Hurricane Irma & Causation: The (Un)Settled Matter of Florida Insurance Law

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As the property damage from Hurricane Irma begins to come into focus, so too do the big property insurance coverage issues – and potential disputes – between Florida insureds and their carriers. Front and center among them is the age-old question of causation, thanks to a decision of the Florida Supreme Court during its most recent term, *Sebo v. American Home Assurance Co.,*[1] a case that has been described as a "big win" for first-party policyholders. Plaintiffs' counsel have eagerly been awaiting an opportunity to test the limits of their recent victory, hoping to be able to persuade Florida courts to apply and extend its causation-related holding as far and as much as possible. Hurricane Irma is now being seen as that opportunity.

Hurricane Irma, the most powerful Atlantic Ocean hurricane ever,[2] began its unprecedented path of massive destruction last Wednesday when it made landfall in the Caribbean as a monstrously powerful category 5 storm system.[3] Irma caused massive destruction throughout the islands, then churned northward toward Florida, side-swiping Puerto Rico along the way, leaving millions without electricity. Late Saturday night, Irma, which by then had become so massive that its diameter exceeded the width of Florida itself, directly hit the Sunshine State as a category 4 hurricane, flooding coastal neighborhoods, ripping roofs off buildings, and causing destruction the likes of which Floridians have not seen in decades.

Although Irma's damage is just beginning to be tallied, causation-related coverage questions already have begun to surface. Unlike many other weather catastrophes, hurricanes involve numerous separable perils, and property policies do not always cover every single one of them. Hurricane Irma, for example, battered Southern Florida with its cyclonic hurricane-force winds, the storm surge and coastal flooding, dozens of reported tornados, and rainfall-induced flash flooding. Many commercial property policies cover wind, but do not cover flood or contain a flood sublimit. Moreover, various non-weather perils also would have played a causal role in the property damage over the weekend. One example is contamination, given the strength of Irma's cyclonic winds, which easily would have overpowered certain above-ground waste-storage tanks. The storm's devastating gusts also would have exploited pre-existing structural problems, such as by creating openings in weak, negligently-constructed or unmaintained parts of buildings. In these types of circumstances, the question from a coverage standpoint is simple: What happens

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when the policy covers some perils, but not all of them, that contributed to the damage for which recovery is sought?

In 1917, the Florida Supreme Court issued a decision known as *Evansville Brewing*, which specifically addressed whether a first-party insurance contract covered damage caused by two perils, only one of which was covered.[4] The policy at issue covered the peril of fire, but excluded the peril of explosion. Florida's high court held that, in such circumstances, coverage would be available if the fire had caused the explosion, "the explosion being a mere incident of" the covered peril of fire.[5] But, the Court also concluded that, had it been the other way around, coverage would not be available: "the insurer is not liable for a loss caused by an explosion which was not produced by a preceding fire."[6]

In 2016, the Florida Supreme Court issued its decision in *Sebo*, which similarly addressed whether a first-party insurance contract covered damage caused by multiple perils, one of which was excluded. The court recounted its analysis in *Evansville Brewing*, explaining that the case still remains the law of the land, but only for those multi-peril insurance claims that involve damage caused by multiple *dependent, sequential* perils. As the *Sebo* court put it, for claims involving a "chain of events where one peril directly le[ads] to a subsequent peril," Florida decisional law draws a "distinction between a covered peril setting into motion an uncovered peril and an uncovered peril setting into motion a covered peril" whereby "[c]overage exists for the former but not the latter."[7] The *Sebo* court then went on to explain that not *every* multi-peril claim involves one peril set into motion by another and that, sometimes, two or more *independent* perils simply converge, acting in concert to produce the damage. The insurance claim before the *Sebo* court, for example, involved the effect of Hurricane Wilma on a faultily constructed home. Those perils are independent from one another – the faulty work did not set into motion the hurricane, and the hurricane did not set into motion the faulty work – yet, the perils converged, acting together to cause irreparable water leakage necessitating the home's demolition. With respect to this type of multi-peril claim, "where both causes of the harm are independent of each other," the *Sebo* court found the *Evansville Brewing* analysis to be "of little assistance,"[8] and declared instead that, absent language in the policy providing otherwise, coverage simply would be available for all multi-peril claims of this type, so long as the policy covers at least one of the (independent) concurring perils.[9]

