



## Alerts

### Agent Not Liable for Mental Distress Damages for Katrina Losses; Still Liable for Attorneys Fees and Special Damages

**February 28, 2013**

*Lawyers for the Profession®*

Plaintiff insureds owned a fishing and hunting business. Defendant insurance agency had procured an insurance policy for various buildings located on the insureds' property when Hurricane Ivan damaged the insureds' buildings in 2004. The insureds then undertook new construction and repairs to the existing buildings. As each phase of construction was completed, the insureds requested that the insurance agency increase coverage on their buildings.

On July 7, 2005, the insureds requested an increase in coverage on two of their buildings and defendant, an agent with the insurance agency, sent a written request to the carrier by certified mail. The carrier's guidelines on increases in insurance coverage on existing policies called for a written request sent by mail and coverage would be considered bound the day after postmark. The carrier would not consider coverage bound if the written request was sent by mail after a hurricane had entered the Gulf of Mexico. The agent sent the July 2005 request for increased insurance coverage by certified mail and the insurance agency received confirmation by mail indicating that the carrier had received and signed for the written request. Based on prior dealings with this carrier, the agent knew that the carrier's receipt of the request alone would not immediately result in a policy change and that additional follow-up would be required. No follow-up was ever conducted by the insurance agency in July 2005. On August 18, 2005, the insureds again requested further insurance policy increases on two of their buildings and the agent sent this request to the carrier, but only by regular mail. The agent again conducted no follow-up and received no receipt indicating that coverage was bound. Despite this fact, the agent told the insureds that they had insurance coverage in the amount of the two requested increases.

When Hurricane Katrina hit the area on August 29, 2005, the storm damaged or destroyed much of the insureds' buildings and they made claims based on the two increased coverage requests. The carrier denied that the requested increases in the policy limits would be honored and offered to pay only the original coverage on the property. The insureds sued the carrier, seeking the payment of the full amounts. They also sought recovery from the agent, claiming that he was negligent for failing to procure the requested coverage and for his inaction in failing to notify the insureds that their request for additional increases in coverage had not been completed. The insureds entered into a

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settlement agreement with the carrier for the difference between what it had originally paid on the claim and what the amount would have been with the increased coverage. The insureds pursued their claim against the insurance agency and after a bench trial the court rendered judgment in favor of the insureds, finding that the insurance agency was negligent in its handling of both of the insureds' requests for increased coverage.

The damage award included \$75,000 to the individual male insured for mental anguish that was caused by insurance agency's negligence. The judgment also awarded special damages for attorneys' fees and costs expended in the suit against the carrier and for delay in receiving the total amount of the insurance policy limits. The appellate court affirmed the finding as to the insurance agency's negligence, but reversed the finding that the insurance agency failed to exercise reasonable diligence with regard to the July 2005 request for increased coverage. The appellate court also reduced the special damages awarded for delays from \$137,386 to \$100,180.

The Supreme Court of Louisiana took the appeal to determine the correctness of the award of general damages for mental distress to the individual plaintiff and review the special damage award and affirmed in part and reversed in part.

### **Question Before the Court**

*Did the insurance agency act with reasonable diligence in obtaining the requested increases in insurance coverage?*

Yes, as to the July 2005, request and no, as to the August 2005 request. The Court held that the general rule is that an insurance agent who undertakes to procure insurance for another owes an obligation to the client to use reasonable diligence in attempting to place the insurance requested and to notify the client promptly if he or she has failed to obtain the requested insurance. The Court found that whether reasonable diligence was exercised by the insurance agency here depended on the manner in which it made the two requests. With regard to the July 2005 request, the insurance agency received a confirmation receipt, which showed that the carrier had received the request for increased coverage. The insurance agency could with confidence assure the insureds that coverage was bound as of the day after the request had been postmarked pursuant to the carrier's own policies. The fact that the carrier failed to honor the request was not caused by the insurance agency's failure to exercise reasonable diligence. However, with regard to the August 2005 request, which was sent by U.S. mail only, the Court found that the insurance agency had a duty to ensure such request where actually received. Without obtaining any indication that the carrier had actually received the request for increased coverage, the insurance agency would not know whether the request was ever communicated and it would be unreasonable for the insurance agency to inform the insureds that coverage was obtained under those circumstances. Even though a lot of mail was lost during the period of Hurricane Katrina, the Court found that the insurance agency failed to act with reasonable diligence in attempting to place a request for additional coverage in August 2005. The insurance agency had the additional duty to notify its client of the failure to obtain the requested insurance and had approximately one week between the second coverage request on August 18, 2005 and the date on which Hurricane Katrina entered the Gulf of Mexico to obtain insurance from another company to ensure that they were covered with limits they desired.

