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CURRENT TOPICS IN CLAIM ADJUSTING

Building Damage Issues in Windstorm Events

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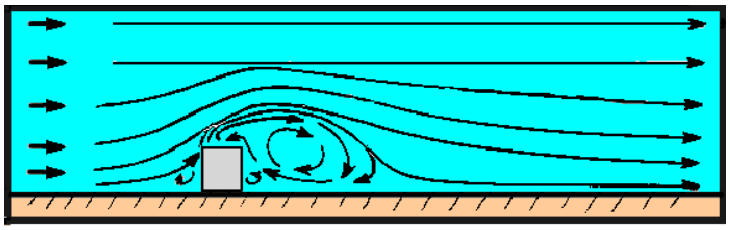
Assessing windstorm property damage should begin as soon as practical *and* possible after an event. While catastrophic damage is often easy to spot, more subtle signs of pre-existing building damage are not. Many types of damage are, in fact, inherent to different construction materials -- but they are not recognized until after the windstorm occurs, which the policyholder then attributes to the event. The purpose of this paper is to consider how wind acts on a building; summarize two common building damage issues; examine legal considerations relevant to the adjusting process; and comment in respect to the same.

As wind hits a building, positive pressure is applied to the windward side – the side facing the wind. This pressure essentially tries to push the structure inward; to push it off its foundation, in other words. The wind then splits over and around the building, creating a negative or suction pressure to the roof and sides, including the leeward side – the side most sheltered from the wind. This pressure tends to peel away side material and uplift and tear off roofing materials, if not the roof altogether. And since the speed of wind increases with height, a gabled or shed roof on any type of structure (home or agricultural) experiences the most suction or uplifting force.

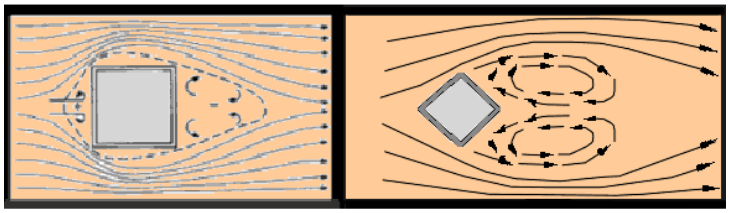
Windstorm damage begins at the roof level and progresses downward and inward with increasing wind speeds and velocities. Thus, the last places structural damage should occur to a building are the interior walls, floor, and foundation

Damage from wind increases if there is an opening, by design or accident, on the side of the building facing the wind

Damage from wind increases if there is an opening, by design or accident, on the side of the building facing the wind. Air rushes into the building, increasing internal pressure which then pushes the interior walls and roof upward. Conversely, an opening on the side not facing the wind reduces the loads on the side walls and the roof – sometimes leading to the improbable result of the building actually leaning in the direction of the wind if the roof survives and the "building envelope" endures the extreme negative pressure (a "hinge" effect).



Flow Pattern: Side View Wind Against Face

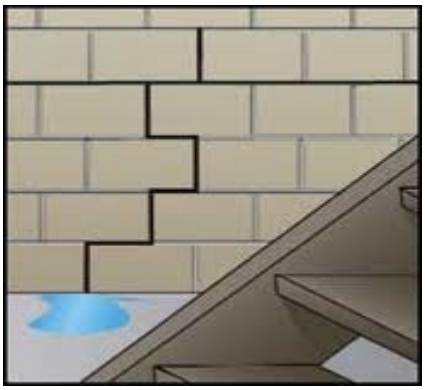


Flow Pattern: Top View Wind Against Face

Flow Pattern: Top View Wind Against Edge

In summary, windstorm damage begins at the roof level and progresses downward and inward with increasing wind speeds and velocities. Thus, the last places structural damage should occur to a building are the interior walls, floor, and foundation.

Brick Masonry



Bricks are a manufactured product. And as with any other type of product that is manufactured, defects can, and often do, occur. For example, shrinkage cracks can form in the brick before the material dries – while it is "green," in other words; cracks can form as the porous brick absorbs moisture (brick is not waterproof) and is subjected to freezing and thawing. Brick may detach and erode away over time.

In addition to manufacturing defects, brick may be installed incorrectly at the time of construction.

For example, the builder may have improperly installed thermal expansion joints, failed to select the correct connectors, or failed to account for significant sun exposure on a westward-facing wall. Failing to account for thermal expansion can cause significant breaks and gaps, thus making the building more susceptible to water intrusion, cracked windows, and various other siding breaks.

