

Please select the boxes below to read our Hurricane Harvey updates and special alerts.



INSURANCE CHECKLIST

A Checklist for Pursuing Corporate Insurance Claims

FORCE MAJEURE

Force Majeure in the Aftermath of Hurricane Harvey

HEALTHCARE

Resources for Healthcare Providers

EMPLOYEE BENEFITS

Special Edition Benefits Alert

LABOR AND EMPLOYMENT

Employer Considerations in Office Closures and Reopenings

FRANCHISE

Price Gouging: Considerations for Franchisors

ENVIRONMENTAL

TCEQ Guidance

INSURANCE COVERAGE

Protecting Your Statutory Rights Before September 1st

The destruction left in Hurricane Harvey's wake is unprecedented. Houston's integral role in the global trade is enormous and the impact of this natural disaster will be felt all around the world. With the initial emergency over, clean up and recovery efforts are starting and insurance coverage, contract, and other liability issues both anticipated and otherwise will begin to surface. Haynes and Boone stands ready to provide support and assistance as the Houston business community and all companies across the globe feeling the impact begin assessing the full scope of the damage from this historic natural disaster.

We have assembled a Hurricane Harvey Rapid Response Task Force of our most experienced partners who have worked with clients through all manner of crises both natural and manmade. This group of experienced practitioners stands ready to assist in any way and will provide our clients with quick, actionable responses to any query. To that end, our task force has assembled a short list of topics to prioritize as you begin to look at areas of need, some of which may include:

- Insurance claims and recovery
- Employee crisis funds
- Force majeure
- Supply chain disruption
- Employee welfare, compensation, and benefits
- Prevention of price gouging (for the retail and hospitality industries)
- Specific application of regulatory guidance of state and federal agencies pertinent to the disaster, including the Governor's granting of the request of the Texas Commission on Environmental Quality's (TCEQ) for suspension of certain of its rules

While this list is not exhaustive, it provides you with a good starting point to help focus in-house legal teams and risk managers as they begin to evaluate next steps for their organizations. Please feel free to contact partner **Suzie Trigg**, who is heading up our Hurricane Harvey Rapid Response Task Force, and she will ensure your questions are answered quickly.

We plan on making updates to this page offering short helpful articles on the kinds of issues that may be facing companies large and small as they tackle the myriad of legal issues Hurricane Harvey has left in its wake.

To subscribe to our Hurricane Harvey alerts and updates please register [here](#).



A MESSAGE FROM THE MANAGING PARTNER REGARDING HURRICANE HARVEY UPDATES AND CONSIDERATIONS

08/31/2017

Tim Powers

Dear Clients and Colleagues,

At this time, the personal safety and wellness of your families and colleagues is of paramount importance. Once the initial emergency is over, and clean up and recovery efforts start, insurance coverage, contract, and other liability issues both anticipated and otherwise will begin to surface. I want you to know that we are here to help you as these issues emerge.

We have assembled a Hurricane Harvey Rapid Response Task Force of our most experienced partners who have worked with clients through all manner of crises, both natural and manmade. This group of experienced practitioners stands ready to assist in any way and will provide you with quick, actionable responses to any query. To that end, our task force has assembled a short list of topics to prioritize as you begin to look at areas of need, some of which may include:

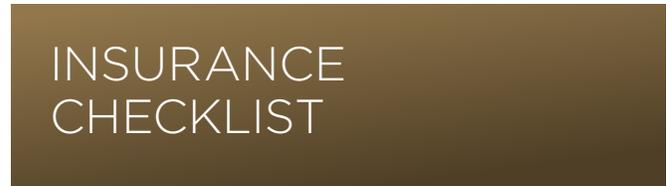
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While this list is not exhaustive, we hope it provides you with a good starting point to help focus you and your team as you begin to evaluate next steps for your organization. Please feel free to contact any of our partners for assistance, and you may also contact our partner **Suzie Trigg** - (214.651.5098, suzie.trigg@haynesboone.com) who is heading up our Harvey Rapid Response Task Force and she will make sure to get your questions answered quickly.

