

No. 11-0587

**OFFICIAL ORDER
of the
COMMISSIONER OF INSURANCE
of the
STATE OF TEXAS
AUSTIN, TEXAS**

Date: July 15, 2011

Subjects Considered:

TEXAS WINDSTORM INSURANCE ASSOCIATION
5700 South MoPac Expressway
Building E, Suite 530
Austin, TX 78749

TEXAS FAIR PLAN ASSOCIATION
5700 South MoPac Expressway
Building E, Suite 530
Austin, Texas 78749

CONSENT ORDER

TDI Enforcement File Nos. 55996, 56422, 57381, 56415
SOAH Docket Nos. 454-09-6187.C, 454-11-3677.C, 454-11-0827.C, and 454-11-0247.C

General remarks and official action taken:

On this date came on for consideration by the Commissioner of Insurance ("Commissioner"), the Texas Department of Insurance's ("Department"/"TDI") complaints against the Texas Windstorm Insurance Association ("TWIA") and Texas FAIR Plan Association ("TFPA"). The Department alleges that TWIA and TFPA violated the insurance laws of the State of Texas and that such conduct constitutes grounds for disciplinary action pursuant to TEX. INS. CODE ANN. §§ 82.051-82.055 and 84.021-84.044.

The parties, by their respective signatures hereto, announce that they have compromised and settled all claims and agree, pursuant to TEX. INS. CODE ANN. § 82.055, to the entry of this Consent Order. The parties request the Commissioner of Insurance to informally dispose of this case pursuant to the provisions of TEX. GOV'T CODE ANN. § 2001.056, TEX. INS. CODE ANN. § 82.055 and 28 TEX. ADMIN. CODE § 1.47.

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JURISDICTION

The Commissioner of Insurance has jurisdiction over this matter pursuant to TEX. INS. CODE ANN. Chs. 541, 542, 2210, and 2211; TEX. INS. CODE ANN. §§ 82.051-82.056 and 84.021-84.022; 28 TEX. ADMIN. CODE §§ 5.4001-5.4800 and 5.9910-5.9929; and TEX. GOV'T CODE ANN. §§ 2001.051-2001.178.

WAIVER

TDI's Notices of Public Hearing (and any amendments or supplements thereto) in the above-referenced Enforcement Files relating to the prompt payment of claims and the handling of roof claims, and TDI's 7/21/2010 Notice of Intention to Initiate Disciplinary Action relating to General Contractors' Overhead and Profit are incorporated herein for the sole purpose of defining the "Scope of Complaint." As part of the "Scope of Complaint," TDI acknowledges and agrees that the subject matter of following investigations are closed without further enforcement action: TDI's 7/21/2010 Notice of Intention to Initiate Disciplinary Action relating to General Contractors' Overhead and Profit in regard to TWIA, TDI's investigation of General Contractors' Overhead and Profit in regard to TFPA.

TWIA and TFPA acknowledge the existence of certain rights provided by the Texas Insurance Code and other applicable law, including the right to a public hearing, a proposal for decision, rehearing by the Commissioner of Insurance and judicial review. With respect to the Scope of Complaint only, TWIA and TFPA waive all of these rights, as well as any other procedural rights that might otherwise apply, in consideration of the entry of this Consent Order. This Consent Order represents a full and final settlement of all claims under Tex. Ins. Code Chapters 541 and 542 related to the Scope of Complaint. This Consent Order does not limit any policyholder rights under the policy, including the right to bring suit individually for any policy benefits or damages not compensated under this Consent Order.

FINDINGS OF FACT

The Commissioner makes the following agreed Findings of Fact:

1. TWIA is an unincorporated association created under TEX. INS. CODE ANN. Ch. 2210 for the purpose of providing windstorm and hail insurance on insurable property located in the designated catastrophe area as provided in Ch. 2210.
2. TFPA is an unincorporated association created under TEX. INS. CODE ANN. Ch. 2211 for the purpose of providing residential property insurance for Texas residents in underserved areas as provided in Ch. 2211.
3. Pursuant to TEX. INS. CODE ANN. § 82.055(b), TWIA and TFPA do not admit to a violation of the Texas Insurance Code or violation of a rule or regulation of TDI and

agree to informal disposition with the express reservation that the existence of a violation is in dispute. Liability is expressly denied by TWIA and TFPA.

4. This Consent Order only resolves TDI's allegations and investigations regarding TWIA and TFPA's conduct prior to the date of this Order relating to the Scope of Complaint.
5. In July of 2008, Hurricane Dolly hit the gulf coast of Texas.
6. In September of 2008, Hurricane Ike hit the gulf coast of Texas.

