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COZEN O'CONNOR

IN Catastrophes: Preparing for Hurricane Matthew Claims in the Carolinas

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Thousands of homes and other buildings both on the coast and in the interior of the Carolinas have been damaged or destroyed by Hurricane Matthew, and ongoing flooding continues to cause damage and hinder recovery efforts. By Major Disaster Declarations dated October 10, 2016 and October 11, 2016, President Obama has declared 34 North Carolina counties and 14 South Carolina counties eligible for some form of federal disaster assistance. Preliminary damage estimates place the expected costs of Hurricane Matthew to be in the billions of dollars.

As the insurance industry handles Hurricane Matthew claims in the Carolinas, insurers should be mindful of primary-claims handling and other potentially relevant requirements in both North and South Carolina, the effects that either of the state's issuance of emergency orders could have on an insurer's handling of a claim, and a summary overview of each state's legal framework for a first-party bad faith claim.

North Carolina

The first subsection below addresses the effects of the North Carolina Insurance Commissioner's emergency mandates to date, as well as the potential effects future orders issued by the commissioner may have on the claims handling process. The remaining North Carolina subsections discuss general rules that apply to the claims handling process absent modification by the commissioner due to the unique circumstances presented by Matthew.

The Effects of Emergency Orders

Disaster-Related Mediation

The North Carolina Commissioner of Insurance issued an order on October 12, 2016, initiating the disaster-related mediation procedure authorized by North Carolina's Mediation of Emergency or Disaster-Related Property Insurance Claims Act, N.C. Gen. Stat. §§ 58-44-70, *et seq.* (the Mediation Act).

The Mediation Act provides for a non-adversarial alternative dispute resolution procedure intended to promote an effective, fair, and timely resolution of **residential** property damage claims caused by significant disaster-related events, such as Hurricane Matthew. The Mediation Act does not apply to commercial insurance, motor vehicle insurance, or liability coverage. It only applies to first-party residential property coverage. N.C. Gen. Stat. § 58-44-70(b).

In order to be eligible for the statutorily provided mediation conference: (1) the claim must arise from a disaster, (2) the insurer must have denied payment in whole or in part, (3) there must be a dispute relating to the cause or amount of loss, and (4) the total amount in dispute must be $1,500 or greater, unless the parties agree to mediate a dispute involving a lesser amount. N.C. Gen. Stat. § 58-44-75(3). Additionally, an insured must request mediation within 60 days of his or her claim being denied or the right to mediation is lost. N.C. Gen. Stat. § 58-44-85(a).

Because insureds are required to request the mediation, insurers are required to provide insureds involved in disputed claims notice of the mediation program in the template form attached to the commissioner's order titled "Notification of the Right to Mediate Residential Property Disaster Insurance Claim." *See also* N.C. Gen. Stat. § 58-44-80. An insurer is required to provide such notice within five days of being notified of a disputed claim and, if the insurer has not been notified of a disputed claim prior to notifying the insured that his or her claim is being denied in whole or in part, the insurer is required to mail the mediation notice to the insured in the same mailing as the

denial. *Id.*

The Mediation Act includes statutory mandates relating to the scheduling and conducting of the mediation and the payment of mediation fees. Therefore, insurers should familiarize themselves with the Act in its entirety promptly upon receipt of an insured's request for mediation and develop procedures for responding to such requests.

Automatic Stay of Proof of Loss Requirements and Deferral of Certain Other Policy Related Deadlines

The North Carolina Insurance Commissioner also has the authority to issue an order automatically staying proof of loss requirements for Hurricane Matthew claims for a temporary time period pursuant to N.C. Gen. Stat. § 58-2-46(1). On October 12, 2016, the commissioner issued an order exercising the authority provided to him by Section 58-2-46(1). Pursuant to this order, all proof of loss requirements for claims arising in the 31 most affected North Carolina counties are automatically stayed for a period of 90 days.

