

**STATE OF LOUISIANA  
DIVISION OF ADMINISTRATIVE LAW**

<b>DEPARTMENT OF INSURANCE</b>	*	<b>DOCKET NO. 2021-6585-INS</b>
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<b>IN THE MATTER OF</b>	*	
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<b>STATE FARM FIRE AND CASUALTY COMPANY AND DOVER BAY SPECIALTY INSURANCE COMPANY</b>	* * *	<b>AGENCY ID NO. "Directive 218"</b>

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**DECISION AND ORDER**

On September 7, 2021, the Louisiana Commissioner of Insurance, James J. Donelon (Commissioner) issued Directive 218, requiring all authorized insurers and surplus line insurers to pay claims for expenses incurred by Louisiana policyholders who resided in 25 specified parishes, because of evacuation and/or being prohibited from using their insured premises due to Hurricane Ida. For the reasons set forth below, Directive 218 is found to be an abuse of the Commissioner’s discretion and therefore invalid and unenforceable.

**APPEARANCES**

The Administrative Hearing in the referenced matter was conducted at the Division of Administrative Law in Baton Rouge, Louisiana, on April 19, 2022, before Administrative Law Judge Patrick E. Moore. Mr. J. E. Cullens, Jr., and Mr. S. Layne Lee appeared as counsel on behalf of the Louisiana Department of Insurance (LDI). Mr. William D. Shea and Mr. Kellen J. Mathews appeared as counsel on behalf of State Farm Fire and Casualty Company (“State Farm Fire”) and Dover Bay Specialty Insurance Company (“Dover Bay”) (collectively “Appellants”).

**JURISDICTIONAL AUTHORITY**

Jurisdiction is granted by Louisiana Revised Statutes (La. R.S.) La. R.S. 22:2191. This adjudication is conducted in accordance with the legislation governing the Division of

Administrative Law, Chapter 13-B of Title 49, La. R.S. 49:991, *et seq.* The proceedings are governed by the Administrative Procedure Act, La. R.S. 49:950, *et seq.*, and the Louisiana Insurance Code, 22:1, *et seq.*

### **STATEMENT OF THE CASE**

On September 7, 2021, the Commissioner issued Directive 218. On September 29, 2021, Appellants filed a timely request for an administrative hearing, seeking a declaration from the Division of Administrative Law (DAL) that the Commissioner's issuance of Directive 218 was an improper exercise of the Commissioner's discretion and is therefore invalid. The appeal also seeks an order requiring the Commissioner to withdraw Directive 218.

Appellant's demand included a request that a stay order be issued, as provided for in La. R.S. 22:2204, deferring implementation of Directive 218 pending the outcome of a hearing on the merits. After a contradictory hearing on the request for a stay order that occurred on November 17, 2021, the stay was granted by order signed November 19, 2021.

The specific issue before the tribunal is whether the Commissioner has the authority to issue a directive mandating an expansion of the term "evacuation order," as that term appears in a homeowner's policy, to require insurers to pay Prohibited Use claims<sup>1</sup> lodged by insureds residing in any of 25 parishes previously identified by the Commissioner as being subject to damaging impact from Hurricane Ida, regardless of whether those insureds resided in a parish or municipality where no express civil authority order to evacuate or to stay away was in place.

The argument and evidence presented at the hearing by LDI supported the Commissioner's authority, while Appellants argued and presented evidence in support of an argument that the Commissioner's issuance of Directive 218 exceeded the extent of his

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<sup>1</sup> Prohibited Use claims are defined below in the Finding of Fact.

authorized discretion. The parties jointly filed Stipulations of Fact.

At the conclusion of the hearing, the record remained open until May 17, 2022, to allow the parties to submit post hearing memoranda. Both parties submitted timely memoranda, after which the undersigned closed the record and took the matter under advisement.

### **FINDINGS OF FACT**

On August 26, 2021, at approximately 10:00 a.m., Tropical Depression Nine formed over the west-central Caribbean Sea. The depression developed quickly and by 12:15 p.m. the next day, August 27, 2021, the depression had strengthened into a Category 1 hurricane named Ida. Hurricane Ida continued to strengthen rapidly and at approximately 11:00 a.m. on August 29, 2021, it began moving onshore near Port Fourchon, Louisiana, as a Category 4 hurricane.

