



INSURANCE LAW POST-HURRICANE IKE



DAVID D. DISIERE



CHRIS LEAVITT



STEVE MOSTYN



THOMAS W. PIRTLE

DRIVEN BY RESULTS ...
GUIDED BY EXPERIENCE



LPM

LAMINACK,
PIRTLE &
MARTINES,
L.L.P.

Richard N. Laminack
Thomas W. Pirtle
Buffy K. Martines
5020 Montrose Blvd., 9th Floor
Houston, TX 77006
713.292.2750

Driven by a deep commitment to justice, the lawyers of Laminack, Pirtle & Martines have worked diligently to protect their clients' interests and achieve results for more than 20 years.

Providing litigation services in the areas of

- Consumer Protection
- Drugs and Devices
- Commercial Litigation
- Products Liability
- Personal Injury

Hurricane Ike arrived in September 2008 and became the third most destructive hurricane ever to make landfall in the United States. It has been blamed for 194 deaths in Cuba, Haiti and the United States. Damages have been estimated at more than \$24 billion in the United States alone. It made landfall in Galveston on Sept. 13 as a Category 2 hurricane with winds of 110 mph and left in its path massive destruction. With all this destruction comes the issue of insurance. If you want a spirited debate in Texas, all you have to do is get people talking about insurance. That's what Texas Lawyer's business department did when it hosted a roundtable in Houston to discuss the insurance issues arising out of Hurricane Ike. What follows is the discussion, edited for length and style.

MIKE ANDROVETT, moderator, attorney and owner of Androvett Legal Media & Marketing, Dallas: *Panelists, if you would, please introduce yourself and talk a little bit about the nature of your work.*

CHRIS LEAVITT, Associate, The Buzbee Law Firm, Houston: The Buzbee Law Firm specializes in contingency fee cases involving commercial litigation, Jones Act and maritime matters, and catastrophic injury. Our firm is led by Tony Buzbee, named one of the top five commercial litigators in the state, and one of the leading maritime attorneys in the U.S. Under his leadership, our firm has collected over \$500 million in under five years. We've gotten involved in the

insurance, Hurricane Ike claims, due to the fact that we lost both our Galveston office and our Houston office as a result of Hurricane Ike. And it was something that really interested us. We wanted to help the people affected by the storm, and we think there are some interesting legal issues involved in these cases, and we look forward to litigating those.

THOMAS W. PIRTLE, partner, Laminack, Pirtle & Martines L.L.P., Houston: In 2006 we spun off from a large law firm called O'Quinn, Laminack & Pirtle. We try probably some of the biggest cases out there, including pharmaceutical litigation, insurance bad faith, tobacco, you name it. And in 2006 we decided we were going to do our own thing. But before we did that, when we were doing breast implants, we also had an office in New Orleans. And we did breast implants and Fen-Phen down on Canal Street in New Orleans. I've tried quite a few cases down there. And, see, the long and short of it is we lost our New Orleans office lock, stock, and barrel. And that was in Katrina. So we have some friends down there. We got with them in a consortium of law firms and started doing this type of work and through Katrina and through Rita now into Ike. We just kind of fell into it and thought that Ike would be good work to do, too. Then we would see some of the same patterns develop in litigation. Those insurance companies — of course, I'm a plaintiff's lawyer — tried everything in the world to keep from paying in Katrina and Rita.

J. STEVE MOSTYN, partner, Mostyn Law Firm, Houston: Our practice has been for quite a while insurance litigation. David Disiere, who is to my right, is a defense lawyer. He's kind of like the coyote and the sheep dogs are sitting up here. I plan to be the sheep dog. But we've been doing cases against each other for about ten years. And this has been our bailiwick

for a long time. Pirtle and I are trying to figure out who can sound more from East Texas. He's from Henderson. I'm from Whitehouse.

DAVID D. DISIERE, founding partner, Martin, Disiere, Jefferson & Wisdom, L.L.P., Houston: We practice in the area of insurance coverage litigation and defense, representing insurers. In talking about Texas, I'm a BOI Texan, born on the island, Galveston, Texas. We started our firm, Martin, Disiere, Jefferson and Wisdom almost ten years ago, but our years of experience and expertise is much greater. We have offices in Houston, Dallas and Austin. Our firm has successfully defended many insurers in first party bad faith cases. And we have a long line of published decisions we've obtained for insurers, essentially defining insurance coverage under homeowners' and commercial policies under Texas law. For example, our firm had the privilege of defending State Farm in the *Fieess* matter in which the Texas Supreme Court concluded that the Texas HOB policy form did not provide coverage for mold. Some say we wrote the book on Texas insurance law, and we're still writing.

ANDROVETT: *Well, gentlemen, you're living it, many of the folks in this room are living it, but for the record, to set the stage for our discussion, Hurricane Ike arrived in September of 2008 and eventually became the third most destructive hurricane to ever hit landfall in the U.S. On a personal note, do any of you have experiences with Ike that you want to share before we start getting into the weeds?*

MOSTYN: I was out of my house, I guess, for 12 weeks. My wife wanted to know if I knew the saying the shoemaker's kids go without shoes. And can I bother to work on our claim for a little while instead of everybody else's. I've told my clients that I've seen the play 2000 times, but this is



With more than 25 years of experience, **HG Litigation Services** introduces **Trial Resource** as your one-call source for all your trial support needs.

Trial Consulting
Trial Web Repository
Trial Presentation and Graphics
The Resource for all your trial needs.



David D. Disiere, a partner in Martin, Disiere, Jefferson & Wisdom, L.L.P., is a leading practitioner in the area of complex insurance coverage issues and related litigation with over 20 years experience. He is an Adjunct Professor of Property and Casualty Insurance Law at the University of Houston Law Center. He holds an Associate in Claims (AIC) designation from the American Institute for Chartered Property Casualty Underwriters. In addition to receiving an AV Rating from Martindale-Hubbell, Disiere was voted a Texas Super Lawyer by *Texas Monthly Magazine* for 2007 and 2008 and was also recognized in *H Texas Magazine* as one of Houston's Top Lawyers in Insurance Coverage and Litigation in 2007 and 2008. Lastly, he was recognized as one of the leading lawyers in the U.S. in the field of Insurance and Reinsurance – Natural Disasters by *The Legal 500 US: Volume III (Litigation)* 2007 and was selected by his peers for inclusion in the 2009 edition of *The Best Lawyers in America®* in the specialty of Insurance Law.

the first time I've been in it. So it wasn't a very pleasant experience. Our office and I know y'all's offices were damaged. And I know that gives us good perspective on cases.

PIRTLE: Yeah. And from my perspective, we lost a roof on our house in Memorial, believe it or not. And it rained down the middle of it. So we lost some stuff that we care about. And we lost part of the roof on our building over on Montrose. But, it was the personal stuff that matters. And I think that's one of the things that you can't replace when you're dealing with these people. You lose photographs and stuff that you just can't pay enough money.

LEAVITT: Absolutely. Both my firm and my family had losses as a result of Hurricane Ike. Watching storm damage on TV is one thing, but you gain a totally different perspective when you are standing in a FEMA line, waiting for bags of ice, and worrying about the damage to your home. It's something we're still dealing with. Our offices are still being rebuilt. So this is something we take very personally, and something that is helping us better represent our clients.

DISIERE: We had very minor damage at home. Our office was without air conditioning for a while, but many of our partners, Dale Jefferson in particular, took great pride in getting into the office, after church the Sunday after the storm, to serve our clients. But we have experienced it. And certainly there's a lot of blue tarps still around the City of Houston and throughout the state. I've had the opportunity to drive up north, and you can see how widespread the damage is and repairs are still on the way. No doubt, the storm has had a significant impact in Texas.

