

# What's in Your Manual? A three-step guide for windstorm claims management.

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June 1, 2013, marked the beginning of the Atlantic hurricane season, a time measured by the annual cycle of tropical cyclone formations arising from the Atlantic basin. The first system was prompt and made landfall along Florida's coastline on June 5, ushering in what will likely be the season's first wave of catastrophic and non-catastrophic windstorm damage claims. Given the recent uptick of windstorms, increased instances of insurance fraud pertaining to such events, and the complexities of handling such claims in a manner to avoid bad faith, it is advisable to take a proactive stance and consult the "windstorm manual" for guidelines on claims management for the 2013 season.

## Chapter One: Taking Stock

From a legal perspective, first-party property claims must be handled efficiently and timely, with cognizance to the insured's policy and its particular endorsements. Interestingly, the term "windstorm" is generally not defined within the confines of a homeowners' policy, making these claims slightly more complex to litigate when they reach the courtroom.

To complicate matters further, the adjustment and investigation process may be hindered by the fact that the windstorm may have been accompanied by a catastrophic weather event such as a hurricane or tornado. To maintain a successful claims-handling protocol, claims professionals and their carriers should be conscious of the particular jurisdictional definitions set forth in reported case law.

Assessment of windstorm damage should begin as soon as possible following an event. The passage of time and third-party involvement can skew an insurer's opportunity to inspect damage

properly, making it increasingly difficult to differentiate between actual windstorm damage and pre-existing wear and tear occurrences. Typical windstorm damage begins at the roof level and travels downward along the structure. As this occurs, wind speeds increase, often inflicting more damage on the structure. Due to this phenomenon, windstorms rarely cause structural damage to interior walls, floors, and the foundation, and claims involving such damage should be cautiously adjusted.

## Chapter Two: Third-Party Involvement

The landscape of windstorm and CAT claims is widely different than that of a standard large-loss property claim. For instance, following a major windstorm event, there may be local law enforcement or FEMA to contend with in terms of surveying the loss or making contact with the insureds. Though FEMA and law enforcement may not intend to get in the way of the claims process, it can be difficult to reach insureds when an area has been administratively shut down or cut off from the rest of the local community. When third parties are involved, carriers and their claims professionals should strive to work closely with them throughout all stages of the investigation.

Likewise, windstorm claims may signal the entry of public adjusting companies to the affected areas. While a public adjuster is not in contractual privity with an insurance carrier, he is in contractual privity with the named insured by way of a separate agreement authorizing action on behalf of the insured. While understanding that the public adjuster is not permitted to act as legal counsel, it is advisable to respect the level of representation between the public adjuster and

the named insured. Legally speaking, interfering with the contractual privity between them could subject a carrier to a lawsuit for tortious interference.

Additionally, when encountering a public adjuster-related claim, a carrier should request a copy of the retention agreement followed by a copy of the state-specific licensure of the adjuster. These requests ensure that the relationship between the public adjuster and insured is proper.

In dealing with insureds, it is important to remember that emotions generally run high in the aftermath of catastrophic windstorm events. Maintaining a calm and level-headed demeanor throughout the adjustment process will ensure that a carrier does not commit contractual breach and bad faith. Claims professionals should prepare themselves to be scrutinized on a local and, sometimes, national level.

In addition to federal and state authorities, class-action attorneys eager to get involved in the claims process may be watching from the sidelines, ready to rush the scene at any appearance of inequity. The media is another factor to consider following a catastrophic windstorm event, as they are almost certain to talk to homeowners about their individual experiences—including the behavior and responses of their insurance carriers.

### Chapter Three: Avoiding Bad Faith

Broad public scrutiny is often also the recipe for extra-contractual claims and litigation. As such, it is important to maintain proper claims handling discipline. The New York and New Jersey legislatures already have been active in passing draconian regulations regarding insurer deadlines to respond to and adjust claims. These legislatures also have proposed bad-faith litigation bills that are expressly drafted with retroactivity to include claims arising out of Superstorm Sandy in October 2012.

The focal point of bad-faith litigation in any jurisdiction is the reasonableness of an insurer's conduct in the handling of a claim. Though the

actual burden of proof can vary from state to state (and even within a particular jurisdiction through differing judicial opinions), the emphasis remains on how the claims professional and his file will stand up under the microscope of bad-faith litigation. As such, it is a good practice to take stock of your practices and procedures in claims handling before the storm hits.

First and foremost, it is important for the claims professional to maintain professionalism in a tense environment. The sheer volume of claims that accompany catastrophic windstorm events places extraordinary pressure on the insureds, their communities, emergency responders, and the insurance community. It is important to remember that the claims file will be the ultimate record of claims handling for each individual claim. Tips for maintaining the best possible claims file, even under trying circumstances arising from CAT losses, include:

**Keep claims files distinct, clean, and professional.** Avoid references to multiple insureds with similar claims. It may be tempting to draft a single log entry with multiple insureds and then post it to multiple claims. However, this will reflect poorly if any one of those claims proceeds to litigation. Further, it could potentially waive any privilege as to the other claims and even open the door for a discovery order on all of the claims.

**Use proper spelling and grammar.** You don't need to worry about a dangling participle; however, claims entries should be well written and spell-checked. Entries should read simply and professionally. If the claims log contains sloppy entries, it will create an inference in the jury's mind that the handling of the claim was similarly conducted.

**Always respond promptly to insured inquiries.** Even if you have no new information to provide, reply promptly and politely. Many bad-faith claims can be avoided by simply employing a better bedside manner. If possible, try to avoid "check this box" delay letters. They are impersonal, often

do not match the inquiry at issue, and convey a message to the insured, and potentially a jury, that he or she has no personal value to the company. You may believe that you are avoiding a confrontation when you do not have new information or updates that your insured is looking for; however, the reality is that the failure to respond at all is much more inflammatory. Further, it reflects poorly in the claim when it is viewed dispassionately in litigation.

**Use the same professionalism in your communications with third parties** that you use with your insured. These letters, emails, and telephone log entries also will be discoverable in bad-faith litigation. Avoid any characterizations of the insured or their claim. You may feel safe communicating in such a manner with familiar claims adjustment partners, such as restoration companies, contractors, and agents and brokers; however, it may look like you and your industry partners are ganging up on an unsophisticated insured. This is very sympathetic for the insured and negative for the insurer in bad-faith litigation.

**Avoid clever or humorous comments in claims log entries.** You may think that a derogatory or ironic comment about the insured, the community, or even the storm itself may be entertaining for co-workers or industry partners at the time it is drafted, but it could come back to haunt you should bad-faith litigation arise. Almost universally, attempts at humor in a claims file work against the insurer. At best, they fall flat and

are awkward. At worst, they reflect insincerity about the claim and the hardship that the insured is experiencing. Claims log entries should be written in a straightforward and factual manner.

It's fairly certain that the 2013 Atlantic hurricane season will continue to present new challenges for insurers when it comes to windstorm claims. Claims professionals and their carriers must do their part to ensure that claims are adjusted timely and within the confines of their own individual subject policies, while being conscious of the particular jurisdictional backdrop. One should expect third parties to enter the adjustment process, and field adjusters should be vigilant in demanding and requesting proofs, maintaining a calm demeanor, and being fully aware of their surroundings.

The perils of bad faith should be avoided through professional and responsive communication and by documenting claims files in a manner that will reflect well on the claims professional and the carrier. Adhering to these windstorm manual guidelines can reduce the financial strain on the carrier and bring efficacy, order, and economic efficiency to the often complicated windstorm claims management process. **CM**

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