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Hurricane Season Hits Increasingly Tough Insurance Market

By **Eli Flesch**

Law360 (June 17, 2022, 1:05 PM EDT) -- A tough market for flood insurance and vulnerable infrastructure and dwellings are some challenges insurers and policyholders are facing during this year's hurricane season as climate change threatens even-larger storms, experts say.

Following a busy Atlantic hurricane season that helped make 2021 the third-costliest year on record for the insurance industry, climate scientists again predict an above-normal season with the potential for more storms of greater intensity. Experts warn that aging infrastructure and population growth in high-risk areas have contributed to some of the most significant losses in decades.

Michael John Miguel, a McKool Smith partner who represents policyholders, told Law360 that market constrictions are making finding insurance almost as difficult as making a claim after the fact of a loss. Those insurers that haven't pulled back from insuring hurricane risks such as wind and flooding have raised their premiums, he said.

"You're paying a lot more and getting a lot less if you can get it in the first place," Miguel said, adding that it was harder to see hurricanes as fortuitous events. "What you are actually getting is significantly less than what you used to be able to get in the past."

In 2021, tornado outbreaks and windstorms pushed the costs for insurers to near-record levels, with billions in losses being tacked on to the $36 billion worth of insured damage Hurricane Ida caused, professional services company Aon said in a report in January.

While experts say climate change isn't increasing the amount of hurricanes, it is strengthening the storms that do develop while also changing their behavior. There has been more evidence, for example, that hurricanes are strengthening to the moment of landfall and dropping significantly more precipitation, as with Hurricane Harvey in 2017.

Recent supply chain disruptions and inflation have also caused some insurance companies to consider premium increases for property policies, insurer RT Specialty said in a February report. Most major carriers seem to be focusing on reducing the impact of natural catastrophes on earnings volatility, the insurer said in the report.

Another way insurers have sought to limit their exposure to hurricanes is through hurricane deductibles, said Laura Gregory, a Sloane & Walsh LLP partner who advises carriers. Major past hurricanes such as Andrew in 1992 and Katrina in 2005 had a bearing on how much risk carriers were willing to take when it came to hurricanes, she said.

Hurricane deductibles, which a policyholder must pay before coverage kicks in, are usually a percentage of a property's value — often 1 to 10% — rather than a set amount, and they could apply per event, season or year, Gregory told Law360.

"These deductibles are separate from other homeowners deductibles and how the two deductibles apply is dependent on the language of the policy at issue," she said.

She added that hurricane deductibles are allowed in 19 states and the District of Columbia, per the National Association of Insurance Commissioners, and "are becoming common in the states most impacted by hurricanes and named storms."

The National Oceanic and Atmospheric Administration, which tracks the Atlantic hurricane season, predicted in May a likely range of 14 to 21 named storms. Of those storms, six to 10 could become hurricanes, and three to six major hurricanes, defined as those with the most damaging wind speeds, exceeding 111 miles per hour.

Jay W. Brown, a Shackelford Bowen McKinley & Norton LLP lawyer representing carriers, told Law360 that recently the excess and surplus market has been one of the only places to secure flood coverage. Those policies will still often be pricey, he said, and will also often contain language limiting what carriers pay out for certain risks.

"I rarely see the flood coverage on the first layer," said Brown, who has represented excess insurance carriers. "It's usually on top of a National Flood Insurance Program layer. And then, it's usually going to be for a business that has a lot of resources."

Homeowners will usually go through the NFIP to secure coverage for flood risks. Congressional hearings for the reauthorization of the program are currently being held, and the administration of President Joe Biden proposed reforms last week that include discounted premium rates for low-income households and reducing the program's debt burdens.

Experts told a group of U.S. House of Representatives lawmakers in a hearing last month that preventing the NFIP from lapsing by a Sept. 30 reauthorization deadline was critical to ensuring continued flood protections. Carolyn Kousky, executive director of the Wharton Risk Management and Decision Processes Center at the University of Pennsylvania, said the program should be reformed to lower premiums by ensuring that mitigation efforts target communities and households at the highest risk of flooding.

