Defendant GECKO because this defendant is a domestic insurance company that engages in the business of insurance in the State of Texas, and Plaintiffs' causes of action arise out of this defendant's business activities in the State of Texas.

7. The Court has jurisdiction over Defendant AGENT because this defendant engages in the business of adjusting insurance claims in the State of Texas, and Plaintiffs' causes of action arise out of this defendant's business activities in the State of Texas.

**VENUE**

8. Venue is proper in Harris County, Texas, because the insured property is situated in Harris County, Texas. TEX. CIV. PRAC. & REM. CODE §15.032.

**FACTS**

9. Plaintiffs are the owners of a Texas Homeowners' Insurance Policy (hereinafter referred to as "the Policy"), which was issued by GECKO.
10. Plaintiffs own the insured property, which is specifically located at Ridgeline Drive, Bellaire, Texas 77401, in Harris County (hereinafter referred to as "the Property").

11. GECKO sold the Policy insuring the Property to Plaintiffs.

12. On or about July 23, 2008, Hurricane Harvey struck Harris County, Texas, causing severe damage to homes and businesses throughout the gulf-coast region of Texas, including Plaintiffs' residence. Plaintiffs' roof sustained extensive damage during the storm. Water intrusion through the roof caused significant damage throughout the entire home and garage including, but not limited to, the home's ceilings, walls, insulation, and flooring. Plaintiffs' home also sustained substantial structural, exterior, and porch damage during the storm. Immediately after the storm, Plaintiffs filed a claim with their insurance company, GECKO, for the damages to their home caused by Hurricane Harvey.

13. Plaintiffs submitted a claim to GECKO against the Policy for ALE, Other Structure Damage, Roof Damage, Structural Damage, Water Damage, and Wind Damage the Property sustained as a result of Hurricane Harvey.

14. Plaintiffs asked that GECKO cover the cost of repairs to the Property pursuant to the Policy.

15. Defendant GECKO then assigned Defendant AGENT as the individual adjuster on the claim. Defendant AGENT inspected the entire home for hurricane damages in merely thirty (30) minutes. Defendant AGENT conducted a substandard inspection which is evident in his report which failed to include many of Plaintiffs' damages noted upon inspection. His estimate did not allow adequate funds to cover repairs to all the damages sustained. Defendant AGENT failed to perform a thorough investigation of
damages and undervalued and underpaid Plaintiffs' claims, thus denying properly covered damages. As a result, Plaintiffs have not been able to make necessary repairs to restore the home. Furthermore, the delay in making repairs caused by the inadequate investigation and underpayment of the claim has caused Plaintiffs additional damage.

16. As detailed in the paragraphs below GECKO wrongfully denied Plaintiffs' claim for repairs of the Property, even though the Policy provided coverage for losses such as those suffered by Plaintiffs. Furthermore, GECKO underpaid some of Plaintiffs' claims by not providing full coverage for the damages sustained by Plaintiffs, as well as under-scoping the damages during its investigation.

17. To date, GECKO continues to delay in the payment for the damages to the property. As such, Plaintiffs have not been paid in full for the damages to their home.

18. Defendant GECKO failed to perform its contractual duties to adequately compensate Plaintiffs under the terms of the Policy. Specifically, it refused to pay the full proceeds of the Policy, although due demand was made for proceeds to be paid in an amount sufficient to cover the damaged property, and all conditions precedent to recovery upon the Policy had been carried out and accomplished by Plaintiffs. GECKO's conduct constitutes a breach of the insurance contract between GECKO and Plaintiffs.

19. Defendants GECKO and AGENT misrepresented to Plaintiffs that the damage to the Property was not covered under the Policy, even though the damage was caused by a covered occurrence. Defendants GECKO's and AGENT's conduct constitutes a violation of the Texas Insurance Code, Unfair Settlement Practices. TEX. INS. CODE §541.060(a)(1).
20. Defendants GECKO and AGENT failed to make an attempt to settle Plaintiffs' claim in a fair manner, although they were aware of their liability to Plaintiffs under the Policy. Defendants GECKO's and AGENT's conduct constitutes a violation of the Texas Insurance Code, Unfair Settlement Practices. TEX. INS. CODE §541.060(a)(2)(A).

21. Defendants GECKO and AGENT failed to explain to Plaintiffs the reasons for their offer of an inadequate settlement. Specifically, Defendants GECKO and AGENT failed to offer Plaintiffs' adequate compensation, without any explanation why full payment was not being made. Furthermore, Defendants GECKO and AGENT did not communicate that any future settlements or payments would be forthcoming to pay for the entire losses covered under the Policy, nor did they provide any explanation for the failure to adequately settle Plaintiffs' claim. Defendants GECKO's and AGENT's conduct is a violation of the Texas Insurance Code, Unfair Settlement Practices. TEX. INS. CODE §541.060(a)(3).

