Applying Florida's Valued Policy Law to Wind vs. Flood Hurricane Claims

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When hurricanes make landfall, wind damage is a given; however, more and more Floridians face the imminent threat of storm surge and flooding as a result of these intense tropical cyclones. It seems that buildings throughout the state, especially in coastal areas, are at a greater risk of damage caused by storm surge than ever before. Even so, the threat of, or destruction by, flood waters from a hurricane does not minimize the devastating effect of high speed, cyclonic winds. Understanding how these two types of risk interplay in property insurance policies is paramount to maximizing the coverages available to policyholders.

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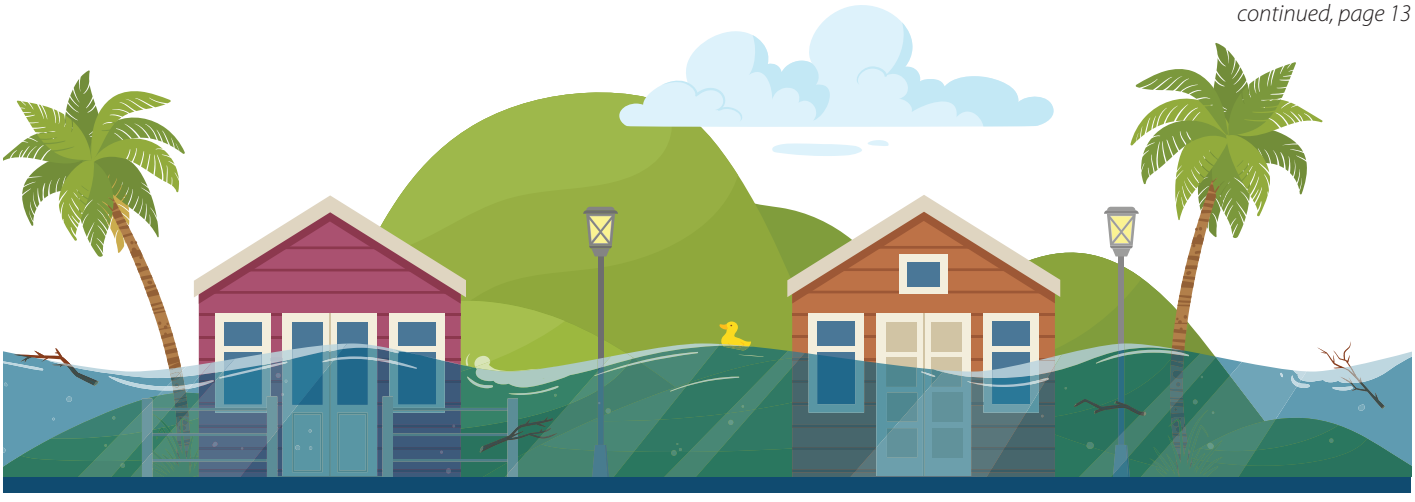

Property insurance policies which cover windstorms, such as hurricanes, generally exclude damage caused by flood or storm surge, whether driven by wind[1] or not. Accompanying such exclusionary provisions is a lead-in clause which states as follows, "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."[2] This is referred to as an "anti-concurrent causation" clause. When an anti-concurrent causation clause prefaces an exclusion, all damages affected by that excluded cause of loss, no matter the apportionment of fault or percent of contribution, are also excluded.[3] But how then, you ask, is one to address total losses caused by both wind and flood during a hurricane? Enter Florida's Valued Policy Law.

While originally enacted in 1899 for fire and lightning losses,[4] since 1982,[5] Florida's Valued Policy Law ("VPL") sets the amount of an insurer's liability in a total loss caused by any covered peril.[6] In the event of a total loss, the insurer's liability is for the total amount of the policy limits for which premiums were charged.[7] As a statute which is part of Florida's Insurance Code, VPL is incorporated into every property insurance policy issued by admitted carriers[8] for properties in Florida.[9]

A building is considered a total loss when there is no possibility of repair.[10] A total loss can be categorized in two ways: an actual total loss and a constructive total loss. An actual total loss occurs when a building "has lost its identity and specific character as a building, and becomes so far disintegrated, it cannot be possibly designated as a building, although some part of it may remain standing."[11] In essence, an actual total loss is based on an observation of the building, usually with the building materials being destroyed or gone. Alternatively, a constructive total loss occurs when a building, "although still standing, is damaged to the extent that ordinances or regulations in effect prohibit or prevent the building's repair, such that the building has to be demolished."[12] A constructive total loss can also occur when the cost of repairing the property is prohibitive in relation to the value of the home or the cost to rebuild.[13]

Regarding constructive total losses, the Florida Building Code[14] defines Substantial Damage as "damage of any origin sustained by a structure whereby the cost of restoring the structure to its before-damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred."[15] In the event of a Substantial Damage determination, the property must be brought up to code in line with FEMA requirements as well as any state or local code in place.[16] While this does not always require demolition, more often than not, newer, more stringent, building codes will mandate repairs, which render the building a constructive total loss.