*Did the trial court properly award general damages for mental distress to the individual insured based on the insurance agent's negligence?*

No. The Court held that the agent's negligent conduct was not such as to lead to the likelihood of genuine and serious mental distress. The general rule was that if the agent's conduct is merely negligent and causes only mental disturbance without accompanying physical injury, illness or other physical consequences, the agent is not liable for such emotional disturbance. The Court found that the agent's conduct in depositing the request for additional insurance coverage into regular mail and then informing the insureds that their request would be acted upon was just ordinary negligence and did not rise to the level of "special circumstances" necessary for an award of general damages. The record showed that the individual insured did not establish that he had suffered any more than the level of distress people in southern Louisiana experienced in the aftermath of Hurricane Katrina. He never sought professional help or participated in counseling or therapy. His wife, the other individual insured, could not separate out her husband's mental distress from his general distress over the damage to the property and the devastations suffered by the entire region.

*Were the insureds entitled to special damages for attorneys' fees, costs and interest on the amount of the insurance*



*proceeds during the pendency of the action against the carrier?*

Yes. The Court held that the insureds were also entitled to recover special damages based on the attorneys' fees they incurred in maintaining their case against the carrier as well as interest on the amount of the insurance proceeds during the three years they were forced to litigate their claims against the carrier. The Court reasoned that the insureds were obligated to file suit and participate in the litigation against the carrier to recover the policy limits they believed they already had, but did not, due to the insurance agency's negligence either in failing to ensure that coverage was actually bound or in failing to alert the insureds that they were not covered in the requested amounts. The Court also noted that the settlements with the carrier did not negate the fact that the insureds had suffered additional damages beyond the policy limits of their insurance coverage. Consequently, the interest on the amount of insurance proceeds in dispute and the attorneys' fees in litigating the case against the insurance carrier where the proper measure of damages sustained by the insureds for the negligence of the insurance agency. The Court also found that the attorneys' fees were recoverable, despite the fact that there was no contractual or statutory basis for such an award because they were not an award for the present litigation against the insurance agency, but were to recompense the insureds for the litigation made necessary against the carrier. The amended award of \$100,180 was affirmed against the insurance agency.

### **What the Court's Decision Means for Practitioners**

The Court found that the insurance agency was not diligent in obtaining increases in coverage pre-Hurricane Katrina. The use of regular mail instead of certified mail and the failure to follow-up led to a liability finding. Although the insurance agency was not liable for \$75,000 in mental distress damages, the Court affirmed its liability for \$100,180 in attorneys' fees expended by the insureds in litigating the case against the carrier and interest on the loss of the use of their money for the three-year period of that litigation because these were *compensatory damages*. The general "American rule" that each party shall bear its own attorneys' fees and costs did not apply.

This is not a unique holding — courts in other jurisdictions have advanced this rationale. (See, *DeChant v. Monarch Life Ins. Co.* (1996) 200 Wis.2d 559 [insurance bad faith]; *Third Eye Blind, Inc. v. Near North Entertainment Insurance Services*, (1995) 127 Cal.App.4th 1311: "Under California law, it is a well-established principle that attorney fees incurred through instituting or defending an action as a direct result of the tort of another are recoverable damages." [claim against insurance broker]).

*Prest v. Louisiana Citizens Property Insurance Corporation*, 2012 WL 6015594 (Sup. Ct. La. No. 12-C-0513 Dec. 4, 2012)

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