Thank you as always for the trust you place in us and we look forward to being of assistance as we move past this catastrophic event. If there is any way I can be of personal service to you, please do not hesitate to call me directly at 214.651.5610.

Regards,

Tim Powers
Managing Partner



RESPONDING TO HURRICANE HARVEY: A CHECKLIST FOR PURSUING CORPORATE INSURANCE CLAIMS

09/08/2017

Ernest Martin, Jr. and Micah E. Skidmore

In the days following Hurricane Harvey, tremendous attention has been appropriately placed on individual safety and rescue for the millions affected by the storm’s devastating winds and catastrophic flooding. Now the immediate emphasis for many corporate policyholders has turned to the practical challenge of repairing damaged property and restoring business operations suspended by the storm. Here is a checklist for corporate insureds to use when pursuing claims for property damage or business interruption relating to Hurricane Harvey.

✓ **MANAGE YOUR PROPERTY/BUSINESS OPERATIONS AND DOCUMENT YOUR CLAIM APPROPRIATELY**

- Act to reasonably protect and preserve property from loss or damage. Many first-party policies have so-called “sue and labor” clauses requiring the insured to mitigate covered loss or damage, with the associated cost of this mitigation payable by the insurer to the extent of its interest.
- Document the scope and nature of the damage to insured property, or, as appropriate, to the operations of the insured’s business. This may include everything from taking photographs of damage to creating and preserving records of business operations and your efforts to continue or resume your business as soon as possible.
- Permit the insurer reasonable access to inspect and review the damaged property or records relevant to your claim.
- Act diligently in repairing damaged property and in restoring business operations interrupted by the storm. Let your insurer know before making significant repairs to (or other disposition of) covered property.
- Seek an advancement of funds for both property damage and business interruption, particularly when some substantial quantum of covered loss and damage is known. Policyholders should keep in close communication with insurance adjusters to ensure that appropriate advances are paid in a timely manner.
- In the event that third-parties are responsible for some portion of the insured’s loss or damage, the insured must not compromise claims against such third-parties without the insurer’s consent.

✓ **KNOW YOUR INSURANCE POLICY**

- Review your policy with your insurance broker, counsel or other insurance professional to understand what is covered, what is excluded and what obligations you have as a corporate policyholder.
- Commercial property and builders’ risk policies may insure more than just the cost to rebuild or to replace damaged property or related income lost from business interruption. Your policy may provide specific coverage for
 - debris removal
 - code upgrade coverage (insuring the increased cost of complying with building codes governing repairs)
 - extra expense (insuring the increased cost incurred to maintain business operations)
 - expediting expense (insuring the extra cost incurred to perform temporary repairs quickly)
 - lost profits caused by damage to a dependent business, including a customer or supplier (contingent business income coverage)
 - lost profits caused by evacuation orders or other mandates from government authorities prohibiting access to insured premises (civil authority coverage)
 - lost profits caused by lack of incoming electricity, fuel, water or data/communications, as well as the lack of outgoing communications, sewer or other services (service interruption coverage).
- Be familiar with the attendant limitations, such as deductibles (or waiting periods), and sublimits to take full advantage of available coverage.

✓ COMPLY WITH POLICY CONDITIONS REGARDING NOTICE AND PROOF OF LOSS

- Be aware of what events require notice to the insurer, what information needs to be submitted with your claim and what specific deadlines the policy includes for providing this information.
- If you are unsure whether notice is appropriate or what information should be included with your notice, contact your insurer, your insurance broker, counsel or another insurance professional.
- Many policies require not only “notice” to an insurer, but the submission of a formal proof of loss. For property damage claims, this submission will include details regarding the scope and value of the damage claimed by the insured.
- For business interruption claims, the proof of loss will include the value of the lost income for which the insured is seeking payment. In complex claims, preparation of the proof of loss may take months of work and often requires the assistance of one or more professionals, including accountants, architects, auditors, engineers or others.
- Check to see if your policy insures the cost of professional fees incurred by the insured to prepare and certify the details of an insured’s loss or damage.
- Take note of the deadline to submit the proof of loss, as well as other deadlines imposed by your policy. In the event that such deadlines or other policy conditions cannot reasonably be met despite the insured’s reasonable diligence, the insured should obtain advance consent or other relief from the insurer, which should be documented in writing.