ANDROVETT: *Can you give us a state of things here at early April 2009? I would imagine that, for example, while there have been some lawsuits filed, maybe many more are on the horizon? I've read something that says there have been over a half million claims filed. The everyday work that you do, what are you seeing in terms of response to Ike?*

DISIERE: What we are seeing is that initial inspections have been done. Insurance carriers have been out. And most of them have seen the houses and done the

initial work in paying insureds for covered repairs. Some insureds and homeowners are having trouble getting repairs done and putting contractors in place. So it's taking time to get that done. Reinspections are talking place and supplemental payments are being made. But we're also getting to a point where insurers are making decisions on disputed claims. Everything is being paid that is owed under the policy. But there may be some gray areas where compromises are being made. And then there are some areas where there's a coverage dispute, specific exclusions in the policy, for example wind versus flood. And whether there's coverage for the loss or the part of the loss. We're getting into some of the minutia of the claims under both the policy and in the facts. And we're getting to the point to where demand letters are being sent, lawsuits are being filed, and there's a lot of work being done in between. That's where I'm doing a lot of my work right now, assisting carriers in evaluating claims, trying to resolve the claims and looking at creative solutions rather than jumping straight into litigation. I've heard of claims counts in the range of 750,000 to 900,000 or more claims. Even with a small percentage of lawsuits arising from the storm, the numbers could prove overwhelming for the court system. And that's being addressed by the courts. For example, the Galveston County courts have a standing abatement and mediation order in place. Perhaps we'll talk about that more. The Beaumont courts and Jefferson County have assigned specific insurance companies to specific judges for discovery purposes. And in Houston they had a meeting on Monday for the Harris County courts. We're still trying to work out some of those issues. So I think we're at a point where creative solutions can come into play in resolving claims. I'm working with my clients in getting those settled that need to be settled and those where coverage is or may be afforded. Or if it's clearly a claim where coverage is excluded, a dispute as to damages, the appropriate or reasonable and necessary repairs etc. then those may be claims that simply need to be litigated, if we can't get them resolved.

MOSTYN: This is where David and I begin to disagree, as I checked in as a sheep dog. People begin to realize that the

little piece of payments that they receive from the insurance companies don't cover the damage to their house as the contractor actually shows up to do the repairs. They're tired of dealing with their sixth or seventh adjuster. They're tired of waiting. They're tired of losing tenants under their lease agreements that allow the tenants to get out if after six months they're not able to get back in. And they're now beginning to contact attorneys. David's position, the carrier's position, will always be that it's gray areas or concerns. I've got people that testified Monday in the Senate who were still homeless because the insurance company refuses to pay them from Rita. And so the house is gone. I should have brought some pictures. That's not a gray area. But it's just the insurance companies.

ANDROVETT: *Tom, Chris, what are you seeing?*

PIRTLE: Well, right now, if you want to talk about the way claims are progressing, we're dealing with adjusters. And, in fact, we're dealing with adjusters right now on one of the bigger commercial claims we've got, because I looked over there and one of my guys is not here. So I know where he's is. It's this process of trying to get the claims adjusted and trying to get their adjusters, which they switch off over and over. Again, I'm sure it's for good reason. And to see eye to eye with your adjuster. So we're in that process right now. And we're not to a point where we're in full-blown litigation, although Harris County is fixing to consolidate.

LEAVITT: I agree with Tom. The sense that I get from the people we're dealing with — and I was at a town hall meeting last night in Texas City speaking with homeowners — is that there is a lot of confusion out there. And people don't understand exactly what their options are. People are still waiting to see if TWIA and the other insurers are going to do the right thing and come up with adequate sums of money to fix their homes. And I think we're still waiting for the onslaught of cases.

MOSTYN: After 12- to 1500 of these cases in Rita, my experience was telling me that after seven months, if they have not done the right thing, they are not going to do the right thing. I've had one

of the claim supervisors from TWIA, who was terminated, in my office for three days explaining the design process on how they were told not to do the right thing. Now, the commercial claims like Tom and them are working through, those processes do work a little better. So try to get with your adjusters and so forth. But on the residential side and on the ones where there's been denials, it's clearly been underpaid or they haven't paid you yet. They pay because they have to in a lawsuit, is my opinion. And so they don't pay you because they like you, and that's unfortunate. And that is the situation we are in. We have the highest homeowner rates in the country in this state. Florida is lower than us. And they look like a jigsaw map puzzle when you look at the hurricanes. We have the loosest regulation on insurance companies on the writing side. This is a predatory market for insurance companies.

ANDROVETT: *Steve, I sense some frustration from you.*

MOSTYN: I'm tired. I was at the legislature until 1:30 last night. Came in, did an interview on CNN. Our firm mediates 50 of these cases a month from Rita that we're still trying to get through. And you hear the same story over and over again. And after a while when the 200th person tells you the same conduct, you begin to think that might be bad.

ANDROVETT: *Now, 750,000 claims? Is it unreasonable to believe that this is an extraordinary event and maybe the processing of claims goes a little slower and that there's not any hidden agenda on the part of the insurance companies?*

DISIERE: As the lone defense attorney up here, let me address a couple of things and that question as well. Seven-hundred-and-fifty-thousand or more claims. If you can imagine the magnitude and the claim force that had to be put in force on short notice, the catastrophe adjusters. They're on 24-hour notice. They're called to leave their homes and families wherever they are in the country, and you have an army of adjusters flooding into an area within days after the storm. In fact, they're en route even before the storm is occurring, heading this way toward the storm to start adjusting claims, trying to get claims paid and handled. So one of the things about a house totally destroyed — we've all seen, I



Chris Leavitt received his undergraduate degree with Honors from the University of Texas in 2002 and is a 2005 graduate of the University of Houston Law Center. During his time in law school, Chris completed clerkships for the Harris County District Attorney, The Buzbee Law Firm, and the Honorable Lynn H. Hughes, United States District Judge, Southern District of Texas. After graduating from law school, Leavitt went to work for one of the largest commercial real estate firms in the nation, where he negotiated agreements for more than \$2 billion in commercial real estate transactions. After deciding he wanted to pursue plaintiffs' work in 2008, Leavitt joined The Buzbee Law Firm, where he had been a Law Clerk in 2003. He was brought in to head the firm's Hurricane Ike Claims division.



The Mostyn Law Firm has set itself apart in the field of Plaintiff's First Party Bad Faith Insurance litigation. Its founder, **Steve Mostyn**, is from small-town Texas: growing up in Whitehouse, near Tyler. After attending the University of Texas for his undergraduate degree, Mostyn graduated cum laude in 1996 from South Texas College of Law. He immediately went to work at a Houston plaintiff's law firm, but left in 1999 to start his own firm. The Mostyn Law Firm's mission is to level the playing field for individuals and businesses against multi-national corporations and insurers. Mostyn has handled literally thousands of first party insurance claims. The vast majority of these cases resulted in extra-contractual damages for his clients, going far beyond expectations. The Mostyn Law Firm represents families, churches and businesses throughout the State of Texas in first party insurance litigation, a variety of commercial litigation disputes and complex, serious personal injury cases. The Mostyn Law Firm has handled or is handling thousands of Hurricane Rita claims and has already been retained on hundreds of Hurricane Ike claims.

think it was on Boliver Peninsula, the one house sitting alone. Why? Because it was elevated above the rest of the homes on the peninsula. And when the surge came through, the flood waters came through, it wiped the rest of the houses off the peninsula. So what you've got left in that one area is a house that withstood the wind, but the rest of them couldn't withstand the surge or the flood. And in that instance you have a coverage issue. Homeowners' policies exclude damage caused by flood waters, essentially, the surge. And it's a tough decision for those adjusters coming in short notice. I was an adjuster, by the way. I handled claims by day and went to law school by night at the University of Houston back in the late '80s. But it is the easiest thing that an adjuster can do is to sit down with the homeowner and write that check. They are happy, they smile, they thank you and they bless you and your children and your children's children. But it is a tough decision whenever you have to look at the facts of the loss and apply it to the coverage afforded by the policy and tell that insured, "I'm sorry. There's just no coverage for your flood damage. I can pay for this, but I can't pay for the flood damage." That's a tough position for both the insured and the adjuster to be in. The people that I've worked with are trying to do the right thing. And that's why we're always looking to these creative solutions. Litigation, I think, if it's premature, is counter-productive because there are still things to be done and new adjusters coming in. Why do you have five adjusters? Because those people that came in on the surge had to get back home to their families. Claims are returned to the normal claim units. And you get different, specialized people assigned to the remaining tasks. Believe it or not there's still an ongoing effort by the carriers, at least those my firm works with, to try to pay what they owe, nothing more, nothing less, because there is a duty to the other policyholders, like Steve said. Premiums in Texas in this area are some of the highest in the country. And do we want to be paying claims where no coverage is afforded and all of those other policyholders ultimately being responsible for higher premiums because uncovered claims are being paid?

