

Hurricane Laura: What Can Insurers Expect with Claims in Texas and Louisiana?

Last week Hurricane Laura became the strongest hurricane on record to make landfall in the state of Louisiana since 1856.¹ The Category 4 storm claimed at least 10 lives and caused an estimated \$4 to \$7 billion in property damage in Louisiana and Texas.² As the damage is assessed and insurance claims are submitted, insurance carriers should consider how Texas and Louisiana evaluate relevant claims and policies.

Based on our experience with prior hurricanes, here are answers to the most common questions we expect to see.

Will Texas and Louisiana enforce flood exclusions?

Both states enforce “unambiguous” flood exclusions and define terms by their plain language meanings. However, there will likely be public pressure on courts to find coverage.

Texas courts “presume parties intend what the words of the contracts say.”³ Consequently, “[i]n determining a question of insurance coverage, [Texas courts] look first to the language of the policy.”⁴ Texas courts “give the policy’s terms ‘their ordinary and generally-accepted meaning unless the policy shows the words were meant in a technical or different sense.’”⁵ “If a contract as written can be given a clear and definite legal meaning, then it is not ambiguous as a matter of law.”⁶ Therefore, so long as a flood exclusion is unambiguous, a Texas court will enforce it.⁷ However, “[t]erms in insurance policies that are subject to more than one reasonable construction are interpreted in favor of coverage.”⁸

Louisiana courts will similarly enforce unambiguous flood exclusions. In interpreting such exclusions, Louisiana courts give the word “flood,” when undefined in the policy, its “plain, ordinary” meaning.⁹ The Louisiana Supreme Court has held that the plain and ordinary meaning of flood “is the overflow of a body of water causing a large amount of water to cover an area that is usually dry.”¹⁰ This meaning encompasses both man-made and natural causes of flooding.¹¹ As such, Louisiana courts enforced unambiguous flood exclusions in Hurricane Katrina cases.¹²

How will named-storm endorsements be enforced?

The Fifth Circuit has addressed these types of endorsements a handful of times, primarily in cases arising out of hurricane-related flooding claims. Those cases have generally found that the endorsement is enforceable if the insurer properly calculates the deductible.¹³

However, we note that the Fifth Circuit has reached conflicting conclusions on the issue of applying flood sub-limits to the loss, depending on the specific policy language involved. For instance, one Fifth Circuit case addressed differing primary and excess policies to determine whether the flood sub-limits applied to losses arising out of Hurricane Katrina.¹⁴ The Fifth Circuit reached two different conclusions based on the precise language in the policies. It found that the language in certain policies created an ambiguity as to whether the flood sub-limit applied to the flood damage caused by hurricane, while the language in other policies unambiguously established that the flood sub-limit applied to all damage arising out of Hurricane Katrina.

This year, the Fifth Circuit decided a Hurricane Harvey case involving competing deductibles. In *Pan Am Equities, Inc. v. Lexington Ins. Co.*, a policy had two competing deductibles — a \$100,000 deductible for “flood” losses, and a much higher named storm deductible of 5 percent of the total



Joseph A. Ziemianski

Co-Chair, Global
Insurance
Department

jziemianski@cozen.com
Phone: (832) 214-3920
Fax: (832) 214-3905



Melissa Brill

Co-Chair, Global
Insurance
Department
Regional
Manager, Global
Insurance
Department –
Northeast

mbrill@cozen.com
Phone: (212) 908-1257
Fax: (866) 825-3144



Alycen A. Moss

Co-Vice Chair,
Global
Insurance
Department
Regional
Manager, Global
Insurance
Department –
East

amos@cozen.com
Phone: (404) 572-2052
Fax: (877) 728-1396



Stephen P. Pate

Co-Chair,
Property
Insurance
Group

spate@cozen.com
Phone: (832) 214-3957



Paul Ferland

**Co-Chair,
Property
Insurance
Group**

pferland@cozen.com
Phone: (212) 453-3914
Fax: (212) 509-9492

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insurable values at the time of loss at all locations involved in the loss or damage.¹⁵ The policy also included an anti-stacking clause indicating “if multiple deductibles apply, then the largest one trumps.”¹⁶ The court enforced the named storm provision, which it interpreted to cover “all loss” due to the storm, including Hurricane Harvey’s flood damage.¹⁷

Based on the foregoing, assessing how a court will treat a named-storm endorsement will likely depend on the specific language of the endorsement itself and the contents of the rest of the policy.