- Many policies will include contractual limitations periods requiring insureds to bring suit within a certain number of years from the date the insured discovered the loss. Note that under Texas law, a contract that purports to impose a limitations period that is less than two (2) years is void. See TEX. CIV. PRAC. & REM. CODE § 16.070.

✓ ESTABLISH AND FOLLOW A COMMUNICATIONS PROTOCOL WITH YOUR INSURER

- Establish and follow a clear communications protocol with the insurer regarding the claim.
- Communicate regularly with the insurer regarding the claims process, either directly or through an intermediary (broker or counsel).
- Identify one point of contact to communicate with the insurer, through whom all communications will be directed upon appropriate review by the necessary stakeholders.
- Determine from the insurer’s adjuster exactly what the insurer’s expectations are, including requests for information and the anticipated timing for fulfillment.
- Establish and document corresponding expectations regarding the anticipated schedule for receipt of insurer’s position regarding coverage and any payments.
- Confirm all substantive communications from the insurer promptly and in writing, including (1) requests for information; and (2) positions regarding coverage.
- Respond to requests for information from the insurer on a timely basis and confirm receipt of the requested information in writing.

- Do not speculate regarding either the cause or amount of property damage or related business interruption loss in internal communications among the stakeholders responsible for managing the insurance claim.
- Keep attorney-client communications confidential. Any materials prepared in anticipation of litigation, including documents created on behalf of the insured by brokers, consultants or other agents, should be kept confidential.

FORCE MAJEURE

FORCE MAJEURE IN THE AFTERMATH OF HURRICANE HARVEY

09/06/2017

As Hurricane Harvey continues to cause far-reaching disruptions, it is important to understand how to effectively assert or respond to assertions of force majeure. This summary outlines the steps to take to assert force majeure, and initial considerations for those who have received several notices of force majeure from counterparties.

While it is tempting to rely upon general notices asserting the occurrence of force majeure, affected parties should keep in mind that whether or not an event qualifies as force majeure depends heavily upon the contract at hand and each contract might have its own specific notice requirements. Even if an event is force majeure, that may not excuse all performance. Finally, in the aftermath of the significant economic losses and ongoing disruptions of Hurricane Harvey, parties may encounter disputes and could be important to have considered, at the outset, how to invoke force majeure or to respond to force majeure assertions by counterparties.

FORCE MAJEURE ACTION ITEMS

1. Determine the extent to which your business may be impacted by Hurricane Harvey and consequential business and supply chain interruptions.
2. Identify which contracts, if any, your business may be unable to perform timely or completely.
3. Identify the contracts for which your business has received a notice of force majeure from the counterparty.
4. Review all potentially affected contracts for force majeure language.
5. If applicable, carefully comply with any notice requirements necessary to invoke force majeure.
6. Understand each party's obligations (including any mitigation or allocation requirements) under an impacted contract following the invocation of a force majeure clause by either party.
7. If the contract terms are ambiguous, or if the contract does not address force majeure, closely review relevant law to determine the options or obligations of the parties.

IS HURRICANE HARVEY "FORCE MAJEURE"?

It is important to closely review the definition (if any) of a "force majeure" to ensure that the event qualifies as force majeure. Typically, to qualify as force majeure, the contract's definition of force majeure must name the specific event or the definition must refer generally to circumstances beyond a party's reasonable control and the event must qualify as such. If the implicated contract does not contain a definition of "force majeure," the existence of the clause itself may be sufficient to assert an excuse to the alleged failure to perform. Where possible, courts will rely on the parties' contract to determine whether a specific event

rises to the level of force majeure. In ascertaining whether a force majeure provision applies, a Court’s primary concern is to ascertain the true intent of the parties as expressed in the contract. Importantly, the party invoking the clause would have the burden of establishing the occurrence of a force majeure event.

Additionally, it is important to ensure that a causal connection exists between such force majeure event and a party’s inability to perform under the contract at hand. The mere occurrence of a catastrophic event does not provide a party with the ability to seek protection under a force majeure clause— such party must be unable to perform because of the catastrophic event. Such analysis not only requires a close inspection of the contract, the company, and the crisis at hand, but a review of the impact of a force majeure event on the party’s overall business and industry.