MOSTYN: We also have the lowest loss

ratios of any state, which means profit for the insurance companies in Texas is one of the highest.

PIRTLE: I agree with that. There are 750,000 claims. But they are collecting 750,000 policy payments, too. And that was no problem processing. And I understand that it's easier to count money than it is to hand it out. But, you brought up Boliver. And I was talking to a lot of you this morning about some people we've got down on Boliver. And the insurance company comes in, and they offer 11.2 percent of the face of the policy. The lady we've got that was one of the homeowners in the homeowners association, she knows all the people that own the slabs left around here. And we started asking around, and they offered everybody within about a 3-square-mile radius 11.2 percent of the face value of the policy. Boy, that don't take a lot of adjusting, does it?

DISIERE: Was that the flood policy?

MOSTYN: It's the TWIA policy. And we can account for eyewitness testimony. Just to give you an example of TWIA and Boliver and the exempted home insurers, right down on the coast they make TWIA do it, so they don't have to write risk coverage. Let's talk about TWIA and Boliver.

ANDROVETT: *And tell everyone what TWIA is.*

MOSTYN: Texas Windstorm Insurance Association.

ANDROVETT: *And they basically are insurer of last resort?*

MOSTYN: Insurer of last resort on the coast. This year, the only possibility becoming very quickly, because if you're an insurance company, why write what's risky when you can just write the stuff that's not. So let the state association pick that up. But if you're with TWIA and you have lifted or torn shingles and you got your claim processed before December the 18th, you got paid. If you're with TWIA and you were after December 18th and you had lifted or torn shingles, you did not. Why? Because they changed the policy. Not your policy, "the" policy. Why? Because it costs too much money. That's not a difference. That's what's going to come out in this litigation. So State Farm, one of David's clients, advertises in their television commercials that they have 5,000 cat adjusters. Remember on

Sunday while we're all watching football; we had to watch State Farm advertise every game. And they're telling you 5,000 cat adjusters. Come on. Trust me, if State Farm had 200,000 claims, that is 40 each. Seven months. Your insurance company owes you a duty before you make the claim to be adequately staffed and prepared to meet a disaster. They are in the hurricane business. It's kind of like if we got invaded and the military says, "Did anybody see those rifles? Because I didn't know we were going to get invaded." You get prepared in case, and then they say like Tom said, "Oh, we didn't know this was coming." Well, of course you knew. That's what you advertise. That's the security you sold these people. TWIA told me that the other day in the mediation. I said your symbol is a hurricane behind the state of Texas. You didn't know there was a hurricane going to come? Come on guys. So we have very different views on that. Don't get me wrong, some claims get paid. You're going to have neighbors and friends who got paid fine. But what we have seen is if your case got off in the ditch right at the start, if the first guy came through who didn't have the ladder and he was supposed to get on your roof and he's standing on a bucket outside your house looking up at the roof, and once it got in the ditch, there's no process to get it out.

LEAVITT: Steve brought up a good point. There's actually an internal memo circulated by TWIA that after a certain date they're not replacing roofs unless it has physical loss. And I've heard this figure of 750,000 claims. And I do think TWIA has been totally overwhelmed. And the adjusters they are sending out, I'm sure like anything you have good and bad adjusters. But, we're finding that there are adjusters going out to look at damaged homes that have very little experience, who six months ago were selling home mortgages or in the car business. So, it is a problem with the homeowner not getting a fair adjustment. And this is not because the homeowner did anything wrong or wasn't thorough enough, but because they got a bad adjuster.

ANDROVETT: Tom, earlier you had mentioned Katrina and Rita. The response among insurance companies, claimants, the legislature and the courts, any lessons there

for how Hurricane Ike will play out?

PIRTLE: Well, if you look at what happened, of course, obviously a devastating event for the City of New Orleans and the whole south area down there. You're hearing some of the same stuff. The lesson we've got to work on whether or not it was wind or whether or not it was water. Now, that's a pretty standard trick. And in Katrina and Rita, that's already been, I think, won. And you've got to watch what you're doing or they'll say it's water when it's really wind or rain coming in from shingles on the roof.

ANDROVETT: And explain — and I know we're going to talk a lot about this — but for someone perhaps reading Texas Lawyer newspaper that is not conversant in insurance law and this issue, what's the big deal about the difference between wind and water?

PIRTLE: It's coverage. In most policies, if the water comes in your house because of the flood, it's not covered. But if the water comes in your house because your roof is bad or from another defect up there, then it is covered. And so the pressure is, with the folks and what they tried to get these adjusters to say, is that there's a water intrusion, not wind driven water or water driven by wind. So that's one of the big ones. And we've got to determine whether they're covered.

AUDIENCE MEMBER: What's the relationship between the state of Texas and the Texas Windstorm Association? It's my understanding it's not really a private thing; it's a governmental insurance entity. I don't know how much of these claim adjustment issues are driven by government problems or private insurance company problems?

MOSTYN: It's not a government entity. It may become one, but it was set up as an insurance of last resort for windstorm. The TWIA system has funds. And then after they go out of their funds, they tap into a secondary group, which is a drop on the other carriers, and then they go to reinsurance, and then they come back to the other carriers, who then get a tax premium credit. TWIA can be sued. And my position — and we haven't lost it — is that they're under the same laws as the other carriers. The interesting thing about TWIA is that they drop on the other carriers. Take Texas Farm Bureau, for instance,



Thomas W. Pirtle, a partner in Laminack Pirtle & Martines, L.L.P., is a nationally recognized trial lawyer who has won a number of ground-breaking verdicts in cases involving defective medical devices and pharmaceutical products. From 1990-2006 Pirtle was a senior litigator with the law firm of O'Quinn, Laminack & Pirtle. During his tenure at the O'Quinn firm he worked in the firm's mass tort division which encompassed a number of medical device and pharmaceutical dockets where he became a recognized leader in establishing corporate liability in complex cases. Pirtle has served as trial counsel in a number of ground-breaking cases including some of the first jury verdicts awarding damages to women injured by silicone breast implants and a record setting historical verdict awarded to the family of a woman who died as a result of her ingestion of the "Fen-Phen" diet drug combination. Pirtle received a Bachelor of Science degree from Stephen F. Austin University and graduated from South Texas College of Law.



Mike Androvett is in business to make sure that his lawyer clients get positive news coverage and their law firms are marketed effectively through advertising and public relations. Androvett is the founder of Androvett Legal Media & Marketing, the largest public relations and advertising firm in the Southwest exclusively devoted to lawyers and the legal profession. Established in 1995, Androvett Legal Media serves the specialized needs of law firms in communications with outside audiences, including news media coverage, brochures and Web sites, and sophisticated advertising of all kinds. Androvett's firm assists lawyers in virtually all areas of practice while observing the highest ethical standards. Lawyers and their clients who receive media training from Androvett Legal Media are much better prepared to deal with reporters and TV camera crews. And, as a former chairman of the State Bar of Texas Advertising Review Committee, his expertise and experience is essential to firms seeking to comply with the state rules governing lawyer advertising. Androvett and his team take the mystery out of public relations and advertising by recognizing law firms' true goals and providing the know-how to make them happen. He can be reached at 214-559-4630 or mike@legalpr.com.

Texas Farm Bureau has a 15-million-dollar retention policy. Before the wind quit blowing, they were through their 15-million-dollar retention. They went to reinsurance. These are local insurance companies. They're at 161 million into a billion dollar retention of reinsurance policy. The very good news for those carriers is when they talk about losses, it's really not their money. They went into reinsurance. And when TWIA does a draw on them to pay for the other claims that is part of the deal is you don't have to write the cost but you're going to have to pay for it if we get above everything. So when we do a draw up on these guys, it's really coming from the reinsurers, but they're getting tax refunds from the state of Texas. So it's a pretty sweet deal. I'd like to add I've thought maybe I should switch sides and I was going to call my company something like "horrific insurance." Do some honesty in marketing.

