

ANDERSON KILL & OLICK



PORT ADMINISTRATION AND LEGAL ISSUES

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**INSURANCE RECOVERY FOR HURRICANES
AND OTHER NATURAL DISASTERS**

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The Policyholder Perspective on Hurricanes and Property Policies:

- A hurricane is a massive storm that can roar through a region and cause costly damage to business, residential and personal property.
- A hurricane is a cohesive whole, with a beginning, a middle and an end.
- Property policies, which were purchased for substantial premiums, should cover the property damage caused by the hurricane.

The Insurance Company Perspective

- A hurricane is a series of separate and distinct perils.
- Some of these perils are covered and others are not.
- Policyholders have the burden of proving which losses come from which perils.
- These limitations are made clear to policyholders in clear and understandable policy language.





The Challenge:

“There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any agreement as to the proper approach.”

W. Prosser, *Handbook of the Law of Torts*, at 236 (4th Ed. 1971)

Checks and Balances

- Judicial Precedent
- State Insurance Departments
- State Attorney Generals
- State Legislation

The Key Concept: “Efficient Proximate Cause”

- An insurance company is liable for losses proximately caused by a peril covered by its policy.
- The proximate cause of a loss is a dominant, effective or operative cause.
- It is not necessarily the first, last or only cause.

Losses are covered when wind is the “efficient proximate cause,” even if other perils contributed to the loss.

- **Louisiana Supreme Court**
Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v. Cont’l Ins. Co. of N.Y., 112 So. 2d 680, 683 (La. 1959)
- **Mississippi Supreme Court**
Glens Falls Ins. Co. of Glens Falls, N.Y. v. Linwood Elevator, 130 So. 2d 262, 270 (Miss. 1961)
- **Alabama Supreme Court**
Western Assur. Co. v. Hann, 78 So. 232, 236 (Ala. 1917)

It All Comes Down to the Facts

- Coverage found because four witnesses saw house blown off its pilings, rather than being washed away. Picone v. Manhattan Fire & Marine Ins. Co., 218 La. 546 (1950).
- Coverage found because witnesses saw water drain away from building, showing roof collapsed from wind. New Hampshire Fire Ins. Co. v. Kochton Plywood & Vener Co., 242 Miss. 169 (1961).
- Coverage found because of testimony of neighbor who drove near house shortly before it disappeared. U.S. Fid. & Guar. Co. v. Morgan, 399 S.W.2d 537 (Tex. 1966).

Katrina Litigation Is No Exception

“In accordance with well-established principles of Mississippi law, it is the question of causation that will determine whether any particular loss is covered by the policy or not.”

Lott v. State Farm Fire & Cas. Co., 2006 WL 2728695
(S.D. Miss., Sept. 19, 2006)

A Few Trends May Be Emerging

- Jurisdictional issues have been paramount.
- Remand motions have failed when actions arose from NFIP policies, but succeeded when actions arose from state law.
- Courts have declined to enforce policy language that they perceive as ambiguous.

The “Anti-Concurrent Causation” Clause

“We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.”

Insurance Services Office Causes of Loss-Special Form (CP 10 30 04 02),
accompanying Building and Personal Property Coverage Form (CP 00 10
04 02).

Are These Clauses Enforceable?

- Not in Washington State. “[B]y drafting variations in exclusionary clause language an insurer may [not] circumvent the “efficient proximate cause” rule . . .” Safeco Ins. Co. of Am. v. Hirschmann, 773 P.2d 413, 416 (Wash. 1989).
- Not in West Virginia. Murray v. State Farm Fire & Cas. Co., 509 S. E. 2d 1 (W. Va. 1998).

Are These Clauses Enforceable?

- Thus Far, Not in Mississippi.
Leonard v. Nationwide Mutual Ins. Co., 2006 WL 2352961
(S.D. Miss, August 15, 2006)
- If enforced, clauses “would mean that an insured whose dwelling lost its roof in high winds and at the same time suffered an incursion of even an inch of water could recover nothing under his Nationwide policy. . . I do not believe this is a reasonable interpretation of the policy.”

Are These Clauses Enforceable?

- Yes, in Utah.
 - Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272 (Utah 1993).
- To be determined in Louisiana and Texas.
NB: Legislation precluding the enforcement of these clauses has been under consideration in Louisiana.

Other Relevant Doctrines . . .

- *Contra Proferentem*
- Common law doctrines of good faith and fair dealing
- State consumer protection statutes, including bad faith and timely payment of claims
- Policyholder's Reasonable Expectations Doctrine

Louisiana Valued Property Law

“[I]f the insurer places a valuation upon the covered property and uses such valuation for purposes of determining the premium charge to be made under the policy, in the case of total loss the insurer shall compute and indemnify or compensate any covered loss . . . without deduction or offset . . .”

LA. REV. STAT. ANN. § 22:695(A)

Mississippi Valued Property Law

“ . . . When buildings and structures are insured against loss by fire and, situated within this state, are totally destroyed by fire, the company shall not be permitted to deny that the buildings or structures insured were worth at the time of the issuance of the policy, the full value upon which the insurance is calculated, and the measure of damages shall be the amount for which buildings and structures were insured. . . . ”

MISS. CODE ANN. §83-13-5

Texas Insurance Commissioner's Bulletin No. B-0045-98

“ . . . an insurer providing property coverage under replacement cost residential policies that allow for the adjustment of covered losses to structures on an actual cash value basis may not calculate actual cash value on the basis of replacement cost . . . nor may the insurer deduct sales tax on building materials.”

Florida Valued Policy Law:

- Florida had a Valued Policy Law for 106 years.
- After Hurricane Irene, a Florida appellate court ordered payment of full claims under this statute. Mierzwa v. Florida Windstorm Underwriting Ass'n., 877 So. 2d 774, (Fla. Dist. Ct. App. 2004).
- But state legislature changed the law shortly after that decision.

Things to Remember:

- “Buyer Beware” applies to policyholders who buy insurance policies.
- But “Seller Beware” applies to the insurance companies who sell them.

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