Signs and symptoms of pre-existing brick damage include stair-stepping cracks around windows, doors, and fascia; gaps around doors and windows, or windows that are out of square; drafty doors or windows throughout the building; fallen or dislodged bricks; and crumbling grout.

Brick walls are susceptible to cracking with up and down foundation movement, and old cracks become discolored with time as they accumulate dirt, paint, and debris. They are also susceptible to windstorm damage, especially when subjected to high internal pressure. Internal or positive pressure (as seen in the wind discussion) results when doors or windows are breached on the windward side of the building. A combination of positive and negative pressure (on the exterior side or leeward walls) can lead to wall failure.

This is especially true if the wall is non-load bearing. Such "freestanding" walls are pushed inward on the windward sides and pulled outward on the leeward side. In fact, a non-load bearing wall not anchored to the building may be flexible to some degree when pushed by hand. This *does not mean* that windstorm caused the damage; it means that the wall was improperly anchored.

The Foundation

The foundation is typically the last place in a building to experience distress from a windstorm event. There are six common types of house foundations in the United States: concrete slab, pier and beam, poured concrete wall, concrete masonry wall, stacked brick or block, and timber piles or masonry and concrete columns. In general, homes on concrete slab foundations are found in the south and southwest United States. Houses on stacked brick or blocks are more often found in the south, and timber piles and masonry or concrete columns support homes in coastal or flood-prone areas.

While it is true all houses settle to some degree, building codes require footings and foundations to be strong enough to "uniformly" support the structure. In other words, as the weight of a house and its furnishings are applied on top of a foundation, it can't help but settle into the soil to some degree, but it must do so uniformly or in one piece.

If cracks have developed in the brick exterior of a home or in the interior sheetrock, a likely cause is that the foundation is suffering from a "differential" settlement which occurs when the footing has cracked and the pieces are settling farther apart. These cracks tend to be progressive in nature and get worse as the soil expands and contracts as the seasons change.

Many buildings are constructed on thin concrete slabs with shallow footings are also susceptible to differential foundation movement from moisture changes in the soil. Concrete slabs "float" on the ground and rise and fall with expansion and contraction of the soil.

Signs and symptoms of foundation failure include leaning walls; cracked brick veneer; interior sheetrock cracks; sunken or uneven floors; stair-stepping cracks, especially near doors, windows, and fascia; windows and doors that stick or are difficult to open or close; windows and doors that are out of square alignment; gaps in window and door trims or gaps in crown molding; cracks in the foundation itself or in basement walls and floors; and, when applicable, the chimney pulling away from the house.

The adjusting process for a windstorm claim is more often than not complicated by the fact that it is the result of catastrophic weather event – a hurricane or tornado. The complication is not necessarily caused by the complexity of the claim; rather, it is caused by the interrelated factors of the insurer handling a large volume of claims in mass while still managing day-to-day claims from areas not affected by the catastrophe. The ability to do both is a core competency for the insurer to measure, reflect upon, and achieve.

It goes without saying that full measurement and documentation of the aspects of an insured loss is significantly more difficult in a catastrophic situation. Regardless of the difficulty, however, the policy requires that certain conditions be satisfied by both insurer and insured.

Going beyond the first step of loss mitigation (emergency cleanup and stabilization of the property), the next step is to prepare the necessary estimates of structural damage and inventories of damaged business and personal property. These tasks require trained and experienced – often expert – personnel and can be time consuming when their availability is limited. And this goes back to our overriding complication: it is possible that weeks will pass before the insurer's representatives will have the opportunity to visit the loss site to perform their inspections and due diligence.

With respect to the critical need to fully measure and document the loss, that process is more effective where the insurer is cognizant of certain legal imperatives in respect to windstorm claims.

Windstorm Defined

In any claim made under a windstorm policy, the first question for the claim professional – as basic as it seems – is whether a windstorm within the meaning of the word as used in the policy actually took place. There is no question that direct physical loss by windstorm is covered by basic property insurance, both commercial and personal.

"Windstorm" is generally not defined in homeowner policies and commercial package policies in widespread use, and so claim professionals should turn to judicial definitions and standards of contract interpretation.

The velocity or speed of the wind should never be used as the sole determining factor in whether a wind constitutes a windstorm, because if windstorm is the causative agent of the property damage, it does not matter if the speed was 25 miles-per-hour or 75 miles-per hour. This is not to say that wind speed should never be a factor in making a causation determination – rather, it should be only one of the factors including consistent or ancillary damage to the property and its surroundings; the verified condition of the property both before and after the occurrence; and analysis of the damage as having occurred from long-term exposure to wind or from a single, identifiable occurrence of windstorm.