LEAVITT: I think the *TWIA v. Poole* case which came out of the Amarillo appeals court in May of last year addresses what you're talking about. In that case it states that TWIA is a government agency for private insurers. The private insurance companies pick the officers, however, they are under the supervision of the Texas Department of Insurance. And basically that's a private insurance business operating under a government cloak. Under Chapter 2210 of the insurance code it states if you're an aggrieved person you can either go through their appeals process or a private action. And this case confirmed that and said you do not have to exhaust all your administrative remedies to bring an action against TWIA, even though it's not your standard private insurance company with a registered agent, etc. It is available to be sued.

ANDROVETT: So TWIA is available to be sued?

MOSTYN: Sue them.

DISIERE: Typically, what you have is TWIA and the National Flood Insurance Program. They're kind of similar. TWIA on the state basis, the enabling legislature, as Chris mentioned, is in Chapter 2210 of the Texas Insurance Code. And that addresses windstorm. Windstorm is excluded under certain policies, typically standard homeowners policies along the

coast. Then you have also the exclusion for flood because while these are risks that insurers take, as a private entity, they are not well suited to absorb that magnitude of a loss, the potential of these losses. So that risk has to be underwritten and shared by insurers rather than isolated homeowners getting that type of coverage through private insurers. The same thing with the flood insurance under the FEMA program. If you have a flood claim under the flood policy, that is actually handled by "write your own" insurers, insuring entities like State Farm or Farmers, are handling and paying claims. But the actual money is coming from FEMA, through the national flood program. Any they have limited immunity in relation to extra-contractual claim handling related claims. So there's immunity for FEMA and claim handling activities. You can't sue for state law tort claims, such as bad faith for FEMA for the handling or mishandling of a claim. And by the way, the FEMA guidelines, proof of loss, and those types of things are very strict. So if you're helping homeowners with that, be sure that you know what the policy requires and make sure that the insureds comply, because you're dealing with the federal government and a well established body of law. There is a recent case, *Campos v. Allstate*, which talks about an exception to the tort immunity for negligent procurement claims; that is the agent knew that he was supposed to get the coverage or the carrier was supposed to get the flood coverage, and they failed to do it. That falls outside. So there are a few exceptions to that immunity. And I'm assuming the same thing exists with TWIA. I haven't done a lot of work with that, but certainly be aware of that flood coverage.

MOSTYN: David brings a very good point for the practitioners in the room. The flood policies, which are paid by FEMA, have some extremely strict deadlines in them. And so those of us who are used to filing lawsuits within two years have got to be very careful on submitting proof of loss, because the deadline has been moved to June 8th. So the difference is with TWIA, TWIA wants to be the federal program, but they're not. So they can be sued. What difference does it make? Well, they are subject to the common law

tort of bad faith. They're also subject to the statutory requirements underneath the article insurance codes 541, 542. What difference does that make? It means you get attorneys' fees, penalties and interest, and possibly travel. That's the big difference. They want to be. Believe me, they talked to me all the time, but we've done quite a few cases against TWIA through resolution, and they just don't have those protections. And I'm working with the legislature right now making sure they don't get them.

ANDROVETT: *Can any of you describe how successful the process is to file a claim through TWIA, as opposed to through private insurance companies? Any quicker? Any slower? Any particular nuance?*

MOSTYN: Pirtle and I are like, you're going to hire attack dogs. We're not going to go through the administrative process. I haven't done the administrative process with them. We generally go to private causes of action.

LEAVITT: There's no question the administrative process is a lot quicker. As soon as you receive notice, it's generally scheduled within 30 days. So absolutely it's faster. If it's more beneficial to a homeowner, that's a different story. We advise our clients to not elect the administrative process.

MOSTYN: The reason I don't do administrative process is if anybody wanted to come to me, I can settle my entire docket tomorrow for \$500. Speed is not what my people are looking for. They're looking to get their businesses and homes paid for, and get back. So while I have not been through the TWIA administrative process, I have been through other administrative processes, which have not been full recovery. I don't believe the administrative process allows for penalties, interest and attorneys' fees, to start with. So if you need a hundred dollars to get your house fixed and you've got to pay me \$25 of it, you're still \$25 short on your house.

PIRTLE: If you go through the process and you can't get a resolution, which you probably won't get a resolution because they won't be fair, you end up right back the same place where you started, just a little bit later. So I don't like it either in any way, shape or form.

ANDROVETT: *David, you might take issue with this question, and the other*

members of the panel may agree with it, but I feel it's relevant. And that is in the current economic climate — AIG immediately comes to mind — it's reasonable to conclude that many insurance companies are struggling due to their outside investments and the tie up of credit. Does that have an impact on an insurance company's desire to do what is right by the premium payer or to slow things down? How do you reconcile that?

DISIERE: I just don't think it does. And here's why: Insurance companies are a business. Policyholders are customers. And you can't stay in business very long if you cheat, lie, and steal from your customers. You have to pay claims that you owe, but you have to be prudent in that process. We have to look at the facts of the loss and the coverage afforded. It's a contract with your insurance company called an insurance policy. And if the facts of your loss fit within the policy, you should be afforded coverage. They should take care of the customers. They should provide prompt, fair claims service. I sound like I'm preaching, but I've done this myself. And I know that that's truly the goal, at least from my perspective, and the carriers that I work with.

MOSTYN: I would like to address the very good news that AIG and companies like that were never allowed to get their property insurance companies and so forth outside of state regulations. So the state regulators kept these guys properly reserved. American General, for example, which is owned by AIG is in very good shape. It's AIG, the parent on top, that got in trouble. I think State Farm has got 48 billion in assets last time I looked. For example, when we got ready to try the first State Farm case after Katrina, Rita, and all the hurricanes that had hit the coast, State Farm had still recorded a profit of 3.7 billion dollars. Now they like to go around saying they lost 1.3 billion, because they projected five. But it's still a very profitable business. As for their customers, the problem with insurance and the reason that it's regulated is that it's a mandatory purchase for most people. It's like you regulate industries that's a required purchase, such as electrical. Most any homeowner that has a mortgage is going to be required to have insurance. And we have to have insurance in case of fires and so forth. And

so they know you've got to buy the product. And so I don't see the customer aspect so much sometimes.

DISIERE: Can I just respond real quickly? We've got TWIA and we've got FEMA, which illustrates the fact private insurers are the preferred entities to protect our interests with limited protection from FEMA and TWIA where risk from catastrophic losses arise. And if we can keep private insurance available, it does relate to a customer, but I've got to tell you, I worked catastrophe duty as an adjuster when Hurricane Andrew hit Homestead, Florida. It just missed Miami by a few miles. Multiple insurers went into bankruptcy. And I understand that for many other carriers, any profit that had been earned from 20 years before up to the day that Hurricane Andrew hit Homestead, Florida, was wiped out. So anything that was made over the past 20 years suddenly became zero or a loss. That's a scary proposition whenever you've got homeowners relying on their insurance carriers to pay many other types of claims. You want carriers to charge adequate premiums, not excessive but reasonable, to be able to pay those claims. And because of solvency, there is a lot of money flowing into the area. There's a lot of work being done. There are some claims and I know there are disputes. But for the most part, efforts are being made and billions are being paid to people to restore the insured, to pay them the amounts owed under the policies.

AUDIENCE MEMBER: *I'm just curious. I heard on the news sometime not too long ago that State Farm is actually no longer writing homeowner policies in Florida, and that it was a business decision. Would you give your take?*

DISIERE: I'm sorry. I just don't know.

