

**STATE OF LOUISIANA
DIVISION OF ADMINISTRATIVE LAW**

DEPARTMENT OF INSURANCE * **DOCKET NO. 2019-10801-INS**
*
*
IN THE MATTER OF *
*
STATE FARM FIRE AND CASUALTY * **LICENSE NO. 1296**
COMPANY

DECISION AND ORDER

On August 20, 2019, the Louisiana Department of Insurance issued a *Cease and Desist Order and Notice of Regulatory Action* (Order) demanding that State Farm Fire and Casualty Company cease and desist from imposing a Hurricane Duration deductible on claims made by Louisiana State Farm homeowners insurance policyholders for losses incurred during the period “when policy language dictates that a Hurricane Duration Deductible should not be imposed.”¹ The Order warned of further regulatory action and proposed to suspend or revoke the Certificate of Authority issued to State Farm Fire and Casualty Company.²

On August 26, 2019, State Farm Fire and Casualty Company requested an administrative hearing, seeking to have the Order declared invalid and contrary to law. For the reasons set forth below, the Order is **AFFIRMED**.

JURISDICTIONAL AUTHORITY

Jurisdiction is granted by Louisiana Revised Statutes (La. R.S.) La. R.S. 22:2191. This adjudication is conducted in accordance with the legislation governing the Division of Administrative Law, Chapter 13-B of Title 49, La. R.S. 49:991, *et seq.* The proceedings are governed by the Administrative Procedure Act, La. R.S. 49:950, *et seq.*, and the Louisiana Insurance Code, 22:1, *et seq.*

¹ *Cease and Desist Order and Notice of Regulatory Action*, LDI Exhibit D-24.

² *Id.*

APPEARANCES

A hearing was conducted at the Division of Administrative Law in Baton Rouge, Louisiana, on August 23 and 24, 2021, before Administrative Law Judge Patrick E. Moore. Mr. John W. Waters appeared as counsel on behalf of the Louisiana Department of Insurance (LDI). Mr. William D. Shea and Mr. Kellen J. Mathews appeared as counsel on behalf of State Farm Fire and Casualty Company (Appellant).

STATEMENT OF THE CASE

The Order issued against Appellant was published by LDI by letter dated August 20, 2019. On August 26, 2019, Appellant filed a timely demand for an administrative hearing pursuant to La. R.S. 22:2191. Appellant seeks to have the Order declared invalid to the extent LDI requires Appellant to apply an increased deductible, referred to as a Hurricane Duration Deductible (HDD), to claims made by Appellant's homeowners insurance policyholders as of the day a storm system is declared a hurricane. LDI issued the Order after receiving complaints from Appellant's policyholders who contested Appellant's application of the HDD for damages claimed after the landfall of Hurricane Barry on July 13, 2019.

Appellant's demand included a request that a stay order be issued, as provided for in La. R.S. 22:2204, deferring implementation of the Order pending the outcome of a full hearing on the merits. After a contradictory hearing on September 10, 2019, the stay was granted by order signed September 11, 2019.

The specific issue before the tribunal involves the interpretation of the language in Appellant's HDD policy endorsement. At the hearing, Shawanda Smith, LDI Compliance Examiner, Jeffery W. Zewe, Deputy Commissioner of Insurance, and Juan Paraillo, State Farm Claim Manager, testified on behalf of Appellant. Appellant's exhibits labeled as A-1, A-4

through A-16, and A-18 through A-21 were admitted into evidence. Objections to the admission of Exhibits A-23, A-24, and A-25 were sustained to the extent that the first page or pages of each of those exhibits was an email that was admitted, but the chain of attached emails or fragmented emails that followed the first email were excluded from evidence.

After the conclusion of Appellant's case, Jefferey W. Zewe testified on behalf of LDI. In connection with Mr. Zewe's testimony, LDI's exhibits labeled as Exhibits D-2, D-4 through D-15, D-20, D-20A, D-22, D-24, D-25, and D-28 through D-30 were admitted as evidence, subject to objections sustained as to the inclusion of email chains or chain fragments that appeared after the first email in Exhibits D-13, D-20 and D-20A. Counsel for State Farm objected to the admission of Exhibit D-30 as inflammatory and prejudicial. Exhibit D-30 is an email sent from one of Appellant's policyholders to LDI in which he complains derogatorily about the handling of his claim. The objection was overruled and the exhibit was admitted into evidence upon a finding by the undersigned that the exhibit was not overly inflammatory or otherwise prejudicial.