REVIEW REQUIREMENTS SET FORTH IN THE CONTRACT AND UNDER APPLICABLE LAW

Generally, a party seeking to invoke a force majeure clause must provide notice to the other parties within a specific timeframe. If the party does not provide adequate and proper notice within the required period, a party’s ability to gain protection under the contract’s force majeure clause may be null. Further, a force majeure clause will often provide for detailed steps that a party must strictly follow once such party invokes the protection, as a means of mitigating any damage caused by the abdication of any party’s duties under the contract.

For example, a party invoking a force majeure clause may be required to:

- Provide a specific plan of action for how the parties will move forward under the contract and when, if ever, operations will resume fully;
- Exercise “commercially reasonable efforts” or “best efforts” or act “in good faith” in order to get operations up and running quickly;
- Pay for more expensive materials or enter into subcontractor arrangements in order to mitigate damages under the contract; and/or

- Allocate its limited supply of products, if a supplier, between customers (in which case, such action may exacerbate the supplier’s relationship with smaller customers that may acutely rely on prompt deliveries to keep its business afloat and avoid bankruptcy).

Finally, many contracts contain exclusivity provisions requiring a party to purchase goods from a specific supplier or sell goods to a specific customer. Under such contracts, the triggering of a force majeure clause may allow a buyer or seller to exit this exclusive relationship for the duration of the force majeure (or longer, potentially) and take their business elsewhere, potentially disrupting the economic assumptions underlying the parties’ decision to enter into the agreement.

AN EVENT OF FORCE MAJEURE MAY NOT EXCUSE ALL PERFORMANCE

Finally, unless the occurrence of a force majeure provides for a blanket termination right under a contract, the force majeure provision will typically specify certain obligations that are excused or suspended during a force majeure. Complete dismissal of all duties under the contract may only occur if the disruption lasts for several months – and typically, that is positive, since the loss of key contracts can have lasting consequences.



RESOURCES FOR HEALTHCARE PROVIDERS IN THE AFTERMATH OF HURRICANE HARVEY

09/01/2017

[Kenya S. Woodruff](#), [Priscilla Bowens, DVM, MPH](#), [Neil Issar](#), [Lisa M. Prather](#) and [Phillip L. Kim](#)

Hurricane Harvey has radically impacted every industry in southeastern Texas, including healthcare

providers, who continue to analyze potential next steps in ensuring operations can resume so that they can further assist those in need of healthcare services. Below are several links to resources that may be helpful for healthcare providers attempting to navigate through their options.

The **Texas Division of Emergency Management** has been fully activated to help with matters related to Hurricane Harvey, and the **Texas Department of State Health Services (DSHS)** has issued health precautions for people experiencing flooding and power outages in Southeast Texas and beginning recovery from Hurricane Harvey along the middle Texas coast - see below:

- **[Health Precautions for Residents Affected by Hurricane Harvey](#)**
- **[DSHS News Updates](#)**

For those in Harris County, one of the hardest hit areas, Harris County Public Health Office of Public Health Preparedness and Response has issued **notices and recommendations for individuals and food establishments** dealing with the aftereffects of Hurricane Harvey.

FOR HEALTHCARE PROVIDERS

Governor Abbott has also temporarily suspended all necessary statutes and rules to allow out-of-state healthcare providers to practice in Texas to assist with the Hurricane Harvey disaster response operations. Relevant resources for out-of-state providers are available on the **Texas Medical Board website**. In addition, pharmacists across Texas are now allowed to dispense up to a 30-day supply of medication (other than a Schedule II controlled substance) for patients affected by Hurricane Harvey. See notification of Governor Abbott's approval **here**.

Relatedly, the US Department of Health and Human Services (HHS) has temporarily waived certain provisions of HIPAA for certain affected areas. For the specifics regarding the waivers, please see the HHS "**Hurricane Harvey & HIPAA Bulletin**." HHS has also **waived** certain Medicare, Medicaid, and CHIP requirements in Texas to exempt providers from

sanctions for noncompliance as a result of Hurricane Harvey. And the Texas HHS has issued **FAQs** to assist Medicaid and CHIP MCOs provide services and support to affected residents.

