

# Hurricane insurance claims: key causation and coverage issues

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With hurricane season under way, it is important to have a plan in place to mitigate the extent of financial losses from a storm and to understand the scope of coverage available under your first-party property policies.

The recent destruction caused by Hurricanes Laura and Sally in Louisiana and Texas has renewed focus on coverage for these catastrophes under commercial property insurance policies.

Two issues permeate discussions concerning coverage for windstorm losses.

First, where your business has been physically damaged by the storm, the issue is often whether the loss is subject to adjustment under the concurrent causation doctrine or the efficient proximate cause doctrine when covered and non-covered perils combine to cause the loss.

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This issue often arises in the aftermath of a hurricane, where wind and flood or storm surge combine to damage property.

“All risks” property policies cover all direct physical loss unless specifically excluded. Many standard property policies exclude damage caused by flood, but they generally cover damage resulting from wind, including wind-driven rain.

The second hot topic issue in windstorm claims is, putting aside damage to covered property caused directly by a storm, whether your business is entitled to contingent business interruption coverage based on damage to other businesses (or the properties of consumers) on which your business relies.

The first part of this article will discuss the causation issues that often arise when a storm causes direct physical damage to covered property.

The second part of this article will address coverage potentially available when there is no direct physical damage to your property

from a storm, but your operations are nevertheless shut down or seriously disrupted.

## HOW DO EFFICIENT PROXIMATE CAUSE AND CONCURRENT CAUSE WORK?

Under the efficient proximate cause doctrine, in determining the existence of coverage, courts focus on whether the policy insures against the event that precipitates the loss.

In other words, if a covered peril and an excluded peril combine to cause a loss, the policy generally only provides coverage if the covered peril was the predominant cause of the loss.

Under this approach, the “efficient” or “proximate” cause is the one that sets the other(s) in motion. *See, e.g., Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694, 697 (Fla. 2016) (“The EPC provides that 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.”).

For instance, if a fire causes damage to a building and also causes an explosion that further damages the building, the fire is the efficient cause.

If the policy covers damage from fire but excludes coverage for damage from an explosion, coverage is nonetheless triggered under an efficient proximate cause theory because a covered peril (*i.e.*, fire) caused an excluded peril (*i.e.*, the explosion).

If the sequence of events is reversed, however, and the explosion (a non-covered peril) causes the fire (a covered peril), then there is no coverage under the efficient proximate cause approach because the explosion, an excluded peril, precipitated the loss.

On the other hand, the concurrent causation doctrine is typically applied when two causes independently combine to damage property, and neither causes the other.

Under this doctrine, there is generally coverage under a first-party policy when a covered peril contributes, in any way, to cause property damage — even if an excluded peril is the predominant cause.

In the absence of an anti-concurrent causation provision (discussed below) in the applicable property policy, Florida follows the

concurrent causation doctrine. *Sebo v. Am. Home Assurance Co.*, 208 So. 3d 694, 700 (Fla. 2016).

In *Sebo*, because there was more than one cause of property damage to the insured's home, including defective construction, rain, and wind, and no reasonable way to determine the proximate cause of the damage, the Supreme Court of Florida held that the concurrent causation doctrine applied. *Id.* at 697, 699-700.

Texas applies a different analysis. If excluded and covered perils combine to cause loss, and the damage from the two causes cannot be separated, then the loss will be deemed caused by concurrent causes and will trigger the excluded peril — meaning that the insurer will have no duty to provide coverage. *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 608 (Tex. 2015).

**Under Florida law, if neither the insured nor the insurer can establish the cause of the damage, the insurer may be unable to meet its burden of proving that a policy exclusion applies to bar coverage, either in total or by virtue of an ACC provision.**

The Supreme Court of Texas, however, has noted that if a covered event and an excluded event each independently cause a loss, “separate and independent causation exists” and the insurer must provide coverage, despite the exclusion. *Id.*

#### WHAT IF THE POLICY CONTAINS AN ANTI-CONCURRENT CAUSE PROVISION?

Most standard property policies include anti-concurrent causation (“ACC”) provisions that remove coverage for “loss or damage caused directly or indirectly” by an excluded peril, regardless of whether “any other cause or event contributes concurrently or in any sequence to the loss.” See, e.g., ISO Form CP 10 30 10 12.

