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HURRICANE CHARLEY
A PRELIMINARY FACTUAL AND LEGAL ANALYSIS
OF THE SUBROGATION ISSUES: August 2004



Satellite Photo of Hurricane Charley
following Tropical Storm Bonnie

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I. INTRODUCTION

On August 14, 2004, Hurricane Charley slammed into the west coast of Florida at Punta Gorda and ripped a path across the state and beyond. To make matters worse, Charley hit land approximately 36 hours after Tropical Storm Bonnie made landfall near Apalachicola in the Panhandle of Florida. It is the first time since 1906 that two storms have struck Florida within such a short period of time.



Charley left homes destroyed, three cities without running water, 2 million homes without power, and at least 25 dead. The personal losses are immeasurable. In Florida alone the property damages are currently estimated at over \$15 billion. According to Insurance Information Institute chief economist Bob Hartwig, the insured losses in Florida will reach 7.4 billion dollars. The state-run Citizens Property Insurance Corp., the insurer of last resort for over 815,000 Florida policyholders, estimates it will pay out over 1.2 billion. This makes Charley the second-most expensive U.S. hurricane, surpassed only by

1992's Hurricane Andrew and its 15.5 billion in insured losses.

Recovery will be a long and arduous process. But it will not be impossible. The insurance industry will contribute much to the cost of that recovery. But insurers too can recover a significant portion of what they will bear. Millions of dollars can be saved or recaptured by insurers who have armed themselves with professionals trained to handle coverage and subrogation issues in the disaster context. Cozen O'Connor has extensive experience serving that function. From Hurricanes Hugo to Andrew to Fran to Floyd to Isabel, we have saved our clients multiple millions in claims payments.

This paper serves as an initial analysis of the factual and legal issues affecting subrogation opportunities, providing various theories of recovery in the catastrophe context, with emphasis on the law of Florida, Georgia, South Carolina, North Carolina, and Virginia.

II. THE STORM

After lashing Cuba with torrential rains and pounding surf, Hurricane Charley descended on Cayo Costa, a barrier island just west of Cape Coral, Florida as a Category 4 storm at

approximately 3:45 pm on Friday, August 13, 1004. Winds were estimated at 145 m.p.h.¹ with greater gusts. At the same time, seven-foot storm surges were recorded in Fort Myers. At 4:35 pm Punta Gorda Airport registered winds at 111 m.p.h. before the equipment failed. In the Naples area, the maximum storm tide was about 10 to 11 feet above sea level while the area from Vanderbilt Beach to the Lee County Line sustained maximum storm tide of about 10 to 13 feet above sea level.



Charley was not supposed to land there. Proving how dangerous and unpredictable any hurricane can be, Charley increased in speed and changed its track at the last moment surprising meteorologists. On Thursday evening, August 12, Charley was heading to the West Coast of Florida as a Category 2 storm. Forecasters predicted that the storm would hit the Tampa Bay area around 8:00 pm on Friday, August 13. Over 800,000 residents in the Tampa Bay area were told to evacuate. State meteorologist Ben Nelson was quoted as saying that MacDill Air Force Base and parts of downtown Tampa would be underwater if the storm increased to a Category 3 hurricane. He predicted that Pinellas County would become a virtual island.

Residents were told to take a last look at the Tampa Bay because it would never look that way again.

As late as 11:00 am on Friday morning, the National Weather Center was still issuing bulletins declaring Charley's maximum wind speeds at 110 m.p.h., still a Category 2 storm. Forecasters were still assuming landfall near the Tampa Bay area. Then around 1:00 pm things started changing. The maximum sustained winds spiked to 125 m.p.h., a Category 3 storm the forward speed of the storm increased and the landfall track moved slightly right and south of Tampa Bay. At 2:00 pm, the winds had jumped up to 145 m.p.h., a rare Category 4 storm. A Special Advisory was issued warning for the first time that Charlotte Harbor, Florida was the likely landfall area.