How will Texas and Louisiana courts decide issues of concurrent causation?

Texas courts follow the concurrent causation doctrine, while Louisiana courts adopt the efficient proximate cause doctrine as the default rule.

Texas recognizes the common-law doctrine of concurrent causation. Under the doctrine of concurrent causation, “[w]hen covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage.”¹⁸ Thus, an insured is able to recover only for damage caused by a covered peril.¹⁹ The burden is on the insured to plead and prove coverage under a policy.²⁰ “[F]ailure to segregate covered and noncovered perils is fatal to recovery.”²¹ Thus, if flood damage is excluded, then non-excluded surface water damage may be covered, and there will be an allocation.

In Louisiana, the efficient proximate cause doctrine is the default rule.²² In that regard, courts will look to the dominant and efficient cause of the loss.²³ In *Roach*, the Louisiana Supreme Court held “it is sufficient, in order to recover upon a windstorm insurance policy not otherwise limited or defined, that the wind was the proximate cause or efficient cause of the loss or damage, notwithstanding other factors contributing thereto.”²⁴

Will Texas and Louisiana courts enforce anti-concurrent causation clauses?

Yes, if they are unambiguous.

In *JAW The Pointe*,²⁵ the Supreme Court of Texas held that anti-concurrent causation clauses are enforceable. There, the clause at issue provided: “Lexington will not pay for any ‘loss or damage caused directly or indirectly by any’ excluded cause or event, ‘regardless of any other cause or event that contributes concurrently or in any sequence to the loss.’”²⁶ The Supreme Court of Texas stated: “[U]nder Texas law, the anti-concurrent causation clause and the exclusion for losses caused by flood, read together, exclude from coverage any damage caused by a combination of wind and water.”²⁷

Louisiana courts recognize that “insurance companies and their insured may opt-out of the efficient proximate cause doctrine by contract.”²⁸

Are there any issues that should be considered with regard to sewer back up claims?

Analysis of sewer back up claims will be a policy-by-policy analysis that must focus on whether the policy expressly excludes or includes damage caused by water that backs up from a sewer. Policies that use the standard ISO form language contain a standard “water” exclusion that expressly excludes any loss or damage from flood and surface water, which then also excludes damage caused by water that backs up from a sewer or drain. Yet, other policies expressly cover direct loss or damage from water or waterborne material that backs up through a sewer pipe or drain pipe.

Texas courts hold that the flood exclusion does not apply to water that otherwise backs up through a sewer or plumbing system. If floodwaters enter into a sewer drain or pipe, and then back up into an insured property through the plumbing system, then the policy will cover it so long as the plumbing/sewer perils are not otherwise excluded.²⁹ The *Marchetti* case expressly held that the flood exclusion does not apply even if excessive rainfall proximately caused flooding of the

sewer system, and even if it was the proximate cause of the overflow into the insured's home, because the water is no longer considered flood water once it enters a manmade piping system.

However, the policies that use the standard ISO language would still result in the damage being excluded based on the clear language of the water exclusion.³⁰ There also are cases that explain that the sewer exclusion will apply over a general coverage provision concerning overflow from a plumbing system.³¹

Like Texas, in Louisiana, sewer or gutter back up claims require a policy-by-policy analysis. In *St. Joseph's Condo. Ass'n*, the insured's property was damaged following rains that caused the gutter system at the property to overflow, resulting in damage.³² The policy contained an exclusion barring coverage for damages resulting from "[w]ater that backs up or overflows from a sewer, drain or sump."³³ The court applied the plain meaning of the terms, and found "the word 'drain' is a synonym for 'gutter.'"³⁴ As such, the court held the exclusion applied to bar coverage.³⁵

How will the 2017 Texas Hailstorm Bill affect Hurricane Laura claims?

Enacted on the heels of Hurricane Harvey, this law, Chapter 542A of the Texas Insurance Code, implemented key new requirements that will affect claims arising from Hurricane Laura. Among them is the requirement that a policyholder must allow an insurance carrier the opportunity to inspect their property if such request is made within 30 days of issuing a demand letter to the carrier.

Another notable provision will likely reduce the filing of new lawsuits. The provision permits insurance carriers to indemnify adjusters if they are sued. This discourages a tactic used by policyholders, which involved suing an in-state adjuster in order to keep cases in state court and avoid federal court.

Also of importance, the law imposes new fee-collecting requirements on policyholder attorneys. Policyholder attorneys must now provide a statement to justify their fee along with "contemporaneous time records."

