Fla. Insurance Suit Trends To Look Out For After Hurricane Ian

By **David Levin and Spencer Leach** (November 30, 2022)

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In late September, Florida was again at the center of a historic natural disaster when Hurricane Ian made landfall along the Lee Island Coast as a strong Category 4 storm, leaving behind a wake of devastation.

Innumerable properties were affected by Hurricane Ian, with estimated property losses in Florida exceeding $40 billion.[1] With an impact of this scale, Hurricane Ian claims could approach the 1 million claims associated with Hurricane Irma.[2]

The number of Hurricane Ian lawsuits that will be filed is anybody's guess, but if history has taught us anything, there will be tens of thousands, with a singular insurance claim having the potential to result in separate lawsuits by an insured, a tarping company, a water mitigation company, a mold remediation company, a roofer, a contractor and so on.

So goes the typical tale of Florida property insurance litigation. The flood of litigation is coming, but what will it entail? How will it be different from prior storms? What areas of the law are going to be tested? This article discusses some key legal and factual issues likely to be at the heart of Hurricane Ian litigation.

Determining What Peril Caused the Damage and Whether It Is Covered by Insurance

Typical homeowner's policies exclude damages caused by flood, tidal water and storm surge, and usually cover damages caused directly by windstorms.

Accordingly, when adjusting a Hurricane Ian claim, a threshold inquiry will be whether the damages being claimed were caused by flood water, wind forces or a combination of both.

If a property was damaged by both flood water and wind forces, the necessary next question is whether it is possible to reasonably discern and segregate the causes of loss, and determine what damages were caused by what perils. The policy will also need to be carefully reviewed to determine how it treats concurrent causes of loss.

There will be easy cases where the ability to determine exactly what caused damages will be clear, perhaps with well-defined watermarks proving helpful in separating damages.

A carrier might have a practice of covering those interior damages caused by a leaking roof or blown out window which are located above a defined watermark, such as upper walls, ceilings and roofs, but declining coverage for lower walls, cabinetry, floors, appliances, and personal property located at or below a watermark.

However, there will be many cases where separating damages will be a complicated task. For instance, if a roof started to leak during Hurricane Ian, and there is no well-defined watermark inside, then a dispute may ripen as to whether the interior damages were caused by water entering the roof, which would potentially be covered, or through surface water, which would likely be excluded.

In some cases, if the policy contains what is commonly referred to as "storm-created opening" language, then interior damages caused by a leaking roof might only be covered if there is evidence that the direct forces of wind caused an opening in the roof or walls through which rainwater entered.

In other words, not all damage from a leaking roof will be covered, but a wind-damaged roof most likely will be subject to coverage. In other cases, a roof might exhibit evidence of direct wind damage, but no wind-created opening that would have allowed water to enter — and so some homeowners may be entitled to a roof replacement, but not coverage for interior water intrusion.

The process of differentiating between wind and flood damage, and determining whether a roof is merely leaking or instead has storm-created openings, presents a factually intensive determination that will require a case-by-case field assessment, often assisted by a forensic engineer, along with review of weather data and historical aerial photographs.

Further, evidence alone will not always answer the question of what is or is not covered; instead, carriers, adjusters and insureds will need to view these claims through applicable Florida law and specific policy provisions that might operate to limit or bar coverage under certain circumstances, such as the concurrent cause doctrine, anti-concurrent cause provisions and Florida's Valued Policy Law.

Concurrent Cause Doctrine

The concurrent cause doctrine provides that coverage may exist where an insured risk constitutes a concurrent cause of the loss even when it is not the prime or efficient cause.[3]

In Sebo v. American Home Assurance Company Inc., the Florida Supreme Court clarified in 2016 that:

> The concurrent-cause doctrine, not the efficient-proximate-cause doctrine, is the appropriate theory of recovery to apply when two or more perils converge to cause a loss and at least one of the perils is excluded from an insurance policy.[4]

Specifically, it applies where there is no reasonable way to distinguish the proximate cause of the loss, with the court noting, "[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage."[5]

In considering the concurrent cause doctrine, once a covered loss has been established, the insurer has the initial burden of production to present evidence that an excluded risk was a contributing cause of the damage.[6]

