



## Cat 5 Litigation in the Forecast?

- As 2008 Hurricane Claims Enter Court and New Season Approaches, Katrina Issues Linger -

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, Texas, and Gustav, which made landfall in Louisiana, caused the greatest destruction.

A number of key coverage issues emerged in the aftermath of 2005's Katrina and the subsequent insurance claims litigation. Many of the 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.

One difference that can be anticipated with the 2008 season fallout is that there won't be the same frontal challenges of 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.

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 exclusion with even more precision. Anti-concurrent clauses state, "We can exclude the following perils, alone or in sequence." The anti-concurrent clauses at issue specify that if a property is damaged by an excluded event, such as flood or earthquake, that it doesn't matter that the property was also damaged by a covered issue, such as wind. In such cases insurers argue, there is not 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 cases, 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 provisions for Ike claims.

Another aspect of the wind versus water issue is the burden of proof. 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.

Finally, even when the damage is entirely caused by water, disputes will arise over the cost of repairs. This is normal, of course, and not unique to hurricane claims. What is particular to hurricane insurance litigation is the question of when the loss is valued. Because traditionally prices spike in affected areas during the aftermath of a hurricane, the timing of 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 litigator with one of the top 100 Law firms in America acknowledged. "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."