At the conclusion of the hearing, the parties requested that the record remain open to allow them an opportunity to submit post hearing memoranda. The record was originally scheduled to close on September 28, 2021. Appellant moved for extensions of the record close date due to problems with transcribing the recording of the proceeding. The extensions were granted, the parties submitted timely post hearing memoranda, and the record closed on November 30, 2021. The undersigned took the matter under advisement for a determination of whether the Order was invalid and contrary to law.

FINDINGS OF FACT

The policy language at issue appears in a Hurricane Duration Deductible Endorsement

(Policy Endorsement 3387)³, the contents of which were approved by LDI in 2011 as an endorsement to Appellant’s homeowner, condominium, and renter policies. The content of Policy Endorsement 3387 sets forth as follows in pertinent part:

The **Hurricane Duration** deductible applies to Losses Insured that:

1. are caused by wind, wind gusts, hail, rain, tornadoes, lightening (except covered fire losses caused by lightening), cyclones, civil authority, or power outage; and
2. occur within the **Hurricane Duration** and result from the storm system that triggered the **Hurricane Duration**.

provided this storm system has hurricane status, as classified by the National Hurricane Center of the National Weather Service:

1. sometime within the 48 hour period prior to first causing damage to property within this state; or
2. anytime after first causing damage to property within this state, so long as this hurricane classification occurs while a hurricane watch or warning is still in effect for this state. (Emphasis original)⁴

The endorsement includes the following definition of “Hurricane Duration:”

“**Hurricane Duration**” means a period of time

1. beginning when a hurricane watch or warning is issued for any part of this state because of a storm system that has been declared to be a hurricane by the National Hurricane Center of the National Weather Service; and
2. ending 72 hours after the termination of the last hurricane watch or warning for any parts of this state.⁵

At 4:00 p.m. on July 10, 2019, the National Hurricane Center of the National Weather

³ Appellant Exhibit A-8 at Page 18 of 41. The Order references the State Farm Hurricane Duration Deductible Endorsement by a specific endorsement number, FE-3387. In the *Request for Administrative Hearing*, Appellant indicated that FE-3387 is a form for Rental Dwelling Policies and is not the endorsement form associated with the policy that was the subject of the initial policyholder complaint, FE-5494.1. The *Request for Administrative Hearing* repeatedly referenced the endorsement as FE-5494.1, but also indicated that the language of the two endorsements is substantively similar as it pertains to the definition of Hurricane Duration. A review of both documents so confirmed. See Appellant’s *Request for Administrative Hearing*, Footnotes 5 and 12.

⁴ *Id.*

⁵ *Id.*

Service issued a hurricane watch for the southern coast of Louisiana as a result of a storm system that was developing in the Gulf of Mexico.⁶ At that time the storm system at issue, which had maximum sustained winds of 30 miles per hour (mph), was referred to as Tropical System Two.⁷ At 4:00 p.m. on July 11, 2019, the National Hurricane Center issued a hurricane warning for portions of the Louisiana coast. At that time, maximum sustained winds were 40 mph. At 10:00 a.m. on July 13, 2019, the National Hurricane Center declared that the tropical system had developed maximum sustained winds of 75 mph and had become Hurricane Barry.⁸ At 1:00 p.m. on July 13, 2019, the National Hurricane Center announced that Hurricane Barry made landfall near Intercoastal City, Louisiana, and had weakened to a tropical storm with maximum sustained winds of 70 mph.⁹

On July 17, 2019, LDI received a complaint from Sonny Lieu, a Baton Rouge resident who indicated that the chimney on his house fell on Saturday, July 13, 2019, and caused damage.¹⁰ Mr. Lieu complained that his homeowners insurer, Appellant, had informed him that the HDD applied to his loss and that as result, his deductible would exceed \$30,000.¹¹ Mr. Lieu contended that the loss was caused by conditions that were unrelated to the storm, and that as a result the HDD should not apply to raise his deductible. Two additional complaints by Appellant's policyholders followed, both regarding Appellant's imposition of the HDD on their claims.¹² LDI later determined in all three instances that Appellant did not violate the insurance code when adjusting the claims.¹³

⁶ LDI Exhibit 8, p. 094.