What are bad faith laws in Texas and Louisiana?

In Texas, under either common law or statute, an insurer may be liable when "the insurer had no reasonable basis for denying or delaying payment of [a] claim, and [the insurer] knew or should have known that fact."³⁶ A bona fide dispute about the insurer's contractual liability does not rise to the level of bad faith.³⁷ An insured establishing a right to benefits under a policy can recover them as actual damages resulting from a statutory violation.³⁸ However, an insurer's statutory violation does not permit the insured to recover any damages beyond policy benefits unless the violation causes an injury that is independent from the loss of the benefits.³⁹ In *Menchaca*, the court noted that "the possibility that a statutory violation could cause an independent injury suggested that a successful independent-injury claim would be rare."⁴⁰

Separately, the Texas Prompt Payment of Claims Act provides timing requirements for responding to a first party claim and damages for the failure to do so, even if denial of the claim was not in bad faith.⁴¹ An insurer's payment of an appraisal award does not, as a matter of law, bar an insured's claims under the Prompt Payment statute.⁴²

A violation of § 541.060 allows a claimant to recover actual damages, court costs, attorneys' fees, with a "knowing" violation providing up to treble actual damages. Actual damages for common law bad faith are recoverable, but not attorney's fees. Punitive damages may be recoverable upon "clear and convincing" evidence that insurer's conduct arose out of fraud, malice, or conscious indifference given the extreme degree of risk and probability of harm to others.⁴³ Violation of the Prompt Payment Act (§ 542.051 *et. seq.*) allows an insured to recover statutory 18 percent per annum damages of the amount of the claim, as well as attorneys' fees, and prejudgment interest.

Louisiana statutes provide that "[a]n insurer ... owes to his insured a duty of good faith and fair dealing" and "has an affirmative duty to adjust claims fairly and promptly and to make a reasonable

effort to settle claims with the insured, the claimant, or both.”⁴⁴ Section 22:1892 identifies a series of actions that constitute a breach of this duty, including misrepresenting pertinent facts and failing to pay a settlement within 30 days after an agreement. Under La. R.S. § 22:1973, when an insurer breaches its good faith obligations, a claimant may be awarded penalty damages in an amount not to exceed two times the damages sustained or \$5,000, whichever is greater.⁴⁵

¹ Valerie Bauerlein and Elizabeth Findell, Trump Surveys Damage From Hurricane Laura as Cleanup Begins, *The Wall Street Journal* (Aug. 29, 2020).

² *Id.*

³ *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 602 (Tex. 2015).

⁴ *Id.*

⁵ *Id.* at 602-03.

⁶ *Id.* at 603.

⁷ See *George v. State Farm Lloyds*, 07-12-00465-CV, 2014 WL 2481894, at *2 (Tex. App. - Amarillo May 19, 2014, no pet.) (finding flood provision unambiguous, and holding that flood exclusions barred coverage for damage caused by overflowing ditch water).

⁸ *JAW The Pointe*, 460 S.W.3d at 603.

⁹ *Sher v. Lafayette Ins. Co.*, 988 So. 2d 186, 193 (La. 2008).

¹⁰ *Id.* at 194.

¹¹ *Id.*

¹² *Id.* at 196; see also *In re: Katrina Canal Breaches Litigation*, 495 F.3d 191, 214 (5th Cir. 2007) (holding under Louisiana law, flood exclusions are unambiguous and that man-made flooding “fits squarely within the generally prevailing meaning of the term flood” as does natural flooding, and therefore flood exclusions operate to exclude coverage of both types of flooding).

¹³ See *Saratoga Resources, Inc. v. Lexington Ins. Co.*, 642 Fed. Appx. 359 (5th Cir. 2016) (holding the insurer properly calculated the named-storm deductible for damage caused by Hurricane Isaac); *Williams v. Republic Fire and Cas. Ins. Co.*, 424 Fed. Appx. 304 (5th Cir. 2011) (holding the insurer properly calculated the deductible under the named-storm deductible endorsement in response to Hurricane Katrina claim).

¹⁴ *Six Flags, Inc. v. Westchester Surplus Lines Ins. Co.*, 565 F.3d 948 (5th Cir. 2009); see also *Seacor Holdings, Inc. v. Commonwealth Ins. Co.*, 635 F.3d 675 (5th Cir. 2011) (explaining that if “wind-driven Flood is caused by another covered peril, such as a Named-Storm, then the Flood sub-limit does not apply”).