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Judicial interpretations of "windstorm" are helpful – but not absolute.

"In the absence of definition or limitation in the policy, we think that a windstorm must be taken to be a wind of sufficient violence to be capable of damaging the insured property either by its own unaided action or by projecting some object against it."

The definition first formulated and enunciated in *Gerhard v. Travelers Fire Ins. Co.*, 18 N.W.2d 336 (Wis. 1945), remains in wide use in some form or another across multiple jurisdictions: "In the absence of definition or limitation in the policy, we think that a windstorm must be taken to be a wind of sufficient violence to be capable of damaging the insured property either by its own unaided action or by projecting some object against it."

Some courts, in seeking to harmonize the definition based on an outburst of tumultuous force with that based on a capability of damaging the insured property, have historically concluded that there is no conflict between such definitions and that a wind which is capable of damaging the insured property is necessarily a wind of tumultuous force.

For example, in *Fidelity-Phenix Fire Ins. Co. v. Board of Education*, 204 P.2d 982 (Ok. 1948), the court said that "the correct standard is stated in [*Gerhard*]," but "it would seem that any wind that is of such extraordinary force and violence as to thereby injuriously disturb the ordinary condition of the things insured is tumultuous in character, and is to be deemed a windstorm."

The disfavor of using wind speed as a sole measure of windstorm is noted in the Alabama Supreme Court case of *Great American Ins. Co. v. Railroad Furniture Salvage of Mobile, Inc.*, 162 So.2d 488 (Ala. 1964), in which the court held that where there are no limiting terms in the policy, "windstorm" is to be defined as a "wind of such tumultuous force and sufficient velocity as to proximately cause injury to the insured's property"; "[a]ny other view would work an imposition upon the insured." That is, if an insurer "wishes to adopt some scale which establishes the velocity of wind necessary for a windstorm," the court wrote, citing *Gerhard*, "it should incorporate its proposed standard in the policy by clear terms."

And, in *Kemp v. American Universal Insurance Company*, 391 F.2d 533 (5th Cir. 1968) the U.S. 5th Circuit Court of Appeals wrote, "In absence of a definition or limitation of the subject, a 'windstorm' must be taken to be a wind of sufficient violence to be capable of damaging insured property either by impact of its own force or by projecting some object against the property, and in order to recover on a windstorm insurance policy, not otherwise limited or defined, it is sufficient to show that wind was the proximate or efficient cause of loss or damage notwithstanding other factors contributed to loss."

Anti-concurrent causation clauses are the industry's response to judicial and public policy reasoning in respect to concurrent causation that where two events act together to cause the loss, one being a covered peril and the other not, the insurance policy should provide coverage

Anti-Concurrent Causation Clauses

Anti-concurrent causation clauses are the industry's response to judicial and public policy reasoning in respect to concurrent causation that where two events act together to cause the loss, one being a covered peril and the other not, the insurance policy should provide coverage. Many court decisions have addressed whether it would be unfair or unlawful to allow such provisions to avoid coverage.

As a general rule, courts have applied three rationales. First, some states have adopted a statutory or common law rule that insurance policies must provide coverage if the efficient proximate cause of loss is a covered peril. Thus, the existence of coverage depends on whether the proximate cause, efficient proximate cause, efficient cause, predominate cause, or moving cause of the loss is a covered loss under the policy. If it is, the causation requirement is satisfied. Conversely, if the efficient proximate cause is not covered or is excluded, the claim is not covered.

Quite often following a catastrophe, insurers will hire structural engineers to assess damage in an affected area and determine the extent to which the natural disaster caused the damage

In recent years, courts have found insurance companies to have acted fraudulently or in bad faith by hiring allegedly biased engineering firms to produce outcome-oriented reports

Second, under the law of many states, an insurance policy must be interpreted in a manner that is consistent with the "reasonable expectations" of the policyholder.

This view was developed to allow for the fact that insurance policies are contracts of adhesion, drafted by the insurer and sold on a take it or leave it basis. Some courts have ruled that anti-concurrent clauses are unenforceable because they defeat the insured's reasonable expectations of coverage when a covered peril is the proximate cause of loss. Other courts have held that since the clauses are clear and unambiguous, policyholders could not reasonably expect coverage to be provided.

