

## Hurricane Harvey: If Flood Isn't Covered, Then What Is?

Hurricane Harvey dropped record amounts of rain on Texas, and the photographs of the devastation are horrific. AccuWeather has predicted that Harvey will be the most expensive natural disaster in United States history, costing the economy about \$190 billion and exceeding the combined damage done by Sandy and Katrina.

But where will the money come from to repair the damage?

Most people instinctively think that insurance will respond and assist homeowners to rebuild their homes and companies to reopen their businesses. Insurance companies are probably working overtime preparing the form denial letters that will undoubtedly be going out to policyholders in the coming weeks. Why? Because the typical homeowner insurance policy (HO) excludes damage caused by flood, surface water, waves, tidal water or overflow of a body of water. This is the way it has been since the 1960s. Flood insurance is provided by the federal government through the National Flood Insurance Program (NFIP), and comes with its own unique set of rules and restrictions that makes it the poster child for the oft-repeated quote from Ronald Reagan: "If more government is the answer, then it was a really stupid question."

Regardless of the deficiencies of the policies offered by the NFIP, they are certainly better than nothing. But only about 15% of the homes in the Houston area have policies from the NFIP.

Numerous charitable funds are in full swing, and although laudable, the combination of NFIP coverage, government assistance, and private charity will probably fall far short of making the disaffected whole.

So, where will homeowners turn?

For some, the answer is back full circle to their own insurance company. True, property damage caused by flood and surface water is excluded. But policyholders have certain coverage arguments that can be used to counter an insurance company's deny-first, ask-questions-later approach.

**Sewer backup on the premises.** Most HO policies provide at least some coverage for damage caused by water that backs up from a sewer or drain on the insured premises. Often, this is the first source of water into a house as water enters through a basement floor drain or a toilet that backs up and overflows. Only later, after the house has been damaged by several inches of sewer backup water, does outside flood or surface water enter. Policyholders can argue that their homes were damaged by covered sewer backup water before the non-covered outside flood water or surface water entered.

Sewer backup endorsements are usually subject to their own policy limit, and this limit is often quite low, maybe \$5,000 to \$15,000. But this is not always the case. My own HO policy has a sewer backup endorsement with policy limits that match my regular dwelling limits.

**Storm drain sewer overflow off the premises.** This coverage is rarer, but we have seen it in some policies and used it to successfully obtain coverage for damage caused by surface water. The coverage can apply when storm drains or sewer lines located off the insured premises accidentally discharge or overflow and cause all or part of a building on the insured premises to collapse. Of course, storm drains will all overflow if there is enough surface water, and the result will be a flood. It seems somewhat contradictory to exclude flood and surface water damage while at the same time purport to cover damage from the overflow of storm drains or sewer lines. That is not necessarily the case. A flood can occur in an area without sewers. Any policy that

contains this coverage has a strong coverage argument, especially since this coverage is not typically tied to a lower policy limit, as is coverage for on-premises backup.

**Wind driven rain.** Policyholders used this coverage argument successfully in both Sandy and Katrina. Damage caused by windstorm is covered by the standard HO policy, as is damage caused by wind-driven rain that permeates a home's shell and damages windows, insulation, drywall, and the electrical system. The fact that flood waters later damage the same components does not negate coverage for the damage caused by the covered peril. Missing siding or shingles go a long way in making this coverage argument work.

**Collapse.** Water that accumulates on flat roofs can become so heavy that the roof collapses. HO policies usually deal with the collapse peril separately, so a policyholder needs to carefully examine a policy to see how this peril may apply. This is also an argument for business owners who have flat roofs, and may be combined with the drain backup coverage when a roof drain becomes clogged or overtaxed.

**Storm surge.** In May 2011, the Insurance Services Office (ISO) issued a new standard HO3 policy form. The HO3 is the most commonly used residential policy form in the United States. This edition of the HO3 expanded the water damage exclusion by explicitly exempting coverage for "storm surge." Prior editions of the HO3, many of which are probably still in use, did not specifically exclude storm surge, so policyholders sometimes successfully argued that damage caused by storm surge was not excluded, and was therefore covered, under their version of the HO3 form. This argument is now bolstered by the new HO3 form. A policyholder can argue that if the prior HO3 form already clearly excluded storm surge, then why did ISO amend the form to list it separately. This may be enough to convince a court that since the old version of

the HO3 form does not specifically exclude storm surge, it must not be excluded. Not being excluded equals being covered under “all-risk” property insurance policies.

Storm surge is *not* just a giant wave. Rather, it is a rise in the sea level along the coastline caused by a combination of a hurricane’s surface winds and the physical geography of the coastline. This argument will be best utilized by homeowners close to the coast, but storm surge can carry far inland, as witnessed by the storm surge damage done in New York City by Sandy.

**All policies are not created equal.** The best lesson for a policyholder with a water damage claim is to remember that not all policies cover this peril in the same way. Fire is a peril uniformly covered under all HO policies, but coverage for loss caused by water damage is much “trickier.” The exclusions are not uniform, the endorsements modifying the policies are not uniform, and the exceptions to the exclusions are not uniform. In some cases, the analysis of coverage for a water loss can be mind-numbingly complex. Each policy must be examined carefully; there is no “one-size-fits-all” in this arena.

A final word of caution for policyholders. The meaning of what qualifies as a “flood” or other excluded event for purposes of insurance may not be what you might expect. Coming home from vacation to a home with a basement inundated with water from a broken pipe or overflowing toilet could lead one to report a claim for flood damage. You have *not* suffered a flood; that is an excluded peril and will start your insurance claim off on the wrong foot. You have suffered a water loss. Plain and simple.

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