Prompt Payment of Claims

7. TEX. INS. CODE ANN. § 542.055(b) states, "An insurer may make additional requests for information if during the investigation of the claim the additional requests are necessary." TDI interprets this section to refer to additional requests made only to the claimant.
8. TEX. INS. CODE ANN. § 542.056(a) states, "Except as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss." TDI interprets this section to refer to items, statements, and forms required by the insurer from the claimant only.
9. TEX. INS. CODE ANN. § 542.058(a) states, "Except as otherwise provided, if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statutes do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060." TDI interprets this section to refer to items, statements, and forms reasonably requested and required from the claimant only.
10. TWIA and TFPA disagree with TDI's interpretations of TEX. INS. CODE ANN. §§ 542.055(b), 542.056(a) and 542.058(a) as set out in Findings of Fact Nos. 7, 8, 9 herein and deny any violation of the prompt pay statute; however, in consideration of the informal disposition agreed in this Consent Order, TWIA and TFPA agree to process claims consistently with TDI's interpretation; that is, based on deadlines that run from receipt of requested items, statements and forms from the claimant or the claimant's representative. Nothing in this agreement shall prevent TWIA or TFPA from adjusting its claim processing policy to conform to any statutory changes to TEX. INS. CODE ANN. Chapter 542, Subchapter B, or any opinions issued by any Texas court or agency of competent jurisdiction in regard to the construction of TEX. INS. CODE ANN. Chapter 542, Subchapter B. Nothing in this agreement shall prevent TWIA or TFPA from

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challenging the construction of TEX. INS. CODE ANN. Chapter 542, Subchapter B in any civil lawsuit.

11. TWIA and TFPA agree to implement adjuster and examiner training and issue clarifications in the claims manual concerning prompt payment of claims consistent with its agreement in Finding of Fact No. 10 herein.
12. TWIA and TFPA agree to implement technological upgrades and claim process changes to improve claim status tracking, follow-up with adjusters, and compliance with prompt payment of claims deadlines.
13. In 2009, TDI conducted an audit of TWIA Hurricane Ike claims. Of a sample of approximately 400 claims reviewed, approximately 17 claims were identified by TDI as having been paid after the deadlines imposed by TEX. INS. CODE ANN. Ch. 542, Subchapter B. TWIA denies TDI's allegation of non-compliance with deadlines imposed by TEX. INS. CODE ANN. Ch. 542, Subchapter B or Tex. Ins. Code 541.060(a).
14. Additionally, as of August 31, 2010, TDI has received approximately 593 complaints against TWIA from policyholders alleging delays in Hurricane Ike claims payment that TDI's Consumer Protection Division classified as "justified." There are bona fide disputes between the parties as to which of these were paid after deadlines imposed by Tex. Ins. Code Ann. Ch. 542 or Tex. Ins. Code 541.060(a).
15. As of April 19, 2010, TDI has received approximately 114 complaints against TFPA from policyholders alleging delays in Hurricane Ike claims payment that TDI's Consumer Protection Division classified as "justified." There are bona fide disputes between the parties as to which of these were paid after deadlines imposed by Tex. Ins. Code Ann. Ch. 542 or Tex. Ins. Code 541.060(a).
16. TWIA and TFPA agree to, within 15 days from the date of this Order, identify all claims wherein the initial claim payment (other than an ALE advance) was made more than 90 days after receipt of the claim (excluding any claims in which a lawsuit, other than SOAH Docket Nos. 454-11-0827.C and 454-11-0247.C, was filed or a demand letter or letter of representation has been received by TWIA or TFPA from an attorney or public adjuster, or that has previously been settled by release, class action settlement, or appraisal award).
17. TWIA and TFPA agree to, within 60 days from the date of this Order, review all claims identified in Finding of Fact 16 and determine whether the payment was made within the period required by TEX. INS. CODE ANN. Ch. 542, Subchapter B, upon receipt of all items, forms and statements required from the policyholder or policyholder's representative. Because the parties agree that there is a bona fide dispute over determination of claim payment deadlines based on receipt of requested items,

statements and forms solely from the claimant, TDI, TWIA and TFPA stipulate that determinations of payment deadlines made under this paragraph are not intended as an admission of a statutory violation, but are merely agreed cut-offs for settlement purposes only.