MOSTYN: I heard the threat. The difference is the argument on our side has gotten a lot better, particularly in the way insurance companies deal with their profits, particularly AIG. In 2005 State Farm has the worst hurricane season we've seen in 40 years and the CEO gets 11 million dollars in profit. There's no money left in the company. So that's why you've got to regulate the hell out of them because they're going to go and take it. The free market without any regulation has proven that those in charge will take the money

INSURANCE LAW, POST-HURRICANE IKE

and go do something else with it. So that's much easier, from the litigation side, to stand in front of a jury and say that the insurance carriers didn't do what they're supposed to do. And it's a much more receptive audience than we used to have.

PIRTLE: With the current national feelings about corporate irresponsibility, you're going to see some massive jury verdicts and awards come out. And if it's against these insurance companies that are not doing what they're supposed to do, so be it. But as a whole trend, I think you're going to see juries more critical of corporate America because they see we're losing money. We're losing money or we can't make ends meet. But now we pull back the curtain and look back there at what's going on. They're all back there having a drunken orgy rolling all over money. And that's what the people believe. And so these days when folks are talking about going to trial, I say, "Well, let's go." I want to put it in front of 12 people any and every chance I can, because I believe that American is tired of this corporate greed, this corporate irresponsibility and it bleeds over into the insurance companies. What we saw with Katrina and what we saw with Rita, at least in the city of New Orleans and Louisiana, was the judiciary in my view became friendlier to our causes, too, because they understand. These people are hurting, and they're getting mistreated in a lot of regards. And they want to see the people compensated. And I believe you're going to see that in Texas, and I hope we see it going up the appellate line.

ANDROVETT: *And what are going to be those issues? We talked about wind versus flood. What are the coverage issues that are likely to take up the time and trouble in the courts in the next few years?*

DISIERE: I'll start with that, but I want to just respond by stating that the insurance industry in the state of Texas is one of the most tightly regulated industries in Texas. Insurance and perhaps banking. But in terms of the coverage issues, I'd like to address some in the homeowners' context. Because for 20 years or more, in Texas, up until this most recent decade, the homeowners' policy form was an HOB policy form, a state mandated policy form. And after the problems with the mold coverage or mold claims, where the losses were

so great insurance companies were leaving Texas, they were finally allowed to write their own policies. It's called file and use and very few still use the HOB policy form. So you have to understand that if you're reading the case law, there will be issues with different types of policies that have different wording. You've got large body case law interpreting the HOB policy form, but now you have different policies and they have different language. You mentioned the issue about wind versus flood. Well, there's a clear exclusion about flood. But there is also, you'll find in some policies, something that you didn't see in homeowners' policies before, anti-concurrent cause clauses. There's a doctrine of concurrent causes in Texas. Let's say it's an all-risk insurance policy. Everything is covered except what's excluded. Then you have a flood exclusion, and then you have exceptions to the exclusion. And if a loss is caused by more than one cause, e.g. wind and flood, that presents concurrent cause issues. Two events may have caused the same damage. And it's the insurer's duty to pay what's covered and deny what's excluded. But what the policies have in them now, are anti-concurrent cause clauses that you have not seen in homeowners' policies before. And they typically provide a lead-in to the exclusion that says, "We do not cover regardless of whether before or after the loss or in any sequence to the loss, the following causes of loss." It doesn't matter if there were two causes or events. If the excluded cause or event was an actual cause of the loss, the entire loss is excluded — there's a case, *Wong v. Monticello*, which talks about it and upheld the exclusion under an anti-concurrent cause provision. But issues may still arise regarding coverage for the loss even where you have an anti-concurrent cause clause because the excluded event must actually be a cause of the loss. So there's a lot of coverage issues that are going to be coming out of these policies and the courts will need to address them.

ANDROVETT: *David, in practice, does that mean if the wind comes in and blows off your roof then subsequent down the road there's some water into the house, coverage is excluded?*

DISIERE: Well, in that event I understand what carriers are typically doing for

the most part, and that is if there's wind damage, they'll pay for the wind damage. If flood comes in, for example, you can see a three foot waterline through the house, that flood damage is excluded or needs to be paid by the flood policy if the insured has one. Based on wind speed measurements, the winds weren't too severe. The surge or flood damage was much more devastating. Wind damage is usually minor in this storm, with exceptions for some tornadic activity and isolated gusts because the winds overall weren't that severe.

MOSTYN: Did you go down there?

PIRTLE: They were a hundred miles or more. They blew the whole roof off my house, and it was thrown.

DISIERE: I will say there are certain areas where, yes, there was some severe winds and those claims should be paid under the coverage afforded through TWIA or private insurance as applicable.

PIRTLE: Did y'all hear that, all this exclusion to the exclusion and exception to the exclusion that he just talked about? How in the world can the average homeowner stand a chance to try and get money out of that? You've got to go help these people, and I feel passionate about this. I didn't understand half the stuff. However, I've had to get it going inside my head. It was going too fast.

DISIERE: So do we have insurers throw out the contract and simply pay everything?

PIRTLE: No. But we get one that's reasonable for folks to read that's not negotiated on just one side.

MOSTYN: Yes. The reason that the policy is written the way it is — and it's not quite that complicated — it is extremely complicated. But you have main perils. And one of them is windstorm. So put it underneath windstorm. If you can't find an expert to put it under windstorm, I'll send you one. But anyway, that's a joke. The time we get to this particular policy was deregulation in 2003 by the insurance market. They needed to exclude mold, but they excluded everything else, too. They took a hatchet where a scalpel should have been done. I've heard this low wind story before. When we went to try that case against State Farm, and one of David's clients, they actually flew an old boy

down from Lubbock who wrote a report, charged them \$26,000 to write a report and say there was no hurricane. Finally they said there was no hurricane in Hurricane Rita. I've got the local weatherman from CBS. He came out and said, "Yeah. There was a hurricane." It just so happens that the jury panel had actually been through the hurricane. So it was a little easier to explain to them there was a hurricane. Kind of like trying a bus rollover case and all the jurors are from the first six rows of the bus. It wasn't that bad. It only flipped four times. So they went down and they tried to de-designate the expert. They de-designated him because they were scared I was going to say they hired an expert that says that there wasn't a hurricane. They tried to exclude me talking about them having an expert in the first place that said there wasn't a hurricane. The problem was all their other experts and the lawyers relied on the one expert's report, so you can't exclude them. So we were going to beat the hell out of them on a no hurricane expert from Lubbock, Texas, who had himself a very fancy computer program. So that case settled. But that's what we see. And God bless David for being the only one up here from the defense side. They do not believe the winds weren't that bad. They were bad for those of you that got damage. Folks, on the coverage side, the biggest thing that I see — and there are differences in the policies. And it's one thing you have to know these policies — is wind driven rain. Some policies will cover it. Some policies will cover wind driven rain without what they call an opening, and some won't. The question often becomes for me, if I set this sealed bottle of water here and I come back in four hours and it's empty, does it have an opening? The adjusters take the approach they've got to see it with their eyes. My position is if the shingles pulled back during the storm and caused an opening but then laid back down when the wind quits blowing, there was an opening. That's how the water got in. For your clients the one thing that the insurance companies don't want to deal with, is if you left your home, like I did, and you looked around your house and the ceiling hadn't fallen in right before you left and the cracks and the water wasn't there and you come back

after the hurricane and those things were there, the adjusters don't want to take that into account. Right? They said, "Well, that must have been foundation settling." Well, it wasn't there before the hurricane. The house was fine. Then there's a hurricane, and then it's damaged. And unless they want to come in and call your client a fraud — in the first case we started was a doctor — and say they're lying, then have at it. But if not, the best evidence that we know that our engineers can go off of is a lot of times what our clients, who are the only eyewitnesses before and after this claim.

