

CAUSE NO. 10CV3828

RICHARD CHENEY & BERNICE CHENEY,
Plaintiffs,

v.

TEXAS WINDSTORM INSURANCE ASSOCIATION,
Defendant,

IN THE DISTRICT COURT OF

GALVESTON COUNTY, TEXAS

10th JUDICIAL DISTRICT

10 OCT -14 PM 4:47
District Clerk
Handwritten signature and date

PLAINTIFFS' ORIGINAL PETITION

Richard Cheney and Bernice Cheney ("Plaintiffs") file this *Plaintiffs' Original Petition*, complaining of Texas Windstorm Insurance Association ("Defendant"), and would respectfully show as follows:

I.
DISCOVERY CONTROL PLAN

1. Plaintiffs request that discovery in this case be conducted under the provisions of Texas Rule of Civil Procedure 190.4 (Level 3), and request that the Court enter an appropriate scheduling order.

II.
PARTIES

- 2. Plaintiffs are individuals residing in Galveston County, Texas.
- 3. Defendant is an insurance company domiciled in Texas and engaged in the business of insurance in Texas. This Defendant may be served with process through its President or Vice President at 5700 South Mopac Expressway, Bldg E, Suite 530, Austin, TX 78749 or by leaving a copy of the process at this Defendant's home office or principal business office during regular business hours at 5700 South Mopac Expressway Suite 530, Bldg E, Austin TX 78749.

Handwritten initials

Status Conference - 02/08/2014

10 - CV - 3828
OCORPET
Original Petition - oca

10-8-2010 Issued 1 O/C Citation @ 8.00
mailed to Atty with Status Conference LS

4. The Clerk is requested to issue Citation.

III.
JURISDICTION AND VENUE

5. This Court has jurisdiction over this case because the amount in controversy is within the jurisdictional limits of the Court, and because the events giving rise to Plaintiffs' claims occurred in this jurisdiction.
6. This Court has jurisdiction over Defendant because Defendant is domiciled in Texas, because Defendant committed a tort in Texas, and because Defendant engages in the business of insurance in Texas.
7. Venue is proper in this county because the property at issue in this case is in this county, and because the events giving rise to this lawsuit occurred in this county.

IV.
FACTS

8. On September 13, 2008, Plaintiffs owned certain real property with improvements and personal property located at 9 Harbor Lane, Kemah, TX 77565 (the "Property"), which was insured by insurance policy number 31392506, issued by Defendant (the "Policy").
9. On September 13, 2008, Hurricane Ike struck Southeast Texas, causing severe damage to the Property.
10. After Hurricane Ike, Plaintiffs made a claim (claim no. C0098096) and demand for payment on Defendant for damages to the Property and other damages covered by the terms of the Policy (the "Claim").
11. Defendant failed to comply with the Policy, the Texas Insurance Code, and Texas law in handling Plaintiffs' claim. Further, Defendant has refused to pay all amounts due and owing

under the Policy for the Claim.

12. Plaintiffs have complied with any and all of Plaintiffs' obligations under the Policy.

V.
CAUSES OF ACTION

A. Count One: Breach of Contract.

13. The Policy is a valid, binding and enforceable contract between Plaintiffs and Defendant. Defendant breached the contract by refusing to perform its obligations under the terms of the Policy and pursuant to Texas law. Defendant's breach proximately caused Plaintiffs' injuries and damages. All conditions precedent required under the Policy have been performed, excused, waived or otherwise satisfied by Plaintiffs.

B. Count Two: Unfair Settlement Practices.

14. Defendant violated TEX. INS. CODE. § 541.060(a) by engaging in Unfair Settlement Practices.
15. Defendant engaged in Unfair Settlement Practices by:
- a) Misrepresenting to Plaintiffs material facts or policy provisions relating to the coverage at issue;
 - b) Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the Claim, even though Defendant's liability under the Policy was reasonably clear;
 - c) Failing to promptly provide Plaintiffs with a reasonable explanation of the basis in the Policy, in relation to the facts or applicable law for Defendant's denial of the Claim or offer of a compromise settlement of the Claim;
 - d) Failing within a reasonable time to affirm or deny coverage of the Claim to Plaintiffs or to submit a reservation of rights to Plaintiffs; and/or
 - e) Refusing to pay Plaintiffs' Claim without conducting a reasonable investigation with respect to the Claim.
16. Each of the foregoing unfair settlement practices was completed knowingly by Defendant, and was a producing cause of Plaintiffs' injuries and damages.

C. Count Three: Prompt Payment of Claims.

17. The Claim is a claim under an insurance policy with Defendant, of which Plaintiffs gave Defendant proper notice. Defendant is liable for the Claim. Defendant violated the prompt payment of claims provisions of TEX. INS. CODE § 542.051, *et seq.* by:

- a) Failing to acknowledge receipt of the Claim, commence investigation of the Claim, and/or request from Plaintiffs all items, statements, and forms that Defendant reasonably believed would be required within the time constraints provided by TEX. INS. CODE § 542.055;
- b) Failing to notify Plaintiffs in writing of its acceptance or rejection of the Claim within the applicable time constraints provided by TEX. INS. CODE § 542.056; and/or by
- c) Delaying payment of the Claim following Defendant's receipt of all items, statements, and forms reasonably requested and required, longer than the amount of time provided by TEX. INS. CODE § 542.058.

D. Count Four: Breach of the Duty of Good Faith and Fair Dealing/Bad Faith.

18. Defendant breached the common law duty of good faith and fair dealing owed to Plaintiffs by denying or delaying payment on the Claim when Defendant knew or should have know that liability was reasonably clear. Defendant's conduct proximately caused Plaintiffs injuries and damages.

E. Count Five: Violations of the Texas Deceptive Trade Practices Act.

19. Defendant's conduct violated the Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE § 17.41, *et seq.* ("D.T.P.A.") by engaging in "false, misleading or deceptive acts and practices."

20. Plaintiffs are "consumers" in that Plaintiffs acquired goods and/or services by purchase, and the goods and/or services form the basis of this action.

21. Defendant committed numerous violations of the D.T.P.A., insofar as Defendant:

- a) Represented that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have;
 - b) Represented that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
 - c) Failed to disclose information concerning goods or services which was known at the time of the transaction when such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;
 - d) Generally engaged in unconscionable courses of action while handling the Claim; and/or
 - e) Violated the provisions of the Texas Insurance Code described herein.
22. Defendant took advantage of Plaintiffs' lack of knowledge, ability, experience or capacity to a grossly unfair degree and to Plaintiffs' detriment. Defendant's acts also resulted in a gross disparity between the value received and the consideration paid in a transaction involving the transfer of consideration. As a result of the Defendant's violations of the D.T.P.A., Plaintiffs suffered actual damages. In addition, Defendant committed the above acts knowingly and/or intentionally, entitling Plaintiffs to three times Plaintiffs' damages for economic relief and mental anguish.

F. Count Six: Common Law Fraud.

23. Defendant knowingly or recklessly made false representations as to material facts and/or knowingly concealed all or part of material information from Plaintiffs with the intent of inducing Plaintiffs to accept a denial and/or underpayment of insurance benefits. Defendant allowed Plaintiffs to use this information, or lack thereof, in justifiable reliance in accepting the denial and/or underpayment. Plaintiffs relied upon said statements in accepting the denial and/or underpayment for the Claim, and suffered injury as a result.

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