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## GLOBAL INSURANCE GROUP REPORT

*Hurricane Irene Strikes The Eastern Seaboard:  
An Overview Of The Facts And Coverage Issues*

*Prepared by*

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On the sixth anniversary of Hurricane Katrina, another such storm was devastating the eastern coastline of the United States. Irene—the first hurricane of the 2011 season—was thankfully not as destructive as the 2005 storm that ravaged New Orleans and the Gulf Coast area. Nevertheless, Irene was a powerful and destructive storm that hit areas of the country that seldom see this kind of event. Irene is likely to generate several billion dollars in insurance claims over the coming weeks, as policyholders seek to recover for losses attributable to flooding, windstorm and loss of electricity. Causation issues will arise when the damage flows from some combination of such perils, and insurers will also see claims caused by mandatory evacuation orders and claims for additional living expenses. Finally, the impact of named storm deductibles must be factored into any compensability calculations.

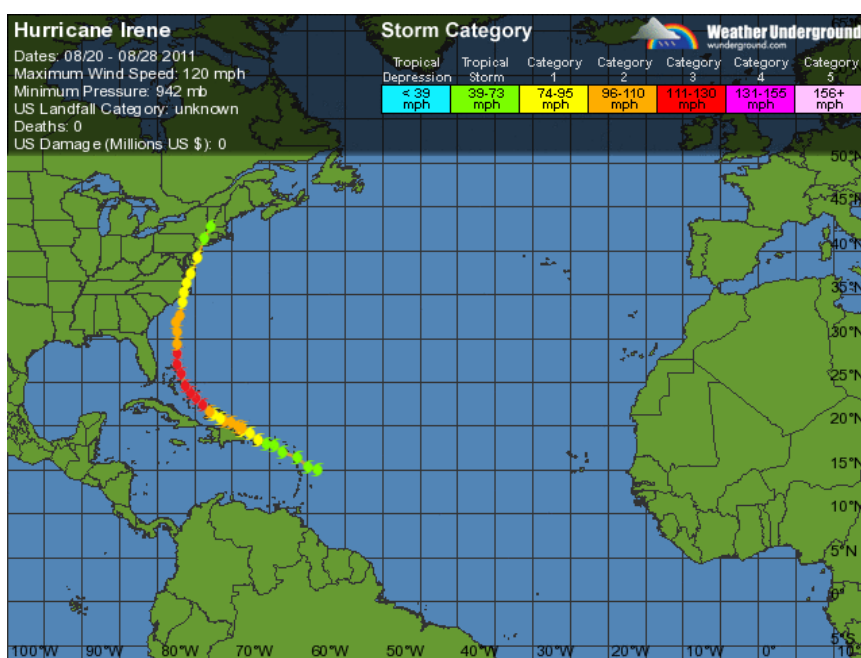
This report reviews the facts as they are known two weeks after Irene and then briefly surveys some of the case law implicated by the foregoing claims issues.

## THE HURRICANE

Irene was a powerful Atlantic storm that caused flooding, tornadoes and other wind damage, and widespread power failures along a swath of the Eastern seaboard. The destruction stretched from North Carolina and Virginia through the Mid-Atlantic states and into New York and New England. The storm struck between Saturday, Aug. 27, and Monday, Aug. 29.

### THE HURRICANE'S TRACK

The storm formed as a tropical cyclone in the mid-Atlantic early on Aug. 20, and it was upgraded to a tropical storm at 6 p.m. EDT that afternoon. By Aug. 22, shortly after passing over Puerto Rico, it reached Category I strength (74-95 mph). It passed just north of the island of Hispaniola, strengthening to a Category II (96-110 mph) as it did so, and then it crossed the Turks and Caicos Islands. As it bore down on and passed through the Bahamas, its strength reached Category III (111-130 mph).



Irene then turned due north, heading for the Outer Banks, and weakened as it encountered cooler water. It initially made landfall on the U.S. mainland at Cape Lookout in North Carolina at 7:30 a.m. EDT on Saturday, Aug. 27, as a Category I storm. It tracked back out over the Atlantic on the afternoon of the same day, and moved north-northeastward off the mouth of the Chesapeake Bay and past the Delmarva Peninsula. It then made a second landfall at Little Egg Inlet on the coast of New Jersey at 5:35 a.m. EDT on Sunday, Aug. 28, as a weak Category I storm (75 mph). It was the first hurricane to make landfall in New Jersey since 1903.

After traveling along the Jersey shore, Irene turned back out to sea again and then made a third U.S. landfall as a strong tropical storm (39-73 mph) with winds of 65 mph in the Coney Island section of Brooklyn, N.Y., at 9 a.m. EDT on Aug. 28. The storm continued to travel north-northeastward over Connecticut and northern New England, ultimately weakening and losing its status as a tropical storm while over Maine at 11 p.m. EDT on Aug. 29. It then entered Quebec, crossed the St. Lawrence River and Newfoundland and disappeared into the Labrador Sea.