22. Defendants GECKO and AGENT failed to affirm or deny coverage of Plaintiffs' claim within a reasonable time. Specifically, Plaintiffs did not receive timely indication of acceptance or rejection, regarding the full and entire claim, in writing from Defendants GECKO and AGENT. Defendants GECKO's and AGENT's conduct constitutes a violation of the Texas Insurance Code, Unfair Settlement Practices. TEX. INS. CODE §541.060(a)(4).

23. Defendants GECKO and AGENT refused to fully compensate Plaintiffs, under the terms of the Policy, even though Defendants GECKO and AGENT failed to conduct a reasonable investigation. Specifically, Defendants GECKO and AGENT performed an outcome-oriented investigation of Plaintiffs' claim, which resulted in a biased, unfair, and

24. Defendant GECKO failed to meet its obligations under the Texas Insurance Code regarding timely acknowledging Plaintiffs' claim, beginning an investigation of Plaintiffs' claim, and requesting all information reasonably necessary to investigate Plaintiffs' claim, within the statutorily mandated time of receiving notice of Plaintiffs' claim. GECKO's conduct constitutes a violation of the Texas Insurance Code, Prompt Payment of Claims. TEX. INS. CODE §542.055.

25. Defendant GECKO failed to accept or deny Plaintiffs' full and entire claim within the statutorily mandated time of receiving all necessary information. GECKO's conduct constitutes a violation of the Texas Insurance Code, Prompt Payment of Claims. TEX. INS. CODE §542.056.

26. Defendant GECKO failed to meet its obligations under the Texas Insurance Code regarding payment of claim without delay. Specifically, it has delayed full payment of Plaintiffs' claim longer than allowed and, to date, Plaintiffs have not received full payment for their claim. GECKO's conduct constitutes a violation of the Texas Insurance Code, Prompt Payment of Claims. TEX. INS. CODE §542.058.

27. From and after the time Plaintiffs' claim was presented to Defendant GECKO, the liability of GECKO to pay the full claim in accordance with the terms of the Policy was reasonably clear. However, GECKO has refused to pay Plaintiffs in full, despite there being no basis whatsoever on which a reasonable insurance company would have
relied to deny the full payment. GECKO's conduct constitutes a breach of the common law duty of good faith and fair dealing.

28. Defendants GECKO and AGENT knowingly or recklessly made false representations, as described above, as to material facts and/or knowingly concealed all or part of material information from Plaintiffs.

29. As a result of Defendants GECKO's and AGENT's wrongful acts and omissions, Plaintiffs were forced to retain the professional services of the attorney and law firm who are representing them with respect to these causes of action.

30. Plaintiffs' experience is not an isolated case. The acts and omissions GECKO committed in this case, or similar acts and omissions, occur with such frequency that they constitute a general business practice of GECKO with regard to handling these types of claims. GECKO's entire process is unfairly designed to reach favorable outcomes for the company at the expense of the policyholders.

CAUSES OF ACTION:

CAUSES OF ACTION AGAINST AGENT

NONCOMPLIANCE WITH TEXAS INSURANCE CODE:
UNFAIR SETTLEMENT PRACTICES

31. Defendant AGENT's conduct constitutes multiple violations of the Texas Insurance Code, Unfair Settlement Practices. TEX. INS. CODE §541.060(a). All violations under this article are made actionable by TEX. INS. CODE §541.151.

32. Defendant AGENT is individually liable for his unfair and deceptive acts, irrespective of the fact he was acting on behalf of GECKO, because he is a "person" as defined by TEX. INS. CODE §541.002(2). The term "person" is defined as "any individual, corporation, association, partnership, reciprocal or interinsurance exchange, Lloyds plan,
fraternal benefit society, or other legal entity engaged in the business of insurance, including an agent, broker, adjuster or life and health insurance counselor." TEX. INS. CODE §541.002(2) (emphasis added). (See also Liberty Mutual Insurance Co. v. Garrison Contractors, Inc., 966 S.W.2d 482, 484 (Tex. 1998) (holding an insurance company employee to be a "person" for the purpose of bringing a cause of action against him or her under the Texas Insurance Code and subjecting him or he to individual liability)).

33. Defendant AGENT's unfair settlement practice, as described above, of misrepresenting to Plaintiffs material facts relating to the coverage at issue, constitutes an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. TEX. INS. CODE §541.060(a)(1).

34. Defendant AGENT's unfair settlement practice, as described above, of failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the claim, even though liability under the Policy is reasonably clear, constitutes an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. TEX. INS. CODE §541.060(a)(2)(A).