On August 26, 2021, Louisiana Governor Jon Bel Edwards and United States President Joe Biden declared a state of emergency in Louisiana in anticipation of the approaching storm. On the same day, the Louisiana Commissioner of Insurance issued Emergency Rule 47. Among other things, Emergency Rule 47 provided mandatory grace periods for payment of insurance premiums and temporarily postponed involuntary cancellations and non-renewal of policies by insurers. Emergency Rule 47 identified 25 parishes to which it applied, namely: Ascension, Assumption, East Baton Rouge, East Feliciana, Iberia, Iberville, Jefferson, Lafourche, Livingston, Orleans, Plaquemines, Pointe Coupee, St. Bernard, St. Charles, St. Helena, St. James, St. John the Baptist, St. Martin, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Washington, West Baton Rouge, and West Feliciana (hereinafter the “enumerated parishes”).

Parish and/or municipal officials in 14 of the enumerated parishes issued mandatory

or voluntary evacuation orders to their citizens.<sup>2</sup> In addition, some parish and local municipal officials located within the enumerated parishes issued declarations asking residents who had evacuated not to return to their homes due to widespread storm damage, power outages, and interruption of essential services. Conversely, some parish and/or municipal officials in the enumerated parishes did not order evacuations, nor did they issue declarations asking residents not to return to their homes at any time before or after landfall of Hurricane Ida.

Many homeowner insurance policies provide “Prohibited Use” coverage for additional living expenses, such as hotel and fuel costs, incurred by insureds when a civil authority issues an order of evacuation or a related stay-away order (hereinafter collectively referred to as an “evacuation order”) that prohibit an insured’s access to their residential premises.

To address Prohibited Use claims lodged by Louisiana policyholders who evacuated and/or who stayed away from areas that were located within the enumerated parishes, but who were not subject to a civil evacuation order, the Commissioner issued Bulletin 2021-07 on September 2, 2021. In the bulletin, the Commissioner requested that insurers waive policy language that required the issuance of a civil evacuation order to trigger Prohibited Use coverage. On September 7, 2021, upon information that some insurers refused to honor the Commissioner’s request, the Commissioner issued Directive 218 to require payment of those claims.

Specifically, Directive 218 requires insurers to “... treat the multiplicity of actions taken by all public officials and the spirit and intent of all communications issued by all public officials as being tantamount to an order to evacuate that fulfills...” the policy requirement of

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<sup>2</sup> The parties to the administrative appeal stipulated that beginning on August 26, 2021, and continuing until August 28, 2021, prior to Hurricane Ida’s landfall, 18 Louisiana parishes, including 14 of the enumerated parishes, issued either mandatory or voluntary evacuation orders to all of their citizens or to citizens living within certain areas of the respective parishes. *See: Stipulation of Facts* filed jointly into the administrative record.

all Prohibited Use claims lodged by insureds who reside in any of the 25 parishes identified in Emergency Rule 47, regardless of whether an evacuation order was issued for the specific area in which the policyholder resided.<sup>3</sup>

In response to Directive 218, Appellants filed an administrative appeal, contending therein that Directive 218 improperly requires Appellants to expand language in their homeowner's insurance contracts to extend Prohibited Use benefits to insureds who resided in parishes or municipalities that were not subject to an evacuation order issued by local authorities.

### CONCLUSIONS OF LAW

The Commissioner's issuance of Directive 218 to require Appellant to pay Prohibited Use claims made by Louisiana policyholders residing in areas that were not subject to a civil evacuation order, in relation to the landfall of Hurricane Ida, was an improper exercise of the Commissioner's discretion and is therefore invalid.

The civil evacuation order requirement is typically set forth in Appellant's policy as follows:

Prohibited Use: We will pay Additional Living Expenses and Fair Rental Value, for a continuous period not to exceed two weeks, beginning when a civil authority issues an order of evacuation that prohibits your use of [your] residential premises.<sup>4</sup>

The Commissioner, by directive,<sup>5</sup> seeks to require Appellant to interpret the cited policy language to provide coverage to Louisiana policyholders who resided in areas located within the

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<sup>3</sup> *Directive 218, Appellants' Request for Administrative Appeal, Exhibit D, p. 2.*

<sup>4</sup> Appellant's Exhibit D, p. 11.

