

## 5 Hurricane Harvey Insurance Battlegrounds To Watch

By **Jeff Sistrunk**

*Law360, Los Angeles (September 6, 2017, 8:19 PM EDT)* -- As Hurricane Harvey's floodwaters recede and losses fully come into focus, property owners and their insurers will likely lock horns over a slew of issues, including whether damage was caused by flooding or wind and how many separate events contributed to a loss.

Here, Law360 looks at five questions that may lead to clashes between policyholders and insurers in the hurricane's aftermath.

### **What Caused the Loss?**

Harvey unleashed its fury on a swath of east Texas for days, bringing winds of up to 130 miles per hour and dumping up to 50 inches of rain on affected cities. As with many large-scale natural disasters, the dynamics of the hurricane and the ensuing flooding will raise critical questions about the causes of damage to policyholders' properties, and the answers may have a decisive impact on the availability of insurance coverage.

While coverage for wind damage is widely available through private property insurance policies and policies issued through the Texas Windstorm Insurance Association, coverage for flood losses can only be acquired via the federally backed National Flood Insurance Program and a select few private insurers, and data indicates that utilization of the NFIP in the areas slammed by Harvey is low.

According to the Insurance Information Institute, only about 40 percent of homeowners in the hard-hit Aransas and Galveston counties on the Gulf of Mexico hold flood policies through the NFIP, and for homeowners in Harris County — which includes Houston — that portion is just 15 percent.

Therefore, attorneys say, it will be important for property owners without comprehensive flood coverage to demonstrate what portion of their damage is attributable to wind or rain.

"Our Texas Supreme Court has made it clear you have to segregate or allocate your damages between covered and uncovered losses," said Jim Cooper, a Houston-based member of Reed Smith LLP's insurance recovery group. "If a policyholder, perhaps a homeowner, doesn't have flood insurance but has coverage under a homeowner's policy for wind-driven rain, it is going to be up to the insured to allocate that damage and prove the cause of their loss was covered. That is a difficult burden, but one they should hopefully be able to carry."

Policyholders located near airports and military bases will be able to refer to wind data collected at those facilities to help establish that their claimed property damage was caused at least in part by wind, said Nossaman LLP partner Steven Knott.

"For anything above 35 miles per hour, you have a good argument that wind contributed to the damage," Knott said. "I think a lot of policyholders will be trying to get accurate wind data."

However, attorneys say, property owners who don't hold flood policies shouldn't give up on coverage for all losses tied to water accumulation, as some property policies have less expansive definitions of "flood." In addition, such policies often extend coverage for "named windstorms," and the applicable definition of that term often includes damage due to wind-driven water or storm surge.

"It is important to keep in mind that the definition of flood can vary from policy to policy. In this particular storm, not all of the water damage was caused by storm surge; a lot of it was caused by rain," said Finley T. Harckham, senior litigation shareholder at Anderson Kill PC. "It may be the case that water damage is not considered caused by flood — for instance, if there is backup in plumbing, roof drains or storm drains. Also, water infiltration from a structure's roof may not be considered flood, even if it is caused by pounding of water."

Perhaps most importantly, policyholders shouldn't be too quick to pin their losses on any one cause, said Stephen Moll, head of Reed Smith LLP's insurance recovery group in Houston.

"They will want to delay suggesting a cause of loss to their carriers until they have done a careful factual investigation and understand the coverage available under their policies," Moll said.

### **How Many Incidents?**

Policyholders and insurers are also likely to duke it out over whether Harvey-related losses are attributable to more than one "occurrence" or incident. A policyholder's position on the issue will depend on the applicable deductibles and policy limits, attorneys say.

"The typical thinking is that the insurers may try to push a multiple-occurrence position for the purpose of having multiple deductibles apply, and ultimately less coverage available," said Blank Rome LLP partner Jared Zola. "However, in the case where a policy has low retentions and per-occurrence limits, it may be in the policyholder's best interest to have multiple occurrences and multiple available limits."

For instance, if a large company has a \$50 million per-occurrence limit in its property policy but a \$100 million aggregate limit for the policy period, it would work to the company's advantage to prove that the damage was caused by more than one occurrence, so it could access the aggregate sum.

By contrast, a small business owner holding a \$5 million policy for several stores could take a significant financial hit if it had to satisfy multiple deductibles based on a determination that multiple occurrences were in play.

Generally speaking, attorneys say that Harvey's initial landfall and the ensuing waves of rain and destructive wind will likely be treated as a single occurrence by most insurers.

"In this instance, I would think it would be difficult to call the kind of damage we've seen more than one

occurrence," said Cooper. "I understand most people have experienced continuous rainfall for days on end. At least in the Houston area, we're probably looking at one occurrence."

