

# Hurricane Irma Damaged My Kitchen or Did It?

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Anyone who has experienced a hurricane bears witness to its destructive forces. Bands of wind and rainwater can last for days and cause significant damage to a home. In the course of the storm, homeowners can experience rainwater damage to the interior of their homes through various points of entry. A water leak that finds a path to the kitchen ceiling can result in an expensive claim for kitchen cabinet and countertop

h. Rain, snow, sleet, sand or dust to the interior of a building unless a covered peril first damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

For coverage to apply under this provision, a covered peril must first damage the home causing an opening in the roof or wall. Covered perils such as windstorm, hail,

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replacement, painting of the kitchen walls and adjoining rooms and even tile floor replacement. Although the water damage inside the home may be clear, coverage may nevertheless be precluded under a homeowners policy.

Under many homeowners policies, coverage for loss to the interior of the home turns on whether a covered peril first damaged the home, causing an opening in the roof or walls, allowing rainwater to enter and damage the interior. Homeowners policies commonly include a provision similar to the following:

## **SECTION I – Perils Insured Against Coverage A - Dwelling and Coverage B - Other Structures**

We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property.

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We do not insure, however, for loss:

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Caused by:

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lightning and tree fall may well cause such an opening, triggering coverage for damage caused by water entering through the opening and to the interior of the home. On the other hand, rainwater that enters a home due to an opening caused by wear and tear or defective construction will not trigger coverage as these causes are not covered perils under the policy. Similarly, interior damage caused by rainwater that bypasses building materials such as shingles, windows or doors that have not sustained damage due to a covered peril will not be covered.

As with most policy provisions, unique facts and legal arguments can be presented. In *Lobell v. Graphic Arts Mutual Insurance Company*, 83 A.D. 3d. 911, 921 N.Y.S. 2d 306 (2d Dep't 2011), the insureds were renovating their home and placed tarps over openings in their roof to protect the interior from a rainstorm. A claim for damage to items inside the home was submitted and denied by Graphic Arts Mutual. Affirming judgment for the insurance company, the court decided the tarps did not constitute a "roof" as used in the windstorm or hail provision. It necessarily followed that the loss was not covered because the storm did not first cause an opening in the "roof." Similarly, in *Paulson v. Farmers Insurance*



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Company, 382 P.3d 1058 (2016), rainwater leaked through storm-damaged roof underlayment during a roof replacement. At the time of the storm event, the roof shingles had not yet been installed. The court found the term “roof” does not encompass a roofing system in the state of partial completion. In *Phillips v. National Security Fire & Casualty Company*, 59 So. 3d 711 (Ala. Civ. App. 2010), the insured conceded the water damage was not caused by a peril insured against, but claimed entitlement to coverage because the interior water damage ensued from faulty workmanship in connection with a prior roof replacement. The court rejected this argument, finding the ensuing loss provision could not reasonably be interpreted to create coverage beyond the perils initially insured against.

In litigation over a denied rainwater intrusion claim, a question may arise as to which party has the burden to prove a covered peril first damaged the home, causing an opening in the roof or wall. The court in *Florida Windstorm Underwriting v. Gajwani*, 934 So. 2d 501 (Fla. 3d DCA 2005) provided a clear answer: the insured. Construing a policy provision similar to the one cited above, the court acknowledged established case law that an insured bears the burden to prove an exception to an exclusion. In that case, the only evidence presented was that rainwater

had been driven into the home through window and sliding glass door openings, and seeped through second floor patio tiles and stucco cracks. On those facts, and considering the homeowners’ concession that they had no evidence of rainwater entry through openings in the roof or walls caused by the storm, the court ordered judgment in favor of the insurance company.

The burden of proof was also addressed by the Eleventh Circuit in the case of *Divine Motel Group, LLC v. Rockhill Insurance Group*, 655 Fed.Appx. 779, 782 (11th Cir. 2016) (if an exception to an exclusion exists, the burden shifts to the insured to prove the exception applies). There, the Eleventh Circuit found that the rain damage exclusion specifically provides that damage to the “interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain... whether driven by rain or not...” *Id.*, at \*7. Applying Florida law, the court held it was the insured’s burden to establish the alleged damage occurred after “[t]he building or structure first sustained damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters.” *Id.*

However, the exact nature of the burden can depend upon the language of the exception. For example, in *Pine Island*



Shopping Plaza at Sunrise, LLC v. Westchester Surplus Lines Ins. Co., 2016 WL 8729962 (S.D. Fla. 2016), the insurance company argued that the rain damage exclusion is common in the industry as a way to limit rain damage

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coverage to water intrusion through an opening in the roof or walls previously created by a covered cause of loss. Distinguishing the language of the exception at issue from similar provisions, the Pine Island court noted the

exception does not specify that the covered cause of loss must create an opening in the roof or walls — it merely specifies that the building or structure must sustain damage “to its roof or walls.” Id.

Although the rain damage exclusion may be clear on its face, it can present factual and legal challenges as discussed above. Because coverage for interior rain damage depends upon the nature of the leakage, careful inspection of the roof and walls is required of the claims adjuster. The homeowner should be questioned regarding the source of leakage and all areas of interest should be documented photographically for future reference and for use at trial if necessary. Some claims can present “chicken or the egg” questions. For example, which came first, the covered peril or the stucco cracks; the storm or the caulking cracks? In these situations, engagement of an engineer may be necessary to evaluate the cause and origin of the cracks or other damage to the home. Given the controlling case law concerning the burden of proof, carriers may be well positioned to seek summary judgment in litigation by taking steps during the claims process to carefully document the cause and origin of the claimed damage.

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