Unfortunately, the *Sebo* decision arguably could be interpreted to re-open certain otherwise-settled questions, chief among them the age-old wind-versus-flood issue

expected to be at the forefront of Hurricane Irma claims. The issue arises most commonly in the context of a policy that covers the peril of wind but excludes or limits coverage for the peril of flood. For decades, claimants have litigated the issue, arguing that, in the case of a hurricane, the powerful winds generate a massive storm surge that, in turn, floods the land and damages the insured's land-bound property. The suggestion, of course, is always that the claimants' water damage is not merely from the (excluded) peril of flood, but rather is from a flood that was set into motion by the (covered) peril of wind. Although courts seemingly everywhere have rejected that argument, the *Sebo* decision arguably (albeit inadvertently) may have given claimants some new hope to attempt to re-litigate it. According to *Sebo*, Florida law draws a "distinction between a covered peril setting into motion an uncovered peril and an uncovered peril setting into motion a covered peril" whereby "[c]overage exists for the former but not the latter."[10] The problem is that this standard, as described by the *Sebo* court, is either overly simplistic generally, or else unworkable and inapplicable specifically to the context of a flood. Floods are *always* set into motion by some other peril, such as Hurricane Irma's wind-generated storm surge. If insurers could not enforce agreed-upon flood exclusions in any claims involving a flood set into motion by another peril, then insurers could not enforce agreed-upon flood exclusions in any claims at all. It is highly unlikely the Florida Supreme Court intended that result, but that will not stop claimants from insisting on an overly literal reading of the *Sebo* decision's text.

The *Sebo* decision also seems to assume that all multi-peril damage cases will fall neatly into one of the two categories described above, and the *Sebo* decision itself, taken to its logical extreme under the right factual circumstances, arguably could dictate surprising outcomes never intended by the contracting parties. Suppose, for example, that a building is improperly designed and constructed, and that the problems are so severe that the entire structure will need to be demolished at some point soon. The insured submits a claim, but the insurer properly and justifiably denies it on the basis of the insurance policy's inadequate design and faulty workmanship exclusions. Thereafter, Hurricane Irma's winds – a covered peril under the policy – hit the enfeebled building, delivering the final blow that requires its immediate demolition. Under this scenario, Hurricane Irma would have played a *de minimis* causal role in bringing the building to the point of having to be demolished, plus the building would have had to have been demolished shortly thereafter *anyhow*, and entirely because of the damage caused by excluded perils. Again, it seems highly unlikely that the Florida Supreme Court intended – or even envisioned – that its decision in *Sebo* might be used by an insured in such extreme circumstances as these in support of a demand that the insurer fully cover the building's demolition.

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Hurricane Irma claimants and their coverage counsel will be tempted to test the limits of the *Sebo* decision in their effort to seek full recovery for damage in multi-peril claims that, in the past, might have been readily denied without dispute (or unclaimed entirely). That much is clear. It remains to be seen whether Florida courts will agree to apply *Sebo* in an overly literal manner rather than in a manner more consistent with logic and the contracting parties' intent.

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ENDNOTES

1. 208 So.3d 694 (Fla. 2016).

2. Maggie Astor, "No, Hurricane Irma Won't Be a 'Category 6' Storm," N.Y. Times (Sept. 6, 2017) ("The difference between successive categories on the existing scale ranges from 14 to 26 miles per hour, and Irma's winds were 28 miles per hour past the Category 5 threshold. In the years ahead, hurricanes are quite likely to become stronger, and the strongest ones more frequent."), https://www.nytimes.com/2017/09/06/us/hurricane-irma-category-six.htmlA.

3. *Ivelisse Rivera & Lizette Alvarez, "Hurricane Irma, Packing 185-M.P.H. Winds, Makes Landfall in Caribbean," N.Y. Times (updated Sept. 6, 2017), https://www.nytimes.com/2017/09/05/us/hurricane-irma-a-category-5-hurricane-heads-for-puerto-rico.html?_r=0.*

4. *See Fire Ass'n of Phila. v. Evansville Brewing Ass'n*, 73 Fla. 904, 75 So. 196 (1917).

5. *Evansville Brewing,* 75 So. at 198.

6. *Id.*

7. *Sebo,* 208 So.3d at 697.

8. *Sebo,* 208 So.3d at 699 (quoting Wallach v. Rosenberg, 527 So.2d 1386 (Fla. Ct. App. 1988)).

9. *Sebo,* 208 So.3d at 700 ("As stated in *Wallach*, '[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage.'" (quoting *Wallach*, 527 So.2d at 1388)).

10. *Sebo*, 208 So.3d at 697.