But certain events related to Harvey could be considered separate occurrences for coverage purposes, according to attorneys. In one noteworthy development, Houston and Harris County have run into some criticism for their decision to release water from two storm-swollen reservoirs. A putative class action filed against the city and county on Sunday alleges that the controlled releases flooded thousands of Houston homes and businesses.

"There could be an argument made that, when the floodgates were literally opened, that was a separate occurrence," said Harckham.

### **Does Business Interruption Coverage Apply?**

Following a huge storm, a company's losses due to property damage may pale in comparison to its losses stemming from the inability to operate its own business, or from the interruption of a supplier's or customer's business. Attorneys say the temporary shutdowns of many oil refineries and chemical plants in Harvey's path could have companies that partner with those facilities looking to a form of insurance known as contingent business interruption coverage.

"[Contingent business interruption] coverage makes this storm more economically relevant for entities doing business all over the country and the world if, for example, property damage to the policyholder's supplier prevents the supplier from providing goods or services at full capacity," said Zola. "Also, if customers are unable in whole or in part to receive the policyholder's products due to property, the policyholder may also be able to obtain coverage for those economic losses."

In order for contingent business interruption coverage to apply, the cause of the customer's or supplier's loss must fall within the scope of the policyholder's own insurance, noted Harckham.

"So the overarching issue of whether flood or windstorm caused the damage will apply to many contingent business interruption claims as well," Harckham said.

Many business interruption policies also include coverage for losses resulting from the policyholder's inability to physically access its business premises, including in situations where a government authority issues an evacuation order. In the Houston area, though, policyholders may run into difficulties tapping into that coverage, given that city officials didn't call for an evacuation before Harvey hit, attorneys say.

"The decision not to require mandatory evacuation could affect civil authority coverage, and impact ingress and egress coverage," said Rhonda Thompson, co-chair of Thompson Coe Cousins & Irons LLP's insurance litigation and coverage section. "Whether or not this, and similar coverages, apply will be driven by policy language applied to a policyholder's specific circumstance."

### **How Precise Do Claims Have To Be?**

A week after Harvey made landfall, a polarizing new Texas law impacting policyholders' ability to sue over weather-related insurance claims took effect. The law, H.B. 1774 — which applies only to property policies issued by private insurance carriers — requires a policyholder to provide written notice of a claim to an insurer 61 days before filing suit. The notice must contain information regarding the damages claimed from the insurer, as well as the "reasonable and necessary" attorneys' fees incurred by the policyholder.

According to attorneys, policyholders' preliminary estimates of damages and attorneys' fees are sure to be subject to challenges by insurers. And the stakes are high, because the law provides for limitations on attorneys' fees awards to policyholders where the damages sought in the presuit notice against the insurer greatly exceed the damages actually recovered at trial.

Under the law, policyholders can win 100 percent of their attorneys' fees if they recover at least 80 percent of the presuit demand, but if they obtain less than that, the award of attorneys' fees will be reduced according to a scale.

While policyholders should accordingly strive to make their estimates as accurate as possible at the outset, they should have nothing to fear as long as they aren't trying to inflate their claims, attorneys say.

"I would argue that the intent of the law is to eliminate fraud," said Barry Fleishman, head of Shapiro Lifschitz & Schram's insurance coverage litigation practice. "The aim of the law is not to reduce the amount of legitimate coverage that should be given to a policyholder that has been paying premiums. 'Reasonable' depends on the circumstances at the time you are giving the estimate."

"Anyone in this business knows that it is difficult to estimate the loss at the beginning of the claim period," Fleishman added. "It takes investigation and review to come out and estimate that total loss. I would imagine that courts and juries will be relatively lenient."

### **How Long Can an Insurer Investigate?**

Under H.B. 1774, once an insurance company has received a presuit demand, it may request an opportunity to "inspect, photograph or evaluate" the damaged property "in a reasonable manner and at a reasonable time."

The insurer may then seek a court order barring the policyholder from filing suit over the claim until at least 15 days after the requested inspection is complete. Furthermore, a court can automatically abate a policyholder's suit if an insurer isn't provided a "reasonable opportunity" to carry out an inspection.

Some attorneys say the provisions in the new law outlining insurers' rights are rife with ambiguous terminology. One provision states that an insurer must complete its inspection no later than 60 days after receiving a presuit demand, if "reasonably possible." But that language provides an opening for insurers to stretch out investigations beyond the 60-day time frame, which could lead to conflicts with policyholders, according to attorneys.

"Particularly in the corporate context, this could be an area of dispute: what does a 'reasonable opportunity' to inspect or evaluate property mean and when is that 'completed'?" said Pillsbury Winthrop Shaw Pittman LLP counsel Tamara Bruno.

--Editing by Philip Shea and Breda Lund.