## SAFETY MEASURES

In the U.S., 65 million people in 14 states and the District of Columbia were in the potentially affected area. States of emergency were ultimately declared from South Carolina to Maine.

North Carolina ordered mandatory evacuation of three counties, including the entire Outer Banks. Virginia evacuated low-lying areas such as Virginia Beach, and New Jersey ordered evacuation for all of Cape May County and all the seaside communities in Atlantic and Ocean counties. It was the first mandatory evacuation in the history of Atlantic City. Overall, 2,285,000 people were relocated in six states: North Carolina (300,000), Virginia (200,000), Maryland (315,000), Delaware (100,000), New Jersey (1,000,000) and New York (370,000).



The U.S. naval vessels at Norfolk Naval Shipyard and in nearby Newport News—including four aircraft carriers—put to sea to ride out the storm in the Atlantic Ocean.

Philadelphia shut down its Southeastern Pennsylvania Transportation Authority commuter railroad services at midnight on Saturday, Aug. 27, and the New Jersey Transit Authority suspended all rail and bus services on Saturday and Sunday as well. New York City ordered a complete shutdown of the Metropolitan Transportation Authority—the nation's largest transit system—for the first time in its history, at noon on Saturday. Boston also closed all public transportation offered by the Massachusetts Bay Transportation Authority at 8 a.m. EDT on Sunday.

Irene caused the postponement of six major league baseball games, one National Football League preseason game and three major league soccer games.

## DAMAGE IN THE CARIBBEAN

As it passed Puerto Rico, Irene caused severe flooding and downed trees and power lines that ultimately left almost a million people without electricity. The island of Hispaniola (Haiti and the Dominican Republic) also experienced extensive flooding, and 37,000 residents were forced to flee their homes.



The eye of the storm passed directly over several islands in the Bahamas when the hurricane was a Category III with winds at 120 mph, though it missed the main population centers on New Providence and Grand Bahama islands. Gusts reached 140 mph, and the island chain saw as much as 13 inches of rain, which led to widespread flooding and wind damage. It was the worst storm to hit the Bahamas since Hurricane Floyd in 1999.

## DAMAGE IN THE UNITED STATES GENERALLY

Irene caused extensive flooding and downed trees and power lines up and down the Eastern seaboard. Trees toppled in many areas because the ground was already saturated from earlier storms. August was the wettest month ever recorded in southeastern Pennsylvania, for example. Although wind damage was less than expected, the hurricane spawned a number of destructive tornadoes. Ten major rivers measured record flood levels.



At the height of the storm, 7.5 million households and businesses were without power. One of the continuing controversies caused by Irene involves the inordinate length of time it took to restore power to many affected areas. As of Aug. 31, three days after the storm, some 842,000 households were still without electricity.

On Labor Day, Sept. 5, the death toll stood at 55, with eight fatalities in the Caribbean, one in Canada, and 46 in the U.S.

In the southern states, damage was generally moderate. As it passed along Florida's eastern coastline, Irene killed two surfers and caused beach erosion. South Carolina experienced gale-force winds from the storm's outer bands, which led to scattered power outages.

Areas of eastern North Carolina received 10 to 14 inches of rain, and tornados and hurricane-force winds uprooted trees and caused extensive flooding that damaged or destroyed numerous cotton and tobacco crops. Six people died in the state: three were struck by falling trees, two died in traffic accidents and one died of a heart attack while boarding up his house.

Virginia also experienced tornadoes and high winds as the storm passed to the east of Hampton Roads, resulting in widespread power outages. There were four deaths from falling trees.



Damage in the Mid-Atlantic states was moderate, though the storm left hundreds of thousands without power in Maryland, Delaware and Pennsylvania. Those areas saw as much as 10 to 11 inches of rain, which led to localized flooding and crop damage. Eight deaths are attributed to Irene in the Mid-Atlantic states: half were from falling trees, while three drowned and one was killed in a traffic accident.

### DAMAGE IN NEW JERSEY

The most extensively damaged areas were New Jersey, New York and Vermont, and the entire Garden State was subsequently declared a federal disaster area. Despite Irene's landfall on the Jersey shore, damage in New Jersey's coastal areas was minimal—it was the inland portion of the state that suffered the brunt of the storm.

New Jersey saw rainfall of up to 11 inches, and there was severe flooding along six of the state's largest rivers (Raritan, Millstone, Passaic, Rockaway, Rahway and Delaware). Paterson's Passaic River was still well above flood stage when President Barack Obama visited the city on Sunday, Sept. 4.