⁷ *Id.*

⁸ LDI Exhibit 8, p. 096.

⁹ LDI Exhibit 8, p. 097.

¹⁰ LDI Exhibit 7, p. 018.

¹¹ *Id.*

¹² The record includes evidence policyholder complaints regarding Hurricane Barry claims that were investigated by LDI. Complaint of Wayne Runquist, Appellant Exhibit 15; Complaint of Larry Hotard, Appellant Exhibit 16.

¹³ Hearing testimony of Jeffrey W. Zewe. August 23, 2021, at 1:07 p.m.

Jeffrey W. Zewe, Deputy Commissioner of Insurance, investigated the policyholders' complaints. In doing so, he reviewed the terms of Policy Endorsement 3387, the National Weather Service bulletins, and file documents that were accumulated when Policy Endorsement 3387 was approved by LDI in 2011.¹⁴ As a result of his investigation and based on his interpretation of Policy Endorsement 3387, Mr. Zewe concluded that the HDD was never triggered by Hurricane Barry because no hurricane watches or warnings were issued after the tropical system was upgraded to a hurricane.¹⁵

As part of the investigation and to discuss Appellant's use of the HDD, Mr. Zewe arranged for a meeting of several LDI senior personnel that occurred on July 10, 2019. At that meeting, LDI Deputy General Counsel Liz Butler indicated that she interpreted the language of Policy Endorsement 3387 to mean that the HDD was triggered by Hurricane Barry, and it applied to claims arising from insured losses that occurred after 4:00 p.m. on July 10, 2019, the time that the National Hurricane Center issued a hurricane watch for the southern coast of Louisiana.¹⁶

Another meeting to discuss the HDD was hosted at LDI on July 26, 2019. The meeting was attended by representatives of Appellant, as well as Mr. Zewe, Ms. Butler, Insurance Commissioner James J. Donelon, and several other senior LDI personnel.¹⁷ At the meeting Appellant maintained, like Ms. Butler, that the HDD applied to insured losses that occurred after 4:00 p.m. on July 10, 2019, when the National Hurricane Center issued a hurricane watch for the southern coast of Louisiana.

¹⁴ On March 29, 2011, in compliance with Louisiana Insurance Code provisions requiring LDI approval of changes to homeowners insurance policy clauses, Appellant applied to LDI for approval of changes to the Hurricane Duration Deductible Endorsement. Shawanda Smith, an LDI compliance examiner, approved the changes after an exchange between herself and Appellant's personnel, during which Ms. Smith sought clarification of the endorsement language. Hearing testimony of Shawanda Smith. August 23, 2021, 9:35 a.m. to 10:35 a.m.

¹⁵ Hearing testimony of Jeffrey W. Zewe. August 23, 2021, at 10:56 a.m.

¹⁶ Hearing testimony of Jeffrey W. Zewe. August 23, 2021, at 11:15 a.m.

¹⁷ Hearing testimony of Jeffrey W. Zewe. August 23, 2021, at 11:17 a.m.

At that meeting, or shortly thereafter, Commissioner Donelon indicated that he interpreted the HDD differently from Mr. Zewe and Appellant. Specifically, Commissioner Donelon interpreted Policy Endorsement 3387 to mean that the HDD was triggered by Hurricane Barry, and it applied to claims arising from insured losses that occurred after 1:00 p.m. on July 13, 2019, the time that the National Hurricane Center of the National Weather Service upgraded the tropical storm system to a hurricane.¹⁸

On August 20, 2019, LDI issued the Order, indicating therein that Appellant was incorrectly imposing the HDD on claims made by Louisiana homeowner policy holders for losses attributable to Hurricane Barry that occurred prior to the time that Hurricane Barry was declared a hurricane.¹⁹ In the Order, LDI maintained that the HDD did not commence until after Hurricane Barry was declared a hurricane. In accordance with authority granted under La. R.S. 22:1969, the Order indicated that Appellant's imposition of an HDD to the claims of Appellant's Louisiana policyholders for losses sustained before 10:00 a.m. on July 13, 2019, constituted a violation of La. R.S. 22:1892, La. R.S. 22:1964(1)(a), and La. R.S. 22:1964(14)(a).²⁰ Under the heading "Commissioner's Action," Appellant was ordered to cease and desist from imposing the HDD on claims made by Louisiana homeowners insurance policyholders for losses incurred during the period when policy language dictates a HDD should not be imposed.²¹ Under the heading "Proposed Action," Appellant was informed that the Commissioner proposed to suspend or revoke the Louisiana Certificate of Authority issued to Appellant.²²