18. For payments made after the deadline determined under Finding of Fact No. 17, TWIA or TFPA will pay an (additional sum to the policyholder amounting to 18% interest per annum on the amount paid after the deadline determined under Finding of Fact No. 17, calculated as follows¹: $\left(\frac{a}{365}\right) \times .18 \times b$
- Payments required under this paragraph will be made in the form of a credit against either current premium or renewal premium during a one-year period after the date of this Order, not to exceed the full amount of current premium or renewal premium, less agent's commission, on the current or renewal policy. Any payment required under this paragraph that cannot be fully applied as a credit against current or renewal premium during a one-year period after the date of this Order shall be remitted to the policyholder by check. Any payments or credits issued under this paragraph are intended to reflect a compromise of disputed claims with respect to claim processing and payment periods provided in either Tex. Ins. Code Chapters 542 or 541 or the insurance policy.
19. TWIA and TFPA agree to, within 100 days from the date of this Order, provide TDI Enforcement Division, Attn: Catherine Bell, MC 110-1A, P.O. Box 149104, Austin, Texas 78714-9104 with a report of all claim files identified and all payments made under the process described in Findings of Fact Nos. 16, 17 and 18. The report shall include: payee name, claim number, date TWIA or TFPA received notice of the claim, date initial payment was made on the claim, date and amount of payment/credit made under the process described in Finding of Fact Nos. 16, 17 and 18.
20. Within 30 days after receipt of the report required by Finding of Fact No. 19, TDI may audit files in which TWIA or TFPA determined no payment/credit will be made under Finding of Fact No. 18. If TDI disagrees with TWIA or TFPA's determination, TDI may, within 60 days after receipt of the report required by Finding of Fact No. 19, request independent review by an impartial third party who formerly served as a SOAH ALJ, is experienced in insurance claims disputes, and is mutually agreed by the parties. The reviewer shall review the matter on submission and either affirm or reverse the determination made by TWIA or TFPA. The reviewer's decision shall be final, binding and not subject to review. The reviewer's services will be invoiced to and paid by TWIA or TFPA.

¹ Variables defined:

a: number of days between the payment deadline and initial payment
b: amount of payment made after deadline

Unsealed Shingles

21. "Unsealed shingles" for the purposes of this Order are shingles that are partially or totally unsealed but do not exhibit visible creases, cracks, rips, or tears.
22. TWIA and TFPA agree that a sealed shingle that becomes unsealed by a covered windstorm constitutes "direct physical loss" under the TWIA and TFPA policies in effect.
23. TWIA and TFPA agree to implement adjuster and examiner training and issue clarifications in the claims manual and policyholder communications concerning unsealed shingles consistent with their agreement in Finding of Fact 22, providing explicitly that a shingle unsealed by windstorm is covered damage, and that the claims adjuster should investigate and report any evidence of the cause of the unsealing. TWIA and TFPA agree to implement a program of policyholder education regarding unsealed shingles.
24. TWIA and TFPA agree to, within 120 days from the date of this Order, perform the following search for claims in which the insured presented a claim on unsealed shingles and TWIA or TFPA denied the claim using what the 1/4/2011 Amended Proposal for Decision finds are ambiguous denial letters²: Identification of such claims will be accomplished by using each company's existing search capabilities to search electronically using keywords "lifted," "unsealed," "unadhered" or "unglued" or any hyphenated version of any of these words. Searches will be run against the examiner's outgoing correspondence that can be searched across all Hurricane Ike claim files on an automated basis. This paragraph excludes all claims in which (1) a lawsuit or SOAH contested case, other than SOAH Docket Nos. 454-09-6187.C and 454-11-3677.C, was filed, or (2) a demand letter or letter of representation has been received by TWIA or TFPA from an attorney or public adjuster, or (3) that has been settled by release, class action settlement, or appraisal award. Because the parties agree that there are bona fide disputes over determinations of causation, and the reasonableness of related claim denial correspondence, TDI, TWIA and TFPA stipulate that determinations made under this paragraph are not intended as an admission of a statutory or contractual liability, but are merely for settlement purposes only.
 - A. In the event TFPA's existing search capabilities do not enable an electronic search against outgoing correspondence across all Hurricane Ike claim files on an automated basis, TDI and TFPA agree to confer and attempt to reach an

² The Amended Proposal for Decision identifies these letters in PFD Findings of Fact 62-64 as correspondence from claims staff that either directly quoted or substantively paralleled portions of Reggie Warren 2/2/2009 memorandum without clearly distinguishing between the concepts of causation and damage.

alternative search protocol that is mutually agreeable. If no agreement is reached within 30 days from the date of this Order, either TDI or TFPA may request independent review by an impartial third party who formerly served as a SOAH ALJ, is experienced in insurance claims disputes, and is mutually agreed by the parties. The reviewer shall decide on a reasonably comparable alternative search protocol. The reviewer's decision shall be final, binding and not subject to review. The reviewer's services will be invoiced to and paid by TWIA or TFPA.