More than 1.5 million people lost electricity, and the last of these power outages wasn't repaired until Monday, Sept. 5. Portions of Amtrak's main Northeast Corridor line were washed out or covered with debris, and the National Railway Passenger Corporation shut down Acela Express service between Boston and Washington. The Philadelphia-New York portion of the Northeast Corridor wasn't reopened until Wednesday, Aug. 31, and service on the Trenton line was not restored until Friday, Sept. 2.

New Jersey saw 10 deaths from the storm.

### DAMAGE IN NEW YORK AND NEW ENGLAND

New York experienced flooding along the Hudson and Ramapo rivers, and flash floods in the Catskill and Adirondack mountains caused landslides and washed out roads and bridges. The Holland Tunnel was closed due to flooding on the New Jersey side, and power outages left more than half a million people in the dark. There were a number of deaths, including boaters and windsurfers who chose to venture out in the storm.

Connecticut also saw flooding and power outages that affected three-quarters of a million people. Western Massachusetts was hit hard by high winds that toppled trees, and heavy rains caused flooding along both the Deerfield River and the Connecticut River and its tributaries. A quarter million people lost power in Rhode Island.



In Vermont, virtually all rivers and streams flooded; it was the worst flooding experienced by the state since 1927. A number of roads and bridges were washed out and destroyed, including historic covered bridges more than 100 years old. Dozens of rural communities were completely isolated and dependent upon helicopters for supplies for

extended periods. Four people died. Finally, in Maine, an elderly couple died of carbon monoxide poisoning after inadvisably firing up a portable gas generator in the basement of their home.

### THE NATIONAL FLOOD INSURANCE PROGRAM

The damage has already created a crisis for the National Flood Insurance Program (NFIP), which allows homeowners and businesses to purchase flood insurance from the government. The NFIP has 5.6 million policyholders in the U.S., and 900,000 of these live in areas affected by Irene; 600,000 are in New Jersey alone.



The storm is expected to generate several billion dollars in new claims from these insureds. The NFIP is administered by the Federal Emergency Management Agency (FEMA), which was already \$18 billion in debt to the Treasury as a result of Hurricane Katrina. In the first eight months of 2011, it had run up an additional shortfall of almost \$5 billion before Irene struck because of widespread tornadoes and flooding in the South and the Midwest. FEMA had only \$800 million on hand at the end of August, and it has been forced to curtail the funding of anything other than emergency repairs as a result. It will look to Congress for a substantial amount of new funding after the fiscal year ends on Sept. 30.

### MONETIZING THE LOSS

As might be expected only two weeks after the storm, estimates of the extent and cost of damage vary widely. The destruction in the Caribbean was initially placed at between \$1 billion and \$3 billion, but the lower number is now more widely accepted.

Damage estimates for the U.S. range from \$7 billion to \$12 billion. Anything in excess of \$9.2 billion (cost of damages attributed to Hurricane Floyd in 1999) would make Irene one of the 10 costliest catastrophes in U.S. history.

Significantly for the insurance industry, however, most of the damage from this storm was caused by flooding or power outage, rather than by wind. Flood loss is typically excluded under homeowners' policies and excluded or subject to a high deductible under commercial programs. The result, according to Washington, D.C. disaster estimator Kinetic Analysis Corp., will be that insurance companies bear less than 40 percent of the costs associated with Hurricane Irene.

### COVERAGE ISSUES

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Given the wide range of perils and losses that can occur during a hurricane—including wind damage, entry of rainwater into the interior of buildings, flood losses and loss of power—and the range of policies under which claims may be made for such losses, Hurricane Irene can be expected to give rise to various coverage issues that claim professionals will need to consider when addressing claims for losses sustained during and in the aftermath of the storm. What follows is a brief discussion of some of the issues likely to arise.

## FLOOD

Most property policies contain a standard exclusion exempting loss caused by various forms of water damage, including flood. A typical example provides:

This insurance does not cover loss caused by or resulting from:

(1) flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not.

Insurance Services Office CP 10 20 10 91.

The applicability of this exclusion to damage caused by flooding following a hurricane was tested in the aftermath of Hurricane Katrina. After Katrina, litigation ensued over two threshold questions bearing on application of the water damage exclusion to property losses sustained by Mississippi and Louisiana insureds due to the breach of the New Orleans levees and storm surge. The first was whether the water damage exclusion precluded coverage for flooding resulting from negligently designed and constructed levees, while the second was whether the water damage exclusion precluded coverage for Hurricane Katrina-generated storm surge. Stated another way, did wind or some other covered peril cause the surge, thus precluding application of the water damage exclusion? Both questions ultimately required a determination as to whether the water inundation that destroyed homes and buildings in Louisiana and Mississippi constituted a flood.