¹⁸ Hearing testimony of Jeffrey W. Zewe. August 23, 2021, at 11:20 a.m

¹⁹ LDI Exhibit D-24.

²⁰ *Id.*, at p. 185.

²¹ *Id.*, at p. 186.

²² *Id.*

CONCLUSIONS OF LAW

LDI's cease and desist order is affirmed because the Commissioner's interpretation of the policy language of the HDD was reasonable.

The Department of Insurance is charged with enforcing the provisions of the Insurance Code.²³ La. R.S. 22:1969 mandates that if the Commissioner of Insurance determines that a person has engaged in an unfair method of competition or an unfair or deceptive act or practice, the Commissioner shall issue and cause to be served upon the person an order requiring the person to cease and desist from the practice. In this case, the Order was based on the Commissioner's determination that Appellant imposed the HDD during a period when Appellant's policy language dictated that a HDD should not be imposed.

To determine whether the Commissioner's action in issuing the Order was invalid, Appellant has the burden to prove by a preponderance of the evidence that the Commissioner's action was arbitrary, capricious, or an abuse of discretion.²⁴ An arbitrary act is an act based on random choice or personal whim, rather than any reason or system.²⁵ A conclusion of a public body is capricious when the conclusion has no substantial evidence to support it or the conclusion is contrary to substantial competent evidence.²⁶ An abuse of discretion is an agency action that is clearly wrong, manifestly erroneous, or is such an abuse that it shocks the conscience of the court.²⁷

²³ La. R.S. 22:18.

²⁴ *Devillier v. State, Dept. of Pub. Safety & Corr., Pub. Safety Services, Office of State Police, Div. of Charitable Gaming Control, Gaming Enforcement Section*, 634 So. 2d 884 (La. App. 1st Cir., 1993); *Bowers v. Firefighters' Retirement System* 2008-1268 (La. 3/17/2009), 6 So. 3d 173, 176.

²⁵ *Reed v. State Farm Mut. Auto. Ins. Co.*, 2003-0107 (La. 10/21/03), 857 So. 2d 1012, 1020.

²⁶ *Coliseum Square Ass'n v. City of New Orleans*, 544 So. 2d 351, 360 (La. 1989); *Sterling v. Dep't of Pub. Safety & Corr., Louisiana State Penitentiary*, 97-1960 (La. App. 1 Cir. 9/25/98), 723 So. 2d 448, 455.

²⁷ *Jackson v. New Orleans Police Dep't*, 2005-0649 (La. App. 4 Cir. 3/29/06), 930 So. 2d 113, 116. random choice or personal whim

The crux of the dispute is over Appellant’s application of the “Hurricane Duration” as defined in Policy Endorsement 3387. As cited above, the policy endorsement sets forth that the Hurricane Duration means a period of time that begins “... when a hurricane watch or warning is issued for any part of this state because of a storm system that has been declared to be a hurricane by the National Hurricane Center ...” (Emphasis added).

The Commissioner interprets the definition of the “Hurricane Duration” to trigger the HDD once the storm system is declared a hurricane, and that the HDD only applies to damages that occur after the hurricane is declared.

Appellant disagrees with the Commissioner’s interpretation of the phrase “has been declared” as it relates to the event or sequence of events that must occur to trigger the HDD. Appellant contends that the Commissioner errs because the phrase “has been declared” is a use of the “present perfect tense,” and as such it “does not necessarily indicate that the action referred to in a sentence occurred before another action referred to in the sentence.”²⁸ (Emphasis original). As authority, Appellant cites the *Chicago Guide to Grammar, Usage, and Punctuation*²⁹ and to the case of *Whitehall Oil Co. v. Boagni*³⁰ for the assertion that “has been declared” expresses the requirement that the storm system must be declared a hurricane at some point, without any specification of a particular time requirement for that duration.³¹ Appellant’s explanation appears to indicate that the use of the present perfect tense in the definition of Hurricane Duration allows for flexibility as to what order storm conditions must manifest for the HDD to be triggered. Based on that interpretation, Appellant avers that the HDD is triggered

²⁸ Appellant’s *Request for Administrative Hearing*, p. 8.