Several agencies and organizations have set up Hurricane Harvey resource pages:

- **[Texas Office of the Governor - Texas Hurricane Center](#)**
- **[Federal Emergency Management Agency \(FEMA\) Hurricane Harvey resource page](#)**
- **[Texas Hospital Association - Hurricane Harvey](#)**
 - THA is working with necessary stakeholders to coordinate the request of waivers that temporarily suspend certain financial and regulatory reporting and compliance for affected hospitals.
 - The Texas Health and Human Services Commission distributed **Frequently Asked Questions for Medicaid/CHIP MCOs**.
 - THA alerted member hospitals of critical information related to lawsuits resulting from property damage insurance claims filed after Sept. 1 as a result of legislation passed during the 85th Regular Legislative Session.
 - THA assisted members in obtaining aviation clearance to reach inaccessible hospitals.
 - Gov. Greg Abbott suspended certain rules to help hospitals fill workforce needs.
 - State and federal governments have waived rules to help Texas hospitals provide care in their communities.
 - THA continues to participate in preparedness and readiness discussions at state and federal levels.

For more information on disaster preparedness, see:

- **[Ready.gov](#)**
- **[Texas Prepares](#)**

EMPLOYEE BENEFITS

SPECIAL EDITION BENEFITS ALERT: HURRICANE HARVEY

08/31/2017

Charles F. Plenge, Christopher A. Beinecke and
Scott Thompson

IRS PROVIDES RETIREMENT PLAN LOAN AND HARDSHIP DISTRIBUTION RELIEF FOR HARVEY VICTIMS

The IRS has released Announcement 2017-11 providing relief from some of the loan and hardship distribution requirements under qualified retirement plans (including Code Section 401(a) and 403(b) plans) for the period of August 23, 2017 through January 31, 2018. The relief applies to employees or former employees either (i) whose principal residence on Aug. 23 was in one of the Texas counties identified by FEMA for individual assistance because of Hurricane Harvey, or (ii) whose place of employment on Aug. 23 was in one of those counties. The relief also applies if the employee's or former employee's "lineal ascendant or descendant, dependent, or spouse" lived or worked in one of those counties on Aug. 23. This relief will also apply to those living or working in other areas FEMA may identify for individual assistance in Texas or other states due to damage from Harvey. For a list of the counties FEMA has identified, click [here](#).

A hardship distribution is still limited to the maximum amount permitted by IRS rules but can be provided for any hardship, not just those listed in the IRS regulations, and no post-distribution contribution restrictions are required. However, the normal tax rules still apply to any distribution. Plan loans can be made without following the procedural requirements imposed by the plan at the time of the loan. Finally, qualified plans that do not have loan or hardship distribution provisions can still make loans or hardship

distributions, so long as the plan is amended to provide for them by December 31, 2017.

For additional information on the loan and hardship distribution relief for individuals affected by Harvey, please see IRS Announcement 2017-11, which is available here: [Announcement 2017-11](#).

ADDITIONAL RELIEF FOR BENEFIT PLANS DUE TO HURRICANE HARVEY

The IRS and DOL have announced additional relief for benefit plans affected by Hurricane Harvey. This relief applies to participants, beneficiaries, and plans whose plan administration and/or recordkeeping functions reside within the **disaster area**. This relief includes the following:

- The filing date for Form 5500 filings due on or after August 23, 2017 and before January 31, 2018 is automatically extended to January 31, 2018.
- The DOL will provide relief for certain plan loan and distribution verification procedures to be described in later guidance, provide enforcement relief for delays in forwarding participant contributions, and provide relief for failures to timely provide blackout notices for temporary plan restrictions caused by Harvey.
- The DOL requests welfare plans make reasonable accommodations for participants and beneficiaries who are unable to timely file benefit claims or make COBRA elections for the purposes of preserving coverage and providing benefits. The request for accommodation should also include appeals processes and payments for coverage. The DOL will also grant enforcement relief to welfare plans and insurance carriers where appropriate. There is no process to preemptively request relief, so plans may wish to document compliance issues caused by Harvey as a precaution.
- Additional information on this relief is available from the DOL and IRS [here](#) and [here](#).