In *In re Katrina Canal Breaches Litigation*, 495 F.3d 191 (5th Cir. 2007), the Fifth Circuit, applying Louisiana law, held that the water damage exclusion applies to loss from water inundation regardless of whether human negligence was a factor in causing the flood. In the words of the court:

[L]evees are flood-control structures, which by definition means that they interact with floodwaters. Because levees are man-made, one could point to man's influence nearly any time a levee fails. Anytime a flooded watercourse encounters a man-made levee, a non-natural component is injected into the flood, but that does not cause the floodwaters to cease being floodwaters.

The Louisiana Supreme Court in *Sher v. Lafayette Insurance Co.*, 988 So. 2d 186 (La. 2008), similarly held that the only reasonable definition of the term "flood" is a large amount of water covering an area that is usually dry—whatever the cause. Speaking directly about the failure of the levees in New Orleans, the court determined that "[t]he levees did not *cause* the flood, they, whether through faulty design, faulty construction, or some other reason, failed to *prevent* the flood." The court expressly rejected the insured's argument that the water damage exclusion contemplated only "naturally caused" floods versus "artificial" or "man-made" floods.

The Fifth Circuit in *Tuepker v. State Farm Fire & Casualty Co.*, 507 F.3d 346 (5th Cir. 2007), applying Mississippi law, also held that the water damage exclusion unambiguously precludes coverage for storm surge. In *Leonard v. Nationwide Mutual Insurance Co.*, 499 F.3d 419, 437 (5th Cir. 2007), the Fifth Circuit, applying Mississippi law, provided further clarification:

The phrase "storm surge" is little more than a synonym for a "tidal wave" or wind-driven flood, both of which are excluded perils. The omission of the specific term "storm surge" does not create ambiguity in the policy regarding coverage available in a hurricane and does not entitle the [insured] to recovery for their flood-induced damages.

Finally, in *Corban v. United Services Automobile Ass'n*, 20 So. 3d 601 (Miss. 2009), the Mississippi Supreme Court confirmed the Fifth Circuit holdings in *Tuepker* and *Leonard*, further holding that storm surge "is plainly encompassed within the 'flood' or 'overflow of a body of water' portions of the 'water damage' definition, and no other 'logical interpretation' exists."

In short, while flooding is often the most devastating and dangerous impact spawned by hurricanes, many people and businesses thus affected may not have flood insurance and will contend that, because the flooding was the

result of a windstorm, their losses were proximately caused by wind or windstorm—a covered peril. But as reflected in the Katrina jurisprudence, courts have rejected such arguments.

## WINDSTORM

In the context of claims arising out of hurricane losses, issues relating to water damage exclusions often arise in tandem with the covered peril of windstorm. This is not surprising given that a “hurricane” is defined as a “cyclone usually involving heavy rains and winds exceeding 74 mph.” The American Heritage Dictionary 416 (4th ed. 2001). For that reason, when dealing with hurricane losses, any discussion regarding the applicability of a water damage exclusion often necessitates both a review of causation and also the covered peril of windstorm. See, e.g., *Lititz Mut. Ins. Co. v. Boatner*, 254 So. 2d 765 (Miss. 1971) (damage from Hurricane Camille was covered under a windstorm policy containing a water damage exclusion because the “great weight of the evidence shows that the house and its contents had already been destroyed [by wind] and distributed over a large area before the tidal wave came ashore”); *Commercial Union v. Byrne*, 248 So. 2d 777 (Miss. 1971) (coverage was available for damage resulting from Hurricane Camille because any water damage occurred after high winds).

Windstorm coverage has historically been provided under both all-risk and named perils policies. As a preliminary matter, when a policy does not provide a definition for “windstorm,” the meaning of that term must be determined by the court. Some courts have defined “windstorm” as a wind of “unusual violence or tumultuous force” sufficient to proximately cause injury to the insured’s property, without regard to the condition the property was in before the windstorm. See, e.g., *Great Am. Ins. Co. v. Railroad Furniture Salvage of Mobile, Inc.*, 162 So. 2d 488 (Ala. 1964); *New Hampshire Fire Ins. Co. v. Kochton Plywood & Veneer Co.*, 134 So. 2d 735 (Miss. 1961). There is another line of authority, however, holding that a “windstorm” means a wind of sufficient violence capable of damaging insured property that has been maintained in a reasonable condition. See, e.g., *Koory v. W. Cas. & Sur. Co.*, 737 P.2d 388 (Ariz. 1987); *Yunker v. Republic-Franklin Ins. Co.*, 442 N.E.2d 108 (Ohio 1982); *Kyle v. Ga. Farm Bureau Mut. Ins. Co.*, 195 S.E.2d 787 (Ga. Ct. App. 1973); *Napanoch Realty Corp. v. Public Serv. Mut. Ins. Co.*, 336 N.Y.S.2d 489 (1972); *Glens Falls Ins. Co. v. Ogden*, 310 S.W.2d 547 (Ky. 1958).