Third, other courts in states that lack a proximate causation rule reject the reasonable expectations doctrine in favor of one that insurance policies are to be interpreted under the same rules as all other contracts. Anti-concurrent causation clauses are enforceable because they are clear and unambiguous and entered into by parties who are free to contract as they wish.

Use of Experts

Insurers often rely upon reports produced by professional engineers or other experts to survey damaged property to determine causation and thereby, in subsequent measure, liability for the claim. Quite often following a catastrophe, insurers will hire structural engineers to assess damage in an affected area and determine the extent to which the natural disaster caused the damage. But in recent years, courts have found insurance companies to have acted fraudulently or in bad faith by hiring allegedly biased engineering firms to produce outcome-oriented reports.

While it is generally accepted that an insurer's reliance on the advice of an expert in the investigation and evaluation of an insurance claim is a defense – perhaps an absolute defense – to an allegation of bad faith, a plaintiff pursuing the claim will conduct discovery in respect to both the bias of the expert as well as the insurer's repetitive use of the same. This operates more or less as a burden-shifting tactic in the overall strategy of the claim to the insurer to prove not only that it relied upon an expert opinion, but that the opinion itself was unbiased and untainted by a fixed judgment.

"In this case, the Nicolaus presented evidence from which a fact-finder could logically infer that Haag's (engineering) reports were not objectively prepared, that State Farm was aware of Haag's lack of objectivity, and that State Farm's reliance on the reports was merely pretextual"

For example, in a case still cited today as a benchmark ruling on the issue, the Texas Supreme Court held an insurer to be liable for hiring a biased engineering firm to evaluate a homeowner's claim for a plumbing leak. The court held that reliance on an expert report did not shield an insurer from fraud and bad faith if the plaintiff presented evidence that same was not prepared objectively: "In this case, the Nicolaus presented evidence from which a fact-finder could logically infer that Haag's (engineering) reports were not objectively prepared, that State Farm was aware of Haag's lack of objectivity, and that State Farm's reliance on the reports was merely pretextual." *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997).

Furthermore, the *Nicolau* court noted that evidence supported a logical inference that State Farm obtained the reports from Haag Engineering because of Haag's general view that plumbing leaks are unlikely to cause foundation damage, the crux of the claimed property damage. This and other similar cases have found insurers to have hired engineering firms to produce biased "cookie cutter" reports blaming damage on excluded causes of loss, particularly with respect to windstorm claims.

Comments

We have looked at how windstorm acts on a structure; building damage issues in respect to brick masonry and concrete foundations; the judicial definition of "windstorm" and application of anti-concurrent causation clauses; and using an expert in the investigative process. A few comments follow as to each.

Building Damage Issues

The claim professional, with basic knowledge of windstorm, can establish a baseline of knowledge from which to delve deeper into the complexities of adjusting a windstorm damage claim. The greatest concern in the process is quite likely to be whether damage pre-existed the windstorm or was aggravated or exacerbated by the same. In other words, was the cause of loss windstorm, or was the damage existing at some point in time before the windstorm?

In this respect, and in many instances involving alleged damage to brick masonry and foundations, an insurer should turn to its own records if available.

In the process of underwriting, an insurer establishes guidelines for buildings – whether home, farm, or commercial – that dictate the category in which it will insure the same and the appropriate premium to be charged. With guidelines approved by regulatory authorities as well as loss experience and historical trends, an insurer is able to write a contract of insurance that provides cost-effective coverage for the insured while avoiding adverse risk selection on large and small scales and mitigates potential exposure.

Insurance agents have at times been referred to as "field underwriters." Trained in the guidelines, an agent will go through a process of providing the underwriting department with the information it requires to properly and informatively categorize the risk – or, the property. This will often mandate that the agent personally inspect the property and provide the underwriter with check sheets, photographs, measurements, and any other detail necessary for the proper categorization and premium.

Further, if the policy renews automatically on an annual basis, the agent may be required to revisit the property on a biennial basis or some other computation of time and rewrite or update the policy to ensure that changes in its condition are accurately reflected. And once again, this requires a personal inspection in most instances and the forwarding of documentation to the underwriter.

A claim department historically operates separately from the underwriting department as well as the marketing department. Each is, to its own, a separate entity within the company with often competing interests. But in considering a claim with an issue of pre-existing damage or some other cause of the damage other than the peril alleged, the insurer should overcome any reluctance to look to its own files in the adjustment process. In fact, courts have held that, at least in the case of a demonstration of bad faith, they could do so.