EMERGENCY PTO SHARING PLANS MAY HELP EMPLOYEES AFFECTED BY HURRICANE HARVEY

With the effects of Hurricane Harvey likely to be felt for many weeks and months to come, employees affected by the storm may need to take time off from work in excess of the amount of paid time off (“PTO”) they are eligible for from their employer. One way to provide additional PTO to affected employees is for the employer to adopt an emergency PTO sharing plan. Under an emergency PTO sharing plan, employees can donate some of their PTO to a PTO bank that is administered by the employer. Employees who have been adversely affected by Harvey could apply for additional PTO, and the employer would then grant additional PTO to the affected employees based on need. For purposes of an emergency PTO sharing plan, an employee has been adversely affected by a natural disaster if it caused severe hardship to the employee (or a family member) that requires the employee to take time off from work. An emergency PTO sharing plan must satisfy certain other conditions, which include, among others, that (i) PTO may not be donated by an employee for a specific coworker, (ii) an affected employee may not receive cash in lieu of taking additional PTO, (iii) the plan must limit the time period following the natural disaster during which PTO may be donated and used, and (iv) unused donated PTO must be returned to donors at the end of that time period.

For additional information on the requirements of an emergency PTO sharing plan, please see [IRS Notice 2006-59](#).

Please visit our blog, [Practical Benefits Lawyer](#), for discussion of issues and developments in the areas of employee benefits and executive compensation.

LABOR AND EMPLOYMENT

HURRICANE HARVEY: EMPLOYER CONSIDERATIONS IN OFFICE CLOSURES AND REOPENINGS

08/31/2017

[Karen C. Denney](#), [Felicity A. Fowler](#) and [Laura E. O'Donnell](#)

Whenever emergency situations such as Hurricane Harvey cause office closures and such offices are subsequently reopened, Texas employers must remember several points to stay compliant with employment laws.

- In general, employees who are classified as exempt from the Fair Labor Standards Act's minimum wage and overtime provisions must be paid a salary each week. This requirement to pay a salary includes time periods when the office may be closed, but the employee is ready, willing and able to work.
- Employees who are paid on an hourly basis must be paid for all time worked. Employees who work from home or other alternate locations should be required to track all time worked and report this time worked to their employers on a weekly or more frequent basis to ensure proper payment of these employees.
- Employers with collective bargaining agreements or contracts with employees should review these documents for any additional pay requirements during office closures.
- Dependent on the employers' applicable policies, employers may require employees to use accrued, unused paid time off (except when the employee is taking workers' compensation leave). Employers may also consider providing employees with temporary pay assistance as a form of an employment benefit while offices are closed.

- Employers have a duty to provide a safe and healthy workplace. When considering reopening the office, the workplace should be evaluated for hazards (such as fall, electrocution, laceration, hazardous substances, and other hazards that may have been introduced by severe weather), and, whenever possible, hazards should be eliminated from the work area.
- Once the office is reopened, encourage employees to use their best judgment in determining whether it is safe for the employees to travel from the employees' homes to the office and to only report to the office if it is safe for the employees to do so. Please note that company insurance policies do not cover employees' personal use of personal vehicles.
- Employers should consider reminding employees of any employee assistance programs available through the employers' benefit plans that could assist employees coping with the aftermath of an emergency.

Specifically, The Texas Deceptive Trade Practices-Consumer Protection Act strictly prohibits taking advantage of a natural disaster declared by the governor by: "(A) selling or leasing fuel, food, medicine or another necessity at an exorbitant price; or (B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity."

All franchisors who have franchisees located in areas impacted by Hurricane Harvey need to be aware of the potential for franchisee price gouging, which may result in vicarious liability for the franchisor. Because of this, any franchisor that becomes aware of franchisee price gouging should consider taking immediate remedial action, such as a letter to the franchisee in question that quotes The Texas Deceptive Trade Practices-Consumer Protection Act and demands indemnification under the franchise agreement. Such steps may help to protect the franchisor in the event a demand or other legal action or complaint is made against the franchisor. In addition, a franchisor may need to respond directly to local authorities regarding allegations of price gouging. While a franchisor should be sensitive and supportive of its franchisees during times of crisis, it must also take action to try to protect itself against potential prosecution and fines.