Whether wind-driven water is included in the windstorm peril is also of particular relevance to hurricane coverage claims. A similar issue was addressed in *New Hampshire Insurance Co. v. Carter*, 359 So. 2d 52 (Fla. Dist. Ct. App. 1978). *Carter* dealt with claimed damage to the contents of a house due to a confluence of wind and rain damage. Prior to the storm, the insureds were in the process of reroofing their home and had removed the existing shingles. The insurer denied coverage because the policy restricted coverage to instances when wind or hail first caused an opening in the roof, thus allowing the entry of rain. As long as wind was the proximate cause of damage to the roof, the policy covered the damage. However, the proximate cause of the damage in *Carter* was the removal of the shingles by the insured prior to the windstorm. Consequently, the court ruled that the homeowner’s loss was not covered. See also *Morehead v. Allstate Ins. Co.*, 406 F.2d 122 (5th Cir. 1969); *Sherwood Real Estate & Inv. Co. v. Old Colony Ins. Co.*, 234 So. 2d 445 (La. Ct. App. 1970).

In more recent years, exclusions have been written into property policies precluding coverage for damage caused by wind-driven rain unless wind first caused an opening in the structure through which the rain entered. These exclusions have been enforced. See, e.g., *Florida Windstorm Underwriting v. Gajwani*, 934 So. 2d 501 (Fla. Dist. Ct. App. 2005).

## CAUSATION

Three distinct categories of damage are potentially at issue in the wake of Hurricane Irene: (1) damage caused exclusively by wind, (2) damage caused exclusively by water or flood, and (3) damage caused by wind “concurrently or in any sequence” with water. There will likely be no dispute that damage caused solely by wind is covered. Additionally, and as discussed above, the water damage exclusion has been held applicable to damage caused by water, flood, storm surge and/or inundation of water as a result of a hurricane. As to the third category of damage, an evaluation of coverage will largely depend on the particular jurisdiction’s approach to concurrent or sequential causation. An additional consideration is whether the particular water damage exclusion at issue is preceded by anti-concurrent and/or anti-sequential causation language and, if so, whether that language will be upheld in a particular jurisdiction.

There are three approaches to analyzing concurrent causation:

*The Majority Approach – “Efficient Cause”:* The most frequently adopted approach to concurrent causation attempts to determine the “efficient proximate cause” of the loss. Under this approach, if a covered cause and an excluded cause combine to cause a loss, the court will attempt to determine the “predominant” or “efficient” cause of the loss. In theory, if the “efficient” cause is covered, the entire loss is covered. In practice, however, courts often reach inconsistent results in the actual application of the doctrine.

*The “Liberal” Approach:* Another approach to concurrent causation, generally considered the more liberal (meaning policyholder-friendly) approach, provides that where a covered cause contributes to a loss, the entire loss is covered irrespective of the concurrence of an excluded cause. Only a handful of states expressly follow this liberal reading of the doctrine of concurrent causation.

*The “Conservative” Approach:* Some commentators describe a third, more conservative (meaning carrier-friendly) approach, under which the concurrence of an excluded cause of loss results in a lack of coverage, even where a covered cause of loss contributes to the damage. Although no jurisdiction strictly follows the conservative approach, Texas and New Jersey follow a modified version. In those states, where covered and excluded losses combine to cause a loss, the insured has the burden of establishing which portion of the loss is the result of the covered peril, and may recover only for damages that result from that covered cause of loss.

Insurers have attempted to opt out of application of the doctrine of concurrent causation by revising the preambles of certain sections of their policies listing excluded causes of loss to include what is generally called “anti-concurrent causation” language. ISO forms and those based on ISO language preface some of the exclusions with the following language:

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Several jurisdictions have denied effect to the anti-concurrent causation language, holding that an insurer cannot contract out of the concurrent causation doctrine. Most states, however, permit insurers to avoid application of the doctrine by including anti-concurrent causation policy language.

## LOSS OF POWER

One of the most significant impacts of Hurricane Irene was the widespread and, in many instances, prolonged loss of electric power. Power outages and loss of other utilities can negatively impact businesses and homeowners in various ways; however, without resulting property damage, the loss of electricity alone will not typically result in a covered claim under a standard homeowners or commercial property insurance policy. Most often, insured property that has lost its power supply does not sustain structural or other direct damage, which is often a prerequisite to coverage under first-party property policies. Courts generally hold that when a policy requires direct physical loss or damage, the mere loss of power and utilities, without more, will not trigger coverage.

For example, in *Southeast Mental Health Center, Inc. v. Pacific Insurance Co.*, 439 F. Supp. 2d 831 (W.D. Tenn. 2006), a commercial policyholder sought coverage under an all-risk property policy providing business interruption insurance after the insured clinic and its operations center lost power during a hurricane. The policyholder claimed that loss of electricity caused its operations to be suspended, resulting in a loss of computer data. The court found that the electrical and telephone outages were caused by damage to power and utility lines that were not located on the insured property, and thus the power outage did not constitute “direct physical loss of or damage to” the insured property, as required by the policy. However, the court further held that the resulting corruption of computer data did constitute direct physical loss to insured property; thus, the resulting loss of business income related to such loss was covered.