However, National Weather Advisories are not always heard by the public the second they are issued. Around 3:00 pm Friday in the town of Punta Gorda, located on Charlotte Harbor, Pat and Jerry Presseller were monitoring weather reports when they learned for the first time that they were in the direct path of a Category 4 hurricane. With the storm roughly an hour away they had no where to run and were trapped in their house. Grabbing their three daughters, a son-in-law and four dogs, they crowded in their windowless bathroom while Mr. Presseller tried to hold

¹ As of the time this document was published, NOAA had not published its final wind speed data. The wind speeds in this paper have been taken from National Weather Service bulletins and the Florida Division of Emergency Management.



the door shut against the increasing, wind-driven pressure. While the first 45 minutes of the storm were frightening, the winds that came after the eye passed over were worse. While Mr. Presseller continued to hold the door, the entire house lifted off the ground rattling the Pressellers' remaining nerves. Fortunately for them when the storm passed, they had survived the ordeal, even

though their home had not.

After battering the Charlotte Harbor area, Charley then moved northeast across DeSoto, Harde, Polk, and Osceola counties making its way to Kissimmee by 9:15 pm. Orlando International Airport reported a gust to near 105 m.p.h. at 9:15 pm EDT, with sustained winds anywhere from 60-70 m.p.h.

The Hurricane reached Daytona Beach at approximately 11:30 pm with winds registering at 70 m.p.h. and 80+ m.p.h. gusts. The Hurricane went out to the Atlantic past the Volusia County coast at approximately 1:00 am on Saturday, August 14, 2004.

Appreciating the danger of the unpredictable storm, South Carolina Governor Mark Sanford declared a state of emergency and ordered residents and vacationers in two counties along South Carolina's Grand Strand to evacuate. State Troopers began redirecting all traffic away from the Myrtle Beach area.

While in the Atlantic, Hurricane Charley reached maximum sustained winds of 85 m.p.h. and moved north-northeast at 25 m.p.h. past the Jacksonville coast. The storm traveled past the Georgia coast with the highest winds registering at 35 m.p.h. on the Georgia coast. By 7:00 am Saturday the hurricane had reached South Carolina. Charley made landfall once again at McClellanville, South Carolina near the borders of Charleston and Georgetown Counties. At 11:00 am the sustained winds had fallen to 75 m.p.h. The storm then moved into the grand strand of Myrtle Beach, South Carolina where at least 65,000 people lost power and even more had evacuated.

The Hurricane moved into Brunswick County, North Carolina near Supply with maximum sustained winds of 75 m.p.h. and gusts of more than 80 m.p.h. It traveled toward the north-northeast at about 30 m.p.h. past Wilmington, North Carolina and through coastal Virginia. It then made its way north-northeast touching areas off the coast of New Jersey, New York,

Connecticut, Rhode Island, and Massachusetts. By 2:00 pm, on August 14, 2004, Charley was downgraded to a tropical storm with sustained wind speeds of 69 m.p.h. The Storm took the same path north-northeast and was finally downgraded to a Tropical Depression at 11:00 am on August 15, 2004.

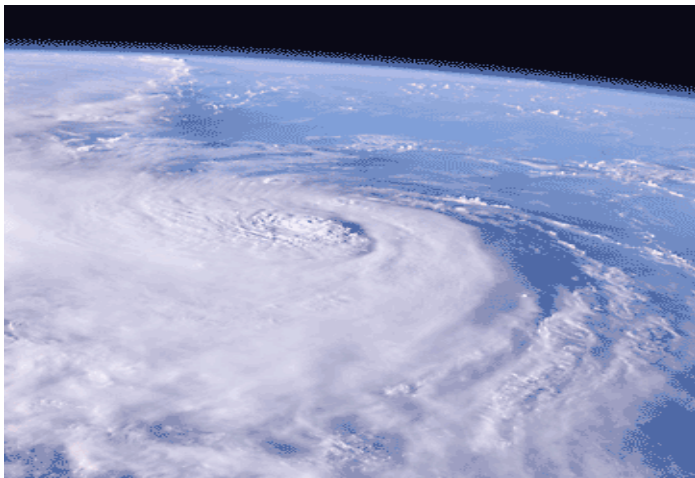
III. OVERVIEW OF THE SUBROGATION ISSUES

In any natural catastrophe, the focus is not on the naturally occurring event but on third parties who played a contributing role to the ultimate damages -- supporting players in the Act of God.

This section addresses not just hurricanes, but also the tornadoes, floods, and lightning they can spawn. Section A provides an overview of the nature of hurricanes and their "offspring." Section B provides an overall legal analysis of third-party liability in the face of such natural disasters. Section C discusses particular forms of negligent preparedness and response in the disaster context.

