TESTING THE WATER: SUBROGATION POSSIBILITIES ARISING FROM THE AUGUST 19, 2005 STORM

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INTRODUCTION

On Friday, August 19, 2005, Southern Ontario was hit by a storm of recent unprecedented strength. The storm pummeled communities from Kitchener to Toronto and spawned 2 tornadoes which struck the Fergus area, northwest of Kitchener. Although the extent of the storm's damage has yet to be realized, insurers are estimating that claims arising from the storm will exceed $400 million. This would make the August 19th storm the largest insured loss in Ontario's history, far and above the recent flooding in Peterborough which resulted in approximately $95 million in claims.

Although the insurance industry will absorb a significant portion of the costs needed to clean, restore and rebuild the region, millions of dollars can be saved or recaptured through proper coverage analysis and, ultimately, by virtue of a thorough investigation of subrogation opportunities. In any large loss, the potential for subrogation should never be overlooked, not even when the loss is caused by the so-called “Act of God.” Indeed, Cozen O'Connor has recovered millions of dollars in several “storms of the century.” The focus on such claims is on third parties who played a contributing role in covering the resulting damages.

This paper will serve to highlight the factual and legal issues affecting your subrogation opportunities. This
paper does not address coverage issues and cannot possibly cover all issues relating to subrogation arising from a catastrophic loss such as this. Cozen O'Connor has a wealth of materials and experience in handling catastrophic claims and it stands ready to assist you in addressing all possible issues which will be faced in handling both first party claims and analyzing subrogation potential in the aftermath of the storm.

**OVERVIEW OF SUBROGATION ANALYSIS**

When faced with a storm such as that which occurred on August 19th, the focus of any subrogation analysis will not be on the occurring event - or “the act of God” - but on any potential third parties who may have contributed to or aggravated the ultimate damage. Potential liability against these third parties may exist as a result of structural construction, design and/or installation defects, improper maintenance of structures and related systems including storm, sewer and drainage systems and negligence of adjoining property owners in the maintenance of their own property.

The primary defence which may be raised in any potential subrogation claim associated with the storm will be the so-called “Act of God” defence. However, as is discussed below, Canadian courts are not willing to label a storm and/or resulting flood as an “Act of God” simply due to the fact that it is a natural occurrence. Generally, when the damage caused is the result of the combined effects of the acts/omissions of a negligent third party and the natural event in issue, the defendant will rarely succeed in relying on the Act of God defence.

**POTENTIAL SUBROGATION CLAIMS**

**Building Defect Claims**

The August 19th storm has resulted in innumerable claims for damage to structures and their related systems. A significant number of roof collapses will have occurred in the areas affected by the storm due to heavy rains, roof blow-offs and other structural damage. A concurrent cause of these losses may be improper design, construction and/or maintenance of the particular structures. The key issues involved in these losses will entail statutes of limitations and contractual waivers which may exist to insulate and shield the architects, engineers, contractors and sub-contractors with regard to losses occurring potentially years after construction.

*Key considerations to address are:*

- What were the wind speeds in the immediate area?
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- What wind speed was the building/roof rated to withstand per the building specifications?
- What were the local code requirements when the building was built?
- When was the building built and have there been any significant upgrades, modifications or repairs?
- Did other buildings in the immediate area suffer similar damage or remain unscathed?

Potential experts to employ to assist in the subrogation analysis are:
- Structural/Civil Engineer
- Mechanical Engineer
- Design/Construction Engineer
- Architect
- Weather Expert

Key items to obtain:
- Construction contracts, plans and specifications
- Warranties
- Lease agreements
- Instruction manuals
- Key physical evidence
- Building officials' files
- Pre loss photographs and diagrams
- Post loss photographs including aerial photographs

Issues to be considered by the retained experts:

Particular Maintenance/Preparation Issues to Consider:

- Failure to install storm shutters for all exterior windows and doors
• Failure to remove dead or decaying trees or limbs

• Failure to secure movable objects or to move them low to the ground

• Failure to protect against potential damage to adjoining property or connected businesses as a result of:
  - Inadequate construction
  - Inadequate foundation
  - Inadequate flood proofing
  - Susceptible gas mains
  - Explosive materials
  - Poorly secured chemicals

• Failure to keep drains unclogged

• Failure to upgrade facilities to retroactive code requirements?