This order also provides for the deferral of certain premium, debt, and other policy related deadlines pursuant to N.C. Gen. Stat. § 58-2-46(2). Specifically, insurers are required to give their customers who reside within the geographic area designated in the disaster declaration the option of deferring premium or debt payments that are due during the earlier of the time period covered by the disaster declaration or the time period prior to the expiration of the commissioner's order on January 10, 2017. *Id.* The deferral period is 30 days from the last day the premium or debt payment may be made under the terms of the policy. *Id.* This deferral period also applies to any statute, rule, or other policy provision that imposes a time limit on an insurer, insured, claimant, or customer to perform any act during the time period covered by the disaster declaration, with respect to policies when the insurer, insured, claimant, or customer resides or is located in the disaster area. *Id.* It also applies to any time limitations imposed on insurers under the terms of a policy or provision of law related to individuals who reside within the geographic area designated in the declaration. *Id.* The commissioner may extend this deferral period if he deems it necessary to do so in the future. *Id.*

Because the commissioner could extend the effective period of this order or the duration of the deferral period discussed above, careful attention should be paid to any future orders issued by the commissioner relating to Hurricane Matthew or the handling of Hurricane Matthew related claims as they may further impact the general claims handling rules discussed below.

Proof of Loss Requirements

Blank Proof of Loss Forms Should Be Provided

When an insurer requires written proof of loss forms after receiving notice of a claim, North Carolina law generally requires that the insurer furnish blank proof of loss forms to the insured within 15 days after receiving notice of the claim. N.C. Gen. Stat. § 58-3-40.

If the insurer does not provide the blank forms in a timely manner, the insured is deemed to be in compliance with the policy's proof of loss requirements so long as the insured submits written documentation covering the occurrence, character, and extent of the loss for which the claim is made within the timeframe required for proof of loss submission. *See* N.C. Gen. Stat. § 58-3-40.

Enforcement and Waiver

Assuming the insurer provided the blank proof of loss forms as required, the insured's compliance with the requirements for filing proof of loss forms is generally a prerequisite to an insured's recovery under the policy in North Carolina. *See Brandon v. Nationwide Mut. Fire Ins. Co.*, 271 S.E.2d 380, 382 (N.C. 1980). If, however, the insured failed to comply with the proof of loss requirements for good cause, and the insured's failure to comply with the proof of loss requirements did not prejudice the insurer, the insurer is not relieved from its indemnity obligation under the policy because of the insured's failure to satisfy the proof of loss requirements. *See* N.C. Gen. Stat. § 58-44-50; *Smith v. N.C. Farm Bur. Mut. Ins. Co.*, 351 S.E.2d 774, 776 (N.C. App. 1987). The insured bears the burden of showing that he or she had good cause for failing to submit the proofs in a timely manner before the insurer must show that it was prejudiced or substantially

harmed by the insured's failure in this regard. *See Smith*, 351 S.E.2d at 777-778.

As for waiver, proof of loss requirements are for the benefit of the insurer, and, therefore, the requirements can be "waived by any conduct on the part of the insurer or an authorized agent inconsistent with an intention to enforce strict compliance." *Brandon*, 271 S.E.2d at 383. Generally, the waiver is not effectuated by a single act; but, rather, by a series of acts or a course of conduct inconsistent with an intention to enforce the proof of loss requirements. "Some of the relevant factors to consider are: (1) whether the insurer had actual knowledge of the loss, (2) whether an agent or adjuster made representations to the insured indicating that no proofs need be filed, and (3) whether the insurer made partial payment or otherwise indicated a recognition of liability by providing assurances that an adjustment would be made." *Lloyd v. Grain Dealers Mut. Ins. Co.*, 645 S.E.2d 230 * 2 (N.C. App. 2007) (unpublished opinion).

As discussed above, however, the North Carolina Commissioner of Insurance has issued an order automatically staying the proof of loss requirements for insureds in the disaster area for a temporary time period. Therefore, insurers handling Hurricane Matthew claims should carefully consider that order and any subsequent orders issued by the commissioner relating to such proof of loss requirements prior to the denial of any claim on proof of loss related grounds.

Other Claims Handling Time Limits

Reasonably Prompt Acknowledgment Required

In North Carolina, insurers are obligated to acknowledge and act upon communications with respect to claims in a "reasonably prompt" manner. N.C. Gen. Stat. § 58-63-15(11)(b). What is a "reasonable" time period will depend on the particular facts and circumstances relating to the claim.