DISIERE: I want to go back to this thought that I said "it wasn't bad." I hope I didn't say that. There were bad winds. But they weren't of the severity of winds that you had with Hurricane Andrew that hit Homestead. There were areas where winds were very severe. There's damage in those areas. So it's up to some experts or the data, the information is there, to analyze the claims on a case by case basis. Because you can't paint it with a broad brush. I live in Friendswood, which is right along the bay. I boarded up three sides of my house thinking I was looking at swirling winds and the direction of the storm. It's not scientific. I'm not an expert here. And I thought it would hit the back side or a certain side. And what happened is the wind whipped around and came from the front of the house and the other part of my home I didn't have boarded up. I didn't lose a window. I had some small trees that were blown over. I lost pieces of fence. There were large trees in the neighborhood knocked down. But my home was fine. I bought a generator and was back in my house the afternoon of the storm. I was one of the fortunate ones. I know that there are people out there that had a lot of damage. And I know that there are a lot of insurance companies and adjusters out trying to do the right thing, pay the claims that they owe, take care of their customers, and provide the benefits the insureds secured or purchased through the insurance policy. But it is a contract. We can't throw that contract out. As confusing as some people may think it is, it's not. It's a contract. And that's what this country is founded upon, keeping your agreements.

LEAVITT: Another issue we're watching

closely is the case that's currently before the Supreme Court, *Johnson v. State Farm*. And it's going to decide whether if your claim gets pulled into appraisal, what the appraisers, and essentially the umpire, might be able to decide. It is going to determine whether the meaning of the term amount of loss includes the extent of loss. The original case is saying that the extent of damage is a part of the amount of loss. And so that is going to have a pretty big impact upon a lot of these cases because most of these claims are going to have issues such as one adjuster claiming a wall that has a water stain on it can be fixed by paint and assign it a value for a paint job, and another adjuster might look at it and assign it a value to replace the sheetrock. The extent of the damage could and probably will have an enormous influence on the amount of loss. Also, you're going to have, like David mentions, concurrent causes where part of it might be flood, part of it might be wind, and you're going to have an appraiser making coverage issues when that's something the courts have traditionally done.

ANDROVETT: *Is that a good thing or a bad thing if the appraiser is making decisions that courts used to make?*

MOSTYN: We have to see the outcome.

LEAVITT: I don't feel comfortable with an appraiser and the umpire, who are regularly retained by an insurance company, making decisions on whether my house is going to get fixed.

MOSTYN: I'm not going to go to appraisal, but sometimes if the outcome is good, we might be happy with it. But David and I actually agree with this. I agree with the insurance company on the position in the *Johnson v. State Farm*, which is you're not supposed to appraise coverage issues. I don't like appraisal. Appraisal, first of all, for the attorneys in the room, it's not arbitration. And that's been kind of the deal. It's supposed to deal with the actual cost of a piece of sheet rock, not whether it was damaged by the hurricane. And so that's been unfortunately in the *Johnson v. State Farm* case, the plaintiff is pushing the issue. I have seen appraisal used most often by the insurance companies to try to block litigation. And so my position on those has been that most of the time by the time they get to me, the

contract has been breached or I wouldn't take the case.

DISIERE: The appraisal provision, interestingly enough, there's a well established body of law going back to 1888 that talks about the appropriate use of the appraisal clause and what's not appropriate. The clause itself provides that you can use the provision whenever there is a dispute as to the amount of loss. As stated in the *Wells v. American States* and other decisions, it's not appropriate to use appraisal whenever you're dealing with causation or coverage issues. But here's an interesting twist. In the *Johnson* decision that Chris mentioned, there was a dispute as to what the cost to repair the roof would be. State Farm estimated the cost would be \$499.50 because it could be repaired. The homeowner says it's going to cost \$6,400 to replace my roof. Well, that's if the roof is damaged and needs to be replaced. And following Ike we've seen minor damage where roofs can be easily repaired. And we've seen areas where roofs need to be replaced. And there are efforts to submit some of these disputes to appraisal. And when there are coverage issues, appraisal is inappropriate. Did other portions of a partially damaged roof sustain physical damage? Direct physical loss to covered property? And if there's no damage, then it's not appropriate for appraisal. But let me go back. I mentioned creative solutions. The appraisal clause, if both sides are reserving the right to dispute coverage to dispute causation, but want to find out the costs of repair, appraisal may be appropriate. I don't think it's appropriate in the *Johnson* case, but there may be instances where appraisal can at least limit those areas where there's an "amount of loss" in dispute. Let's say both agree the roof needs replacement. One says it is \$5,000, the other says it's \$7,000. Well, they disagree. They hire an umpire. They determine it is \$6,000. There will be a \$6,000-dollar check that will be issued for the cost of repairs. That's provided by the contract, the appraisal provision. There may be other areas and coverages disputed, and certainly that might be better suited for litigation or mediation, discussion, however you want to try to get it resolved. There are creative solutions. There are ways to get these things done,

to keep things moving so we can focus to getting the claims paid that need to be paid, and litigating those where there's a true dispute over coverage or causation.

ANDROVETT: *We hear the extremes. Let's see if we can find some middle ground. Couple of just quick questions: Tom, you made a very eloquent, persuasive argument that the customer out there needs protection. These policies are obscurely written. They're very hard to comprehend. But at some point that makes me a little uncomfortable that I need a protector because I can't read the policy myself and make decisions. David, do you think that it's reasonable that a customer should be able to look at their policy and say, "I understand what's covered and what's not?"*

DISIERE: Well, interestingly, the law in Texas is that a homeowner, once they have secured coverage, they're deemed to know and are bound by the terms of their contract, whether they understand them or not. The state of Texas, the Texas Department of Insurance, regulates the policies. They approve or disapprove the policy forms. They mandate language. And there are certainly insurance policies that are challenging to read. But the law in Texas is that a homeowner, once they have a policy, they're deemed to understand and know the terms of the policy, and they're bound by the terms of their contract.

MOSTYN: I think the question was more on a moral right or wrong. The question becomes — and this is where we diverge. And, at some point, the jury is going to say I'm going to go with the plaintiff. What question do I need to answer? This state is the prime example of a state that's been hijacked by insurance companies, mortgage companies and bankers. So we've got the worst coverages, the worst policies, the highest premiums, and a team of lawyers that defend these guys. And so absolutely it doesn't take 80 pages to say, "I'll cover your house for a hurricane." And it shouldn't take a contract.

PIRTLE: That won't work with insurance companies.

MOSTYN: We've got a deal? Tom, I'll pay you X dollars per year to cover my house unless it gets hit by a hurricane.

ANDROVETT: *Isn't that a little unrealistic? Isn't it also that there are folks out there who kind of know how to work the system*

and then an insurance company has got to be able to protect itself against somebody that says, "Okay. The damage is really this, but I'm going to make it look like this?"

MOSTYN: If I had to deal with Pirtle to cover my house in a hurricane, what is hard about that?

DISIERE: Caused by the hurricane or wasn't caused by the hurricane?

PIRTLE: Did you see where Mostyn just wrote in an exclusion to this one-line policy? It is not unreasonable and certainly not morally unreasonable for a homeowner to understand the terms of the insurance policy. And what we just heard over here is, well, the law of the state of Texas is, because it's so biased for the insurance companies, oh, the insured doesn't have to understand. Well, that's not an argument they make in front of a jury. That's an argument they make outside the presence of the jury in summary judgment, which is wrong. I have business owners that I represent that own business interruption insurance. They needed help. A lot of them don't know what products they're getting. And the reason why the things are 80 pages long is they have to write not what they will cover, but what they won't cover.