35. The unfair settlement practice of Defendant AGENT as described above, of failing to promptly provide Plaintiffs with a reasonable explanation of the basis in the Policy, in relation to the facts or applicable law, for the offer of a compromise settlement of Plaintiffs' claim, constitutes an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. TEX. INS. CODE §541.060(a)(3).

36. Defendant AGENT's unfair settlement practice, as described above, of failing within a reasonable time to affirm or deny coverage of the claim to Plaintiffs, or to submit a
reservation of rights to Plaintiffs, constitutes an unfair method of competition and an
unfair and deceptive act or practice in the business of insurance. TEX. INS. CODE
§541.060(a)(4).

37. Defendant AGENT's unfair settlement practice, as described above, of refusing to pay
Plaintiffs' claim without conducting a reasonable investigation, constitutes an unfair
method of competition and an unfair and deceptive act or practice in the business of
insurance. TEX. INS. CODE §541.060(a)(7).

CAUSES OF ACTION AGAINST ALL DEFENDANTS

FRAUD

38. Defendants GECKO and AGENT are liable to Plaintiffs for common law fraud.

39. Each and every one of the representations, as described above, concerned material facts
for the reason that absent such representations, Plaintiffs would not have acted as they
did, and which Defendants GECKO and AGENT knew were false or made recklessly
without any knowledge of their truth as a positive assertion.

40. The statements were made with the intention that they should be acted upon by Plaintiffs,
who in turn acted in reliance upon the statements, thereby causing Plaintiffs to suffer
injury and constituting common law fraud.

CONSPIRACY TO COMMIT FRAUD

41. Defendants GECKO and AGENT are liable to Plaintiffs for conspiracy to commit fraud.
Defendants GECKO and AGENT were members of a combination of two or more persons
whose object was to accomplish an unlawful purpose or a lawful purpose by unlawful
means. In reaching a meeting of the minds regarding the course of action to be taken
against Plaintiffs, Defendants GECKO and AGENT committed an unlawful, overt
act to further the object or course of action. Plaintiffs suffered injury as a proximate result.

CAUSES OF ACTION AGAINST GECKO ONLY

42. Defendant GECKO is liable to Plaintiffs for intentional breach of contract, as well as intentional violations of the Texas Insurance Code, and intentional breach of the common law duty of good faith and fair dealing.

BREACH OF CONTRACT

43. Defendant GECKO's conduct constitutes a breach of the insurance contract made between GECKO and Plaintiffs.

44. Defendant GECKO's failure and/or refusal, as described above, to pay the adequate compensation as it is obligated to do under the terms of the Policy in question, and under the laws of the State of Texas, constitutes a breach of GECKO's insurance contract with Plaintiffs.

NONCOMPLIANCE WITH TEXAS INSURANCE CODE:
UNFAIR SETTLEMENT PRACTICES

45. Defendant GECKO's conduct constitutes multiple violations of the Texas Insurance Code, Unfair Settlement Practices. TEX. INS. CODE §541.060(a). All violations under this article are made actionable by TEX. INS. CODE §541.151.

46. Defendant GECKO's unfair settlement practice, as described above, of misrepresenting to Plaintiffs material facts relating to the coverage at issue, constitutes an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. TEX. INS. CODE §541.060(a)(1).

47. Defendant GECKO’s unfair settlement practice, as described above, of failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the claim,
even though GECKO's liability under the Policy was reasonably clear, constitutes an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. TEX. INS. CODE §541.060(a)(2)(A).

48. Defendant GECKO's unfair settlement practice, as described above, of failing to promptly provide Plaintiffs with a reasonable explanation of the basis in the Policy, in relation to the facts or applicable law, for its offer of a compromise settlement of the claim, constitutes an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. TEX. INS. CODE §541.060(a)(3).

49. Defendant GECKO's unfair settlement practice, as described above, of failing within a reasonable time to affirm or deny coverage of the claim to Plaintiffs, or to submit a reservation of rights to Plaintiffs, constitutes an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. TEX. INS. CODE §541.060(a)(4).

50. Defendant GECKO's unfair settlement practice, as described above, of refusing to pay Plaintiffs' claim without conducting a reasonable investigation, constitutes an unfair method of competition and an unfair and deceptive act or practice in the business of insurance. TEX. INS. CODE §541.060(a)(7).

**NONCOMPLIANCE WITH TEXAS INSURANCE CODE:**
**THE PROMPT PAYMENT OF CLAIMS**

51. Defendant GECKO's conduct constitutes multiple violations of the Texas Insurance Code, Prompt Payment of Claims. All violations made under this article are made actionable by TEX. INS. CODE §542.060.

52. Defendant GECKO's failure to acknowledge receipt of Plaintiffs' claim, commence investigation of the claim, and request from Plaintiffs all items, statements, and forms.
that it reasonably believed would be required within the applicable time constraints, as described above, constitutes a non-prompt payment of claims and a violation of TEX. INS. CODE §542.05_5.