Both Florida and Texas — two states that frequently suffer losses due to wind, flood, storm surge, or a combination thereof from hurricanes — have enforced ACC provisions.

Under Florida and Louisiana law, parties may contract around the concurrent clause doctrine through an ACC provision. See, e.g., *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312, 1320 (M.D. Fla. 2002) (parties may avoid the concurrent cause doctrine through an express anti-concurrent cause provision); *Stewart Enterprises, Inc. v. RSUI Indem. Co., Inc.*, 614 F.3d 117 (5th Cir. 2010) (enforcing ACC provision under Louisiana law).

Texas has also upheld the applicability of an ACC provision. *JAW The Pointe*, 460 S.W.3d at 599. In *JAW The Pointe*,

Hurricane Ike caused both wind and flood damage to an apartment complex. *Id.* The policy covered wind damage, but excluded flood damage. *Id.*

The storm damage triggered a city ordinance requiring the property owner to bring the apartment complex into compliance with code requirements mandating that the structure be raised to a base flood elevation. *Id.* at 600.

To comply with the ordinance, the property owner had to demolish and rebuild the building. *Id.* at 601.

The insurance policy that covered the affected property contained an ACC provision that barred coverage for loss or damage caused directly or indirectly by flood, regardless of whether any other cause or event contributed concurrently or in any sequence to the loss. *Id.* at 604.

The Supreme Court of Texas held that under Texas law, the policy's flood exclusion, when read together with the ACC provision, barred coverage for any damage caused by a combination of wind and water. *Id.* at 608-10.

Because Hurricane Ike had caused both covered wind damage and excluded flood damage, which combined to cause the city to enforce the ordinance to the insured apartment building, the Court concluded that the policy did not cover the building owner's losses. *Id.* at 609-610.

#### WHAT IS THE CURRENT STATE OF CAUSATION?

Recently, Floridians prepared for Tropical Storm Isaias, which largely spared the peninsula. Texas and Louisiana are dealing with the aftermath of Hurricane Laura, which had sustained winds of approximately 150 miles-per-hour when it made landfall and caused horrific storm surge.

But which peril caused the actual destruction? Was it the sustained winds and wind-driven rain or was it flood damage due to storm surge or flooding due to rain?

Perhaps all of those perils caused the destruction. In many instances, property owners and insurers may never know. So how will courts treat these losses based on the current state of the law?

The answer may turn on which party has the burden of proof. Under Florida law, an insured claiming under an all-risks policy must show initially that insured property suffered a loss while the policy was in effect. *Jones v. Federated Nat'l Ins. Co.*, 235 So. 3d 936, 941 (Fla. Dist. Ct. App. 2018).

The burden then shifts to the insurer to prove that the damage or loss is excluded from coverage. *Id.* Texas follows the same approach. *JAW The Pointe*, 460 S.W.3d at 603 (citing Tex. Ins. Code § 554.002 (West 2017)).

In connection with concurrent causation, the burden is on the insurer to prove that the loss was caused by an excluded peril such as flood. The insurer may also try to establish that the

loss was caused by a combination of wind and flood damage sufficient to trigger the anti-concurrent causation provision.

Under Florida law, if neither the insured nor the insurer can establish the cause of the damage, the insurer may be unable to meet its burden of proving that a policy exclusion applies to bar coverage, either in total or by virtue of an ACC provision.

Under Texas law, however, as discussed above, where concurrent causes cannot be separated, “the exclusion is triggered” such that the insurer has no duty to cover the loss. *JAW The Pointe*, 460 S.W.3d at 608.

Policyholders and insurers will typically use causation experts to opine on which peril caused the loss.

### CONTINGENT BUSINESS INTERRUPTION COVERAGE (CBI)

Where your property has not been physically damaged by a hurricane or other windstorm, you still may face significant lost profits due to disruptions in your supply chain. This is where contingent business interruption coverage (CBI) comes in.

Generally, CBI covers loss of income due to physical loss or damage to property of a third party, such as a supplier, customer, transporter or other businesses that you rely on for your operations.

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Some policies limit contingent business interruption coverage to businesses in a direct contractual relationship with the policyholder, whereas other policies employ broad language that only requires damage to “any supplier of goods or services.”

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For instance, if a hurricane shuts down your only supplier of raw materials, your business could suffer significant financial loss as a result. CBI insurance provides coverage for this type of loss.