A. Overview of Hurricanes and Their Offspring

Hurricanes are severe tropical storms with winds that rotate counter clockwise and reach sustained levels of at least 64 knots (74 miles per hour). They develop over warm tropical oceans and can produce torrential rains and flooding. They can also spawn tornadoes and cause



flooding and flash floods. The winds can reach 160 miles per hour and extend inland for hundreds of miles causing tremendous property damage along the seaboard states. The hurricane season lasts from June through November. Satellite systems and hurricane hunters provide ready information on the development of hurricanes over the ocean. The National Hurricane Center in Miami will issue hurricane watches and warnings as soon as a hurricane appears to be a threat. A hurricane watch

will typically provide advance warning one to two days before the hit.

Tornadoes are storms with violent whirling winds that extend from thunderstorm clouds down toward the ground. The winds can reach 300 miles per hour, uprooting trees, buildings, and other objects and turning them into devastating projectiles in the process. They can create paths of damage over a mile wide and fifty miles long. They form with little advance warning. Every state is susceptible to potential tornadoes, but they occur most often in the Midwest, Southeast and Southwest. It should be noted that auditoriums, cafeterias, and gymnasiums that are covered with a flat, wide-span roof are not considered safe shelter areas.

Of all the natural disasters, floods are perhaps the most common and widespread throughout the states. Most floods develop from spring rains, heavy thunderstorms, or winter snow thaws. They often develop slowly over a period of days. Flash floods, however, come without warning, descending upon communities in a crash of water in mere minutes, usually from intense storms, like hurricanes, or dam failure.

Lightning strikes are common in the course of a hurricane, often resulting in fires. If the structure was improperly equipped with lightning strike protection or fire protection, an action may lie against the architects, contractors, or others that failed to provide, or install, such equipment.

B. Overview of Liability in the Disaster Context

The first question in the hurricane context is the path of the hurricane and the intensity of the winds in its path and periphery. Most liability scenarios in the hurricane context involve claims



in the peripheral areas where the winds were *below* the level of a hurricane or tornado. In such cases, liability is premised on the argument that the property in question failed to conform with building codes, which usually require buildings to withstand winds in the range of 70 to 90 miles per hour. Liability may be relatively straightforward with such claims as long as the claim is supported by experts who can opine on the standard of care in construction and in the degree of force applied to that construction. It will be important for

those experts to analyze the degree of damages to surrounding structures to assess how well they held up to similar conditions.

Because hurricanes can spawn tornadoes, it will be important to look for a tornado path. If the damaged structure is outside that path, it is possible to make the case that the structure was only subjected to partial impact. When feasible, an aerial photograph of the structure and its surrounding structures should be taken.

In cases involving direct-path damage from a true hurricane or tornado, other possible theories may also be available, such as failure to remove debris or properly secure a structure before the storm. Other theories may include lack of post-disaster governmental response, e.g., pre-storm failure to maintain sewage systems or post-storm failure to install new stop signs or traffic signals within a reasonable time after the storm.

Regardless of whether the claim is a peripheral damage or direct damage case, some basic theories of liability can be used to make the case.

1. Negligence

As with any negligence claim, the elements for a negligence claim against a third party for damage caused in the disaster context are: (1) duty of care, (2) breach of the duty, (3) proximate cause, and (4) actual damages. In the natural disaster context, these elements have special considerations.

a. Duty of Care

Almost all jurisdictions agree that a party with actual or constructive knowledge of an unreasonably dangerous condition owes a duty to adjoining property owners to make the condition safe. In addition, courts in an increasing number of jurisdictions will impose the added duty of *inspecting* the property for potential defects or hazards, as discussed more fully in Section C, below.

b. Breach

The question of whether a party failed to take the appropriate precautions and thus breached the standard of care is typically an issue for the jury to decide after hearing all of the evidence.

c. Proximate Cause

Even if a landowner breached a duty of care and was thus technically negligent, the landowner will not be liable if the damages would have occurred from an act of God regardless of that negligence. However, the party will be liable for negligence committed in *concurrency* with an act of God, as discussed more fully in Section C, below.