53. Defendant GECKO's failure to notify Plaintiffs in writing of its acceptance or rejection of the claim within the applicable time constraints, constitutes a non-prompt payment of the claim. TEX. INS. CODE §542.056.

54. Defendant GECKO's delay of the payment of Plaintiffs' claim following its receipt of all items, statements, and forms reasonably requested and required, longer than the amount of time provided for, as described above, constitutes a non-prompt payment of the claim. TEX. INS. CODE §542.058.

BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

55. Defendant GECKO's conduct constitutes a breach of the common law duty of good faith and fair dealing owed to insureds in insurance contracts.

56. Defendant GECKO's failure, as described above, to adequately and reasonably investigate and evaluate Plaintiffs' claim, although, at that time, GECKO knew or should have known by the exercise of reasonable diligence that its liability was reasonably clear, constitutes a breach of the duty of good faith and fair dealing.

KNOWLEDGE

57. Each of the acts described above, together and singularly, was done "knowingly," as that term is used in the Texas Insurance Code, and was a producing cause of Plaintiffs' damages described herein.
DAMAGES

58. Plaintiffs would show that all of the aforementioned acts, taken together or singularly, constitute the producing causes of the damages sustained by Plaintiffs.

59. As previously mentioned, the damages caused by Hurricane Harvey have not been properly addressed or repaired in the months since the storm, causing further damages to the Property, and causing undue hardship and burden to Plaintiffs. These damages are a direct result of Defendant GECKO's and AGENT's mishandling of Plaintiffs' claim in violation of the laws set forth above.

60. For breach of contract, Plaintiffs are entitled to regain the benefit of their bargain, which is the amount of their claim, together with attorney's fees.

61. For noncompliance with the Texas Insurance Code, Unfair Settlement Practices, Plaintiffs are entitled to actual damages, which include the loss of the benefits that should have been paid pursuant to the policy, mental anguish, court costs, and attorney's fees. For knowing conduct of the acts described above, Plaintiffs ask for three times their actual damages. TEX. INS. CODE §541.152.

62. For noncompliance with Texas Insurance Code, Prompt Payment of Claims, Plaintiffs are entitled to the amount of their claim, as well as eighteen (18) percent interest per annum on the amount of such claim as damages, together with attorney's fees. TEX. INS. CODE §542.060.

63. For breach of the common law duty of good faith and fair dealing, Plaintiffs are entitled to compensatory damages, including all forms of loss resulting from the insurer's breach of duty, such as additional costs, economic hardship, losses due to nonpayment of the amount the insurer owed, exemplary damages, and damages for emotional distress.
64. For fraud, Plaintiffs are entitled to recover actual damages and exemplary damages for knowingly fraudulent and malicious representations, along with attorney's fees, interest, and court costs.

65. For the prosecution and collection of this claim, Plaintiffs have been compelled to engage the services of the attorney whose name is subscribed to this pleading. Therefore, Plaintiffs are entitled to recover a sum for the reasonable and necessary services of Plaintiffs' attorney in the preparation and trial of this action, including any appeals to the Court of Appeals and/or the Supreme Court of Texas.

**JURY DEMAND**

66. Plaintiffs hereby request that all causes of action alleged herein be tried before a jury consisting of citizens residing in Harris County, Texas. Plaintiffs hereby tender the appropriate jury fee.

**WRITTEN DISCOVERY**

**REQUESTS FOR DISCLOSURE**

67. Plaintiffs' Request for Disclosure to Defendant GECKO Lloyds is attached as "Exhibit A." Plaintiffs' Request for Disclosure to Defendant Errol AGENT is attached as "Exhibit A-1."

**REQUESTS FOR PRODUCTION**

68. Plaintiffs' Request for Production to Defendant GECKO Lloyds is attached as "Exhibit B." Plaintiffs' Request for Production to Defendant Errol AGENT is attached as "Exhibit B-1."
INTERROGATORIES

69. Plaintiffs' First Set of Interrogatories to Defendant GECKO Lloyds is attached as "Exhibit C." Plaintiffs' First Set of Interrogatories to Defendant Errol AGENT is attached as "Exhibit C-1."

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that upon trial hereof, said Plaintiffs have and recover such sums as would reasonably and justly compensate them in accordance with the rules of law and procedure, as to actual damages, treble damages under the Texas Insurance Code, and all punitive and exemplary damages as may be found. In addition, Plaintiffs request the award of attorney's fees for the trial and any appeal of this case, for all costs of Court on their behalf expended, for prejudgment and postjudgment interest as allowed by law, and for any other and further relief, either at law or in equity, to which they may show themselves justly entitled.

Respectfully submitted,

Your Firm

ATTORNEYS FOR PLAINTIFFS