

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-60796-CIV-ALTONAGA/Brown

RICHMOND MANOR APTS., INC.,
THE GURKIN FAMILY LIMITED
PARTNERSHIP, INTRACOASTAL
TERRACE CONDOMINIUM ASSN, INC.,
and SERENA VISTA CONDOMINIUM
ASSN, INC., individually, and on behalf
of all those similarly situated,

Plaintiffs,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S
LONDON, and LLOYD'S UNDERWRITERS
AT LONDON,

Defendants.

_____ /

FIFTH AMENDED CLASS ACTION COMPLAINT

The Class Plaintiffs, RICHMOND MANOR APTS., INC. (hereinafter referred to as "RICHMOND"), THE GURKIN FAMILY LIMITED PARTNERSHIP (hereinafter referred to as "GURKIN"), INTRACOASTAL TERRACE CONDOMINIUM ASSN, INC. (hereinafter referred to as "INTRACOASTAL") and SERENA VISTA CONDOMINIUM ASSN, INC. (hereinafter referred to as "SERENA VISTA"), individually, and on behalf of all those similarly situated, by and through their undersigned counsel, hereby bring this lawsuit against CERTAIN UNDERWRITERS AT LLOYD'S LONDON (hereinafter referred to as "CERTAIN UNDERWRITERS") and LLOYD'S UNDERWRITERS AT LONDON, and as grounds therefore allege as follows:

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1. This is a claim for declaratory and monetary relief brought on behalf of a class whose aggregate damages exceeds \$15,000.00, exclusive of all interest, costs and attorneys fees, as well as additional individual damages. The Plaintiffs are unsure whether the claims in this case in the aggregate exceed \$5,000,000.00.

2. RICHMOND is a Florida corporation and is otherwise *sui juris*.

3. GURKIN is a Florida Limited Partnership and is otherwise *sui juris*.

4. INTRACOASTAL is a Florida corporation and is otherwise *sui juris*.

5. SERENA VISTA is a Florida corporation and is otherwise *sui juris*.

6. Lloyd's of London, is a franchise, created to facilitate the sale of property and casualty insurance to Florida persons and/or entities, like RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA through franchisees. As part of this franchise, franchisees known as Names form Syndicates to underwrite insurance policies, including the policies issued to the Plaintiffs. These Syndicates are then managed by Managing Agents. The Defendants, CERTAIN UNDERWRITERS in this case are all of the Names and/or Syndicates who underwrite and provide property and casualty insurance for policies which were delivered in the State of Florida for the class period. A list of known Syndicates Managing Agents, in 2009, is attached hereto and incorporated herein as Exhibit "1". Each one of the Syndicates and all the Names in the Syndicates which were involved in underwriting policies of insurance during the claims period is a Defendant to this action. These Defendants are all *sui juris*.

7. Pursuant to discussions with the Defense Counsel, it has been represented that several of the Syndicates have not written property insurance in the State of Florida and/or have not had a relevant hurricane claim. These Syndicates

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are numbers 44, 218, 260, 308, 386, 457, 557, 566, 626, 779, 1176, 1218, 1221, 1231, 1301, 1318, 1880, 1910, 1965, 2112, 2468, 2525, 2526, 3010, 3210, 3334, 3622, 3623, 4020, 4040, 4041, 4242, 4711 5151, 5500. Attached hereto and incorporated herein as Composite Exhibit "2" are affidavits from all of these Syndicates' Managing Agents attesting to the fact that they are not part of the alleged class. In reliance on these representations, it is the Plaintiffs' position that none of these Syndicates are part of this lawsuit and do not need to appear in this lawsuit.

8. Defendant LLOYD's UNDERWRITERS AT, LONDON, is an eligible surplus lines insurer under the laws of the State of Florida. It received its eligibility on October 1, 1998 and has been given an NAIC number AA1122000 and a FEIN 990000068. It appears that this is the only Lloyd's entity which is eligible to write surplus lines insurance in the state.

9. Venue is appropriate in Broward County, Florida because CERTAIN UNDERWRITERS has an agent or representative for the transaction of its business in Broward County, Florida and/or the cause of action accrued in Broward County, Florida.

