

# PENSACOLA News Journal

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## **Burden of proof**

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Insurers battle over wind, water

The future for many homeowners hinges on a 2004 court ruling

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Patty and Frank Liberato still are finding the shattered pieces of what was supposed to be their golden retirement.

Hurricane Ivan dealt the first blow on Sept. 16, 2004, ripping away a back deck, yanking open a back office and pulling away parts of the roof of their Grande Lagoon home.

The Liberatos stop by occasionally to check on the house. When they walk the shore behind their dream home, they find some broken piece of their household exposed in the sand. A sewing machine, a cassette player, an unscathed porcelain dish bought in Italy.

"This was supposed to be the last home I was ever going to live in," said Frank Liberato, 77, a retired Navy captain. "From here, I was either going to be dead or in a nursing home."

The home's battered remains still are standing, but that's because the house is evidence in the Liberatos' legal fight with their insurer, Citizens Property Insurance Co.

The Liberatos are among hundreds of Escambia and Santa Rosa homeowners whose hurricane recovery is on hold while they sue their insurance companies over disputed settlements.

Local attorneys say they do not know exactly how many lawsuits have been filed, but they estimate several hundred.

They do know that as the one-year anniversary of Ivan passed, their client lists began growing.

Citizens Property Insurance, the state-backed insurer for wind and high-risk policies, also is reporting more litigation.

In June, 90 suits were pending against Citizens, company spokesman Justin Glover said. Now, there are 351 cases that total \$68 million in disputed claims. Most are in the Panhandle.

"My guess is that a lot of people hit that one-year mark and they said, 'I'm still not getting anywhere with my insurance company. Maybe it's time to get an attorney,'" said Matt Schultz, a lawyer with the Levin Papantonio firm in Pensacola.

It has become a test of endurance for all involved.

For the insurance companies, a court decision against them could force additional payments of hundreds of millions of dollars. And, if the insurance companies pay more, they'll pass on higher costs to policyholders.

For homeowners, decisions about where they will live permanently -- and how much home they will be able to afford -- hinge on the outcome of their lawsuits. Some homeowners still are living in damaged homes. Others are using money from flood settlements to make what repairs they can or to find temporary housing elsewhere.

Dan Brannon and his wife, Gaynelle, have moved from a Federal Emergency Management Agency trailer to an apartment and, most recent, a rental house while they wait for the outcome of their suit against Allstate Florida.

"If they'd paid off, I'd have built my house back. I'd have moved in, and I'd have had a place to live," said Brannon, 52, who had little left of his Grande Lagoon home but a slab, a few bricks and scattered debris.

Charles Beall, a partner with the law firm Moore, Hill & Westmoreland, is handling nearly 50 cases. He has advised his clients that a settlement could take years.

"I told them to look at this as an inheritance," he said. "Think of it as you have a rich aunt, and you don't know how long she'll live."

Wind versus flood

Most of the lawsuits involve disputes about whether wind or flood destroyed a home. In years past, insurance companies would decide what percentage of a home was destroyed by wind and what percentage was destroyed by flood.

Private insurers -- and, more recent, the state-backed Citizens Insurance -- were responsible for paying claims for wind damage. The federal government paid under separate flood insurance policies.

In June 2004, however, the equation changed with a 4th District Court of Appeal verdict for Broward County homeowner Zennon Mierzwa.

The court determined that Mierzwa's wind insurer had to pay the full limits of his wind policy regardless of whether wind caused the majority of damage to his home.

In making the ruling, the court relied on a century-old state law known as the valued policy law. That law maintains that it is not the homeowner's responsibility to show how a home was destroyed, and that as long as the homeowner had coverage for the type of risk, the insurance company had to pay.

The law long had applied to fire and other losses, but the Mierzwa case was the first time it was expanded into the debate about wind and flood, Pensacola attorney **Sam Bearman** said.

Some insurance companies, including Citizens, have refused to recognize the Mierzwa ruling and are not paying claims while the issue is under appeal in the courts.

In May, Citizens lost a class-action lawsuit filed in Leon County about its refusal to pay Hurricane Ivan claims the company blamed on flood.

Citizens has appealed to the 1st District Court of Appeal, where, Glover said, arguments could be heard as early as December.

The 351 Citizens cases in litigation could be just the beginning.

"If there's an adverse ruling, there could be hundreds of thousands of Florida homeowners who come forward to sue if the court rules that Citizens is liable for flood," Glover said.

Citizens' stance is that Mierzwa was an incorrect interpretation of the law, Glover said.

The company also is citing a Florida statute that created Citizens specifically as a high-risk wind insurer. That, too, is grounds for the company not paying flood claims, Glover said.

Expert versus expert

Even if the 1st District agrees with the 4th District that insurers have to pay in full whether the damage is from wind or flood, it will be of no help to future hurricane victims.

The Legislature this year changed the law in support of insurance companies.

What that means is homeowners will have to prove their case if their assessment of damage differs from the insurance company's.

That's where the Liberatos and the Brannons find themselves.

Each couple has consulted meteorologists and structural engineers to show step by step how the storm moved ashore and what happened to their homes.

