



## Hurricanes and Lawsuits – A Likely Pair

By Jason Wolf

**Those in the Hurricane Belt have seen their fair share of hurricanes.** But when Superstorm Sandy hit the relatively safe corridor of New York and New Jersey as well as other points north and west, reality set in. Hurricane devastation can strike almost anywhere there is a coast.

### **Property Damage Equals First-Party Lawsuits**

Whether or not you believe in global warming, the weather of late has wreaked havoc. Arkansas knows the impact of tornadoes. California knows mudslides and wildfires. From blinding blizzards to the simple yet violent rain storm, property damage is part of every homeowner's life. With the damage comes the inevitable legal influence. Thus, first-party property lawsuits are constant.

In Florida, first-party property lawsuits are popular among plaintiff's attorneys because of one particular statute. While the average homeowner would not be familiar with it, it is critical for the plaintiff's bar. Florida Statute 627.428 awards fees to lawyers who successfully obtain a judgment against an insurance company. According to the statute, "...court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had."

There's a twist – the statute doesn't limit fees, which can result in an outcome where a plaintiff/policyholder wins a few dollars in a lawsuit while the attorney wins more than \$100,000 for litigating the case through final verdict. It is clearly advantageous for a plaintiff's attorney to pursue this type of litigation in Florida.

### **Professions on the Rise**

In Louisiana, Hurricane Katrina's impact is still in effect, but new insurance companies are now coming into the market. The state has made major strides in recovery, making it so companies are not as fearful of entering into the market. In December 2012 alone, the Louisiana Property and Casualty Insurance Commission noted four new companies providing insurance.

But new companies also look like new opportunities to some property owners ... and lawyers. Not surprisingly, litigation attorneys have cropped up in fairly parallel numbers to new insurance companies. The situation is further complicated by the rise in public adjusters. Forty-four states have licensing for public adjusters, and others have some level of assistance for the insured.

Since new legislation was enacted into law in Florida, following a contentious fight in the Legislature, insurers have realized a rise in first-party property lawsuits. The reason is that plaintiff's attorneys see it as a win-win. They are well aware that insurers will typically settle cases rather than risk the potentially devastating situation in which the plaintiff wins a little bit of money at trial, but the insurer is stuck with a massive legal bill, both to its own defense attorneys and to the plaintiff attorney. Pure finances are at play. It's easier – and almost always cheaper – for the insurer to settle the case. Plaintiff attorneys know this, so first-party property has become a volume-based business for many plaintiff firms. And insureds who become plaintiffs have little to lose.

There is another reason insurance companies are reluctant to take first-party property cases all the way to trial: bad faith. If the fee statute is the Holy Grail, bad faith is nirvana for plaintiff's attorneys. To bring a bad faith claim, a policyholder needs to establish liability on the part of the insurer. Insurance carriers are always wary that they will have to defend bad faith allegations in addition to addressing the underlying lawsuit regarding a specific claim. So, the deck is heavily stacked against insurers.

### **How Have Things Changed?**

Initially, when states started creating the concept of public adjusters, this was a well-intentioned idea by which public adjusters would adjust claims on behalf of the public and help unsophisticated policyholders deal with insurance companies. In time, public adjusters, who work on a contingency basis, developed into a worrisome presence. The insurance industry looked at this group with the idea that they could manufacture higher-than-needed estimates so they could obtain a percentage of the recovery. The proverbial fly in the ointment is that when a public adjuster is involved, the result may be an inflated claim that increases his or her own recovery. This is not to say that every public adjuster is out to cheat insurance companies, but the increases in litigation and claims have tarred all public adjusters with a broad brush, whether deserved or not.

Again turning to Florida, after busy 2004 and 2005 hurricane seasons, the number of licensed public adjusters in the state increased. The numbers are staggering and include a more than 300 percent increase from 2003 to 2009, according to the Office of Program Policy Analysis and Government Accountability.

### **The Number of Licensed Public Adjusters in Florida Has Increased Substantially Over the Last Six Years**

Fiscal Year	Number of Public Adjusters	Percent Increase from Previous Year
2003-04	678	NA
2004-05	1203	77.43%
2005-06	1864	54.95.%
2006-07	2630	41.09%
2007-08	2755	4.75%
2008-09	2914	5.77%

**Source:** OPPAGA analysis.

Florida's SB408 placed limits on what public adjusters could earn as well as numerous limitations on their business practices and contingency percentages. So the new reality is that attorneys are becoming involved in insurance claims from the onset. Lawsuits in which the plaintiff's attorney got involved from the get-go used to be a rare occurrence, but these days it happens more than 70 percent of the time.

On a practical level, it's difficult to argue that more of these types of lawsuits are a benefit to either the policyholder or the insurance companies. On the one hand, with an attorney working for you from the first day, you can probably be confident that your rights will be protected. However, is the policyholder really benefiting if the attorney's sole goal is to work up the case only to settle it before trial so he can get his fees and move onto the next one?

No doubt there are some instances when having an attorney from the onset may be helpful – such as for a major loss – but are attorneys really necessary every time a toilet overflows or a baseboard gets a little soggy? Does anyone besides the plaintiff attorney benefit when the insured takes an adversarial stance against the insurance company from day one?

### **Future**

Hurricanes are inevitable – as are tornadoes, blizzards, and other acts of nature. Each time one devastates an area, property insurers and legislators take another look at their

options. So what does the future hold for the property insurance industry? Will insurance companies lobby for changes to the fee statute?

If attorneys couldn't get fees for suing insurance companies, this practice area would be reduced to a fraction of its present condition, simply because attorneys would only become involved in large-dollar lawsuits and policyholders with smaller claims would be unable to find legal redress. With each hurricane or damaging storm, there will be more claims – some valid and others part of the proverbial bandwagon.

As claims increase and insurance companies are forced to spend more money on defense attorneys, who will bear the brunt of it? Obviously, it will eventually trickle down to the policyholders in the form of increased premiums.

But as with many legal practice areas that come and go in response to changes in the law, first-party property litigation is thriving. How long it will last is anyone's guess.

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