¹⁵ 959 F.3d 671, 673 (5th Cir. 2020).

¹⁶ *Id.* at 672.

¹⁷ *Id.* at 675.

¹⁸ *Lyons v. Millers Cas. Ins. Co. of Texas*, 866 S.W.2d 597, 601 (Tex. 1993).

¹⁹ *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971).

²⁰ See *JAW The Pointe*, 460 S.W.3d at 603; *Emp’rs Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex. 1988), overruled in part on other grounds by *State Farm Fire & Cas. v. Gandy*, 925 S.W.2d 696 (Tex. 1996).

²¹ *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 198 (Tex. App. 2003, pet. denied); *Dall. Nat’l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 227 (Tex. App. 2015, no pet.) (holding there was no reasonable basis for estimating amount of damage caused by risk covered by the insurance policy); *One Way Investments, Inc. v. Century Sur. Co.*, 3:14-CV-2839-D, 2016 WL 5122124, at *2 (N.D. Tex. Sept. 21, 2016).

²² *Cameron Parish Sch. Bd. v. RSUI Indem. Co.*, 620 F. Supp. 2d 772, 780 (W.D. La. 2008).

²³ *Lorio v. Aetna Ins. Co.*, 255 La. 721, 232 So.2d 490, 493 (1970) (“[I]f a windstorm is the dominant and efficient cause of the loss, the insured may recover notwithstanding that another cause or causes contributed to the damage suffered.”)

²⁴ *Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v. Continental Ins. Co. of N.Y.*, 112 So.2d 680, 683 (La. 1959).

²⁵ 460 S.W.3d at 605-06

²⁶ *Id.* at 607.

²⁷ *Id.* at 608 (“Because the covered wind losses and excluded flood losses combined to cause the enforcement of the ordinances concurrently or in a sequence, we agree with the Court of Appeals that the policy’s anti-concurrent causation clause excluded coverage for JAW’s losses, and JAW therefore cannot recover against Lexington on its statutory bad faith claims.”)

²⁸ *Cameron Parish Sch. Bd.*, 620 F. Supp. at 781 (holding “the ACC clause in this case unambiguous, and because nothing in Louisiana case law, statute, or public policy precludes insurance companies and their insured from opting-out of the efficient proximate cause doctrine through such clauses, CPSB’s ACC clause must stand.”).

²⁹ *State Farm Lloyds v. Marchetti*, 962 S.W.2d 58 (Tex. App. - Houston [1st Dist.] 1997, pet. denied) (explaining that flood and surface water lose that character once it flowed into underground sewage lines and then overflowed into the home through the plumbing system).

³⁰ See e.g. *Valley Forge Ins. Co. v. Hicks Thomas & Lilienstern, L.L.P.*, 174 S.W.3d 254, 258–59 (Tex. App. - Houston [1st Dist.] 2004, pet. denied).

³¹ *For Kids Only Child Development Center, Inc. v. Philadelphia Indemnity Insurance Co.*, 260 S.W.3d 652 (Tex. App. - Dallas 2008, pet. denied) (holding the sewage exclusion applies when the municipal sewage system fails and then water backs up through the property’s plumbing system).

³² *St. Joseph’s Condo. Ass’n v. Pac. Ins. Co.*, No. 07-3959, 2008 U.S. Dist. LEXIS 86470 at *1-2 (E.D. La. Oct. 27, 2008).

³³ *Id.* at *8.

³⁴ *Id.* at *10.

³⁵ *Id.* at *13.

³⁶ *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex.1994); *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex.1988); Tex. Ins. Code Ann. § 541.060, *et seq.* (“Unfair Settlement Practices” providing a private right of action for a statutory violation).

³⁷ *Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997), *citing Trans. Ins. Co. v. Moriel*, 879 S.W.2d 17).

³⁸ See *USAA Texas Lloyds v. Menchaca*, 545 S.W.3d 479, 497 (Tex. 2018).

³⁹ *Id.*

⁴⁰ *Id.* at 499-500.

⁴¹ Tex. Code Ann. § 542.051, *et seq.*

⁴² *Barbara Technologies, Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 822-23 (Tex. 2019).

⁴³ Tex. Civ. Prac. & Rem. Code, 41.

⁴⁴ La. Rev. Stat. § 22:1973; *see also* La. Rev. Stat. § 22:1892.

⁴⁵ See *Oubre v. La. Citizens Fair Plan*, 79 So. 3d 987 (La. 2011).