• Failure to maintain storm, sewer and related drainage systems

• Failure to flood proof facilities by constructing flood walls or other flood protection devices

*Particular Design Errors to Consider:*

• Improper load calculations

• Improper location of load bearing walls/devices

• Insufficient number of lead bearing walls

• Improper spacing/positioning of trusses

• Improper number of trusses

• Improper size of trusses

• Under designed for expected snow/rainfall/wind
Particular Installation Errors to Consider:
- Improper spacing
- Deficient welds
- Missing parts/bracing
- Inadequate/missing/improper connections
- Selection of improper materials
- Inadequate adhesion of roofing materials
- Improper drainage

Particular Defective Materials Issues to Consider:
- Metallurgical defect (improper forging)
- Polymer defect
- Bad concrete
- Corrosive agents
- Material degradation
- Bad roofing membranes

Claims Resulting from Faulty Roof Drainage

An example of potential claims arising from construction defects specific to the August 19th storm are claims involving damage arising from the faulty installation and/or maintenance of roof drainage systems. Improperly designed and/or constructed roof drainage systems can lead to damage to the building itself (including damage resulting from collapsed roofs as the result of the weight of accumulated rainwater) and resulting damage to property within the building or adjacent buildings.

In Ontario, the Ontario Building Code provides for the standards governing:
- drainage and grades
- design and installation of roofing systems
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- parapets
- roof slope

These requirements may impose liability on third party builders and contractors should water damage arise from the failure of these parties to construct the building and roofing systems in accordance with the applicable Code requirements. Again, in instances where damage has resulted from ineffective or improper roof drainage, it is important to obtain the services of an expert and documentation as outlined above.

Where the property damaged is other property in the care, custody or control of the owner/occupier of the building, there may also be subrogation potential as a result of a bailment situation. Under typical bailment law, these parties have a duty to reasonably safeguard property, despite the occurrence of the storm. The occurrence of the storm may not relieve the bailee of the goods from the obligation of establishing that he/she was free of negligence with regard to appropriate actions to prevent damage to the goods. Failure to take all appropriate actions may also relate to the issues discussed in the above building defects section of this paper.

Claims Against Adjoining Landowners

In most jurisdictions, a property owner owes a duty of care to maintain man-made structures, cultivated trees and other pieces of cultivated landscaping and the naturally occurring objects especially where he/she knows that they are in an unreasonably dangerous condition. The scope of the duty of care generally extends to lawful visitors, drivers on neighbouring public roads and adjoining property owners, so long as the landowner had actual or constructive knowledge of the dangerous condition. The property owner is required to take reasonable precautions against damage to neighbouring property caused by a storm or other natural disaster. The extent of precautions necessarily depends upon the likelihood and probable severity of the disaster and the efficacy and cost of precautions.

Assuming the property owner has been negligent in some manner, the property owner may escape liability if the damage would have occurred even in the absence of the property owner's negligence. However, if the property owner's negligence concurred in causing the disaster, then the property owner can be held liable. If the disaster is so unexpected as to be deemed unforeseeable, then the disaster is a superseding cause, relieving the property owner of liability.

If, however, the property owner has created a nuisance, they may be found liable in the absence of any finding of negligence. The common law of nuisance evolved to provide remedies for individual landown-
ers, who might be injuriously affected by the conduct of their neighbours. To succeed in an action based in private nuisance, the plaintiff must establish either:

1. some significant interference with the beneficial use of his premises; or
2. some injury to those premises or the property located thereon.¹

Claims of nuisance are often coupled with claims under the doctrine of *Rylands v. Fletcher.*² The doctrine, although difficult to summarize, essentially involves the collection on one's property of something which escapes and causes harm to the plaintiff. The collection of water or the divergence of water on one's own property has been held in the past to meet the requirements to support the finding of liability under the doctrine of *Rylands v. Fletcher.*³ In *Eagle Forest Products Inc. v. Whitehorn Investments Ltd.*, the court found the defendant liable for a flood which occurred on the plaintiff's property. The defendant constructed a ditch along his property, causing water to collect in the ditch and flow onto the plaintiff's property. The court held that the defendant was liable in both nuisance and under the doctrine of *Rylands v. Fletcher* for the damages suffered by the plaintiff.