FRANCHISE

HURRICANE HARVEY AND PRICE GOUGING: CONSIDERATIONS FOR FRANCHISORS

08/31/2017

[Deborah S. Coldwell](#), [Maral M. Kilejian](#), [Robert A. Lauer](#) and [Suzanne Trigg](#)

In the wake of Hurricane Harvey, franchisors should take action to avoid potential liability for price gouging committed by franchisees in affected areas. Price gouging occurs when a seller increases prices of goods, services or commodities to a level that is exploitive and unethical. Texas law explicitly prohibits price gouging following a natural disaster, and fines for price gouging can be up to \$20,000 per violation.

ENVIRONMENTAL

HURRICANE HARVEY: TCEQ GUIDANCE FOR HURRICANE HARVEY

08/31/2017

[Jeff Civins](#), [Mary Simmons Mendoza](#), [James D. Braddock](#) and [Carie Goodman McKinney](#)

By August 23, 2017 Proclamation, the Governor of the State of Texas declared that Tropical Depression (now Hurricane) Harvey poses a threat of imminent disaster in 30 counties in and around the Texas coast

beginning August 23, 2017. In response, the Executive Director of the Texas Commission on Environmental Quality (TCEQ), in a press release, directed regulated entities to its guidance [here](#). This guidance discusses legal ramifications of the Governor’s proclamation and steps regulated entities should and may take during this disaster.

Among other things, the TCEQ has suspended a number of its rules in the 30 counties identified in the Governor’s Proclamation for the duration of the disaster. The TCEQ explains that “no additional approval from TCEQ is necessary for activities directly related to disaster prevention or response.” It goes further to indicate that “[r]esponse actions pursuant to the guidance should include all reasonable actions necessary and prudent to facilitate, maintain, or restore fuel production and/or distribution, within the State of Texas, directly related to Hurricane Harvey.” The agency explains that “the Regulatory Guidance does not negate the need to obtain any required permits or authorizations, nor the need to comply with all regulatory and statutory requirements, unless otherwise specified in the guidance.”

TCEQ notes that “Texas law provides a defense against an enforcement action where the regulated entity can establish that the violation was caused solely by an act of God, war, strike, riot, or other catastrophe.” TEX.WATER CODE § 7.251. It clarifies that regulated entities:

- must take all necessary steps to prevent or minimize any increased risk to human health and safety and to the environment.
- must at all times apply best engineering and pollution control practices as required by applicable standards.
- should follow their standard operating procedures as well as startup, shutdown, and maintenance activities, requirements and plans, to the extent feasible.
- should keep records of all activities that they believe are covered by this defense.

INSURANCE COVERAGE

HURRICANE HARVEY AND INSURANCE COVERAGE: PROTECTING YOUR STATUTORY RIGHTS BEFORE SEPTEMBER 1ST

08/28/2017

Ernest Martin, Jr.

As Hurricane Harvey continues to sweep the Texas coastline and destroy property in its path, insureds should take action before September 1st to protect their statutory rights and avoid the changes made under House Bill 1774, also referred to as the “Hail Bill,” which take effect September 1, 2017.

The Hail Bill adds “Chapter 542A - Certain Consumer Actions Related to Claims for Property Damage” to the Texas Insurance Code. This Chapter applies to actions on first-party claims for damage or loss of covered real property caused “wholly or partially” by “forces of nature”—including damage caused by floods, hurricanes, and rainstorms. In relevant part, Chapter 542A does two important things. First, Chapter 542A limits the interest policyholders may recover from a late-paying insurer under Section 542.060 of the Insurance Code for so-called “forces of nature” claims from 18 percent to approximately 10 percent under current market rates. Second, Chapter 542A imposes additional notice and reporting requirements on insureds and may limit the attorneys’ fees recoverable from an insurer.