Personal lines and commercial property policies often contain exclusions that preclude coverage for loss or damage caused by the loss of utilities. Such exclusions are enforced by a majority of jurisdictions. A typical exclusion provides that the insurer “will not pay for loss or damage caused directly or indirectly by utility services and the failure of power or other utility service supplied to the described premises, however caused, if the failure

occurs away from the described premises.” More recent causes of loss forms also exclude coverage for loss or damage caused by the failure of power or utility services that originate at the insured’s premises if the on-premises failure involved equipment “used to supply the utility service to the described premises from a source away from the described premises.” This may include on-premises power lines, circuit breakers, fuse boxes, transformers, switch gear boxes and the like.

Many insurers now offer utility service interruption coverage, either as a part of standard coverage or as an optional coverage that can be purchased separately by the insured. For example, the ISO utility service direct damage endorsement adds coverage for damage to the insured’s property resulting from interruption of utility services, including water, communication and power. *See, e.g., ISO Utility Service—Direct Damage (CP 04 17 04 02) at 1.* Similarly, many commercial forms provide extensions of coverage for business income losses sustained as a result of loss of utilities, even absent physical damage to the insured property.

## ORDERS OF CIVIL AUTHORITY

Although a business may not have sustained any physical loss or damage to its own property, it may nevertheless have sustained business interruption loss as a result of restrictions on access to its property. In anticipation of Hurricane Irene, various national, state, local and other administrative bodies issued declarations and evacuation orders that restricted various types of traffic, imposed curfews, cordoned off areas and issued warnings. In the aftermath of Irene, government officials maintained these evacuation orders and, in those areas hardest hit, prohibited the return to damaged areas.

Many policies providing business interruption coverage contain extensions of coverage for loss caused by “Order of Civil Authority.” This coverage is intended to provide protection where the insured’s property does not sustain physical loss or damage, but the insured’s business operations are disrupted when a governmental authority issues an order that prohibits access to the insured’s place of business. There is a similar extension of coverage available in some commercial policies for business interruption losses sustained when ingress to or egress from the insured premises is prevented or impaired due to a covered peril. Hurricanes frequently give rise to both civil authority and ingress/egress claims, and these types of claims can be anticipated in the aftermath of Hurricane Irene.

The civil authority coverage typically requires that access to the insured premises be prohibited. Such coverage is unavailable when access is still possible, even if limited or hindered by physical damage. Recent cases have addressed the parameters of the access requirement in civil authority policy extensions. For example, in *Kean, Miller, Hawthorne D’Armond, McCowan & Jarman, LLP v. National Fire Insurance Co. of Hartford*, No. 06-770, 2007 WL 2489711 (M.D. La. Aug. 29, 2007), the insured made a claim to recover business losses after the Louisiana governor declared a state of emergency in response to Hurricane Katrina, and Louisiana state police and local government officials requested that residents stay off the streets. Noting that authorities did not actually “prohibit” access to the insured premises but merely encouraged residents to remain off the streets, the court explained that the plain and ordinary meaning of the word “prohibit” is to “formally forbid” or to “prevent.” *Id.* at \*4. Despite the court’s acknowledgement of downed trees and power lines, lack of operational traffic signals, influx of emergency vehicles and general difficulty in navigating Baton Rouge, it nevertheless found that there was no civil authority coverage because there was no evidence of roadblocks or closures prohibiting access to the insured premises.

In addition to showing that access was prohibited, an insured seeking civil authority coverage must also demonstrate that the prohibition of access to the insured premises was caused by the property damage that gave rise to the order of civil authority. This requisite causal link is not established when the order of civil authority is predicated on the threat of a potential future event, as opposed to the past happening of a covered peril that has already impacted property in the vicinity of the insured location. *See, e.g., Cleland Simpson v. Firemen’s Ins. Co. of Newark*, 140 A.2d 41 (Pa. 1958). Courts have also held that ingress/egress coverage requires the existence of a direct causal link between the covered peril and the impaired access to insured property. *See, e.g., United Airlines, Inc. v. Ins. Co. of Pa.*, 385 F. Supp. 2d 343 (S.D.N.Y. 2005); *Chicago v. Factory Mut. Ins. Co.*, 2004 WL 549447 (N.D. Ill. 2004).

