Hurricane Ian: Discussing Wind-Water Disputes

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Insurance Coverage and Bad Faith Alert
9.30.22

"Most of the Florida homes in the path of Hurricane Ian lack flood insurance, posing a major challenge to rebuilding efforts, new data show. In the counties whose residents were told to evacuate, just 18.5 percent of homes have coverage through the National Flood Insurance Program, according to Milliman, an actuarial firm that works with the program."

That's how a September 29th article on *The New York Times* website begins.

When it comes to insurance coverage for hurricanes, the oft-stated maxim is that homeowner's policies cover damage caused by wind but not flood waters.

Such a low take-up rate for flood insurance policies would seemingly create an incentive for those affected by Hurricane Ian to argue, when feasible, that their property damage, despite appearing to have been caused by flood, was also caused by wind. [And, of course, businesses looking to make business interruption claims, under commercial property policies, will be in the same boat.]

Further, even when someone has a homeowner's policy *and* a flood policy, there may still be a reason to argue that the loss was caused by wind, as homeowner's policies often have greater limits than flood policies.

[As an important aside, when hurricane damages are covered, homeowner's policies can have a significant deductible, perhaps up to 10% of a home's insured value.]

Disputes over property damage, allegedly caused by wind and flood waters, were legion after Hurricane Katrina. There was a lack of guidance on the issue under Mississippi law. This played a part in driving the massive coverage litigation that grew out of the storm.

But if there are disputes over the cause of Hurricane Ian damage, Florida's highest court has addressed the issue. Much attention will be paid to *Sebo v. American Home Assurance Co.*, 208 So. 3d 694 (Fla. 2016), where the Florida Supreme Court addressed coverage under a homeowner's policy for property damage caused when hurricane winds and other causes combined to cause damage to a home. On its face, the decision is quite favorable to policyholder's. However, the policy was manuscript, and the court's decision, by its own words, would not seem to apply to standard form homeowner's policies.

John Sebo purchased a four-year-old home in Naples in April 2005. American Home Assurance Company provided homeowner's insurance. The policy, which insured against "all risks," was created specifically for the Sebo residence. The house and other permanent structures were insured for over $8,000,000.

Shortly after Sebo bought the residence, water began to intrude during rainstorms. It became clear that the house suffered from major design and construction defects. In October 2005, Hurricane Wilma struck Naples and further damaged the Sebo residence. The residence could not be repaired and was eventually demolished. Sebo filed a liability action for the construction defects. In addition, he filed suit against AHAC for coverage and a jury found in his favor.

The Florida Court of Appeal reversed and remanded for a new trial, in which the causation of the damage was to be examined under the "efficient proximate cause" theory. More about that below.

The case made landfall at the Florida Supreme Court and it described the task at hand as follows: "We are confronted with determining 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."

In essence, construction defects (excluded from coverage) combined with rainwater and hurricane winds (covered) to cause the damage to Sebo's property. However, there was no reasonable way to distinguish these causes. The court looked to two theories to address the situation:

Under the "efficient proximate cause" theory, "where there is a concurrence of different perils, the efficient cause—the one that set the other in motion—is the cause to which the loss is attributable."

Under the "concurrent cause" theory, "coverage may exist where an insured risk constitutes a concurrent cause of the loss even when it is not the prime or efficient cause." In other words, when there are multiple causes of loss, coverage is owed as long as one of the causes is covered.

In its 1988 decision in *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988), the Florida Court of Appeal adopted the "concurrent cause" theory: "Where 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." However, the appeals court in *Sebo* went in a different direction than *Wallach*, holding that "a covered peril can usually be found somewhere in the chain of causation, and to apply the concurrent causation analysis would effectively nullify all exclusions in an all-risk policy."

But the Supreme Court in *Sebo* determined to follow *Wallach*, stating: "[T]here is no reasonable way to distinguish the proximate cause of Sebo's property loss—the rain and construction defects acted in concert to create the destruction of Sebo's home. As such, it would not be feasible to apply the [efficient proximate cause] doctrine because no efficient cause can be determined. As stated in *Wallach*, '[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.'"

However – and the significance of this cannot be overstated – the Supreme Court added: "Furthermore, we disagree with the Second District's statement (in *Sebo*) that the [concurrent causation doctrine] nullifies all exclusionary language and note that AHAC explicitly wrote other sections of Sebo's policy to avoid applying the [concurrent causation doctrine]. Because AHAC did not explicitly avoid applying the [concurrent causation doctrine], we find that the plain language of the policy does not preclude recovery in this case."

It seems very likely that the Supreme Court in *Sebo* was noting that other sections of the AHAC policy contain an "anti-concurrent causation" clause. This is a clause, almost always seen in the flood exclusion of standard homeowner's polices, providing (or language to this effect) that no coverage is owed for "loss or damage caused directly or indirectly by any excluded cause or event, regardless of any other cause or event that contributes concurrently or in any sequence to the loss." The name "anti-concurrent causation" clause comes from the purpose of the clause – avoid application of the concurrent causation doctrine adopted in *Sebo*.

While *Sebo* is a pro-policyholder decision, that is not the case when you consider that the relevant policy language was not subject to an anti-concurrent causation provision. The court clearly would have reached a different decision if it were.

With standard homeowner's and commercial property polices generally providing an "anti-concurrent causation" clause, *Sebo* should preclude litigation by most policyholders arguing that coverage is owed for property damage caused by wind and water. But as we saw in Katrina – and with Covid-19 coverage litigation – when the stakes are high, coverage will be pursued, challenges notwithstanding.

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