Windstorm insurance has Texas in tough spot
Approving commissioner’s statute change, or something similar, would be best solution
By Seth Chandler
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The fate of hundreds of thousands of policyholders of the Texas Windstorm Insurance Association, the largest insurer of wind risk along the Texas coast, is about to rest this summer on whether a court allows a state regulator to basically rewrite legislation that makes little sense.

Texas Insurance Commissioner Julia Rathgeber must convince the court that she has the authority effectively to change a statute enacted by the Texas Legislature in 2011. If she cannot do so — and it will be an uphill struggle — the windstorm insurance association is likely to have insufficient funds to pay claims this coming summer in the event of a serious hurricane. The problem is that Rathgeber’s solution reaches ever more deeply into the pocket of individuals who live along the coast but who do not have insurance from TWIA or, indeed, may not have homeowner’s insurance at all.

The problem is created by legislative action in 2011 that made a bad problem worse. In 2009, Texas shifted to a system that permitted the windstorm insurance association to have very little cash and secure funds on hand to pay claims but gave it the purported ability to borrow in layers following a big storm. The problem, however, was that the first layer of borrowing was supposed to be paid back by high premium surcharges on TWIA policyholders. But lenders warned that they might not lend on that basis because many of these policyholders might not be able to pay high surcharges following a storm. They might not even have property worth insuring.

By law, the windstorm insurance association couldn’t borrow the higher layers of funds unless the lower layers succeeded. That left TWIA with little borrowing capacity at all.

In 2011, the Legislature recognized the problem and came up with Plan B. If the first layer didn’t sell, the windstorm insurance association could skip to the second layer. But the Legislature didn’t want TWIA policyholders to escape altogether. So, it decided that, now, TWIA policyholders would pay for part of this “second” layer of bonds. But, as Rathgeber has recognized, this probably doesn’t fix the problem. Lenders may still not lend much money if the source of payback is too-large surcharges on devastated policyholders. The windstorm insurance association might still find itself without much money to pay claims.

Rathgeber is now circulating draft regulations with a fairly sensible fix. Plan B would now have the windstorm insurance association borrow based not even in part on significant surcharges on
TWIA policyholders, but based on lower surcharges on a broader range of coastal property policies along with assessments on Texas property insurers. Lenders would probably accept that. Higher layers of borrowing would then be accessible as well.

This wouldn’t make the windstorm insurance association financially healthy, but it would at least give the troubled organization a fighting chance to pay claims in the event of a moderate hurricane.

But there’s a hitch. Rathgeber has effectively written the 2011 legislative action out of existence. Regulators aren’t supposed to rewrite legislation; they are supposed to implement it. She’s changed who has to pay for losses suffered by the windstorm insurance association. That point won’t be lost on coastal Texans, particularly those who don’t have TWIA policies. Coastal legislators are already spearheading protests against higher rates and warning their constituents of the potential for greater surcharges. Moreover, even if a court might ultimately say that the Texas statute is so bad that the commissioner was within her rights in fixing it, what lender would be willing to give the windstorm insurance association $1 billion after a hurricane when the source of repayment was subject to a substantial court challenge?

All of this puts Texas in a tough place. The windstorm insurance association has only $400 million in cash at best. An average minor hurricane hitting Galveston could generate $600,000 in insured losses; an average major hurricane in Corpus Christi could cost the insurance association $4 billion. The best fix would come if groups on the coast could come together and agree to legislation that either ratified the commissioner’s fix or came up with something similar. A quick special session could then give the windstorm insurance association a chance of limping through this hurricane season until more fundamental windstorm reform could take place.

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