2. Trespass and Nuisance

Even if negligence cannot be proven, an action for trespass or nuisance may still lie. A trespass is generally defined as an unauthorized entry onto property which results in interference with the property owner's possessory interest therein. The owner must prove an invasion of the land that interfered with the right of exclusive possession of the land as a direct result of some act committed by the defendant. Any physical entry upon the land constitutes such an invasion, whether the entry is "walking upon it, flooding it with water, casting objects upon it, or otherwise." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13, at 70 (5th ed. 1984). Similarly, nuisance is any act that unreasonably interferes with the quiet use and enjoyment of the land of another. Unlike trespass, however, a nuisance can occur without actual physical entry upon the land. Sounds, smells, and other detractors can suffice.

In the natural disaster context, trespass or nuisance claims can provide a basis for third-party liability even when "the act" of that third party was not technically "negligent." In *Akers v. Mathieson Alkali Works*, 151 Va. 1, 144 S.E. 492 (1928), for example, the plaintiff sued under

theories of continuing trespass and nuisance for leakage of chemical “muck” from the defendant’s storage basin. Defendant argued that the right of recovery was predicated upon a finding of negligence by defendant. The Virginia Supreme Court rejected that argument, stating:

The law requires that every person so use his own property as not to injure the property of another When defendant permitted the muck to escape from its land and injure land of the plaintiff, without his fault, defendant was liable for the damages sustained by the plaintiff. The loss in such cases must be borne by plaintiff or defendant and it seems just that it fall upon the defendant by whose conduct it was made possible.

3. Maritime Law

Coastal storms will often involve at least some damage to boats, marinas, docks, and other structures along the coastline, often implicating federal maritime law. Admiralty jurisdiction will be triggered if the loss arises out of the storage and maintenance of boats in a marina on navigable waters.



The elements of a negligence claim under maritime law essentially mirror the common law elements: duty, breach, proximate cause, and damages. Determining the duty element, however, requires a balancing between (1) the likelihood of the disaster causing injury to others, (2) the potential extent of the injury, and (3) the expense and effort of adequate precautions to avoid the occurrence.

In states with statutory guidelines governing the conduct of marina and boat owners, the question can arise as to whether the state law is pre-empted by federal maritime law. Under the “maritime-but-local” doctrine, federal law will generally govern unless (1) the matter is one which has great local significance and (2) the state law to be applied does not threaten the uniformity of federal maritime law.

C. Overview of Negligent Preparedness and Response Issues

Disaster preparedness is the process of planning for, responding to, and mitigating the damages of the event. The process should start early and stay dynamic. Contractors, property owners, and businesses should consider whom they might affect by failing to properly prepare against the effects of a natural disaster. The ramifications of improper planning can be widespread,

affecting customers, suppliers, other contractors, shareholders, related businesses, tenants, landlords, and neighbors.

1. Structural Considerations

There are several ways to build, fortify, and/or retrofit a structure to prevent or minimize the effects of natural disasters, including:

- a. Upgrading facilities to withstand the shaking of an earthquake or high winds.
- b. "Floodproofing" facilities by constructing flood walls or other flood protection devices
- c. Installing storm shutters for all exterior windows and doors
- d. Removing dead or decaying trees or limbs
- e. Securing light fixtures and other items that could fall or shake loose in an emergency
- f. Moving heavy or breakable objects to low shelves
- g. Attaching cabinets and files to low walls or bolting them together
- h. Placing Velcro strips under typewriters, tabletop computers and television monitors
- i. Moving work stations away from large windows
- j. Installing curtains or blinds that can be drawn over windows to prevent glass from shattering onto employees
- k. Anchoring water heaters and bolting them to wall studs

2. Response Systems

When a third party fails to adopt a feasible response system, an affected party may have a basis for recovery against that party. Some issues to consider are whether the third party conducted an analysis of and developed a plan for addressing the following:

- a. Potential damage to adjoining property or connected businesses as a result of:
 1. Inadequate construction
 2. Inadequate foundation
 3. Inadequate floodproofing
 4. Susceptible gas mains
 5. Explosive materials
 6. Poorly secured chemicals
- b. Governing codes, laws, or ordinances, including:
 1. Occupational safety and health regulations
 2. Environmental regulations
 3. Transportation regulations
 4. Zoning regulations
- c. In-house site maps that indicate:
 1. Utility shutoffs
 2. Water hydrants
 3. Water main valves

