

INSIGHTS

Icy Hot: Texas Policyholders With Losses from Winter's Late-Season Freeze Must Also Prepare for Early-Season Hurricanes

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Many Texas businesses and other organizations are still grappling with the effects from February's winter storm. Unfortunately, this year's hurricane season may complicate those efforts, so insureds with winter storm losses must be prepared to deal with both.

Looking Back – Unusual Losses from the Winter Storm

Normally, claims arising from natural disasters tend to center on property damage and revenue impacts. Those certainly exist here, but this winter storm was no ordinary event. What is unusual here is that the most significant impacts were often on the cost side of the ledger. For example, the spot price for electricity skyrocketed from \$20-\$30 per MWh to \$9,000 per MWh, and some clients had no choice but to purchase power at those prices to prevent losses from the freezing temperatures, both by avoiding the impacts that freezing can have as well as maintaining the ability to fight fires and take other measures to maintain their assets in a safe state. Other utility services were also challenging, such as healthcare institutions that had to have water physically delivered for tasks such as serving patients and staff along with sterilizing surgical instruments. The costs some of these customers incurred ran into the tens of millions of dollars.

Clients with the right coverages can make claims for these costs under "sue and labor" and related provisions as expenses incurred to protect property and avoid losses. Texas courts addressing prior storms have permitted recovery for extra security, overtime pay, meal expenses, temporary locations and employee lodging.^[1] In essence, costs incurred due to the winter storm may be recoverable where those costs were reasonable and necessary.^[2]

Concurrent Causation Issues

As part of the effort to pursue recovery for winter storm losses, policyholders must carefully document all damage sustained during the winter storm, even damage for which they are not currently seeking reimbursement. Failure to do so before any hurricanes arrive could make it more challenging to recover in the future.

Texas law recognizes the doctrine of concurrent causation, which provides that when “a covered and non-covered [cause] combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered [cause].^[3] If the insured fails to provide evidence^[4] upon which a jury or court could allocate damages between losses that resulted solely from a covered cause and those that resulted from a non-covered cause, the policyholder may not be able to recover at all.^[5]

Many commercial property policies take this one step further by adding anti-concurrent causation clauses, which generally read something like this:

[C]overage is excluded for any loss or damage caused directly or indirectly by any of the listed excluded causes, regardless of any other covered cause or covered event that contributes concurrently or in any sequence to the loss.^[6]

In other words, if a covered cause and a non-covered cause combine to create a loss, the insured may not even be able to segregate the damage.^[7]

The fact that so many policies contain these clauses makes it even more important that policyholders document the damage attributable to the winter storm and pursue their claim now in case a subsequent loss involves covered and non-covered causes that are hard to distinguish. Doing this allows insureds to demonstrate what losses were sustained during the winter storm before a hurricane or some other loss can occur to muddy the waters and potentially negate coverage.

Looking Ahead – Hurricane Season

Hurricane season just started, but before things really heat up, insureds should also quickly review their policies one last time, just as pilots do in their pre-flight checklists. In addition to asset verification, compliance with any protective safeguard warranties (e.g., earthen berms) must also be done, along with updating business continuity plans. It may be too late to do wholesale changes to coverage for this season, but sometimes a quick review will reveal things that can be fixed before losses occur.

Taking proactive steps to recover from and document already-incurred losses will help make sure that insureds are in the best possible position to deal with the winter storm behind us and the tropical storms ahead.

^[1] *Travelers Indem. Co. v. Pollard Friendly Ford Co.*, 512 S.W.2d 375, 381 (Tex. App.—Amarillo 1974, no writ); *Rimkus Consulting Group, Inc. v. Hartford Cas. Ins. Co.*, 552 F. Supp. 2d 637, 646 (S.D. Tex. 2007).

^[2] *GBP Partners, Ltd. v. Maryland Cas. Co.*, 505 Fed. Appx. 389, 393 (5th Cir. 2013).

^[3] *Wallis v. United Serv. Auto. Ass’n*, 2 S.W.3d 300, 302–03 (Tex. App.—San Antonio 1999, pet. denied) (citing *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971)). This applies not only with separate weather events, such as a winter storm that brings ice and a summer hurricane that brings flooding, but also to a single weather event, such as when a spring thunderstorm brings both a covered cause of wind and a non-covered cause of rain or flooding.

[4] “Expert allocation of damages between covered and [non-covered] risks is not, however, necessarily required; circumstantial evidence can suffice.” *Lyons v. Millers Cas. Ins. Co. of Texas*, 866 S.W.2d 597, 601 (Tex. 1993) (citing *U.S. Fid. & Guar. Co. v. Morgan*, 399 S.W.2d 537 (Tex. 1966)).

[5] See *Hamilton Properties v. Am. Ins. Co.*, No. 3:12-CV-5046-B, 2014 WL 3055801, at *4 (N.D. Tex. July 7, 2014), aff'd, 643 F. App'x 437 (5th Cir. 2016) (quoting *Nat'l Union Fire Ins. of Pittsburgh, Pa. v. Puget Plastics Corp.*, 735 F. Supp. 2d 650, 669 (S.D. Tex. 2010)).

[6] See *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 604–05 (Tex. 2015).

[7] *Id.* at 608.

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