25. For claims identified pursuant to the process stated in Finding of Fact No. 24 in which the insured presented a claim on unsealed shingles and TWIA or TFPA denied the claim using what the 1/4/2011 Amended Proposal Decision finds are ambiguous denial letters, TWIA or TFPA will review the files individually and pay the policyholder the cost of repair of damage or replacement of the roof as required under the insurance policy, to the extent not already paid. Payments required under this paragraph will be made in the form of a credit against either current premium or renewal premium during a one-year period after the date of this Order. Any payment required under this paragraph that exceeds the full amount of premium or renewal premium (less agent's commission) on the current or renewal policy, or that cannot be fully applied as a credit against current or renewal premium during a one-year period after the date of this Order shall be remitted to the policyholder by check. Any payments or credits issued under this paragraph are intended to reflect a compromise of disputed claims with respect to claim settlement practices required in either Tex. Ins. Code Chapters 542 or 541 or the insurance policy.
26. TWIA and TFPA agree to, within 150 days from the date of this Order, provide TDI Enforcement Division, Attn: Catherine Bell, MC 110-1A, P.O. Box 149104, Austin, Texas 78714-9104 with a report of all claim files identified and all payments made under the process described in Findings of Fact Nos. 24 and 25. The report shall include: payee name, claim number, whether policy benefits were paid for the unsealed shingle claim paid during loss adjustment, date and amount of any payment/credit made under the process described in Finding of Fact Nos. 24 and 25.
27. Within 30 days after receipt of the report required by Finding of Fact No. 26, TDI may audit the search process and files identified by the process stated in Finding of Fact No. 24. If TDI disagrees with TWIA or TFPA's determinations under Findings of Fact Nos. 24 or 25, TDI may, within 60 days after receipt of the report required by Finding of Fact No. 26, request independent review by an impartial third party who formerly served as a SOAH ALJ, is experienced in insurance claims disputes, and is mutually agreed by the parties. The reviewer shall review the matter on submission and either affirm or reverse the determination made by TWIA or TFPA. The reviewer's decision shall be final, binding and not subject to review. The reviewer's services will be invoiced to and paid by TWIA or TFPA.

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28. The Texas Department of Insurance reserves the right to request the Attorney General to bring a class action under Texas Insurance Code Sec. 541.251. TDI further reserves the right to object to a proposed settlement or class certification in any other class action against TWIA or TFPA involving claims regarding unsealed shingles. In any such class action, this Order and TWIA or TFPA's compliance or attempt to comply with this Order are: (1) an offer to compromise, (2) not admissible as evidence, and (3) not an admission of engaging in an act or practice that is unlawful or in violation of the insurance policy. Provided, however, TWIA or TFPA shall receive credits for any payment/credit made under the process described in Findings of Fact Nos. 24 and 25, and the third party reviewer's decisions under the process described in Findings of Fact No. 27 shall be binding. If any such class action is brought by TDI or the Attorney General, TWIA or TFPA's obligations under Findings of Fact 21 through 28 are terminated.

GCOH&P

29. "GCOH&P" for the purposes of this Order means General Contactor's Overhead and Profit.
30. TDI alleges that in handling some claims, TWIA and TFPA made a determination that GCOH&P would be reasonably likely to be incurred by the claimant but then the companies would limit payment of GCOH&P to only certain repairs or construction activities.
31. TWIA and TFPA agree to implement adjuster and examiner training and issue clarifications in the claims manual and policyholder communications concerning GCOH&P consistent with following stipulation: "GCOH&P should be included in all estimates when the insured is reasonably likely to require the services of a general contractor to repair the damage. On claims that warrant GCOH&P, adjusters should apply GCOH&P to all building items and repairs for which supervision or coordination of the item or trade is reasonably required by a general contractor." Nothing in this agreement shall prevent TWIA or TFPA from adjusting its claim processing policy to conform to any statutory changes or any opinions issued by any Texas court or agency of competent jurisdiction in regard to GCOH&P. Nothing in this agreement shall prevent TWIA or TFPA from challenging the application of GCOH&P in any civil lawsuit.
32. TWIA agrees to, within 120 days from the date of this Order, perform a diligent search for claims in which TWIA paid policy benefits for which a WPI-8 Certificate of Compliance was requested, but the policyholder has not provided a WPI-8 for completed repairs or replacement. This paragraph excludes all claims in which (1) a lawsuit or SOAH contested case was filed, or (2) a demand letter or letter of representation has been received by TWIA from an attorney or public adjuster, or (3) that has been settled by release, class action settlement, or appraisal award.