4. Water lines
 5. Gas main valves
 6. Gas lines
 7. Electrical cutoffs
 8. Electrical substations
 9. Storm drains
 10. Sewer lines
 11. Location of each building (include name of building, street name and number)
 - 12 Floor plans
 13. Alarm and enunciators
 14. Fire extinguishers
 15. Fire suppression systems
 16. Exits
 17. Stairways
 18. Designated escape routes
 19. Restricted areas
 20. Hazardous materials (including cleaning supplies and chemicals)
 21. High-value items
3. Post-Disaster Mitigation

Damages in the aftermath of a disaster, especially business interruption losses, can sometimes exceed the initial physical losses. It is therefore critical to initiate repairs and bring systems back on-line as quickly as possible. Failure to do so can extend the damages not only of the affected property owner or business but also of lessees, renters, and adjoining property owners or businesses. In determining whether a third party has exacerbated the post-disaster damage, consider whether that party did the following:

- a. Promptly assessed and protected against remaining hazards.
- b. Protected undamaged property by:
 1. Closing building openings
 2. Removing smoke, water, and debris
 3. Protecting equipment against moisture
 4. Restoring sprinkler systems
 5. Physically securing the property
 6. Restoring power
- c. Kept detailed records, including photographs, videotape, audiotape.
- d. Coordinated actions with appropriate government agencies.

IV. PARTICULAR LEGAL THEORIES IN THE DISASTER CONTEXT

A. Duties for Construction Defects

Structural damage in a hurricane generally is caused by flooding, wind or wind-driven debris. Structures in the immediate path of a 145 m.p.h. storm would be expected to have some damage. However, sometimes structures on the storm's periphery sustain wind-related damage even

though the wind speeds do not exceed the local building code's design requirements. In these cases one should consider if a construction defect contributed to the damage.

1. Duties arising by contract

There are three types of construction defects: improper design, defective building materials, and faulty workmanship. In each situation, one can look to the terms of the contract between the builder and owner and the terms of the plans and specifications to determine if the builder deviated from those documents. While a breach of the terms of these documents may give rise to a breach of contract claim against the builder, in most instances the same document may include defenses, waivers of claims, or limitations of liability that could adversely impact a claim against the builder. One must carefully review these documents along with ancillary documents, such as Change Orders and Requests for Information, to determine the strength of a breach of contract or breach of warranty claim against the builder.

2. Duties arising by Code or Statute

Regardless of the jurisdiction where your structure is located, building codes may exist that govern the actions of the designer, the supplier, and the builder. Failure to adhere to such codes



can be used to form the basis for a separate negligence cause of action. In Florida, such code violations may give rise to a statutory cause of action under Florida Statute § 553.84, which provides for a statutory civil remedy for violation of the State Minimum Building Codes and the Florida Building Code. For example, in *Comptech*

International, Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219 (Fla. 1999) a commercial tenant sued the building owner in negligence for losses to Comptech's computers allegedly damaged while the owner was making an addition to a portion of the building being leased to and occupied by Comptech. The court upheld the count alleging that Milam violated Fla.Stat. § 553.84. This section can be reviewed online at www.leg.state.fl.us/Statutes/index.cfm.

Note, however, that after *Comptech*, the legislature amended section 553.84 to create an "escape clause." The escape clause states:

[H]owever, if the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, and if there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections, this section does not apply unless the person or party knew or should have known that the violation existed.

If the building in question was built before the enactment of the escape clause, the old version of section 553.84 should apply.

Also, in most states the violation of a building code may assist you in getting around certain defenses raised by the builder such as the Economic Loss Doctrine. Because building codes can vary even among counties in the same state, one should always determine what code applies in the particular jurisdiction where the structure is located.

B. Liability of Adjoining Landowners for Debris Damage

A common subject of legal problems for disaster victims involves rights and responsibilities relating to fallen trees and other storm debris. Determining liability depends on an analysis of duty, breach of duty, and proximate cause.

1. Duty

In most jurisdictions, a property owner owes a duty of care to maintain man-made structures, cultivated trees, and other pieces of human-cultivated landscaping, and naturally occurring objects which he/she knows are in an unreasonably dangerous condition. The duty generally extends to lawful visitors, drivers on neighboring public roads, and adjoining property owners, so long as the landowner had actual or constructive knowledge of the dangerous condition.

2. Breach

The property owner is required to take reasonable precautions against damage to neighboring property caused by a storm or other natural disaster. The extent of precautions necessary depends upon the likelihood and probably severity of the disaster and the efficacy and cost of precautions.