GENERAL ALLEGATIONS

10. The Defendant, CERTAIN UNDERWRITERS, provides insurance coverage and issued an insurance policy, SCLACF105349, to the Plaintiff, RICHMOND. The policy which provided coverage which was effective from June 1, 2005 through June 1, 2006 is not in the Plaintiffs' possession and as such the Plaintiffs ask the Defendants to provide a copy of the insurance policy immediately.

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11. The said insurance policy for RICHMOND provided insurance coverage for damage to or the physical loss of property located at and around 11620 Robinson St., 11600 Robinson St., 11520 Jefferson St., and 14540 Jefferson St. ("RICHMOND Property").

12. More specifically the policy provides:

"[w]e will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss."

13. As part of the RICHMOND policy, CERTAIN UNDERWRITERS is also entitled to reduce the amount that it pays for a claim based on a deductible. The standard all perils deductible under the policy is \$5,000.00.

14. On or about October 24, 2005, a hurricane caused substantial damage to the RICHMOND property.

15. In adjusting the claim for damage caused by the hurricane to the RICHMOND property, CERTAIN UNDERWRITERS, has attempted to utilize a separate hurricane deductible of 5% of the policy value.

16. The Defendant, CERTAIN UNDERWRITERS, provides insurance coverage and issued an insurance policy, CRC-14535, to the Plaintiff, GURKIN that provided insurance coverage to various properties owned by GURKIN at various properties. The Declaration Page for this policy which provided coverage which was effective from April 15, 2005 through April 15, 2006 is attached hereto as Exhibit "3".

17. The said insurance policy for the GURKIN property provided insurance coverage for damage to or the physical loss of property located at 7540 SW 59th Ct.,

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Miami, FL; 7430 SW 59th Ct., Miami, FL; 7500 SW 59th Ave., Miami, FL; 7500 SW 59th Pl., Miami, FL; and, 525 NW 72d St., Miami, FL (“GURKIN Property”).

18. More specifically the policy provides:

“[w]e will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.”

19. As part of the GURKIN policy, CERTAIN UNDERWRITERS is also entitled to reduce the amount that it pays for a claim based on a deductible. The standard all perils deductible under the policy is \$10,000.00 per location.

20. On or about August 25, 2005, and October 10, 2005 two hurricanes caused substantial damage to the GURKIN Property.

21. In adjusting the claim for damage caused by the hurricane to the GURKIN property, CERTAIN UNDERWRITERS, has attempted to utilize a separate hurricane deductible of 5% of the policy value for each property.

22. The Defendant, CERTAIN UNDERWRITERS, provides insurance coverage and issued an insurance policy, BX4-5062, to the Plaintiff, INTRACOASTAL that provided insurance coverage to the INTRACOASTAL property shown in the attached insurance policy, including the declaration sheet. The portion of the policy which provided coverage which was effective from November 19, 2004 through November 19, 2005 is attached hereto as Exhibit “4”. The Plaintiff does not have the remainder of the policy so it is unable to attach it to this Complaint.

23. Based on assertions in documents filed by the Defendants, it appears that the policy was underwritten through two contracts ST04/7187 and BCM04/2728 which are managed through several Managing Agents.

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24. The said insurance policy for INTRACOASTAL provided insurance coverage for damage to or the physical loss of property located at 711 NE Harbour Terrace, Boca Raton, Florida ("INTRACOASTAL Property").

25. More specifically the policy provides:

"[w]e will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss."

26. As part of the INTRACOASTAL policy, CERTAIN UNDERWRITERS is also entitled to reduce the amount that it pays for a claim based on a deductible. The standard all perils deductible under the policy is \$2,500.00.

27. On or about October 24, 2005, a hurricane caused substantial damage to the INTRACOASTAL property.

28. In adjusting the claim for damage caused by the hurricane to the INTRACOASTAL property, CERTAIN UNDERWRITERS has attempted to utilize a separate hurricane deductible of \$70,000.00.

29. The Defendant, CERTAIN UNDERWRITERS, provides insurance coverage and issued an insurance policy, BX5-5114 to the Plaintiff, SERENA VISTA that provided insurance coverage to the SERENA VISTA property shown in the attached insurance policy, including the declaration sheet. The policy which provided coverage which was effective from February 7, 2005 through February 7, 2006 is attached hereto as Exhibit "5".