The language of the particular order of civil authority is also of crucial importance. For example, in *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683 (5th Cir. 2011), the insureds were operators of restaurants in New Orleans who sought to recover business losses they sustained due to the mandatory evacuation order issued prior to

Hurricane Gustav. The insureds argued that prior damage in the Caribbean and the hurricane's projected path satisfied the causation requirement, but the court noted that the order did not mention the property damage in the distant Caribbean and that there had been no property damage in Louisiana. Instead, the order stated that the reasons for evacuation were possible future storm surge, high winds and flooding based on the hurricane's projected path. For those reasons, the court found that order of civil authority coverage was not available.

### ADDITIONAL LIVING EXPENSES

Evacuation orders and other orders of civil authority issued in the wake of Hurricane Irene may also generate claims for additional living expenses (ALE). Many homeowners' policies provide coverage for additional living expenses incurred by an insured when the insured is displaced from her usual place of residence as a result of a loss, or when an insured's home is rendered uninhabitable by a covered property loss. This coverage is intended to enable the insured to continue living at the same level of comfort as he or she did prior to the loss. Depending on the policy wording, ALE coverage may be available when an insured is forced to evacuate his home due to an impending storm, even if the storm subsequently changes course and the property is undamaged.

Coverage for ALE generally is limited to the period of time it takes to repair the property or for the insured to settle in permanent quarters, whichever is shorter. Unlike most civil authority provisions, ALE coverage typically has no preset time limitations.

Disputes regarding ALE coverage often involve the issue of whether the insured actually incurred the additional expenses. Typically, an insured will not be entitled to ALE coverage unless the insured can demonstrate that the additional expenses claimed are not speculative.

Given the widespread losses and repairs that often occur in the aftermath of a hurricane, there may be significant delays before insureds are able to return to their property. Claims adjusters will be required to consider the point at which "temporary" property becomes a permanent residence, or when a property is restored to a habitable condition. These considerations are inherently subjective, and, in certain situations, insureds may begin to return to their homes before they are reasonably habitable. Whether insureds are entitled to continue to recover ALE expenses after returning to their homes will depend on a determination of whether the home is "unfit to live in." See, e.g., *Williams v. Auto Club Family Ins. Co.*, No. 06-4829, 2007 U.S. Dist. LEXIS 61991 (E.D. La. Aug. 22, 2007).

With respect to Hurricane Irene, the circumstances giving rise to each civil authority or ALE claim must be evaluated on a claim-by-claim basis. These coverages will generate claims that will require individual consideration in the claim adjustment process.

### NAMED STORM DEDUCTIBLES

An issue that can frequently arise with respect to claims made for losses sustained as a result of a hurricane or other tropical storm is what deductible applies and how it should apply. As discussed, a hurricane can cause damage in a number of ways, including the direct force of wind; impact from wind-driven debris and objects; entry of rainwater into the interior of a dwelling or other structure through either preexisting openings or damage caused by the storm's winds or hail; loss of utilities; flooding caused by storm surge or wave action; or surface water or the overflow of rivers or other waterways due to heavy rainfall, often associated with hurricanes or other tropical storms that make landfall.

In many policies, both the limits of liability provision, which establishes a ceiling with respect to the insurer's liability for covered losses, and the deductible provision, which states the amount to be deducted from the adjusted losses, are written on a "per occurrence" basis. Many policies, particularly commercial policies, contain definitions of "occurrence." Some definitions combine a series of losses—which are attributable directly or indirectly to one cause or disaster or to one series of similar causes or disasters arising from a single event—into a single occurrence. And within the definition of "occurrence," other policies contain what are called "hours clauses." A typical hours clause defines a loss occurrence as "all individual insured losses that are the direct and immediate result of the sudden, violent, physical operation of one and the same manifestation of an original insured peril and occur during a loss period of 72 consecutive hours." Where an insurance policy defines "occurrence," many courts find that deciding which test to apply to a number-of-occurrences analysis should be guided by the policy definition. See, e.g., *Uniroyal, Inc. v. The Home Ins. Co.*, 707 F. Supp. 1358 (E.D.N.Y. 1988); *Unigard Ins. Co. v. U.S.*

*Fid. & Guar. Co.*, 728 P.2d 780 (Idaho 1986). Accordingly, determination of the number of occurrences should be based on the most reasonable application of the policy definition.

Absent a definition of “occurrence,” courts may look to several different common law tests to determine the number of occurrences when a series of related events have impacted the insured’s property. In general, most courts use one of three tests, or a variation on one of those tests. These three tests are often designated as (1) the causation test, which bases the number of occurrences on the number of causes that result in the loss or losses at issue; (2) the liability triggering event test, which bases the number of occurrences on the number of events that trigger liability under the policy; or (3) the effects test, which bases the number of occurrences on the number of effects or results caused by an event.