Unlike traditional insurance for business interruption, which covers loss of your business income when your insured property sustains loss or damage, such loss or damage to your own property is unnecessary to trigger CBI coverage.

Rather, CBI is triggered when physical loss or damage occurs to property on which your business depends for its normal operation. This is why CBI coverage often is referred to as “dependent property” coverage.

Based on the plain language of the policy, the threshold inquiry is whether your supplier’s property is a “dependent property” or other identified covered property for this policy.

Some policies include a designated schedule of dependent properties while others define dependent property to include entities that deliver materials or services to the policyholder, customers that accept the policyholder’s products or services, manufacturers of products and “leader locations” that attract customers to your business.

Furthermore, some policies limit CBI coverage to businesses in a direct contractual relationship with the policyholder, whereas other policies employ broad language that only requires damage to “any supplier of goods or services.”

This broader language, generally, does not require a contractual relationship between the insured and the dependent property.

Accordingly, if the policyholder relies on a supplier, and that supplier relies on another supplier that sustains direct property damage, CBI may be available to cover the policyholder’s financial loss.

The lack of contractual privity with the third party that sustains the loss does not necessarily defeat coverage.

Even under this broader language, however, the dependent property must be central to the operations of the policyholder’s business.

### IS ACTUAL DAMAGE TO DEPENDENT PROPERTY REQUIRED?

An important question that arises is whether physical damage to dependent property is required for CBI to apply. As discussed above, most CBI provisions require that the dependent property suffer some direct physical loss or damage.

Whether specific damage constitutes direct physical loss to dependent property sufficient to trigger CBI coverage will vary depending on the circumstances, including on the particular policy language at issue.

For instance, if wind-driven rain from a hurricane disables a supplier’s computer systems, the water damage to the computers would likely suffice to meet the physical injury to tangible property required to trigger CBI coverage.

Of course, whether such water damage could in fact trigger CBI would also depend on whether wind-driven rain is a covered peril under the policyholder’s own property policy. Indeed, for CBI coverage to apply, most property policies require that a covered peril cause the business interruption.

### THE CBI COVERAGE PERIOD

CBI has time limitations. Typically, CBI does not incept until after a specified waiting period has elapsed. Waiting periods are generally between 48 and 72 hours from the time of the loss. Think of this as a “time-element” deductible or retention.

It is also important to remember that, like other coverages, CBI may be subject to a sublimit of insurance — either a sublimited dollar limit or a sublimit based on the time the dependent business suffers the interruption, such as 30, 60, or 90 days.

Unlike the usual business interruption claim, CBI coverage typically does not require that the dependent property suffer a total cessation of operations — a slowdown or partial cessation will generally be enough to trigger coverage.

Thus, if an insured manufacturer sells a product to retailers nationwide and a hurricane results in reduced production, and thus sales, by the manufacturer to retailers in the region affected by a storm, then the reduced profits for the insured should be covered.

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This is especially important where businesses will have reduced hours leading up to and after a hurricane, such as when curfews are in effect after a storm.

### CONCLUSION

The issues surrounding causation and CBI insurance are only a few of the many important considerations for companies as they continue to prepare for the before and after of dealing with a hurricane.

Insurance companies will be prepared to offer expert opinions on causation. Policyholders should, therefore, be ready to respond to the potential issues and arguments raised by insurers as they evaluate claims.

For policyholders, this underscores the importance of assembling a qualified claim team, including knowledgeable coverage counsel, early in the claim preparation and adjustment process.

Even before the next storm strikes, the causation and CBI complexities discussed above are a reminder of the importance of reviewing insurance policies to understand how they compare against the rules of causation and the scope of

CBI coverage, including understanding the applicable timing limitations, if any, so that your team is prepared to properly document the loss.

Aside from preparing for this hurricane season, doing the work of understanding the provisions of your property policies now can set you up to make any desired changes upon renewal.

For example, where the law of the jurisdiction where your business is located favors efficient proximate cause over concurrent cause, policyholders may look to negotiate coverage endorsements that narrow the effect of, or altogether remove, the policy's anti-concurrent causation provision.

Also, policyholders in storm-prone areas like Florida and Texas may consider purchasing standalone flood insurance if they determine that their current level of coverage inadequately insures the business against that risk.

Regardless, taking precautionary steps before the next storm makes landfall can help mitigate the physical devastation and financial loss that often times follows.

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