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33. For claims identified pursuant to the process stated in Finding of Fact No. 32, TWIA will send correspondence to the policyholder that (a) asks whether all repairs were completed, (b) if all repairs are completed, why a WPI-8 has not been provided, and (c) if repairs are incomplete, why repairs are incomplete. For those policyholders who respond, within 30 days after such correspondence is sent, that insufficient policy benefits were allowed for repairs, TWIA will determine whether GCOH&P was allowed in its adjustment and will pay the policyholder for the full cost of GCOH&P, to the extent required under the insurance policy but not already paid. Payments required under this paragraph will be made in the form of a credit against either current premium or renewal premium during a one-year period after the date of this Order. Any payment required under this paragraph that exceeds the full amount of premium or renewal premium (less agent's commission) on the current or renewal policy, or that cannot be fully applied as a credit against current or renewal premium during a one-year period after the date of this Order shall be remitted to the policyholder by check. Because the parties agree that there are bona fide disputes over determinations of liability for GCOH&P, TDI, TWIA stipulate that payments or credits made under this paragraph are not intended as an admission of a statutory or contractual liability, but are merely for settlement purposes only.
34. TWIA agrees to, within 150 days from the date of this Order, provide TDI Enforcement Division, Attn: Catherine Bell, MC 110-1A, P.O. Box 149104, Austin, Texas 78714-9104 with a report of all claim files identified and all payments made under the process described in Findings of Fact Nos. 32 and 33. The report shall include: payee name, claim number, whether policy benefits were paid for GCOH&P on roofing repairs during loss adjustment, date and amount of any payment/credit made under the process described in Finding of Fact Nos. 32 and 33.
35. Within 30 days after receipt of the report required by Finding of Fact No. 34, TDI may audit the search process or determinations made under Findings of Fact Nos. 32 or 33. If TDI disagrees with TWIA's determination under Findings of Fact 32 or 33, TDI may, within 60 days after receipt of the report required by Finding of Fact No. 34, request independent review by an impartial third party who formerly served as a SOAH ALJ, is experienced in insurance claims disputes, and is mutually agreed by the parties. The reviewer shall review the matter on submission and either affirm or reverse the determination made by TWIA. The reviewer's decision shall be final, binding and not subject to review. The reviewer's services will be invoiced to and paid by TWIA.
36. The Texas Department of Insurance reserves the right to request the Attorney General to bring a class action under Texas Insurance Code Sec. 541.251. TDI further reserves the right to object to a proposed settlement or class certification in any other class action against TWIA or TFPA involving claims regarding GCOH&P. In any such class action, this consent order and TWIA or TFPA's compliance or attempt to comply with

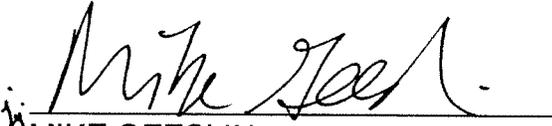
General, TWIA or TFPA's obligations under Findings of Fact 29 through 36 are terminated.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commissioner of Insurance makes the following Conclusions of Law:

1. The Commissioner of Insurance has jurisdiction over this matter pursuant to TEX. INS. CODE ANN. Chs. 541, 542, 2210, and 2211; TEX. INS. CODE ANN. §§ 82.051-82.056 and 84.021-84.022; 28 TEX. ADMIN CODE §§ 5.4001-5.4800 and 5.9910-5.9929; and TEX. GOV'T CODE ANN. §§ 2001.051-2001.178.
2. Pursuant to TEX. INS. CODE ANN. § 82.055(b), TWIA and TFPA do not admit to a violation of the Texas Insurance Code or violation of a rule or regulation of TDI and agree to informal disposition with the express reservation that the existence of a violation is in dispute.
3. This Consent Order only resolves TDI's allegations and investigations regarding TWIA and TFPA's conduct prior to the date of this Order relating to the Scope of Complaint.
4. The Commissioner of Insurance has authority to informally dispose of this matter as set forth herein under TEX. GOV'T CODE ANN. § 2001.056, TEX. INS. CODE ANN. § 82.055 and 28 TEX. ADMIN. CODE § 1.47.

IT IS THEREFORE ORDERED by the Commissioner of Insurance that TWIA and TFPA shall fully comply with the terms of this Order and execute all agreed actions set forth in the above Findings of Fact.


MIKE GEESLIN
COMMISSIONER OF INSURANCE

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APPROVED AS TO FORM AND CONTENT:

Catherine Reyer by permission 
Catherine Reyer
Senior Associate Commissioner