3. Proximate Cause

Assuming that the property owner has been negligent in some manner, the property owner may escape liability of 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.

C. Governmental Liability

Every disaster will involve some aspect of governmental activity. Disasters affect the roadways, sewage systems, storm drains, power lines, firefighting activities, and so forth. However, each state has peculiar rules on whether and to what extent a governmental entity may be liable in tort for such damages.

D. The “Act of God” Defense

The general rule in most states is that an Act of God is no defense if the damages occurred in concurrence with another act. The principle has been stated succinctly as follows: “He whose negligence joins with the act of God in producing injury is liable therefor.” 1 AM. JUR. 2d, Act of God, § 11.

E. Statutes of Repose

A significant barrier to a claim against a builder for negligent construction is the statute of repose. A statute of repose, unlike statute of limitations, does not begin to run when the loss occurs but begins to run when a structure, or an improvement to that structure, has been “born.” What constitutes the “born on” date will vary from state to state but can include the date of the certificate of occupancy, the date of actual occupancy, the last work by the builder, or some other date. The length of time of the statute also varies from state to state. In all states, the effect is the same: a claim against a contractor whose negligence caused damage to the structure will be barred as a matter of law if the contractor’s work was done on a date that is “outside” (older than) the statutory time period. There are, however, exceptions in some states, as discussed in Section V.D. below.

V. THE LAW OF THE AFFECTED STATES

A. Liability of Adjoining Landowners

1. Florida

Liability of a landowner to an adjoining landowner for conditions on the owner’s property is determined on a case by case basis under established principles of negligence law, regardless of whether the conditions on the landowner’s property are man-made or natural conditions, such as foliage. *Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001). As noted in *Short v. Lakeside Community Church*, 700 So.2d 772 (Fla. 2d DCA 1997), the common law duty of all landowners to protect invitees also imposes a duty toward of invitees on nearby property, so long as the landowner’s “foreseeable zone of risk” extends beyond the boundaries of the landowner’s own property. See also *Gunlock v. Gill Hotels Co., Inc.*, 622 So.2d 163 (Fla. 4th DCA 1993); *Johnson v. Howard Mark Productions, Inc.*, 608 So.2d 937 (Fla. 2d DCA 1992). However, the landowner owes no duty of care to invitees off the premises for events that occur solely off the premises and which are wholly unconnected to any activity on the landowner’s premises. *Concepcion By and Through Concepcion v. Archdiocese of Miami By and Through McCarthy*, 693 So.2d 1103 (Fla. 3d DCA 1997).

2. Georgia

A landowner owes a duty to the public to guard, cover, or protect artificial conditions on property immediately adjacent to a public way. *International Paper Realty Co. v. Bethune*, 344 S.E.2d 228 (Ga. 1986). The duty extends to those persons lawfully using the public way might be accidentally injured thereon. *See also Sinkovitz v. Peters Land Co.*, 64 S.E. 93 (Ga.App. 1909) (owner of a building abutting upon a highway owes duty to use ordinary care to keep it from being a source of danger to the public after its construction, as much as it is his duty originally to see that it is not a source of danger by improper construction. Though the owner of a building abutting on a street is not an insurer, he must exercise reasonable care to keep it in such condition that neither the building nor any part thereof will fall and injure passers-by.)

In addition, a landowner owes a duty of ordinary care to those who reasonably could be affected by a dangerous condition to the "approach" to the landowner's property. In *Motel Properties, Inc. v. Miller*, 436 S.E.2d 196 (Ga. 1993), the Georgia Supreme Court held that an "approach" to property, which an owner or occupier of property has duty of ordinary care to keep safe, generally means that property directly contiguous, adjacent to and touching those entryways to premises, through which owner or occupier, by express or implied invitation, has induced or led others to come upon his premises for any lawful purpose, and through which such owner or occupier could foresee reasonable invitee would find it necessary or convenient to traverse while entering or exiting in course of business for which invitation was extended; "contiguous, adjacent to, and touching" means that property within last few steps taken by invitees, as opposed to mere pedestrians, as they enter or exit premises. O.C.G.A. § 51-3-1. Under certain circumstances, noncontiguous property can be deemed "approach" which owner or occupier of land has duty to exercise ordinary care to keep safe, because owner or occupier has extended approach to his premises by some positive action, such as constructing sidewalk, ramp or other direct approach; exception is based on fact that owner or occupier, for his own particular benefit, has affirmatively exerted control over public way or another's property. O.C.G.A. § 51-3-1.