Time Period for Tendering Payments

Property insurers are generally required by regulation to mail or otherwise deliver loss and claim payments for North Carolina claims within 10 business days of the claim being settled. 11 N.C. Admin. Code 4.0421(1).

Bad Faith Exposure

North Carolina has an Unfair Claims Settlement Practices Act, N.C. Gen. Stat. § 58-63-15(11), that prohibits insurers from engaging in such conduct as: (1) failing to acknowledge and respond with reasonable promptness to claim communications, (2) failing to conduct a reasonable investigation or unnecessarily delaying the investigation by requiring the insured to repeatedly submit the same information, (3) not attempting in good faith to effectuate the prompt, fair, and equitable settlement of claims in which liability has become reasonably clear, (4) withholding undisputed funds or offering to settle claims for an amount less than the amount reasonably due or payable, and (5) failing to provide a prompt and clear explanation as to the coverage under which a payment is being made or the reasons for a denial or refusal to settle. A violation of this statute is considered an unfair or deceptive act or practice in violation of North Carolina's Unfair and Deceptive Trade Practices Act as a matter of law. *See* N.C. Gen. Stat. §§ 75-1.1, *et seq.*; and *Gray v. N.C. Ins. Underwriting Ass'n*, 529 S.E.2d 676 (N.C. 2000). An insured that prevails on an unfair and deceptive trade practice claim is automatically entitled to treble their compensatory damages proximately caused by the insurer's unfair or deceptive act or practice as a matter of law, and may also be entitled to recover his or her attorneys' fees. *See*, e.g., N.C. Gen. Stat. §§ 75-16, 75-16.1.

Insureds in North Carolina are also able to pursue a common law tort bad faith claim in the first-party context. In order to prevail on such a claim, the insured must show that there was: "(1) a refusal to pay after recognition of a valid claim, (2) bad faith, and (3) aggravating or outrageous conduct." *See*, e.g., *Lovell v. Nationwide Mut. Ins. Co.*, 424 S.E.2d 181, 184 (N.C. 1993). "Bad faith" means "not based on honest disagreement or innocent mistake." *Id.* at 185. "Aggravated or outrageous conduct" means conduct amounting to "fraud, malice, gross negligence, insult, rudeness, oppression, or wanton and reckless disregard of [the insured's] rights." *Id.* An insured that prevails on such a claim can recover consequential and punitive damages, if the bad faith conduct is sufficiently egregious to constitute fraud, malice, or willful or wanton conduct; but any punitive damages award is capped at three times the amount of compensatory damages or

$250,000, whichever is greater. N.C. Gen. Stat. §§ 1D-15; 1D-25(b).

South Carolina

The first subsection below addresses the effects of the South Carolina Director of Insurance's emergency mandates to date, as well as the potential effects future orders issued by the director may have on the claims handling process. The remaining South Carolina subsections discuss general rules that apply to the claims handling process absent modification by the director due to the unique circumstances presented by Matthew.

The Effects of Emergency Orders

The director entered Emergency Order No. 2016-EO-001 and issued Regulation 69-78 on October 8, 2016. These documents should be read in their entirety because they include items that are not discussed within this article, such as, among other things, regulations relating to a 60 day moratorium on cancellations due to non-payment of premium and non-renewals, methods of payment for claims, premium offsets, and waiver of certain interest, penalties, and fees. For purposes of this article the most pertinent sections of these documents are as follows.

Disaster-Related Mediation

The director's order does not establish a mediation program; however, it states that the director may establish such a program by way of a subsequent order or amendment that will also set forth the rules and requirements applicable to any such program he may enact. S.C. Dep't of Ins. Emergency Order No. 2016-EO-001, Exb. 2, Section 9.