While Hurricane Harvey is a “force of nature” to which Chapter 542A might otherwise apply, by its terms, the Hail Bill does not take effect until September 1, 2017. In order to maximize recovery and avoid the limitations imposed by Chapter 542A, Texas policyholders impacted by Hurricane Harvey should act promptly before Friday, September 1, 2017.

1. Insureds should report claims for property damage caused by Hurricane Harvey before September 1, 2017 in order to recover 18 percent interest on late-paid claims.

The provisions of Chapter 542A limiting interest payable by insurers, who fail to meet statutory deadlines for paying claims, only apply to claims made on or after September 1, 2017. A claim made before September 1, 2017 is governed by the laws in existence today, which require insurers to pay 18 percent interest on late-paid claims for property damage.

If a policyholder makes a claim relating to Hurricane Harvey before September 1, 2017, and the insurer does not comply with existing deadlines for responding to and paying claims, that policyholder may be entitled to recover 18 percent interest on the amount of the claim as damages under Section 542.060 of the Texas Insurance Code. Claims relating to Hurricane Harvey that are not made until September 1, 2017 or later, will be subject to the lower interest rate provided for under Chapter 542A. For these claims, an insured's remedy against insurers who delay or deny claims is limited to approximately 10 percent interest on the amount of the claim under current market rates. The 18 percent interest penalty under current law provides a powerful incentive for insurers to act promptly in reviewing and paying first-party claims. To avoid the reduction in interest available under Chapter 542A, where possible, policyholders should act promptly to report all hurricane-related claims no later than August 31, 2017.

2. Insureds should timely pursue ripened actions arising out of Hurricane Harvey and preserve claims for the broader relief afforded under existing law.

In addition to affecting the interest recoverable for late-paid claims, Chapter 542A impacts policyholders' recovery of attorneys' fees and imposes additional pre-suit notice requirements for "forces of nature" claims. Specifically, the Hail Bill compels policyholders seeking to recover under Chapter 542A to provide 60-days prior notice,

meeting specific requirements and detailing the damages claimed against the insurer, before filing suit to recover interest penalties. The amount of attorneys' fees that may be recovered against an insurer may be limited to the proportion by which the policyholder's recovery against the insurer relates to the amount claimed in the pre-suit notice. If the required pre-suit notice is not provided as specified, recovery of attorneys' fees may be precluded.

These requirements and limitations take effect, not for claims made, but for "[a]n action that is filed on or after the [September 1, 2017] effective date" of the statute. An "action" filed before September 1, 2017 will be governed by the law that exists today, before Chapter 542A is effective.

Given the ongoing devastation along coastal and inland areas affected by Hurricane Harvey, it is unclear what existing disputes, if any, there may be between insurers and insureds over coverage for hurricane-related loss and damage. Most insureds will be unable to assess damage, submit claims or pursue actions against insurers within a week of the Hurricane Harvey making landfall. In light of the ambiguities in Chapter 542A's statutory language and the practical difficulties inherent in invoking current law for hurricane-related loss and damage occurring so close to Chapter 542A's effective date, it is equally unclear whether there will be some judicial or legislative dispensation to allow Texas policyholders affected by Hurricane Harvey to benefit from existing law.

If a policyholder has a ripened dispute with an insurer prior to September 1, 2017, that policyholder should act promptly to file suit by no later than August 31, 2017 to avoid the additional notice and reporting requirements and the limitations on recovery of attorneys' fees imposed by Chapter 542A. For those policyholders who cannot commence "an action" before September 1, 2017, special care should be taken during the claim process to preserve and not waive the right to avoid Chapter 542A's notice requirements and to seek the broader recovery of attorneys' fees permitted under existing law.

CONCLUSION

As Hurricane Harvey continues to wreak havoc on insureds' property in Texas, policyholders should report their claims for property damage to insurers by no later than Thursday, August 31st in order to maximize interest recoverable for late-paid insurance claims. Where possible, policyholders should file suit on existing disputes over coverage for Hurricane Harvey-related loss or damage before September 1, 2017 and otherwise preserve claims for the application of existing law relating to pre-suit notice requirements and recovery of attorneys' fees.