For example, in *Jones v. Alfa Ins. Co.*, 1 So.3d 23 (Ala. 2008), the Court reviewed a case in which the report of a structural engineer was used by the insurer to deny the policyholder's

claim of windstorm damage to a house following Hurricane Opal. The report concluded that that brick cracks, caulk separations, sheetrock cracks, and related damage to the home's carport were due to settlement of the foundation, not wind forces associated with the hurricane.

The Court found that the report was sufficient, in Alabama, to sustain a finding in the insurer's favor on the allegation of *normal* bad faith. The policyholder argued, however, that since the insurer recklessly failed to investigate the claim in the first place, they were not precluded from asserting a claim for *abnormal* bad faith.

Specifically, the policyholders argued that the engineer hired by the insurer focused exclusively on the foundation to the exclusion of all evidence available to him even though they had made a specific claim for roof damage, and the hurricane had blown a tree onto the eaves of their house. They also argued that neither the engineer nor the assigned claim professional gathered any "before and after" evidence from them or from any other source.

The Court held the following facts taken as a whole created a jury question as to the insurer's bad faith: After the hurricane, the insurer *never* investigated any records it had of the condition of the house before the hurricane. The record reflected that the insurer *never* contacted a realtor who visited the house three days before Hurricane Opal made landfall, even though, according to the policyholder, the claim adjuster even inquired about purchasing the residence.

The insurer *never* inquired of the policyholders as to who would have seen their house before Hurricane Opal, and *never* attempted to interview anyone who may have visited the same before the hurricane.

And the insurer *never* considered its own ***37*** "rewrite" inspections of the house, including photographs of the exterior of the house and *never* inquired of its own employees as to the condition of the house when the "rewrite" inspections were conducted -- even though the insuring agent testified that he did not recall seeing any cracks in the interior or exterior walls of the house when he conducted the "rewrite" inspection three months before Hurricane Opal.

Anti-Concurrent Causation

Most policyholders are not aware that their insurance details specific exclusions from coverage. For example, once it is shown that both wind and flood perils may have contributed to a loss, a policyholder will likely challenge either the validity of the exclusion or argue that the cause of the loss under the facts was not attributable to the excluded peril.

The first question to answer is how a court will determine which peril was the cause of loss (wind or water, for example) or whether the damage was the result of pre-existing structural failures or design flaws (foundation settlement or brick masonry cracking, for instance).

With respect to both, causation and the enforcement of policy exclusions are similar whether adjusted on the basis of an all risk policy or named peril policy. In essence, a loss under the former is covered unless an exclusion listed in the policy applies – and the burden of proving the exclusion is on the insurer. A loss under the latter is covered as long as it is the result of a peril specifically set forth in the policy – and the burden of proving the peril is on the insured. Named peril policies may be a less expensive alternative to a comprehensive coverage or all risk policies that tend to offer coverage to most perils.

First-party property coverage often depends on whether what occurred constitutes a covered or excluded peril. Thus, in a claim involving multiple causes of loss, a first step in the factual investigation is often to ascertain what perils occurred, and how many perils occurred; indeed, these issues can be keys in determining whether or not coverage exists. Perhaps surprisingly, it is not always clear what perils occurred, or how many perils occurred.

The initial starting point for the analysis is usually the facts of the loss, and how the policy's insuring provisions and exclusions define various perils. Case law may also provide guidance on how to define the perils (especially if the policy does not do so), and for determining how many perils occurred.

In *Koch v. State Farm Fire and Cas. Co.*, 565 So.2d 226 (Ala. 1990), the Alabama Supreme Court held that an insurer's reliance on policy language excluding coverage for rotting and deterioration of a home's exterior walls was reasonable, even though the cause

of the rot was "seepage" from wind-blown water after repeated hurricanes. Wind-blown water from a hurricane was a covered peril, but the rotting in the walls was not. By affirming the lower court's dismissal of the insured's bad faith claim, the court recognized that the underlying contract provision was in fact enforceable.

Where there are two concurrent causes of damage (wind and flooding) that occur simultaneously instead of over a period of time, Alabama courts recognize principles that would apply to a coverage determination.

Anti-concurrent causation exclusions are valid and enforceable and will be treated like any other exclusion. But where there are two potential causes of a loss, the determination of coverage is a factual inquiry for the jury's determination. For example, in *Allstate Ins. Co. v. Fitzsimmons*, 429 So.2d 1059 (Ala.Civ.App. 1983), the court held that whether water damage and buckling floors resulted from hurricane damage or from an air conditioner leak was a jury question.