**Claims Against the Municipality**

Every disaster will involve some aspect of governmental activity. Disasters affect storm drains, sewage systems, roadways, power lines and so forth. For example, damage resulting from improperly designed and/or maintained storm, sewer and sanitary systems may give rise to claims against the municipality. In analyzing a governmental entities' liability for such damage, an analysis of the governmental law is important to establishing not only the potential for liability but the extent to which such an entity may be held liable in tort for such damage.

In Ontario, claims based in nuisance were historically maintainable against a municipality. An escape of water and/or sewage from municipal sewer lines into a basement of a dwelling or building was found by the courts to constitute a nuisance, and the municipality could be held liable, even in the absence of negligence.⁴

However, recent amendments to provincial municipal acts have legislated a statutory defence to nuisance claims against municipalities. Section 449 of the Ontario Municipal Act provides that no proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against a municipality.⁵ Municipalities can therefore rely on this section in defence of any action based in nuisance commenced against a municipality for flood loss arising from overflowing sanitary and/or sewage systems.
Notwithstanding, claims against municipalities in negligence are still maintainable. In order to succeed in a negligence claim against a municipality in a subrogated action arising from a natural disaster, one would have to show that the municipality had a statutory duty to maintain the storm or sewer system and that it fell below the requisite standard of care with respect to its operative decisions regarding the construction, maintenance and/or repair of the storm or sewer system. If, historically, there are known problems with a storm or sewer system (such as in the Region of York), then a case of negligence may be established which would impose liability on the municipality so long as the problems arose from its operative decisions, rather than its policy decisions. However, a municipality may not be held liable for its policy decisions.6

**POTENTIAL DEFENCES TO ACTIONS ARISING FROM THE STORM**

**The Act of God Defence**

The Act of God defence is often raised when defendants are faced with claims arising from natural disasters. The defence was analyzed in the case of *Nugent v. Smith*7 which described the defence as “such a direct and violent and sudden and irresistible act of nature as the defendant could not by any amount of ability foresee would happen, or, if he could foresee that it would happen, could not by any amount of care and skill resist so as to prevent its effect.”

In Canada, the courts have held that notwithstanding that a storm is abnormal for typical weather conditions of the region, the Act of God defence may not apply.8 For example, in the *Eagle Forest* case, the court held that notwithstanding that the rain storm in that instance was extraordinary and perhaps unprecedented in recent times, such a rain storm is expected to occur once every 100 years or so and, in that sense, it is reasonably foreseeable. On this premise, the court rejected the Act of God defence.9

Defendants raising the Act of God defence typically are required to prove that the “act” was so unexpected, that no reasonable human foresight could be presumed to anticipate its occurrence.10 As such, early, aggressive and thorough inspections (something Cozen O'Connor attorneys have extensive experience in) will be essential to properly evaluate which losses present the possibility of recovery from third parties and the best avenue to that recovery. Even in terms of the “foreseeability” element, today's weather forecasting technology and reporting significantly hamper a defendant's ability to credibly argue that a storm’s path and force could not have been foreseen.
Defence under the Municipal Act in Nuisance

The Municipal Act raises statutory defences to claims in nuisance as well as certain claims in negligence. For example:

Section 449 of the Municipal Act states that no proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against a municipality.

Section 450 of the Municipality Act states that no proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or function of the municipality shall be commenced against the municipality if the action (or inaction) results from a policy decision. Therefore, in order to avoid this defence, one must ensure any action against the municipality in negligence is based on the municipality's failure to perform a statutory duty, and that the failure is an operative decision, rather than a policy decision.

CONCLUSIONS

Many legal issues will arise in the coming months as adjusters and insurers assess the damage and costs to repair and rebuild after the storm of August 19, 2005. Subrogation should not be overlooked as, armed with the knowledge of what questions to ask and where to look, insurers may be able to capitalize on recovery opportunities and spread the loss to responsible third parties. The above is just a brief synopsis of the factual and legal issues to be considered. Cozen O'Connor, at no charge, will provide an attorney to investigate the subrogation potential on all claims exceeding $100,000.00. Cozen O'Connor is prepared to handle your subrogation claims arising from the August 19th loss as well as other property claims.

2. Rylands v. Fletcher [1866] LR1 Ex 265 (Eng. Exch.)
8. See for example, Eagle Forest Products Inc. v. Whitehorn Investments Ltd., supra note 3.
10. Nichols v Marsland (1876) 2 Ex D 1.
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