Most authorities agree that the causation test is the majority test used for determining the number of deductibles. Under this test, the number of occurrences and, thus, the number of deductibles is measured by the number of causes-in-fact for the losses at issue. This test most often applies when losses happen immediately after a readily identifiable cause. When applying the causation test to multiple losses or losses happening over a span of time, or to determine whether one among several potential causes is common to all the losses, most courts employ a modified test called a continuing cause test. This test seeks to determine whether there is “but one proximate, uninterrupted and continuing cause” that results in “all of the injuries and damage, even though several discrete items of damage resulted.” *PECO Energy Co. v. Bode*, 64 F.3d 852 (3d Cir. 1995).

Where the number of occurrences is a relevant issue, the carrier must carefully review the policy’s definition of “occurrence,” if any, and the law of the jurisdiction in which the loss arises.

Because the proper application of standard deductible provisions in the event of hurricanes or other tropical storms has frequently given rise to dispute, and given the potential for widespread catastrophic losses in areas vulnerable to impacts from tropical storms, many insurers use special deductible provisions applicable to the range of losses that can be spawned during or after a hurricane or tropical storm. Similar deductible provisions are often written for the perils of earthquakes or floods.

Named storm or hurricane deductible provisions often set the deductible as a percentage of the value of risk, the measure of which is usually based upon the “schedule of values” previously supplied by the insured to the insurer during the underwriting process. Named storm or hurricane deductible provisions may set the deductible as a percentage of the combined total of all scheduled values at the location, including, for example, such individual items as buildings, contents and time-element values. Alternatively, the deductible provision can be written to apply a separate deductible to separate claim items at one or more insured locations. Thus, there could be separate deductibles applied to the insured’s claim for (1) building damage, set at a percentage of the scheduled value for the building; (2) damage to contents at the location, also set at a percentage of the value of contents at the location; and (3) business income losses sustained at the location, set as a percentage of the business income values provided by the insured for the location. Or, the deductible can be set as a percentage of the combined values for those items for which claim is made. Accordingly, an insured may have to carefully consider whether to make a claim for certain loss items, as doing so may impact the calculation of the applicable deductible by adding a percentage value for that claim feature that actually exceeds the amount of loss or damage sustained by that claim item.

In addition, some named storm or similar deductible provisions are written to apply only to insured locations within certain designated zones—typically those on or near areas of the coastline recognized to be vulnerable to impact from tropical storms.

Many named storm deductible provisions will also provide an alternative minimum dollar deductible, and sometimes a maximum dollar deductible that will apply to the occurrence as a whole, or with respect to a single location for which claim is made. Allocation of the deductible across multiple locations can be challenging and important if different parties hold interests in the different locations.

Some of these deductible provisions are written to be triggered in the event a tropical storm or other windstorm is “named” by the National Hurricane Center of the National Weather Service or other recognized meteorological authority. One of the issues that can arise is whether the special deductible applies after the storm—or its wind velocity—falls below tropical storm force level, which is the original threshold level of intensity required for the

National Hurricane Center to name a storm. But even when a storm's winds diminish below tropical storm force level, the storm is still tracked and referred to by its name and arguably remains a "named storm" for purposes of triggering application of a named storm deductible. And, as demonstrated by Irene, a tropical storm can remain a dangerous force even as its wind field diminishes, and even increase in its threat to life and property as it carries tropical moisture inland where it can (and did) result in horrendous flooding. Already, certain insurance commissioners in the affected states have opined that hurricane deductibles should not be applied because, by the time Irene reached their states, it had been downgraded to a tropical storm.

Other issues can arise with respect to the potential application of a named storm or similar deductible provision. Many policies containing named storm deductibles may also include deductible provisions applicable to other widespread catastrophic events such as earthquake or flooding. When a named storm leads to flood losses, careful consideration must be given to both deductible provisions and how they may relate to one another in order to determine which deductible applies.

In prior disasters, policyholders and their counsel have contended that named storm provisions (or similar provisions that aggregate different kinds of losses, or losses taking place over an extended period, for purposes of determining the number of occurrences that have taken place or the deductible amount that should be applied to a claim) actually serve as a superseding definition of the kinds of losses that are covered under a policy. Thus, the argument goes, a policy that otherwise bars coverage for flood or water damage will afford coverage for water damage that results from a named storm or hurricane where a special deductible provision is written to apply to all losses resulting from a named storm or hurricane. While it goes beyond the scope of this article to address specific policy language and possible issues arising from that language, as a general matter, neither deductible provisions nor provisions defining "occurrences" are written or should be construed to define the scope of coverage afforded under a policy (i.e., the causes of loss or perils that are covered or excluded from coverage).

## CONCLUSION

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No doubt there are many other claim issues that arise with hurricanes, which experience has indicated need to be considered. However, the issues are far too numerous, fact-specific and policy-specific to be addressed in this report. As is the case with every catastrophe, each claim will need to be examined based on its specific facts, the specific policy at issue and the law of the jurisdiction relevant to the claim.