If it does so, the burden shifts back to the insured to produce evidence that a covered risk was a concurrent cause too, and if the insured produces this evidence, the burden again shifts to the insurer to prove the insured's purported concurrent cause either played no — or a de minimis — causal role or was itself excluded.[7]

Where there is a proper debate over the application of doctrines, the trial court should craft jury instructions which have the jury first determine whether a single efficient proximate cause could be identified and, if not, include a follow-up instruction concerning the

concurrent cause doctrine, with the jury determining if at least one of the concurrent causes is covered and not excluded from coverage.[8]

Application of Anti-Concurrent Cause Provision

However, the concurrent cause doctrine's application is still limited. For example, the doctrine does not apply where there are applicable anti-concurrent cause provisions applying to the subject coverages in the governing policy.[9]

According to the 2015 Liberty Mutual Fire Insurance Co. v. Martinez decision from Florida's Fifth District Court of Appeal:

> An anti-concurrent cause provision is a provision in a first-party insurance policy that provides that when a covered cause and noncovered cause combine to cause a loss, all losses directly and indirectly caused by those events are excluded from coverage.[10]

That decision said:

> Absent an anti-concurrent cause provision, when independent covered and noncovered causes of loss combine to produce a loss, the loss is covered under the concurrent cause doctrine.[11]

In Security First Insurance Company v. Czelusniak in 2020, Florida's Third District Court of Appeal found:

> [W]hen independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine. However, when the insurer explicitly avoids the application of the concurring-cause doctrine with an anti-concurrent cause provision, the plain language of the policy precludes recovery … Because evidence of water entering through the exterior walls and windows was undisputed and is expressly excluded by the policy, the entire loss is excluded from coverage due to the anti-concurrent cause provision regardless of any other cause or event contributing concurrently or in any sequence to the loss.[12]

Florida's Valued Policy Law

An important Florida statute known as the Valued Policy Law may be implicated in Hurricane Ian claims involving major destruction to properties. Subsection 1 of Florida's VPL provides that, in the event of a total loss by a covered peril, the carrier must pay "the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid."[13]

There are two essentials of the statute. The first is that the building be "insured by [an] insurer as to a covered peril."[14] The second is that the building be a total loss.[15] If these two facts exist, the VPL mandates that the carrier is liable to the owner for the face amount of the policy, no matter what other facts are involved as to the costs of repair or replacement.[16]

In other words, when applicable, an insured homeowner is not required to prove the cost to rebuild the insured property, as the principal object and purpose of Florida's VPL is to fix the

measure of damages in case of total loss.[17]

Unfortunately, the statute does not define the term "total loss." However, Florida courts have predominantly used the identity test to determine what constitutes a total loss.[18] Under the identity test, a structure is a total loss if the damage to the structure is so severe that it has lost its identity and character as a building, even though a portion of the building's components remain and could be utilized for some useful purpose.[19]

In addition to the definition of total loss under the identity test, when an insured building or structure is damaged by a covered peril and an ordinance or regulation prevents repair, it may be deemed to be a "constructive total loss."[20] Such a designation will also result in an application of Florida's VPL.

However, the VPL's application is not unlimited, and it has been specifically restricted in circumstances relevant to Hurricane Ian claims. The Florida Supreme Court recognized in 2007 in Florida Farm Bureau Casualty Insurance Co. v. Cox that the VPL only intends that an insurer be liable for a loss by a peril covered under the policy for which a premium has been paid.[21]

Accordingly, it concluded:
[W]e do not find that the plain language of the [VPL] statute intends that if a covered peril causes part of a total loss, that the insurer is mandated to pay for the total loss. Of particular importance, the VPL does not mention causation. Section 627.702 does not establish any requirement for an insurer to pay for excluded or noncovered perils. We read the plain language of the statute not to reasonably support such an interpretation.[22]

In doing so, the court specifically rejected the application of the VPL to a loss where a property was damaged by both wind and excluded water in a hurricane.[23] Courts have since repeatedly recognized that the VPL does not apply when a total loss is caused by a combination of covered and noncovered perils.[24]

