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Windstorm Insurance May Not Be Your Only or Best Option

Commentary by John A. Moore

As commercial and residential property owners in South Florida assess their damage after Hurricane Irma they should be cognizant that a claim against their own windstorm insurance may not be the only or best option. This is true in part because making a claim against one's own insurer will inevitably require the payment of a deductible and may result in future higher premiums. Accordingly, consideration should be given as to whether other sources of recovery may exist to cover the damages.


Moore

An analysis of the damage including the causes is a necessary starting point. If, for example, a structural component such as roof shingles or membranes failed, the failure might be due to a manufacturing defect or defective installation. In those situations it may be possible to seek recovery from the product manufacturer or those involved in the construction, including the contractor, engineer and architect either based upon a construction defect claim or a warranty claim.

If the failure is the result of a construction defect the next aspect to consider is whether the work that failed was performed within the last 10 years. The 10-year time frame is important because Florida Statute Section 95.11(3)(c) provides a 10-year statute of repose for construction defects that requires a lawsuit be brought within 10 years "after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer whichever date is latest." Although the law is clear that any construction defect claim is barred if it is not commenced within the 10-year statue of repose, the timing of when that 10-year period is triggered is less clear and may be later than one would think. For instance, a Florida state court ruled that the date of final payment instead of the date the work was completed was the point at which the statute of repose started to run. Whereas another Florida state court decided that the trigger for the statute of repose could be the date at which the engineer of record filed a final plat for the project, even though that filing took place three years after the certificate of occupancy had been issued and the owner had taken possession of the property.

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WARRANTY CONSIDERATIONS

With respect to a potential product or workmanship warranty claim, obviously the specific language of the warranty needs to be reviewed to determine what the warranty purports to cover and to exclude. Again, it is important to know the cause of the damage, keeping in mind that there may be more than one cause, as it is more likely that coverage under the warranty will exist if the damage is caused by wind and driven rain as opposed to damage caused by windblown debris. The warranty may contain language that excludes coverage for damages caused by "Acts of God" which is an expression frequently used in the law and generally refers to damages caused by natural disasters or forces of nature that exist independent of any human acts. And although hurricanes are generally considered to be an "Act of God," the inclusion of such language does not necessarily mean that one cannot pursue a warranty claim. It is possible to challenge such exclusions in situations where the product or work failed in wind speeds that are within the design criteria for the property's location. With respect to Hurricane Irma, the National Weather Service in Miami's preliminary reports of wind speeds in Miami-Dade and Broward County show that the sustained wind speeds did not exceed those of tropical force winds, which is less than 74 mph, and that the maximum hurricane force gusts did not exceed 100 mph. These wind speeds are well within the South Florida Building Code design criteria.

Interestingly, if the issuer of your warranty declares it to be void because the product or work was exposed to hurricane force winds, it may be possible to claim the value of the loss of that warranty as one of your damage components in a property insurance claim, provided of course that you suffered actual direct physical loss or damage to covered property.

If it is apparent that the neighbor's tree or its limbs falling onto your property caused the damage, the general rule is that you are responsible and you would need to make a claim with your own insurer. If, however, the tree was diseased, had dead limbs or had been otherwise improperly maintained it is possible to prove that the neighbor was negligent and therefore liable for the damage.

Accordingly, the options available to a property owner will be dependent upon the type of damages and the cause of them, and in the case of construction defects whether the work was done within the last 10 years.

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