Moreover, the determination of what damages are attributable to what cause is for the jury to decide. In *M.C. West, Inc. v. Battaglia*, 386 So.2d 443 (Ala.Civ.App. 1980), the insured presented evidence attributing the cause of the flooding to his property from the construction of a dam, and he was allowed to recover whatever damages that were reasonably certain from the loss.

Alabama will likely continue to uphold unambiguous exclusions to coverage, such as flood exclusions or anti-concurrent clauses, even if the excluded peril is in the proximate or foreseeable chain of events of a covered loss. In other words, while Alabama follows the doctrine of efficient proximate cause, the parties may eliminate the doctrine by contracting around it. Alabama courts will use these guiding principles to determine the legal cause of action and enforceability of the contract, and will allow the jury to determine the cause of a loss and the damage attributable to each cause where there is any question in the presence of disputed facts or an ambiguous exclusion.

Expert Considerations

First-party property claims often prove expensive and time-consuming to investigate, more so where the claim involves

multiple causes of loss, because in such claims, causation is usually a question of fact. Further, evaluating causation often requires technical or scientific expertise.

Thus, both insurers and insureds must often retain consultants with appropriate expertise to assist in evaluating causation. From the insured's perspective, consultants may help the insured meet its burden of proving that the claim is covered. From the insurer's perspective, retaining consultants may show that the insurer investigated the claim in accordance with applicable state standards.

The steps the insurer has taken, or not taken, in identifying the need to utilize an expert to assist in its claim decision as well as how the insurer conducted itself in the use of the expert will continue to be a source of inquiry in building damage issues

In light of the fact that insurers maintain approved vendor lists, a selection of experts is likely to be made from the same according to the nature of the loss and claimed damage. Also integral to many claim handling strategies is the necessity to consult with experts to assist the insurer in making factual determinations before resolution of the claim. The steps the insurer has taken, or not taken, in identifying the need to utilize an expert to assist in its claim decision as well as how the insurer conducted itself in the use of the expert will continue to be a source of inquiry in building damage issues.

Selection of an expert that is not appropriately qualified not only undermines the insurer's chance of succeeding on the merits of the contractual claim, but also has potentially significant ramifications in bad faith litigation

There should be evidence that the insurer has addressed itself to whether experts are required or not. Since the duty of good faith requires the insurer to respond to a claim in a timely fashion, it is important that the insurer's file reflect that if experts are reasonably required, there is *no undue delay in retaining* the experts. This is particularly important where the nature of the expert analysis will require a significant time to complete – forensic accounting issues, cause and origin issues, and lengthy waiting times for medical examinations.

Choice of experts can be an integral component to the insurer discharging its duty to assess the merits of the claim in a balanced and reasonable manner. Selection of an expert that is *not appropriately qualified* not only undermines the insurer's chance of succeeding on the merits of the contractual claim, but also has potentially significant ramifications in bad faith litigation.

Retaining an expert that is known to have a particular bias will undoubtedly be characterized as evidence that the insurer was not interested in an *objective assessment of the claim*, but only in developing evidence to deny the claim. The plaintiff bar is well-

organized and connected and tracks experts that have a particular bias and are able to come to court well-prepared to expose that bias.

The situation becomes particularly acute if the insurer regularly uses the biased expert and the report is seen as pre-textual to the claim denial.

P. Ted Colquett concentrates his practice in the defense of civil litigation for insurance and corporate clients. He has been involved in significant matters including catastrophic personal injury and wrongful death claims and has been the lead trial counsel for a major property insurer in the defense of multiple claims of bad faith and pattern and practice fraud arising from hurricane and tornado events along the Gulf Coast. Ted may be reached at the Birmingham, Alabama, firm of Wilson & Berryhill, P.C., by telephone at 205.252.4441 or by email to ted@wilsonberryhill.com.

Resource Materials:

MythBusters for Wind versus Water Damage, J. Arn Womble, Douglas A. Smith (2009)
Anatomy of Damage to Coastal Construction: A Multi-Hazard Perspective, M. McCullough, A. Kareem (2009)
Building Damage Issues in Tornados, T. Marshall (Haag Eng. Co.)
Performance of Brick and Concrete Masonry in Windstorms, T. Marshall, S. Morrison, J. Green (Haag Eng. Co.)
Facing the Aftermath: Wind and Flood Considerations in the Wake of Katrina, F. Latta, M. Strasavich (2005)