In the early aughts, a number of cases were released analyzing VPL as it related to the interplay between wind and flood as a result of hurricanes. At the time of those storms, the language of the VPL statute did not specify how to deal with total losses caused by covered and noncovered perils.[17] This resulted in appellate decisions, which applied VPL to claims where both wind and flood caused damages to the insured properties without providing the insurers the benefit of the flood exclusion.[18]

In one such opinion, *Mierzwa v. Florida Windstorm Underwriting Ass'n*, the appellate court addressed a total loss caused in 1999 by Hurricane Irene.[19] The *Mierzwa* court refused to apportion damages caused by both wind and flood to different insurance carriers stating that such action "would be contrary to the VPL."[20] Accordingly, the appellate court required the insurer to pay the face value of the policy even though part of the total loss was caused by flood, a noncovered peril. In doing so, the *Mierzwa* court held that "if the insurance carrier has any liability at all to the owner for a building damaged by a covered peril and deemed a total loss, that liability is for the face amount of the policy."[21] This rationale was later disapproved by the Florida Supreme Court in *Florida Farm Bureau Cas. Ins. Co. v. Cox*.[22]

In *Cox*, the Supreme Court of Florida addressed a total loss, which occurred as a result of Hurricane Ivan in 2004. In analyzing the language of the VPL statute at the time, the *Cox* Court held that the VPL statute "does not establish any requirement for an insurer to pay for excluded or noncovered perils."[23] In its analysis, the *Cox* Court also noted that the legislature amended the VPL statute, seemingly in response to *Mierzwa*, in an attempt to clarify its language. This 2005 amendment has been referred to as the "*Mierzwa* fix."[24]

While there were other smaller changes throughout the statutory language, the 2005 amendment to the VPL statute included the following subsection:

> The intent of this subsection is not to deprive an insurer of any proper defense under the policy, to create new or additional coverage under the policy, or to require an insurer to pay for a loss caused by a peril other than the covered peril. In furtherance of such legislative intent, when a loss was caused in part by a covered peril and in part by a noncovered peril, paragraph (a) does not apply. In such circumstances, the insurer's liability under this section shall be limited to the amount of the loss caused by the covered peril. However, if the covered perils alone would have caused the total loss, paragraph (a) shall apply. The insurer is never liable for more than the amount necessary to repair, rebuild, or replace the structure following the total loss, after considering all other benefits actually paid for the total loss.[25]

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This subsection is clear that the legislative intent was not to create new coverage or deprive defenses; however, the legislature further addressed two important issues that would have benefitted the *Mierzwa* court. First, the revised VPL allows the apportionment of damages when covered and noncovered perils cause a total loss. In that situation, the insurer does not owe policy limits but rather can prorate the amount of loss caused only by the covered peril. Where the amended statute gets particularly interesting is the next sentence. By stating that the VPL liability applies when "covered perils alone *would have* caused the total loss,"[26] the legislature provided an avenue to seek policy limits for wind damages even when flood also affected the insured property. It is important to note that, because the VPL statute was changed in 2005, any analysis regarding the pre-amendment statutory language became obsolete moving forward.

The amended language is particularly important in wind versus flood hurricane claims where wind may first cause a constructive total loss only for flood to then sweep away the wind-damaged building, resulting in what appears to be an actual total loss. In such circumstances, because a covered peril alone would have caused the total loss even if the noncovered peril did not follow, VPL is triggered under the 2005 amendment and policy limits are owed. Of course, it can be argued that a total loss can only occur once, and if wind caused a total loss before the arrival of the storm surge, the flood did not actually cause any damage to the already destroyed building.

The analysis regarding multiple perils stemming from hurricanes causing total losses is seemingly more important than ever. In the fall of 2024, Hurricanes Helene and Milton ravaged the west coast of Florida within two weeks of one another. The storms caused extensive damage from both wind and storm surge in many cases resulting in total losses to property. As of February 19, 2025, Hurricanes Helene and Milton caused over six billion dollars in damage.[27] Of the combined 332,066 residential property claims filed, 140,850 claims were closed without payment.[28] Of these closed claims, 13,447 claims were closed without payment due to non-covered flood damage.[29]

In response to these statistics, on February 20, 2025, the Florida Office of Insurance Regulation ("FOIR") issued its informational memorandum to all authorized residential property insurers containing guidance for coverage determination of wind versus water claims.[30] In the memorandum, the FOIR instructs that it "expects insurers, before denying a total loss claim for wind damage when flood or storm surge damage may have also damaged the building . . . to be mindful of and apply the language contained in" the Florida Valued Policy Law statute.[31] The FOIR further warns that "[i]nsurers failing to comply with Florida law and inappropriately denying coverage due to concurrent causation will be subject to additional regulatory action."[32]