The only recognized exception of sorts is that an insured is allowed to attempt to prove that wind alone caused a total loss before the storm surge arrived, and to thereby require coverage.[25]

Furthermore, new case precedent suggests that the VPL does not apply to surplus lines carriers, further limiting its application.[26]

Remedial Statutes to Curb Litigation Abuses

In recent years, the Florida Legislature has enacted various statutes aimed to curb insurance litigation abuses. The two main statutes are Florida Statute Section 627.7152, commonly referred to as the assignment of benefits, or AOB, statute, and Florida Statute Section 627.70152, commonly referred to as the notice of intent, or NOI, statute.

The AOB statute, which has been in effect since July 1, 2019, applies to all AOBs executed after its effective date. Since enactment, various changes have been made to the AOB statute, which generally requires an assignee to, among a host of other obligations, provide pre-suit notice and a pre-suit demand to a carrier.[27]

Most important for Hurricane Ian claims is newly revised subsection 10, which governs how attorney fees may be awarded. Unlike prior versions of the statute which authorized attorney fees under certain circumstances based on the amounts ultimately recovered by an

assignee, the new statute expressly provides that "attorney fees and costs may be recovered by an assignee only under s. 57.105."[28]

Thus, absent sanctionable conduct, attorney fees can no longer be awarded to a prevailing assignee. This remedial measure should significantly reduce the incentive to engage in overzealous litigation simply to drive up a fee claim, which has terrorized carriers who have regularly been unable to resolve nominal AOB claims due to exorbitant fee demands.

The NOI statute, on the other hand, only went into effect on July 1, 2021. Unlike the AOB statute which applies to all AOBs executed after its effective date, the NOI statute has routinely been interpreted to apply only to insurance policies issued after the effective date of the statute.[29]

Thus, many claims that arose after the NOI statute went into effect were not subject to it. However, now that the NOI statute is over one year old, all Hurricane Ian claims will be required to comply with its requirement.

Generally, the NOI statute requires an insured to provide a carrier with a specific monetary demand, and the carrier then has ten business days to respond.[30] When dealing with a denied claim, the carrier must decide whether to affirm its denial or demand reinspection.[31]

When a carrier opens coverage for a Hurricane Ian claim, the carrier will have the opportunity to require the insured submit to pre-suit mediation or appraisal, thereby potentially avoiding costly litigation.[32]

The carrier can also make a strategic counteroffer to narrow the amounts in controversy, which could later come into play when evaluating whether and to what extent an insured is entitled to attorney fees if it wins the lawsuit.[33]

The specific mechanics of the fee-determining provisions of the NOI statute are not straightforward, and there is currently no known appellate law interpreting how the statute should be applied. For purposes of this article, the important takeaway is that an insured is incentivized not to make an exorbitant demand, because the ability to later recover attorney fees is measured by the pre-suit "disputed amount" against the amounts ultimately obtained.[34]

However, while attorney fee reform is most-welcome, the remedial impact of the statute only comes into play after a trial if the insured prevails, thereby somewhat muting its impact in these circumstances. Finally, the current version of the NOI statute includes a "strong presumption" against the use of fee multipliers, the prospect of which had previously caused carriers and defense lawyers many restless nights.

Takeaways

Ultimately, each carrier is going to focus on different considerations on how they seek to mitigate risk and settle claims. However, Florida has become a breeding ground for fraudulent and overreaching claims, and while a carrier must always strive to deal with their customers fairly and honestly, they too must be vigilant in the face of suspect actors who have pecuniary gain as a primary motive.

As with any claim, a prompt investigation will place a carrier in the best position to assess which damages were caused by a certain peril. Adjusters should be educated on how to

segregate flood and wind damage and should fully document all areas of a home, inside and out.

A carrier will also want to consider engaging an engineer when appropriate, demanding maintenance and repair records from the insured, reviewing all available satellite imagery and working together with any known flood insurers to coordinate efforts.

Following any issued coverage decision, a carrier should have a reliable system in place to evaluate and respond to statutory notices of intent to initiate litigation, both under the AOB and NOI statutes, and should be intimately familiar with the specific policy forms that govern a risk.