<sup>5</sup> The Insurance Code provides the Commissioner with discretion to select a vehicle by which to exercise authority over insurers. In this instance, the Commissioner chose to do so by directive. The Insurance Code defines "Directive" as follows:

(6) "Directive" means a written communication or order issued by or on behalf of the commissioner of insurance to a person whose activities are regulated by this Title, which instructs the person to act in conformance with this Title, or any rule or regulation adopted in accordance with the Administrative Procedure Act.

enumerated parishes that were not subject to an order of evacuation issued by the civil authority having jurisdiction over the policyholder's location.

The crux of the dispute is the Commissioner's ability to enforce the following provision of Directive 218:

Accordingly, pursuant to the statutory authority vested in me by La. R.S. 22:2(A)(1) and (E), 22:11(A), and 22:861, I direct all authorized insurers and all surplus line insurers that, to the extent any insurance contract may contain any language that implies the need for a civil authority to issue an evacuation order, **they shall treat the multiplicity of actions taken by all public officials as being tantamount to an order to evacuate that fulfills any such policy requirement.** Further, the policyholder retains the obligation to demonstrate that the expenses incurred during the evacuation were reasonable. Directive 218 is limited to the twenty-five parishes listed in my previously issued Emergency Rule 47 and referenced in Bulletin 2021-07.<sup>6</sup> (Emphasis added).

The emphasized phrase is the operative portion. It requires insurers to treat the multiple actions of the parish and municipal officials who *did* issue evacuation orders as being tantamount<sup>7</sup> to a single, extra-jurisdictional evacuation order that fulfills the policy requirement of any insured who resided in any of the enumerated parishes who lodged a Prohibited Use claim in relation to the landfall of Hurricane Ida.

To determine whether the Commissioner's action in issuing Directive 218 was invalid, Appellant has the burden to prove by a preponderance of the evidence that the Commissioner's action was arbitrary, capricious, or an abuse of discretion afforded to him by the Insurance Code.<sup>8</sup> An arbitrary act is an act based on random choice or personal whim, rather than any reason or system.<sup>9</sup> A conclusion of a public body is capricious when the conclusion has no

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<sup>6</sup> LDI Exhibit 6, p. 2.

<sup>7</sup> Tantamount means equivalent in value, significance or effect. *Webster's Third New International Dictionary* 2338 (1<sup>st</sup> Ed. 1993). While "tantamount" appears frequently in statutory annotations, it is not used in the Insurance Code, it is not a legal term of art, and it does not connote anything beyond its prosaic application.

<sup>8</sup> *Devillier v. State, Dept. of Pub. Safety & Corr., Pub. Safety Services, Office of State Police, Div. of Charitable Gaming Control, Gaming Enforcement Section*, 634 So. 2d 884 (La. App. 1<sup>st</sup> Cir., 1993); *Bowers v. Firefighters' Retirement System* 2008-1268 (La. 3/17/2009), 6 So. 3d 173, 176.

<sup>9</sup> *Reed v. State Farm Mut. Auto. Ins. Co.*, 2003-0107 (La. 10/21/03), 857 So. 2d 1012, 1020.

substantial evidence to support it or the conclusion is contrary to substantial competent evidence.<sup>10</sup> An abuse of discretion is an agency action that is clearly wrong, manifestly erroneous, or is such an abuse that it shocks the conscience of the court.<sup>11</sup>

Directive 218 cites La. R.S. 22:2(A)(1) and (E), 22:11(A), and 22:861 as the source for the Commissioner's authority. The first authority cited, La. R.S. 22:2(A)(1), is the primary enabling clause for the Commissioner's authority under the Insurance Code. It sets forth that "[i]t shall be the duty of the commissioner of insurance to administer the provisions of this Code." La. R.S. 22:2(E), sets forth that "[t]he commissioner of insurance shall have the authority to make reasonable rules and regulations, not inconsistent with law, to enforce, carry out, and make effective the implementation of this Code." With respect to the current issue, neither cited provision of La. R.S. 22:2 provides the Commissioner with specific authority that empowers him to require the expansion of Prohibit Use coverage. LDI has not otherwise identified that authority.