30. The said insurance policy for SERENA VISTA provided insurance coverage for damage to or the physical loss of property located at 207 Tropic Isle Drive, Delray Beach, FL ("SERENA VISTA Property").

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31. More specifically the policy provides:

“[w]e will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.”

32. As part of the SERENA VISTA policy, CERTAIN UNDERWRITERS is also entitled to reduce the amount that it pays for a claim based on a deductible. The standard all perils deductible under the policy is \$2,500.00.

33. On or about October 24, 2005, a hurricane caused substantial damage to the SERENA VISTA property.

34. In adjusting the claim for damage caused by the hurricane to the SERENA VISTA property, CERTAIN UNDERWRITERS has attempted to utilize a separate hurricane deductible in the amount of \$53,400.00.

35. Florida Statutes Section 627.701(4)(a) requires that the phrase “THIS POLICY CONTAINS A SEPARATE HURRICANE DEDUCTIBLE FOR HURRICANE LOSSES, WHICH MAY RESULT IN HIGH OUT OF POCKET EXPENSES TO YOU” appear on the face of any property insurance policy in boldface type no smaller than 18 points. Failure to provide this language in the appropriate manner renders the separate hurricane deductible void.

36. Florida Statutes Section 627.701(2) specifically provides, that “[u]nless the office determines that the deductible provision is clear and unambiguous, a property insurer may not issue an insurance policy or contract covering real property in this state which contains a deductible provision that: (a) applies solely to hurricane losses; (b) states the deductible as a percentage rather than as a specific amount of money.”

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37. It is the Class Plaintiffs' well founded understanding and belief that most of the property insurance policies issued by the Defendants fail to comply with Florida Statutes Sections 627.701 (4) (a) and accordingly, the Defendants' use of the separate hurricane deductible as to any hurricane claim is wrongful and that the Defendants engage in these wrongful actions as a general business practice.

38. It is also the Plaintiffs' understanding and belief that the Defendants' failed to have the office determine that the separate hurricane percentage deductible was clear and unambiguous, and therefore the Defendants were not permitted, pursuant to Florida law, to issue the policy with a percentage deductible.

39. It is the Plaintiffs' well founded understanding and belief that the Defendants have failed to comply with Florida Statutes Section 627.410 which requires an insurance company to submit to the office for approval any forms that it intends to utilize, including the separate hurricane percentage deductible.

JURITICAL LINK BETWEEN DEFENDANT NAMES AND SYNDICATES

40. CERTAIN UNDERWRITERS consists of a closed group of "Names" and Syndicates which operate within the Lloyds market. These underwriters must operate under a set of identical or substantially similar operating procedures and utilize the same or substantially similar forms and practices in the sale of all insurance products relevant to this case.

41. The Plaintiffs in this matter, and all putative class members have been harmed in the same way based on a concerted scheme by the CERTAIN UNDERWRITERS to not follow Florida law as all of the CERTAIN UNDERWRITERS' position has been that Florida law does not apply to them. Further, all of the CERTAIN

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UNDERWRITER defendants are juridically related in a manner that suggests a single resolution of this dispute would be expeditious and fair.

42. It is also the Plaintiffs' understanding and belief that none of the Syndicates or Names are authorized to write insurance in the State of Florida. It is also the Plaintiffs' understanding that none of the Names and/or Syndicates are eligible surplus lines insurers. This fact is either known or should be known to the Defendants and accordingly, this behavior, which violates Florida law, permeates the entire Lloyds market.

CLASS REPRESENTATION ALLEGATIONS

43. Pursuant to Federal Rules of Civil Procedure Rule 23(b)(2) and 23(b)(3), Plaintiffs bring the claims under Counts I and II of this action on behalf of a class of insureds who submitted claims for hurricane losses where the Defendants' insurance policy contains a separate hurricane deductible.

44. This class consists of and is defined as:

"all CERTAIN UNDERWRITERS and/or LLOYDS insureds who have submitted claims for hurricane damage on a policy that completely omits the required language of 627.701 where the insurance policy issued by CERTAIN UNDERWRITERS and/or LLOYDS, nevertheless, contains a separate deductible applicable to hurricane losses."