ANDROVETT: *Well, what about the agent, should the agent be saying more to the customer about: "Now, I want you to look at this. Here's the eight things that you need to know about this policy?"*

MOSTYN: They should and not only that, they have an obligation to under the DTPA. If you're in a position of superior knowledge and that information that you have would affect the consumer's decision, you must inform them. The agents came to the legislature in 2005 and asked for protection, because the policies had gotten so crazy in 2003, they didn't know what they were writing. Let me give you an example: I went to switch my homeowner's coverage. And I called my independent agent. I said, "Hey, I'd like to price this stuff out. Does the policy you're pricing cover wind driven rain?" She said, "I don't know." I said, "Well, send me the policy. This is what I do." She called me back and she said, "They won't send you the policy unless I write it. We had standard forms." We had an A, a B, and a C until 2003. Now, we've got 200 forms. File and use used to be preapproval,

approve it. Now it's file and use it. And they're writing ridiculous things in these policies. One example: I had the commissioner of insurance sitting in front of me at the table in front of the senate committee. And all of a sudden I realized that this guy is going to answer my questions when I ask them right in front of the senators. And so I began to question the commissioner of insurance. And it became pretty clear that some of these issues like: "How many rate cases have you brought against companies?" "Four." "How have they gone?" "Not so good." So they're allowed to set their own rates, they're allowed to write their own policies. And so a consumer has no chance of knowing what's in their policy anymore. And if you're a lawyer, you have no right telling somebody until you get the policy what's in there anymore. And so no one knows what they've got coverage for. We've got to go back to a standard form. We have a bill, by the way, by representative Trey Martinez Fischer, who is the vice chair of insurance, who is also of counsel to our law firm, that says you must go back to a standard form. You can then in clear language disclaim coverages you don't want to write and show them what the discount is for that, and then in clear language you have to offer them other coverage up front on the front of the sheet. And so what you've got here is if you're an independent agent, you're in trouble because a lot of times you told people they had windstorm coverage and they didn't. And the person thought they had it, and now they've had a damaged home. There is a cause of action for that. They should have disclosed that it's not there. But we shouldn't have to shift this burden to the agent. We should go back to some common sense. This isn't reform. This is just a common sense solution to this.

DISIERE: I hate to keep referring back to case law, but there is a case that determines if an agent is sued. That's the *May* case. It says an agent's duties in Texas are essentially twofold, to place the requested coverage if they can, and if they can't, to let the insured know. Those are their duties. Now some agents may take on more than that. They may try to figure it out and make some representations or something to that extent. That can happen. But, again, under Texas law, the *May*

case controls, the duties are twofold; one to write, with few exceptions, to write the requested coverage and let the insured know if they can't. It's that simple.

MOSTYN: The biggest problem is the agent probably doesn't know what's in the policy. My agent didn't know. She was talking to a lawyer so she said, "I don't know." But if she says to the person, "Yeah, there's coverage" because she wants to make the sale, she just made a misrepresentation to the person. When there are 900,000 claims all of a sudden, these issues get flushed out, because there are suddenly a severe number of these. There are also a lot of cases where the agent didn't bother to forward the money and the check on, and the policy didn't get written. Those situations happen. And they're highlighted when we have this many claims.

ANDROVETT: *Chris, some lawsuits have been filed. Is it fair to say that many more lawsuits are probably on the horizon?*

LEAVITT: I think a bunch are coming. And an area where we can find common ground is that some people, or a lot of these people, have been put in impossible situations. An example would be people with TWIA claims who are being told by the TWIA underwriting department that they're not going to get renewed for windstorm insurance until they get their certification on the roof. And, the underwriting department is saying we're not going to give you the TWIA certification unless you get your roof replaced, just repairing is not enough. The TWIA claims department is saying that you don't need your roof replaced. You can have it repaired, and we're not going to give you enough money to have the roof replaced. So they're stuck in this position where it's lose little or lose big. And it's really a problem, and it's something that I think we're going to be dealing with a lot more, especially with hurricane season on the horizon.

ANDROVETT: *Now, the courts in these affected counties — Galveston, Harris, Jefferson — they've put into place some streamlined measures to move the litigation along. What's your take on those measures to streamline the litigation and what substantive impact is it likely to have in the litigation?*

PIRTLE: Well, I'm a guy that likes consolidation because I've been involved with

so many in various aspects of my practice going back to the days when you had asbestosis and breast implants. So I think it helps the process and certainly keeps us from having getting beat to death with discovery. And on the other side, it also helps the insurance companies from being beat to death in discovery, too. I understand it's being considered right now in Harris County.

MOSTYN: My position — and I think it came out of the Rita litigation — has been pretty tied with the defense bar on this, actually, who have decided that we should consolidate for efficiency. Galveston has already consolidated. That order was entered. Jefferson County has a consolidation order. Harris is going to have one. The consolidation I don't appreciate is the one multi-district litigation that was shifted to a judge in San Antonio. But that was a process that was done to, in my opinion, to forum shop by the insurance companies. Hopefully things like that will be resolved. But consolidation inside the county, I'm for.

DISIERE: The statutes, 541 under the Texas Insurance Code, the unfair claims practices act provide for tools and prompt mediation. Either party can compel mediation within the first 90 days after a suit is filed. There's also the notice required to the insurance carrier, specific notice of the nature of your complaint and the attorney fees that you seek, that you've incurred up to that date. Probably not a hundred thousand dollars, since you only wrote the letter, but if you send a demand letter, there's a way to work through it. And I like the approach by Judge Criss in the Galveston courts. But I have a few concerns, and I perceive there may be some traps in there that are going to have to be litigated in the future. For example, the Court talks about within a hundred days you can do something to mediate the case, abatement of the case. But the order specifically says that the statutory deadlines and other items are not abated. So what happens if you fail to seek your abatement to get proper notice under the DTPA or insurance code that you're entitled to under those statutes, proper specific notice of the claims being made? Do you waive the abatement? I'm not sure. You're abated technically. Can you

INSURANCE LAW, POST-HURRICANE IKE

file a motion for abatement? Well, perhaps, but the order itself says that those statutory deadlines continue to run. So I would advise any defense attorneys, insurance carriers and others out there to read those provisions carefully and be cautious as you proceed. And still if you intend to use the statutory defenses and solutions you should make sure you preserve them. Again, these are creative solutions. Bring these cases to mediation and get resolved what can be resolved and litigate what needs to be litigated.

MOSTYN: I don't suppose to speak for Judge Criss, but here's what would be an appropriate response, David. All carriers' counsel were invited to several meetings in Galveston where this was hashed out. I didn't see you at the meetings. I did see representatives from the clients that you represent at the meetings. I specifically asked each attorney that represented each carrier to state their name and the carrier they represented on the record and say whether or not they agreed to the order. So if one of the clients would like to go back now and litigate a provision of Judge Criss's order, that is probably not a court you'd like to see again.

PIRTLE: I am familiar with Judge Criss, and she runs a pretty tight ship. And you necessarily have to give up some things on both sides, by the way, when litigation is consolidated for expediency. You don't give up due process, you don't give up your rights, but you've got to give up some things and statutory notice may be one of the things. I know that in other consolidations that hadn't been really a problem.

MOSTYN: My point is that all of the major carriers were there with counsel, and they all agreed to the order. So I think you're going to have a hard time undoing the effort.

DISIERE: There's not an effort to undo it. It's simply advice that if you want to be sure that you've protected statutory rights and defenses, you probably need to file something to be sure that you've done so.

MOSTYN: The only reason I'm touchy on it is that my firm spent probably a hundred hours preparing the agreement and every time we'd get it scheduled for Friday, somebody would object on Thursday, and we'd all have to go back down there and go around and around. And the

reason it's been entered is I think it provides a fair process to get it to mediation. We have some good news here. We came out of Rita, and we weren't done with the Rita litigation. And so all the litigation teams were still together on those carriers. And so when Rita started, we thought the war was on. For the first case we took 36 depositions with State Farm. So that peace process, it seems to have kind of carried on into Ike. And we will see, I'm sure. I don't know how long the peaceful marriage will be. But right now the courts are trying to set up ways to deal with these cases in an expedited manner. Judge Criss is particularly interested in it because she managed all the BP litigation, and she's proud of the record that she has on that.

LEAVITT: Anything that can bring our clients' claims to a resolution the quickest and for the highest value is something we approve of. Tony Buzbee was on the steering committee for the consolidation of the BP Refinery Explosion cases in Texas City in Judge Criss' court, and The Buzbee Law Firm achieved very strong results for our clients in that process.

ANDROVETT: *Now, Steve, you mentioned this before, but by no means do I expect you to be the only one that answers this question. But looking forward in the legislative process, can we reasonably expect any tinkering with the insurance laws as they relate to hurricane and disaster coverage, coming out of Ike.*

MOSTYN: You're going to see some tinkering with TWIA depending on funding. The coverages aren't going to get changed. And the way the policies are being done probably will not get changed this time. The public isn't angry enough about it yet. There are too many damn lobbyists in Austin.