At the Brannons' home, carpet and tile were ripped away, along with almost everything else. Yet, houses nearby were almost untouched.

"I've had weather people look at the radar and the time of the storm, and they said those bands that moved over Grande Lagoon were full of tornadoes," he said.

Liberato sees evidence at his house to dispute what the insurance company determined.

"Their engineering report said I had 2 feet of water in my house," Liberato said. "But there was no waterline in the house, the kitchen cabinets were dry and one side of the house was dry. Pictures were still hanging on the wall."

"That's why we are so convinced there was not any flooding in there," said Liberato's wife, Patty.

In the end, it still may come down to their experts disagreeing with insurance company experts.

"Mierzwa accepts reality," **Bearman** said.

"It is so difficult after a storm to prove what wind did and what flood did. The valued policy law says when a home becomes a total loss, the insurer will pay policy limits. The Mierzwa court looked at that and said it doesn't matter if wind or flood caused the damage, the insurance company's covered loss contributed to the loss. Mierzwa took away the impossible task of determining how a structure was destroyed."

Little reason for optimism

As complicated as the recovery process may be with large insurance companies, some homeowners are reporting more difficult times with smaller companies.

Christina and Patrick Monahan were dropped by State Farm insurance in 2000 after they sued over a claim for a leaking upstairs water heater. Their wind coverage now is with Universal Property and Casualty.

Ivan gave the Monahans their first claims test.

They expected \$165,000 from Universal for wind damage. The company paid about \$54,000, they said.

More than a year after the hurricane, and after three visits from adjusters, they said they have received no explanation for the small check.

"It's been a nightmare," Patrick Monahan said. "We can't get any response out of them at all."

Universal did not return telephone calls seeking comment.

The Monahans have contacted the state Department of Insurance about Universal and

have used money their flood coverage paid them for content damage to repair their home. A few weeks ago, they also contacted a local law firm. They were told it may be up to eight weeks before an attorney could meet with them. And no matter how their problem is resolved, they aren't optimistic about one outcome.

"I expect we'll be dropped," Patrick Monahan said of his Universal coverage. "We'll find insurance somewhere. I don't know where."

.COM Watch the Dan Brannons' video online at: [www.PensacolaNewsJournal.com](http://www.PensacolaNewsJournal.com)

Patty and Frank Liberato are engaged in a legal battle with their insurer, Citizens Property Insurance Co. Repairs are on hold at their Grande Lagoon home, which was heavily damaged during Hurricane Ivan on Sept. 16, 2004.

Beall

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Frank and Patty Liberato stand under what's left of their home in Grande Lagoon.

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Gaynelle and Dan Brannon sit with their poodle, Rambo, and cat Ramses as they look through what little they could save from their Grande Lagoon home.

Online exclusive

When Gaynelle and Dan Brannon returned to their Grande Lagoon home four days after Hurricane Ivan, they took a video camera to document any damage to their 2,000-square-foot home.

How the lawsuits can affect everyone

Disputed insurance claims have impact beyond the homeowners who are pursuing legal action.

The area's hurricane damage - and the unresolved claims - are widespread enough to call attention to the fact that insurance companies often challenge policyholders' claims.

"This is business as usual for the insurance companies, only it has come to Pensacola in a very big way," said Matt Schultz, an attorney for the Levin Papantonio law firm. "It may not be you today, but it could be you tomorrow.

"We're talking about probably hundreds of millions of dollars that are illegally being withheld that could help with our city's rebuilding and recovery effort."

Insurance companies argue that, especially in the case of wind-versus-flood disputes, they could end up paying millions of dollars in damage that in years past they would not have owed.

Citizens Property Insurance Co., the state-run insurer of last resort, already has asked for a one-time statewide assessment on all Florida homeowners to make up for a \$516 million deficit after the 2004 hurricane season. Losses estimated at \$1.4 billion after Hurricane Wilma may trigger a second assessment on homeowners.

For the 2004 deficit, homeowners would pay a one-time \$89 charge for a \$1,300 policy, the average cost of a Citizens policy. For the Wilma assessment, a homeowner with a \$1,300 policy would pay \$143. That's an additional \$232 a year and does not include the overall

15 percent rate increase Citizens is seeking.

Court decisions against the insurance companies could have lasting ramifications for customers, said Ryan Priest, a corporate spokesman for Allstate Floridian.

"If we're forced to pay for damage for coverage we don't provide, it's going to have an

extremely negative effect on insurance and insurance rates."

Key legal issues

Hundreds of Escambia and Santa Rosa homeowners are filing suit against their insurance companies. Three main reasons:

Wind-versus-flood disputes: Flood and wind coverage are handled by separate policies, and several hundred homeowners are suing because the insurer for one policy, in most cases wind coverage, contends damage was caused by flood, which would be covered under the other policy.

Adjusting software: A class-action lawsuit against Allstate Floridian, filed by Pensacola attorney Matt Schultz, claims that the company's computer software program for calculating damage payments was so outdated, it miscalculated homeowner claims at a rate well below what materials and repairs cost.

Valuation claims: In these cases, homeowners and insurers can't agree on the amount owed for damages because there is disagreement about the extent of damages, the extent of repair needed or the expected cost of repair.

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