45. Plaintiffs allege, on information and belief, that the number of class members is so numerous that joinder of them is impractical. Plaintiffs' belief is based on the fact that the Defendants sell a large amount of insurance policies in the State of Florida and have, as a general business practice, failed to comply with Florida Statutes Sections 627.701(4)(a), 627.701(2) and 627.410, and notwithstanding this non-

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compliance, the Defendants still attempt to use the separate hurricane percentage deductible to reduce their payment of claims arising from hurricane damage.

46. The members of the class will be easily ascertained by the Defendants' records with additional discovery and will consist of all persons who have purchased insurance from CERTAIN UNDERWRITERS, have made a claim under their property & casualty policy for damages arising from a hurricane, where the policy contains a separate deductible applicable to hurricanes.

47. The Class Representatives, either individually or collectively, raise questions of law or fact that are common to the class as a whole. Indeed, the central issues of the case are as follows:

- a. Whether the Defendants failed to comply with Florida Statutes Section 627.701(4)(a) with respect to the hurricane deductible;
- b. What is the remedy for failing to comply with Florida Statutes Section 627.701(4)(a) with respect to the hurricane deductible;
- c. Whether the Defendants failed to comply with Florida Statutes Section 627.701(2) with respect to the percentage hurricane deductible;
- d. What is the remedy for failing to comply with Florida Statutes Section 627.701(2);
- e. Whether the Defendants failed to comply with Florida Statutes Section 627.410 with respect to the separate hurricane percentage deductible;
- f. What is the remedy for failing to comply with Florida Statutes Section 627.410 with respect to the hurricane deductible;

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- g. Whether the Names and Syndicates which sold policies are eligible surplus lines carriers.
- h. Whether the Names and Syndicates which sold policies are authorized or unauthorized insurers.
- i. Whether the Defendants are responsible to pay attorney fees and costs pursuant to Florida Statutes Section 627.428.

48. The common claims of the Class Representatives are typical of the claims that would be asserted by other members of the class in that each class member will claim and assert similar claims for monetary and/or declaratory relief for the wrongful action taken by the Defendant.

49. The Class Representatives are Florida corporations, partnerships or individuals that will fairly and adequately protect and represent the interests of each member of the class. Additionally, the Class Representatives are fully cognizant of their responsibility as Class Representatives and have retained experienced counsel fully capable of, and intent upon, vigorously pursuing this action.

50. The questions of law or fact common to the Class Representatives' claims and the claim of each member of the class as described above predominate over any questions of law or fact affecting only individual members of the class. Moreover, class representation is clearly superior to other available methods for the fair and efficient adjudication of this controversy. Additionally, the Defendants' actions are generally applicable to the class as a whole thereby making declaratory relief to the entire class particularly appropriate.

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COUNT I: DECLARATORY RELIEF REQUESTED CLASS WIDE RELIEF—
RICHMOND, GURKIN, INTRACOASTAL AND SERENA VISTA SEPARATE
HURRICANE DEDUCTIBLE

51. The Class Plaintiffs, individually and on behalf of all those similarly situated reallege and reaver all of the allegations contained in paragraphs 1-50 as more fully set forth herein.

52. Upon information and belief, the Defendants have engaged in a general business practice of applying a separate hurricane percentage deductible, notwithstanding the fact that the Defendants' policies of insurance do not contain the language required by Florida Statutes Section 627.701(4)(a) and that the Defendants did not comply with Florida Statutes Sections 627.701(2) and 627.410 with respect to the separate hurricane percentage deductible.

53. Notwithstanding its non-compliance with Florida law, CERTAIN UNDERWRITERS has taken the position that it is entitled to apply a separate hurricane deductible to claims for hurricane damage and that the separate deductible applicable to hurricanes is valid under their policy.

54. It is the Class Plaintiffs' position that CERTAIN UNDERWRITERS' failure to comply with Florida Statutes Sections 627.701(4)(a), 627.701(2) and 627.410 renders the separate hurricane percentage deductible void and further prevents the Defendants from utilizing the separate hurricane deductible to reduce payments to its insureds.