At another hearing before a Senate committee Thursday, experts said including reforms to address repeat-loss properties that make up a disproportionate share of claims was a top priority, as was taking steps to mitigate the damaging effects of floods.

In Texas, Brown said he was watching the dialogue between the Fifth Circuit and the state's top court over the concurrent causation doctrine. This limits how much a policyholder can recover to the amount of damages caused solely by a covered cause when an insured property is damaged by both covered and uncovered causes.

The Fifth Circuit asked for the Texas Supreme Court's input in May in a dispute between Allstate and a homeowner over coverage for a leaky roof, saying that it needed guidance on whether to apply Texas' concurrent causation doctrine to wear and tear.

"That'll have a bearing on your hurricane cases," Brown said. "A hurricane wiped out this building that was 50 years old — how much do I have to pay for it, and how much was really just wear and tear?"

Jay K. Gray, a Bergman Gray LLP attorney who represented a homeowner in an earlier concurrent causation suit that eventually settled, told Law360 that extending the doctrine to regular wear and tear damage would gift a windfall to the insurance industry.

"Any roof that's up for a day is going to have wear and tear on it in Texas," Gray said. "Those insurance companies don't charge any less every year when the risk gets older for the wear and tear. They're still charging that same premium, they're still making that same money, so when that loss occurs, they're going to be double-dipping."

Steve Bowen, a managing director and head of catastrophe insights at Aon, told Law360 that Texas is vulnerable to greater losses as a result of inconsistent and poorly enforced building codes. There's an opportunity at the federal level, he said, for more consistent standards to be set that could strengthen buildings against hurricanes.

Florida has done a much better job at ensuring that new buildings are built to the existing codes, he said. Bowen said if the federal government can at least provide a strong framework for building codes, it would be a good starting point. States that don't have strong codes will depend more on federal dollars for disaster recovery, he added.

How a federal framework might be enforced is the big question, Bowen said.

"If we have some type of mandate or some type of guidelines that states can be able to use to be able to enforce, it'd really incentivize communities to become more resilient," Bowen said. "Then there becomes less reliance on money coming out of Congress."

Building codes for commercial and residential properties became a greater cause for concern in Florida following the Surfside condominium collapse in June 2021 that left 98 dead. The tragedy sparked a renewed interest from the insurance industry over safety concerns and protective measures for older buildings in the state, experts have said.

In a special legislative session in May, Florida lawmakers approved a $2 billion reinsurance program to reimburse carriers for their two biggest loss events in a year. Republican Gov. Ron DeSantis signed the bill as part of a property insurance reform package. The program would reimburse carriers for up to 90% of the losses above a retention.

For commercial and residential property owners seeking recovery, experts still recommend taking the time to understand what's covered in their policy to help avoid costly litigation. A drumbeat of recent cases accusing insurers of lowballing coverage offers up some of the most frequently litigated hurricane disputes, including differences in opinion over covered damages, bad faith accusations, and untimely payments.

Greg Van Houten, an associate at Haynes and Boone LLP, said it's important that policyholders document everything connected to a disaster, because insurers will often require proof that the damages are covered. Policyholders should be able to tie back losses to the weather event because that helps ensure speedy recovery, he said.

"We're seeing insurance companies take longer and longer to adjust and investigate claims," Van Houten told Law360, noting that the extended timeline could just reflect a greater number of severe weather events affecting a larger slice of the population.

He also said suit limitation provisions — often included in policies to prohibit policyholders from bringing legal action after a year or two — could make it more difficult to recover on claims for hurricane damage. Nothing would prevent a policyholder from being able to try to negotiate those deadlines during renewal, Van Houten said.

"One thing that policyholders need to be wary of are those deadlines," he said. "Because if one of those deadlines lapses, they're going to be without recourse if they cannot reach a resolution on their claim with their insurance company."

--Additional reporting by Hope Patti, Shawn Rice, and Ganesh Setty. Editing by Neil Cohen and Amy Rowe.