²⁹ BRYAN GARNER, *CHICAGO GUIDE TO GRAMMAR, USAGE, AND PUNCTUATION* (2016).

³⁰ 217 So.2d 707, 714 (La. Ct. App. 1969).

³¹ Appellant’s *Request for Administrative Hearing*, p. 9.

once the storm system is declared a hurricane, and that the HDD applies to damages that occur from the time a hurricane watch or warning was issued.

This tribunal finds the language of the Hurricane Duration definition is not sufficiently specific to exclude the application of any of the various interpretations described herein. Because the HDD definition is subject to more than one reasonable interpretation, it is an ambiguous clause in Appellant's policy endorsement. The rule of strict construction requires that ambiguous policy provisions be construed against Appellant, who issued the policy, in favor of coverage to the policyholders.³² The tribunal finds further that the interpretations by the Commissioner and Appellant are both reasonable, particularly in light of the edict that the language must be interpreted in accordance with the general, ordinary, plain and popular meaning of the words, unless the words have acquired a technical meaning.³³ Appellant did not allege that the Hurricane Duration definition has acquired a technical meaning.

The administrative process examines whether the Commissioner's action in issuing the Order was arbitrary, capricious, or an abuse of his discretion.³⁴ The Order was precipitated by investigation and deliberation LDI's senior staff after complaints were filed by Appellant's policyholders. The Order was not arbitrary or capricious because it was based on the findings of the investigation as conducted by LDI, and after extensive communication with Appellant's representatives. The Commissioner's interpretation of the phrase "has been declared" to mean the HDD only applies to damages that occur after a hurricane is declared is reasonable, rather than random choice or personal whim. The chronology of necessary events required by the Commissioner's interpretation were supplied by documentary evidence of the escalating nature of the storm system that became Hurricane Barry. The Order is not an abuse of discretion in that

³² *Smith v. Matthews*, 611 So.2d 1377, 1379 (La.1993).

³³ Louisiana Civil Code article 2047; *Breland v. Schilling*, 550 So. 2d 609, 610 (La. 1989).

³⁴ *Devillier, supra*.

the Commissioner's interpretation of the relevant definition is not clearly wrong, manifestly erroneous, or such an abuse that it shocks the conscience of the court. It follows that the Order, which imposes the Commissioner's interpretation of the definition of Hurricane Duration upon Appellant, must be affirmed.

ORDER

IT IS ORDERED that the *Cease and Desist Order and Notice of Proposed Regulatory Action* issued by the Louisiana Department of Insurance on August 20, 2019, is **AFFIRMED**.

Rendered and signed on December 30, 2021 in Baton Rouge, Louisiana.

NOTICE OF TRANSMISSION OF DECISION OR ORDER

I certify that on Monday, January 03, 2022, I have sent a copy of this decision/order to all parties of this matter.

Clerk of Court
Division of Administrative Law



Patrick E. Moore
Administrative Law Judge
Division of Administrative Law

REVIEW RIGHTS

This decision exhausts your administrative remedies. If you are dissatisfied with this ruling, you may have the right to seek a rehearing or reconsideration of this decision or order, subject to the grounds for and time limitations provided in Louisiana Revised Statute 49:959 and Louisiana Code of Civil Procedure article 5059. To determine your review rights, you should act promptly and seek legal advice.

To request a rehearing or reconsideration, please send it to one of the addresses listed below:

EMAIL documents to:
INSprocessing@adminlaw.la.gov

FAX documents to:
INS Processing
(225) 219-9820

MAIL documents to:
INS Processing
P. O. Box 44033
Baton Rouge, LA 70804-4033

If you do not request a rehearing of your decision or your rehearing request is denied, you have the right to seek judicial review in accordance with La. R.S. 22:2205, La. R.S. 49:964, and La. C.C.P. art 5059. To determine your review rights, you should act promptly and seek legal advice.