55. A dispute has arisen between the Plaintiffs and all those similarly situated and Defendants concerning this issue and Plaintiffs request that this Court determine the rights and obligations of the Plaintiffs as well as the Defendants. The Plaintiffs have

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had to hire undersigned counsel to represent their interests and have agreed to pay counsel a reasonable fee and reimburse counsel for their costs.

WHEREFORE, Class Plaintiffs RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA respectfully request the following relief:

- a. An Order certifying the class described in this Complaint;
- b. An Order declaring the Defendants failed to comply with Florida Statutes Section 627.701(4)(a) with respect to the hurricane deductible;
- c. An Order declaring that the Defendants failed to comply with Florida Statutes Section 627.701(2) with respect to the percentage hurricane deductible;
- d. An Order declaring that the Defendants failed to comply with Florida Statutes Section 627.410 with respect to the separate hurricane percentage deductible;
- e. An Order declaring that the separate hurricane percentage deductible in the CERTAIN UNDERWRITERS policy is void;
- f. An Order declaring that CERTAIN UNDERWRITERS is responsible to pay all attorney's fees and costs pursuant to Florida Statutes Section 627.428 or any other applicable statute;
- g. An Order declaring that CERTAIN UNDERWRITERS is not an authorized insurer and that CERTAIN UNDERWRITERS is not an eligible surplus lines carrier.
- h. Trial by jury of all issues so triable; and
- i. Any other relief this Court deems just and proper.

COUNT II: BREACH OF CONTRACT FOR CLASS WIDE RELIEF—RICHMOND, GURKIN, INTRACOASTAL AND SERENA VISTA

56. The Class Plaintiffs individually and on behalf of all those similarly situated reallege and reaver all of the allegations contained in paragraphs 1-50 as more fully set forth herein.

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57. RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA entered into a contract of property insurance with some of the Defendants which contained a deductible. This insurance policy did not contain on the face of the policy the language required by Florida Statutes Section 627.701(4)(a). The Defendants also did not comply with Florida Statutes Sections 627.701(2) and 627.410 with respect to a separate hurricane percentage deductible.

58. It is the Class Plaintiffs' well founded understanding and belief that most of the property insurance policies issued by CERTAIN UNDERWRITERS in this state did not contain the language required by Florida Statutes Section 627.701(4)(a). It is further the Plaintiffs' well founded understanding and belief that the Defendants also failed to comply with Florida Statutes Sections 627.701(2) and 627.410 with respect to the separate hurricane percentage deductible.

59. RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA made claims under the CERTAIN UNDERWRITERS insurance policy for the full amount of their losses as a result of hurricane damage. CERTAIN UNDERWRITERS adjusted this loss by applying a separate hurricane deductible; as opposed to the standard all perils deductible, to reduce the amount of payments to RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA.

60. RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA contend that CERTAIN UNDERWRITERS' action in applying the separate hurricane deductible constitutes a breach of the insurance policy. RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA further assert that they have been damaged as a result of

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CERTAIN UNDERWRITERS' actions in that they have not been properly paid for their losses pursuant to the policy of insurance.

61. It is also RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA's well founded understanding and belief that the Defendants have attempted to utilize, as a general business practice, this separate hurricane percentage deductible with all hurricane claims arising under its policies which are not in compliance with Florida Statutes Sections 627.701(4)(a), 627.701(2) and 627.410.

62. RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA have had to hire counsel to represent them in their claims against the Defendants for their failure to properly make payments in accordance with the policy of property insurance. Accordingly, RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA are entitled to attorney's fees and costs pursuant to Florida Statutes Section 627.428.

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63. RICHMOND, GURKIN, INTRACOASTAL and SERENA VISTA hereby demand a trial by jury on all issues triable before a jury.

Dated: April 26, 2010

Respectfully submitted,

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Counsel for the Class Representative

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 2010, the foregoing was electronically filed with the Clerk of Court via CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Edward H. Zebersky

EDWARD H. ZEBERSKY

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v. Certain Underwriters at Lloyd's London, et al.
Case No. 09-60796-CIV-ALTONAGA/Brown

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