Directive 218 next cites La. R.S. 22:11(A) as the source of the Commissioner's authority. The statute authorizes the Commissioner to promulgate rules and regulations that he determines are necessary for implementation of the Insurance Code, provided that his establishment of each rule or regulation complies with legislative notice and other requirements set forth in La. R.S. 49:968. It is undisputed that Directive 218 was issued without the formalities necessary for the establishment of a rule or regulation. It follows then that the directive cannot operate as a rule or regulation to expand Prohibit Use coverage to insureds who did not live in one of the enumerated parishes.

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<sup>10</sup> *Coliseum Square Ass'n v. City of New Orleans*, 544 So. 2d 351, 360 (La. 1989); *Sterling v. Dep't of Pub. Safety & Corr., Louisiana State Penitentiary*, 97-1960 (La. App. 1 Cir. 9/25/98), 723 So. 2d 448, 455.

<sup>11</sup> *Jackson v. New Orleans Police Dep't*, 2005-0649 (La. App. 4 Cir. 3/29/06), 930 So. 2d 113, 116. random choice or personal whim

Directive 218 cites, lastly, that La. R.S. 22:861 is a source of the Commissioner's authority to require the expansion of Prohibit Use coverage. The cited provision requires insurers to file their insurance policy forms for approval by the Commissioner prior to sale of said policy coverage in the state of Louisiana. There is no evidence to support a conclusion that Appellants did not follow the mandate of La. R.S. 22:861 when marketing the policies containing Prohibited Use coverage. Accordingly, the statute does not empower the Commissioner to expand the terms that define Prohibit Use coverage by directive.

In addition to LDI failing to provide statutory authority for the Commissioner's interpretation, the tribunal also finds that the expansive interpretation of Prohibit Use coverage by the Commissioner is not reasonable, particularly in light of the edict that policy language must be interpreted in accordance with the general, ordinary, plain and popular meaning of the words, unless the words have acquired a technical meaning.<sup>12</sup> None of the authorities cited in Directive 218 or elsewhere empowers the Commissioner with the extraordinary ability to unilaterally expand the jurisdictional purview of civil authorities beyond the boundaries of their respective domains for the purpose of creating insurance coverage that would not otherwise exist. The Commissioner's interpretation of the Prohibited Use policy language seeks unreasonable expansion of the meaning of an evacuation order to the extent that the interpretation is clearly wrong, manifestly erroneous, and shocking to the conscience of the tribunal.

*(Order Follows)*

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<sup>12</sup> Louisiana Civil Code article 2047; *Breland v. Schilling*, 550 So. 2d 609, 610 (La. 1989).



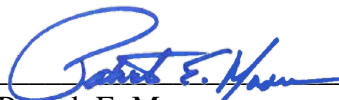
**ORDER**

**IT IS ORDERED** that Directive 218 issued by the Louisiana Department of Insurance on September 7, 2021, is **INVALID and UNFORCEABLE**.

Rendered and signed on July 7, 2022, in Baton Rouge, Louisiana.

NOTICE OF TRANSMISSION OF DECISION OR ORDER

I certify that on Friday, July 08, 2022, I have sent a copy of this decision/order to all parties of this matter.



Patrick E. Moore  
Administrative Law Judge  
Division of Administrative Law

Clerk of Court  
Division of Administrative Law

**REVIEW RIGHTS**

You may seek rehearing or reconsideration of this decision or order, subject to the grounds for and time limitations provided in Louisiana Revised Statutes 49:959. A request for rehearing must be sent to one of the addresses listed below.

**EMAIL:** [INSprocessing@adminlaw.la.gov](mailto:INSprocessing@adminlaw.la.gov)

**FAX:** (225) 342-1812

**HAND DELIVERY TO:**  
1020 Florida Street, Baton Rouge, LA 70802

**MAIL:**

Division of Administrative Law  
ATTN: INS Processing  
P.O. Box 44033  
Baton Rouge, LA 70804-4033

You may have the right to seek judicial review of this decision in accordance with Louisiana Revised Statutes 49:964.