WIND V. WAVE: MAKING THE CRITICAL DISTINCTION OF DAMAGE CAUSED BY STORM WINDS AND STORM SURGE

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Before Hurricane Hermine ravaged parts of Florida last week, it had been almost 11 years since a named storm made landfall in the state. A majority of property owners throughout Florida experienced some affects of the storm and those in the panhandle and nearby areas suffered the most devastating damage, likely due to their coastal location. It is commonplace during a hurricane, or other storm, for the perils of wind and flood to cause a total loss to property. While an owner is unlikely to remain on their property long enough to observe what specific damage wind forces caused before any flooding occurs, this distinction is critical in terms of identifying the scope of coverage potentially available to the affected property owner. The reason is because a proper valuation of property after a total loss occurs is often difficult to ascertain.

Insurance companies generally investigate wind claims differently than flood claims. When multiple perils such as wind and flood are alleged to have caused damage during a hurricane, insurance companies are likely to consider each peril to be a separate event or occurrence even though the perils originated from the same storm. This distinction gives an insurer additional grounds for denying coverage in whole or in part. Accordingly, it is equally important for property owners, before the occurrence of a hurricane or other storm, to properly identify the specific perils covered in their respective insurance policy.

Although commercial and residential insurance policies generally protect property against loss or damage caused by wind, rain or hail, it is a common misconception that these policies also protect against loss or damage caused by flooding. Typically, property insurance policies do not cover flood damage and this exclusion is often highlighted in bold letters on the declarations page of each policy. Therefore, in order to be covered for flood loss, property owners must obtain a separate flood insurance policy. Flood policies generally provide coverage for losses caused by storm surges of tidal water that result in flooding, or the overflow of water from an inland body of water. In Florida, depending on a property's location, flood insurance may be required as a condition to obtain a mortgage or loan. A vast majority of flood insurance coverage is federally regulated and provided through the National Flood Insurance Program ("NFIP"), which is administered through the Federal Emergency Management Agency ("FEMA"). Although the flood program provides relatively affordable insurance for flood damage, there are a multitude of limitations and conditions of this insurance which are distinct from those applicable to a property policy and which require specialized knowledge to navigate in order to maximize coverage.

In Florida, there are two common types of property insurance policies offered by insurers that provide coverage for various types of perils. The first is an "all risk" policy, which provides coverage for all direct physical loss or damage to the insured property unless the cause of loss specifically excluded.[1] Under the prevailing concurrent cause doctrine theory, an "all risk" policy covers the entire loss if two or more perils combine to cause the loss, so long as at least one of the perils is covered.[2] In contrast, under a "named peril" insurance policy, loss or damage to property is covered only if the loss is caused by a listed peril, such as wind, hail, or flood. In other words, unless a peril specifically listed in the policy caused the loss, the loss is excluded and no coverage is afforded.

In the event of a partial loss alleged to have been caused by multiple perils, identifying the specific damage caused by each different peril is much easier to determine. Following a total loss alleged to have been caused by multiple perils, however, differentiating the damage caused by each peril may not be so easy. Florida courts have wrestled with this issue in the aftermath of Hurricanes Irene, Katrina and Wilma. Most recently, New York and New Jersey courts faced a similar issue following Hurricane Sandy. Primarily, a conflict exists as to what extent of a total loss was caused by flood, rather than wind.

When a total loss occurs, property insurance in Florida is regulated by the Value Policy Law, codified in Florida Statutes, §627.702 (“VPL”). The VPL states that in the event of the total loss of any building or structure, absent any fraudulent or criminal fault on the part of the insured or one acting in her or his behalf, “an insurer’s liability under a property insurance policy, if caused by a covered peril, shall be in 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.”

If you are a property owner in Florida and have any questions regarding your insurance policy, including the coverages it provides following a hurricane or other storm, please contact Michael J. Higer of Berger Singerman's Insurance Team.

[1] See Fayad v. Clarendon Nat. Ins. Co., 899 So. 2d 1082, 1085 (Fla. 2005).

[2] See Wallach v. Rosenberg, 527 So. 2d 1386 (Fla. 3d DCA 1988).

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