DISIERE: Insurance carriers are in the risk business. There are contracts. There are rules of law that help them understand what those risks are. Company underwriters assess a proper premium for that risk. If the insuring public in Texas wants to cover everything — flood, hurricane, natural, nuclear explosion, whatever it may be — if we were to cover it, that's fine. Insurance companies will do that. All they ask is that they're able to charge a fair premium for the coverage afforded by the contract. And I think there's a reason why we have TWIA. There are reasons why we

have FEMA. I share the view that insurance companies are trying to abide by the terms of the contract and take care of their customers to keep them satisfied and provide the coverages they have purchased. And they'll continue to do that regardless of whether it's a state mandated policy or if they're able to write their own. They just need to be able to charge a fair premium for the coverage afforded.

PIRTLE: Well, maybe they ought to just nationalize them all, and everybody have universal coverage. That seems to be the trend these days.

MOSTYN: The issue is always going to be: What is a fair premium? There was a lot of pressure on the insurance companies in the 2000s and in the '90s. They took the money they put in reserves and they put it in bonds and they made money on it. It did well. The loss ratio is now in the high 40s. So loss ratio is what they pay out for every premium dollar taken in. You've got to understand they take also the reserves and invest it in market and bonds. The market has gone down, but they're about 80 percent in bonds. They're making that money on the side. And their loss rate is 46 percent of their reinsuring moneys they lost. And that's fine. You're in it for profit. I'm for profit. But it's out of control. This state wants to go the opposite direction from the rest of the country for some reason. But this is one of the issues. And until we decide to address it, we're going to suffer in this state. We're going to suffer because our insurance on the coast is going to become so expensive people are going to not come here when they retire from up north. They're going to go to Mississippi and Alabama and Florida. I've got a buddy of mine who is the biggest developer on the coast down there, and he's about to leave. And so you've got to decide are we going with insurance companies and banks and mortgage lenders or everybody else. And that's what the decision is going to have to be made. But those boys dug in. You go over there to the legislature, and I swear to God, if you had to shake the pockets of the lobbyists there would be 4 million dollars right there on the ground. They go eat dinner with these legislators every night, and they go and give them lots of money, and they forget the people they represent. They forgot

about the business owners and they forgot about the people. Until we get mad as hell and take it back, they're going to keep doing it. The sad thing is other states have figured this out already.

PIRTLE: We let them, or at least the people who are supposed to be watching the gate let this happen to some extent. And we're obligated, I believe, to change it. And it's going to take time, and it's going to take money.

ANDROVETT: *With the knowledge that maybe 15 years ago people would look at Texas and their spin was the state has really let the trial lawyers just take control and corporations are not going to come to Texas. My point is these arguments are very compelling and persuasive, but I think I've heard them before on the other side.*

MOSTYN: Sure. And what happens is the rubber band snaps too far the other way.

ANDROVETT: *In the last couple of minutes we have, what I'm really striving for is an understanding and perhaps you'll tell me that the horse has already run out of the barn, but for the insured, be it a homeowner — and we haven't had a chance really to talk about this much — or the business that is insured, is there some advice to help them get their claim paid or get their coverage accepted to move these claims speedily? David, maybe it's unfair to start with you, but I'm wondering if maybe as a defense you've talked with your insurer about: "Look, when they come to us this way, that is a no-brainer. We can pay this. It's when they come to us this way that we can't." I'm trying to figure out what that looks like.*

DISIERE: Well, I'm already involved in a lot of matters working with insureds and their counsel. I'm working with Steve's office on a matter. We're working on some creative solutions. Before we get too far down the road, before suit is filed, my recommendation is to get someone out there to re-inspect the property. We'll walk with your contractors, their contractors and figure out where the differences lie before we get too far down the road and the claim gets locked up in litigation, the adjusters are pulled off the file because it's reassigned to someone else. Let's — and I like Judge Criss's approach — get out there and figure out where the differences are and see if it can be resolved. Initial

estimates are just that, they're estimates. Supplements can be written. And sometimes there are things missed or there's hidden damage or additional damage that comes up. It goes back to basic good communication between a customer and the company that they're dealing with. Sometimes there's a breakdown in the communication. Sometimes you have to work to make sure that the insureds' points are getting across. The demand letter that gives proper notice that you failed to pay for the roof. This is an area where we think coverage should be provided. Please pay this within the next 60 days, otherwise, we'll have to file suit. That's all part of that. And there's that window of opportunity provided by the statutes and appraisal provisions where appropriate. All of these things that are available before we get these things locked up in the Court system and the battle lines are drawn. They may be drawn some day. And we're going to have disagreements and those things will have to be resolved by a jury of 12 people. And I respect that. I trust our court system and our firm is very comfortable in the courtroom. But before we get there, there's open communication and good discussions that can bring things to an amicable conclusion.

MOSTYN: My advice would be: You need to get someone who is knowledgeable to help these guys to the extent that they can help you with your carrier. Get someone who is an expert that can get a proper estimate written and to bundle it up in a way that's understandable. The difference is that I've never seen them be very willing to pay my fees and other expenses and interest unless I had them in a lawsuit. And so we go from talking about resolving the claim to resolving the lawsuit. And I've never sent David a notice letter that I didn't get one back saying it wasn't sufficient. And so where is George? George just started and he said, "Do we respond to these?" I said, "No, George. Don't worry about that. I've never written one right in ten years. I've done a couple of thousand of them, and I can't figure it out."

PIRTLE: I guess it's twofold. I'm going to start with the business owner, which I deal with. There's a great deal to do and there's a little difference in the business policies for business interruption insurance. You've

got to have the right people looking at it. And that's still going on right now. I'll give you a great example. You've got a building that loses electricity. Maybe the business is a laboratory. Their policy doesn't cover the damage to the laboratory if the power loss is because of damage to the building. And so there's a lot of things you've got to sort out, and you've just got to stay on top of it. The other thing is for the individual homeowners and stuff, documentation — in addition to the experts — and if possible pictures will help these guys pay. It may be a little bit late for that, but if you've got pictures of your loss of your contents, it helps. And it also helps your adjusters.

LEAVITT: My advice to the insureds, as he mentioned earlier, is if the insurers haven't done something in six, seven months, the odds are, it's not going to happen. And looking at Katrina as an example, State Farm turned potentially a 40-billion-dollar exposure into 12 billion dollars by delaying people for three years and causing people to have to settle. People couldn't hold out forever when they're dealing with their homes. And they earned 8 billion dollars in interest on the reserves in the process. So if the insurer hasn't done the right thing, you need to start speaking with somebody.

ANDROVETT: *Well, David, I told Chris he could have the last word, but as our sole defense representative, we'll suspend the rules and give you the last, last word.*

DISIERE: It would be the same advice I give my clients. Let's do what makes sense. If it's something that can be resolved, let's work together to get it resolved. If it's something that needs to be litigated, let's work together and litigate it. But it's going to be interesting going down the road. ❖

For more information on
upcoming events and
sponsorship opportunities,
contact Deni Ruddy at
800-456-5484, ext. 766.

We wrote the book on Texas Insurance Law... and we're *still* writing.

- Top Insurance Litigation Firm in Texas
Chambers USA 2005, 2006 & 2007
- Top Five Firm in the Nation for Litigating Insurance Disputes Involving Natural Disasters
The Legal 500, Legalease Publishers (UK) 2007
- Top Texas Insurance Litigation Firm
LGM's Guide to the World's Leading Insurance and Reinsurance Lawyers 2006-2007



Martin, Disiere, Jefferson & Wisdom
ATTORNEYS AT LAW

DALLAS OFFICE
900 Jackson St., Suite 710
Dallas, Texas 75202
Phone: 214-420-5500
Fax: 214-420-5501

**PRINCIPAL OFFICE
HOUSTON**
808 Travis St., Suite 1800
Houston, Texas 77002
Phone: 713-632-1700
Fax: 713-222-0101

AUSTIN OFFICE
111 Congress Ave., Suite 1070
Austin, Texas 78701
Phone: 512-610-4400
Fax: 512-610-4401

www.mdjwlaw.com