

Cat 5 Litigation in the Forecast?

By Bill Wein

The 2008 hurricane season was the sixth most active tropical storm season recorded since data collection began in 1851. Six storms made U.S. landfall in 2008. They were hurricanes Dolly, Gustav and Ike and tropical storms Edouard, Fay and Hanna. Ike, which made landfall at Galveston, and Gustav, which made landfall in Louisiana, caused the greatest destruction.

Current estimates project that Ike will be the fourth costliest Atlantic storm to make U.S. landfall, behind Katrina, Andrew and Wilma, while Gustav is projected to come in anywhere from number 12 to 20.

A number of key coverage issues emerged in the aftermath of 2005's Katrina and the subsequent insurance claims litigation. Many of these issues are still ongoing. They include the question of flood exclusions from homeowners' policies; issues of [wind damage](#) versus water damage; and the question of potential agent liability in situations where property owners felt their coverage wasn't adequate.

Some of these issues will continue to come into play in insurance cases arising from Ike, Gustav, and the other storms of the 2008 season, while others are not likely to be as significant. Bill Wein, President of IMS *ExpertServices*™, spoke to some of IMS's insurance litigation clients to learn more about how insurance claims from the 2008 season are likely to play out.

One difference we can anticipate with the 2008 season fallout is that we won't see the same frontal challenges to flood exclusions that occurred after Katrina, when plaintiffs argued that storm surge wasn't flood. In light of these challenges, some carriers changed the language of their flood exclusions, specifically listing storm surge as a water exclusion. However, this change is not likely to have much impact, because for the most part, the courts have already determined that storm surge does equal flood. In the words of one AmLaw 100 litigator, "The argument that storm surge doesn't constitute flood is dead."

The question of wind damage versus water damage, however, is still very much in play. For one thing, after Katrina some insurers refined the anti-concurrent clause conditions in their policies, defining exclusions with even more precision. Anti-concurrent clauses state, "We can exclude the following perils, alone or in sequence." They've been the basis of the rejection of wind-damage claims in the Katrina aftermath. The anti-concurrent clauses at issue specify that if a property is damaged by an excluded event, such as flood or earthquake, then it doesn't matter that the property was also damaged by a covered issue, such as wind. In such cases, insurers argue, there is no coverage at all.

State Farm and Nationwide have argued in the Fifth Circuit Court that if storm surge destroyed the house, then wind damage didn't matter. The court's response has been mixed. In some cases it found that when there was damage caused by wind, then even if storm surge later swept the house away, the insurer still owed something. In other instances, anti-concurrent clause conditions have been upheld by the Fifth Circuit Court. It will be interesting to see how the Texas courts handle the anti-concurrent causation provisions in the aftermath of Ike.

Another aspect of the wind versus water issue is the burden of proof. In situations where the courts are allowing coverage for wind damage, how does one determine which damage was caused by what? "During Katrina, people fled for their lives. When they returned, sometimes there was nothing but a slab," a hurricane litigator recalls. "This became the plaintiff's argument: the house was knocked down by the wind."

The difficulties of proof are substantial in this situation, raising the question: where does the burden of proof lie? Plaintiffs argue: my house is gone. That's the proof. But some carriers have pushed back, arguing that once they've proved conditions were right for flooding to occur, then the burden of proof shifts back to the plaintiff. Cases in Louisiana have gone both ways on this issue. In Mississippi, the Supreme Court has agreed to address the wind versus water issue in *Corban v. USAA*, which is still pending.

Because the wind versus water issue is still so unsettled, there's a lot of potential development on the question of damage causation. Teams of causation experts will continue to be needed. These teams traditionally consist of [meteorological experts](#) who perform forensic meteorology and weather reconstruction to opine on storm conditions at a precise location and moment in time, and structural engineers, who determine the effects of those conditions on existing structures.

Finally, even when the damage is entirely caused by water, disputes will arise over the cost of repairs. This is normal in the insurance industry, of course, and not unique to hurricane claims. What is particular to hurricane insurance litigation is the question of when the loss is valued. Since traditionally prices spike in affected areas during the aftermath of a hurricane, the timing of the valuation has a big impact. This question will only be exacerbated by the current state of the economy.

"There are many more contractors willing to work for lower fees than there were a year ago," the AmLaw 100 litigator acknowledges. "However, in insurance valuation, you value for what the cost will be for the next few months. You would never say, it's down now, but it's going back up, so that's how we'll value it."

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