Exceptions to Policy Requirements or Underwriting Decisions for Impacted Insureds

The director's order mandates that insurers "shall" consider exceptions to the insurance contract or underwriting requirements for insureds displaced or directly impacted by Hurricane Matthew, including, but not limited to: (1) an extension of proof of loss deadlines, (2) waivers of limitations relating to the use of out-of-network providers, and (3) insureds that may be temporarily unable to receive or timely act in response to notices regarding underwriting decisions. S.C. Dep't of Ins. Emergency Order No. 2016-EO-001, Exb. 2, Section 5.

Insurers are also barred from considering any request from an insured for a letter documenting that coverage does not exist for Hurricane Matthew related damage that is made for the express purpose of including the letter in an application for governmental assistance as a claim or a claim inquiry for purposes of rating, underwriting, or reporting to a third-party claims history database. *Id.*

Copy of Policy to be Provided at No Cost

The director's order mandates that an insurer shall provide a copy of any requested policy at no cost to the insured within 15 calendar days of receiving a written request, if the insured has been displaced as a result of or otherwise directly impacted by Hurricane Matthew. S.C. Dep't of Ins. Emergency Order No. 2016-EO-001, Exb. 2, Section 8.

Adjustment and Settlement of Claims

South Carolina has an Improper Claims Practices Act, S.C. Code Ann. § 38-59-20, similar to North Carolina's Unfair Claims Settlement Practices Act discussed above. Pursuant to this Act, the director's order states that insurers addressing Hurricane Matthew claims should:

1. Promptly establish contact with the claimant;
2. Promptly survey and assess the claimant's damage;
3. Accurately and completely respond to Department of Insurance inquiries;
4. Promptly inform claimants of any documents that must be submitted to evaluate or process a claim;
5. Provide prompt and accurate response to claimants;
6. Provide prompt payment for additional living expenses and temporary repairs after the

assessment of the insured's or claimant's damage; and
7. Promptly set appointments with the claimant for examination and resolution of claim matters.

S.C. Dep't of Ins. Emergency Order No. 2016-EO-001, Exb. 2, Section 9. However, it is important to note that the South Carolina Improper Claims Practices Act, and presumably this related regulation, does not create a private right of action on the part of individual insureds against their insurers. *See Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Co.*, 241 F. Supp.2d 572, 578 (D.S.C. 2002).

Proof of Loss Requirements

Blank Proof of Loss Forms Should Be Provided

When an insurer requires written proof of loss forms after receiving notice of a claim, South Carolina law requires that the insurer furnish blank proof of loss forms to the insured within 20 days after receiving notice of the claim. S.C. Code Ann. § 38-59-10.

If the insurer does not provide the blank forms in a timely manner, the insured is deemed to be in compliance with the policy's proof of loss requirements so long as the insured submits written documentation covering the occurrence, character, and extent of the loss for which the claim is made within the timeframe set forth in the policy for proof of loss submission. *See* S.C. Code Ann. § 38-59-10; *Williams v. S.C. Farm Bureau Mut. Ins. Co.*, 168 S.E.2d 794, 797 (S.C. 1969) (holding that, where the insurer failed to provide blank proof of loss forms, the insured's initial written claim notice was a sufficient substitute for submission of a proof of loss form because it provided information relating to the occurrence, character, and extent of the loss).

Enforcement and Waiver

Presuming that the insurer provided blank forms to the insured as statutorily mandated, the insured's compliance with a policy's proof of loss requirements is generally a prerequisite to an insured's recovery in South Carolina. Nevertheless, "substantial compliance is all that is necessary." *Compare Travelers Fire Ins. Co. v. Frady*, 180 F.2d 339, 341 (4th Cir. 1950) (holding that invoices provided by the insured showing the value of the potentially lost property along with information from the insured relating to the nature and cause of loss substantially complied with the policy's proof of loss requirements); *with Crawford v. Powers*, 419 F. Supp. 723, 729 (D.S.C. 1974) (holding that a complete failure of the named insureds to comply with the proof of loss requirements barred their claims). Notably, the specific issue of whether an insurer in the first-party context is required to show substantial prejudice prior to denying a claim based on the insured's failure to substantially comply with the proof of loss requirements still remains an undecided question.