3. North Carolina

North Carolina subscribes to the general rule of negligence requiring the plaintiff to show that (1) the defendant owed a duty of care to the plaintiff under the circumstances, (2) the defendant failed to exercise the degree of care what would be exercised by a reasonably prudent person under similar circumstances, (3) the defendant's negligence was a proximate cause of damage; and (4) the plaintiff suffered actual loss or damage. *See Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709 (1988), *McMurray v. Surely Federal Savings & Loan Ass'n.*, 82 N.C. App. 729, 731, *cert. denied* 318 N.C. 694 (1987); Keeton, *Prosser and Keeton on the Law of Torts*, § 30 (5th ed, 1981); *Hester v. Miller*, 41 N.C. App. 509, 512 (1979), *cert. denied*, 298 N.C. 296.

As of August 2004, no North Carolina cases have been uncovered which directly discuss the degree of precaution necessary in the context of an approaching storm. Absent direct law on the issue, establishing liability of adjoining property owners should begin with the principle that the law imposes a duty or ordinary care upon every person who engages in an active course of conduct. *Toone v. Adams*, 262 N.C. 403, 409 (1964). In addition, North Carolina law imposes a

duty of care on a property owner to maintain man-made structures, cultivated trees, and other pieces of human-cultivated landscaping, and naturally occurring objects which the owner knows are in an unreasonably dangerous condition. *Matheny v. Stonecutter Mills Corp.*, 107 S.E.2d 143 (NC 1959). The duty generally applies to lawful visitors but not to trespassers. *Nelson v. Freedland*, 507 S.E.2d 882, 892 (NC 1998). It extends, however, to drivers on public roads and to neighboring property owners, so long as the property owner had actual or constructive knowledge of the dangerous condition. *Gibson v. Hunsberger*, 428 S.E.2d 489 (NC Ct. App. 1993) (landowner is liable to drivers on public roads adjacent to land for dangerous conditions of which the owner had actual or constructive notice, but is not obligated to inspect property in rural, wooded settings); cf. *Rowe v. McGee*, 168 S.E.2d 77 (NC Ct. App. 1969) (owner who knows its tree is decayed and likely to fall and damage plaintiffs' property has duty to eliminate danger but is not liable to defendant if plaintiff had equal ability to control the condition); Annotation, "Failure to Exercise Due Care to Prevent all of Tree", 27 AM. JUR. 2d, *Proof of Facts* 639, section 1, at 645 (noting that both owners and occupiers of property have been held liable where the requisite control was found.).

The *Gibson* case held that in a rural, wooded setting, a property owner is not obligated to inspect the property to uncover dangerous conditions of which the owner was not previously aware. This is consistent with the common law rule absolving the landowner of any duty to find or remedy naturally occurring conditions, a rule designed to avoid burdening rural landowners with inspection of large unpopulated woodlands. See generally Keeton, *Prosser and Keeton on the Law of Torts*, § 57 (5th ed. 1984). Other jurisdictions have held similarly. See, e.g., *Ivancic v. Olmstead*, 66 N.Y.2d 349, 488 N.E.2d, cert. denied 90 L. Ed 658, 106 S. Ct. 1975 (1985) (a duty to remedy the hazard arises where the landowner has actual or constructive knowledge of it, but landowner has no duty to inspect regularly for non-visible decay of trees). However, the *Gibson* case did not specifically address the duty of a landowner in a more populated setting.

4. South Carolina

While landowner in a residential or urban area has duty to others outside property to prevent unreasonable risk of harm from defective or unsound trees on premises, the duty does not extend to owner of trees of natural origin growing on rural, undeveloped land. *Ford v. South Carolina Dept. of Transp.*, 492 S.E.2d 811 (S.C.App. 1997): See also *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123 (Ct. App. 1987), cert. denied, 293 S.C. 406, 360 S.E.2d 824 (1987).

5. Virginia

In Virginia, "[t]he law requires that every person so use his own property as not to injure the property of another, *sic utere tuo ut alienum non laedas*." *Akers v. Mathieson Alkali Works*, 151 Va. 1, 144 S.E. 492 (1928). As stated in *City of Portsmouth v. Culpepper*, 192 Va. 362 (1951), "Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected."

