

## Louisiana Court Finds Hurricane Gustav Property Damage Claim Is Barred by Policy Suit Limitation

### Property Coverage Update

By Bryan Chapman

#### *Eastern District of Louisiana*

In *Fassbender v. La. Citizens/First Premium Ins.*, 2011 U.S. Dist. LEXIS 71288 (E.D. La. July 1, 2011), the U.S. District Court for the Eastern District of Louisiana enforced the policy's suit limitation provision and found the insured's claim for coverage relating to property damage from Hurricane Gustav was barred.

In *Fassbender*, the insured's property was damaged during Hurricane Gustav on September 1, 2008. At that time, Southern Fidelity Insurance Company (SFIC) insured the property. The policy was originally issued by Louisiana Citizens Property Insurance Corporation (LCPIC) and was taken over from LCPIC by SFIC, via novation, thus making SFIC solely responsible for the payment of claims under the policy for the subject loss. (The policyholders, through the authority given to their insurance agent, allowed for their policy to be taken over from LCPIC to SFIC.) The policy provided a two-year time deadline for individuals to file suit and stated in pertinent part:

#### SECTION I – CONDITIONS

\* \* \*

#### **G. Suit Against Us**

No action can be brought against us unless there has been full compliance with all of the terms under Section I of this policy and the action is started within two years after the date of loss.

The insured negotiated the claim with SFIC, but the parties reached an impasse. Once the insured's negotiations with SFIC failed, it retained counsel and gave him the declarations page from the policy issued by LCPIC, failing to inform him of its negotiations with SFIC or of the novation that made SFIC solely responsible for the payment of claims under the policy. As a result, the insured's counsel filed suit on September 1, 2010, naming LCPIC as the sole party defendant. When the insured's counsel learned of SFIC's involvement, he filed a supplemental and amending petition for damages, adding SFIC as a party defendant on December 8, 2010. SFIC received service on December 28, 2010.

SFIC filed a motion to dismiss arguing the insured's claims should be dismissed as a matter of law because the insured did not sue it within the two-year period, as required by the policy. *Id.* at \*4. SFIC argued the insured's claims were barred because, the property damage was

sustained on September 1, 2008, and the insured's did not file suit against SFIC until December of 2010, more than two years after the date of loss. *Id.*

The insured argued the claim should not be barred by way of the suit limitation provision, because under the relation-back doctrine, the December 2010 amendment does not seek to add a new or different kind of claim. *Id.* at \*13. Further, both the September and December complaints arose out of property damage caused by Hurricane Gustav to the plaintiff's property. *Id.* The insured also argued that SFIC knew long before December 2010 that settlement negotiations with its adjusters had reached an impasse, noting that "[i]n the insurance claims industry, when claims do not settle, lawsuits many times follow." *Id.* at \*14.

The court rejected the insured's arguments, and began its analysis by noting that the suit limitation provision in the SFIC policy did not violate Louisiana public policy. *Id.* at \*8. Next, the court held that because the timely sued defendant, LCPIIC, was not a proper party to the lawsuit, the 24-month window for bringing suit against SFIC was not interrupted by the timely complaint against LCPIIC. *Id.* at \*10. Finally, the court found that because SFIC had no notice of the September 1 complaint, and no way of knowing that the insured intended to file suit, the insured's amended complaint did not sufficiently relate back to the original September 1 complaint. *Id.* at \*14. Further, the court noted that the relation back doctrine does not work to "extend the limitations period." *Id.* at \*11. As a result, the court rejected the insured's relation-back argument and enforced the suit limitation provision in the SFIC policy. In so doing, the court characterized the insured's argument as follows:

[Insured] seems to infer that, because SFIC had not heard

from [the insured] following their stalled claim settlement negotiations, SFIC should have assumed it had, in fact, been sued, and contacted [the insured] to determine whether they had, perhaps, mistakenly filed suit against the wrong entity.

This is an absurd argument. SFIC did not receive notice of the lawsuit until December 28, 2010, when it was served. [The insured] fails to offer any evidence to the contrary. Because

this date was more than 24 months after the covered loss occurred, [the insured's] claims against SFIC are prescribed.

*Id.* at \*14. The court dismissed the insured's claims with prejudice.

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