Accordingly, it is clear that the provisions of the VPL statute must be taken at face value, to wit, if "covered perils alone would have caused the total loss,"[33] VPL applies and coverage

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for the face value of the policy must be tendered. Because the plain language of the VPL statute is clear and unambiguous, "there is no occasion for judicial interpretation."[34] That is to say that the amendment to the VPL statute ensured clarity in a post-*Mierzwa* landscape making its application clear for Florida's recent onslaught of hurricanes bringing both wind and flood. This begs the question of exactly how many of the 13,447 claims denied for flood damage should be reevaluated for compliance with Florida's Valued Policy Law.


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Endnotes

1 *See Liberty Mut. Fire Ins. Co. v. Martinez*, 157 So. 3d 486 (Fla. 5th DCA 2015).

2 *Id.*

3 *Id.* at 487, n. 1 ("An anti-concurrent cause provision is a provision in a first-party insurance policy that provides that when a covered cause and noncovered cause combine to cause a loss, all losses directly and indirectly caused by those events are excluded from coverage.").

4 Ch. 4677, §§ 1-2, Laws of Fla. (1899).

5 Ch. 82–243, § 539, Laws of Fla. (1982).

6 Fla. Stat. § 627.702 (2024).

7 Fla. Stat. § 627.702(a) (2024).

8 As VPL is incorporated into Chapter 627, Florida Statutes, it does not apply to non-admitted, surplus lines carrier. *See* Fla. Stat. § 626.913(4) (2024).

9 *Citizens Ins. Co. v. Barnes,* 98 Fla. 933, 124 So. 722 (1929); *Regency Baptist Temple v. Ins. Co. of N. Am.,* 352 So. 2d 1242 (Fla. 1st DCA 1977).

10 *Castro v. People's Tr. Ins. Co.*, 315 So. 3d 761, 765 (Fla. 4th DCA 2021).

11 *Citizens Prop. Ins. Corp. v. Hamilton,* 43 So. 3d 746, 754 (Fla. 1st DCA 2010) quoting Lafayette Fire Insurance Co. v. Camnitz, 111 Fla. 556, 149 So. 653, 654 (1933).

12 *Hamilton*, 43 So. 3d at 754; *see also Netherlands Ins. Co. v. Fowler,* 181 So. 2d 692, 693 (Fla. 2d DCA 1966); *Citizens Ins. Co. v. Barnes,* 98 Fla. 933, 124 So. 722, 723 (1929).

13 *State Farm Fla. Ins. Co. v. Ondis*, 962 So. 2d 923, 925 (1st DCA 2007), *rev'd on other grounds*, 979 So. 2d 930 (Fla. 2008).

14 The Florida Building Code governs "all laws and rules which pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities" in the State of Florida. Fla. Stat. § 553.73(1)(a) (2024).

15 Florida Building Code, Existing Buildings, Chapter 2.202, (7th Edition) (2020).

16 *Bair v. City of Clearwater*, 196 So. 3d 577 (Fla. 2d DCA 2016).

17 *Cf.* Fla. Stat. § 627.702 (2004).

18 *See, generally, Florida Farm Bureau Cas. Ins. Co. v. Cox*, 943 So. 2d 823 (Fla. 1st DCA 2006), decision quashed, 967 So. 2d 815 (Fla. 2007) and *Mierzwa v. Florida Windstorm Underwriting Ass'n*, 877 So. 2d 774, 776 (Fla. 4th DCA 2004).

19 *Mierzwa,* 877 So. 2d at 776.

20 *Id.* at 778.

21 *Id.* at 775–76.

22 *Florida Farm Bureau Cas. Ins. Co. v. Cox*, 967 So. 2d 815 (Fla. 2007).

23 *Id.* at 820.

24 17 Fla. Prac., Insurance Law § 15:3, Amendment to the Valued Policy Law (2024-2025 ed.).

25 Fla. Stat § 627.702(b) (2005-2024).

26 *Id*. [emphasis added].

27 *See* Florida Office of Insurance Regulation, *Catastrophe Claims Data* (last visited March 13, 2025), https://floir.com/tools-and-data/catastrophe-reporting.

28 *Id.*

29 *Id.*

30 *See* Florida Office of Insurance Regulation, *Informational Memorandum: Notification to All Authorized Residential Property Insurers ~ Guidance for Coverage Determination of Wind versus Water Claims* (February 20, 2025), https://content.govdelivery.com/accounts/FLOIR/bulletins/3d319a7.

31 *Id.*

32 *Id.*

33 *Id*. [emphasis added].

34 *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992).