Like in North Carolina, the failure of an insured to file or timely file proofs of loss can be waived by an insurer in South Carolina as a result of conduct on the part of the insurer or its authorized agents that is inconsistent with an intention to enforce strict compliance with the proof of loss requirements, such as conducting a complete investigation of the claim or denying the claim on other, alternative grounds. *Hatcher v. Harleysville Mut. Ins. Co.,* 225 S.E.2d 181, 184 (S.C. 1976).

It should also be noted that, as discussed above, the South Carolina Director of Insurance has ordered that insurers "shall" consider exceptions to the insurance contract's requirements for insureds displaced or directly impacted by Hurricane Matthew, including but not limited to extensions of deadlines applicable to proofs of loss. Thus, prior to denying any Hurricane Matthew related claim on proof of loss grounds, the insurer should carefully consider the insured's situation during the applicable time period and whether or not to grant the insured an extension of the proof of loss filing deadline.

Other Claims Handling Time Limits

Reasonably Prompt Acknowledgment Required

In South Carolina, insurers are obligated to acknowledge and act upon communications with respect to claims in a "reasonably prompt" manner. S.C. Code Ann. § 38-59-20(2). What is a "reasonable" time period will depend on the particular facts and circumstances relating to the

claim.

Time Period for Tendering Payments

Property insurers are simply required to "promptly" pay settled claims in South Carolina. S.C. Code Ann. § 38-59-20(4).

Bad Faith Exposure

As set forth above, the South Carolina Improper Claims Practices Act does not create a private right of action on the part of individual insureds against insurers. Therefore, an insured is only able to assert a common law tort bad faith claim against its insurer in South Carolina. Such claims are allowed in both the first- and third-party context under South Carolina law. While the tort bad faith claim standards technically vary depending on the nature of the claim – i.e., failure to reasonably investigate, improper claims handling, wrongful denial of coverage – in essence, any "bad faith or unreasonable action in processing a claim" can support a tort action in South Carolina separate and apart from a contract action relating to a policy. *Nichols v. State Farm Mut. Auto Ins. Co.*, 306 S.E.2d 616, 619 (S.C. 1983); *Tadlock Painting Co. v. Maryland Cas. Co.*, 473 S.E.2d 52, 53 (S.C. 1996). What is considered "bad faith" or "unreasonable" in any given situation is a fact-driven inquiry that depends on the circumstances applicable to the individual claim at issue. However, whether an insurer has standardized, published claims investigation and handling procedures, and whether the insurer and its representatives followed those procedures in handling the claim at issue is important to a South Carolina bad faith analysis. *See,* e.g., *Crossley v. State Farm Mut. Auto. Ins. Co.*, 415 S.E.2d 393, 397 (S.C. 1992). If an insurer fulfills its obligation to investigate the insured's claim in good faith and in accordance with its claims investigation and handling procedures, and that investigation reveals a reasonable ground for contesting or denying the claim, no bad faith action should lie. *Id.*

Policy benefits, consequential damages, attorneys' fees, and punitive damages are potentially recoverable for bad faith actions in South Carolina. *See,* e.g.*, Nichols*, 306 S.E.2d at 619; S.C. Code Ann. § 38-59-40 (allowing for attorneys' fees in an amount equal to 1/3 of the judgment in bad faith cases); *Hegler v. Gulf Ins. Co.*, 243 S.E.2d 443 (S.C. 1978) (an insured who successfully asserts his or her rights in a declaratory judgment action is entitled to recover attorneys' fees).

Take-Home Points and Conclusion

Hurricane Matthew was an extraordinary event that has caused devastation of an unprecedented level in many North and South Carolina counties. As such, the Departments of Insurance in both states have taken action to provide additional safeguards for insureds and assist, when possible, in their recovery. Insurers should therefore review those regulatory actions and any other actions the Departments of Insurance may take in the coming weeks and months relating to Hurricane Matthew as necessary to ensure that their claims handling procedures are in regulatory compliance. Insurers should also be mindful of the general rules applicable to the claims handling process absent any regulatory modification, as well as the ever-present risk of bad faith exposure, in order to best address the thousands of Hurricane Matthew claims that are being made and will be made in the coming days.