Education on the VPL and anti-concurrent cause provisions will be critical, as many adjusters may incorrectly assume that a destroyed property is unquestionably covered — when in reality, it may be unquestionably excluded from coverage.

When dealing with AOB claims, a carrier should also strictly scrutinize the subject AOB to ensure that it complies with the strictures of the AOB statute.

Moreover, when dealing with an insured's pre-suit NOI, a carrier should give consideration whether a reasonable settlement offer is warranted, both for purposes of settling the claim and to hedge against the future risk of paying the insured's attorney fees.

We expect pre-suit mediation will become the preferred resolution option, as it provides a carrier a chance to avoid costly litigation, without the prospect of adverse attorney fees looming. On cases where a carrier has agreed to a roof replacement, and the real dispute is over scope and pricing, appraisal may be an attractive option.

A final word of advice to the insurance defense lawyers readying for this imminent litigation wave — best to get that pot of coffee brewing right now; you'll likely need it sooner rather than later.

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[1] https://www.barrons.com/articles/hurricane-ian-damage-costs-51664441999.

[2] https://www.insurancejournal.com/news/southeast/2020/09/10/581974.htm.

[3] Sebo v. Am. Home Assurance Co., Inc., 208 So.3d 694, 697 (Fla. 2016).

[4] Citizens Prop. Ins., Corp. v. Salkey, 260 So.3d 371, 372 (Fla. 2d DCA 2018).

[5] Sebo, 208 So.3d at 700.

[6] Wood v. Hartford Ins. Co of the Midwest, No. 5:20-cv-212-AW-MJF, 2021 WL 6882444,

at *4 (N.D. Fla. Oct. 22, 2021).

[7] Id.

[8] Jones v. Federated Nat'l Ins. Co., 235 So.3d 936, 939 (Fla. 4th DCA 2018).

[9] See Salkey, 260 So.3d at 374; Jones, 235 So.3d at 940.

[10] Liberty Mut. Fire Ins. Co. v. Martinez, 157 So.3d 486, 487 n.1 (Fla. 5th DCA 2015).

[11] Martinez, 157 So.3d at 487, n.1; see also Security First Ins. Co. v. Czelusniak, 305 So.3d 717, 718 (Fla. 3d DCA 2020).

[12] Czelusniak, 305 So.3d at 718-719.

[13] Fla. Stat. § 627.702(1)(a).

[14] Fla. Stat. § 627.702(1)(a).

[15] Id.

[16] Id.

[17] Springfield Fire and Marine Ins. Co. v. Boswell, 167 So.2d 780 (Fla. 1st DCA 1964).

[18] See LaFayette Fire Ins. Co. v. Camnitz, 149 So.653, 654 (Fla. 1933).

[19] Id.

[20] Reliance Ins. Co. v. Harris, 503 So.2d 1321, 1323-1324 (Fla. 1st DCA. 1987).

[21] Fla. Farm Bureau Cas. Ins. Co. v. Cox, 967 So.2d 815, 820 (Fla. 2007).

[22] Id.

[23] Id. at 821.

[24] Fla. Farm Bureau Cas. Inc. Co. v. Mathis, 33 So.3d 94, 97 (Fla. 1st DCA 2010); Citizens Prop. Ins. Corp. v. Hamilton, 43 So.3d 746, 754-755 (Fla. 1st DCA 2010); Citizens Prop. Ins. Corp. v. Mallett, 7 So.3d 552 (Fla. 1st DCA 2009).

[25] Id.

[26] CLAIRE CEBALLOS, et al., Plaintiffs, v. IRONSHORE SPECIALITY INSURANCE COMPANY, Defendant., 1:21-CV-22543-KMM, 2022 WL 17037693 (S.D. Fla. Jan. 11, 2022).

[27] Fla. Stat. § 627.7152.

[28] Id.

[29] Fla. Stat. § 627.70152.

[30] Fla. Stat. § 627.70152(3)-(4).

[31] Fla. Stat. § 627.70152(4)(a).

[32] Fla. Stat. § 627.70152(4)(b).

[33] Id.; Fla. Stat. § 627.70152(8).

[34] Id.