6. Other Jurisdictions

The trend in other jurisdictions has been to impose upon a landowner in an urban or residential setting the duty to inspect the property for defects in trees and other naturally occurring objects. *See, e.g., Mahurin v. Lockhart*, 71 Ill. App. 3d 691, 390 N.E.2d 523 (1979); *Barker v. Brown*, 236 Pa.Super 75, 340 A.2d 566 (1975). Some jurisdictions have abolished the common law exception for naturally occurring hazards regardless of whether the setting was rural or urban. *See, e.g., Sprecher v. Adamson Cos.*, 30 Ca.3d 358, 636 P.2d 1121 (1981) (tree); *Dudley v. Meadowbrook, Inc.*, 166 A.2d 743 (D.C. Mun. Ct. App. 1960) (same); *see also* Annotation, "Tree of Limb Falls onto Adjoining Private Property: Personal Injury and Property Damage Liability", 54 A.L.R. 4th 530, 541 (1987).

B. Act of God Defense

1. Florida

Florida imposes liability, even in the face of a so-called Act of God, so long as the result was caused by a "congruence" of the defendant's own negligent act with the natural force or condition. *Marrero v. Salkind*, 433 So.2d 1224 (Fla. 3d DCA. 1983); *Goodman v. Becker*, 430 So.2d 560 (Fla. 3d DCA 1983).

In *Atlantic Coast Line R. Co. v. Hendry*, 150 So. 598 (Fla. 1933), a railroad company constructed a railroad track which bisected the plaintiff's farm. There was a natural waterway near the farm and in order to cross the waterway, the railroad constructed a fill for its trackbed in which it placed a four-foot culvert for the passage of water. During heavy rains, the culvert overflowed and flooded the farm, destroying the plaintiff's crops and the plaintiff sued for damages.

The defendant railroad asserted that the plaintiff's crops were damaged solely as a result of an Act of God. The Florida Supreme Court upheld the determination that the defendant's negligence was a contributing proximate cause of the crop damage. The court determined that the burden was on the defendant who asserts the Act of God defense to show that the damages resulted solely from the Act of God. Further, the Court stated:

The defense of vis major may be successfully interposed in an action for damages resulting solely from an Act of God; but if the defendant's negligence is a present contributing proximate cause, which, commingled with the Act of God, produces the injury, then the defendant is liable notwithstanding the Act of God. Citing *Davis v. Ivey*, 112 So. 264 (Fla. 1927).

2. Georgia

Where damages are caused by the combination of an act of God and the fault of man, such damages must be attributed entirely to human error; the presence of one excludes the existence of the other. *Strange v. Bartlett*, 513 S.E.2d 246 (Ga.App. 1999). Georgia subscribes to a statutory definition of "act of God" that will preclude liability in a negligence action, incorporating three basic elements: (1) an accident produced by (2) an irresistible or inevitable

force of nature or God, (3) which excludes all idea of human agency or conduct. O.C.G.A. §1-3-3(3).

An act which may be prevented by exercise of ordinary care is not "act of God." *Mann v. Anderson*, 426 S.E.2d 583 (Ga.App. 1992); O.C.G.A. § 1-3-3(3). As noted in *Zayre of Georgia, Inc. v. Haynes*, 213 S.E.2d 163 (Ga.App. 1975), an "accident" is defined in the statute as that which takes place without one's foresight or expectation or begins to exist without design, is something which would not have been precluded by exercise of ordinary care on part of either plaintiff or defendant.

3. North Carolina

As held in *Safeguard Ins. Co. v. Wilmington Cold Storage Co.*, 149 S.E.2d 27 (NC Ct. App. 1966), the landowner will be liable if the landowner's negligence acted in concurrence with an act of God:

“[One may be held liable for his own negligence even through it concurs with an act of God.” To the same effect, *Southern Ry. Co. v. Cohen Weenen & Co.*, 156 Va. 313, 157 S.E. 563. Reducing the principle to the terseness of a maxim, “He whose negligence joins with the act of God in producing injury is liable therefor.” *Kindell v. Franklin Sugar Refining Co.*, 286 Pa. 359, 133 A. 566.

Safeguard Ins., 149 S.E.2d 27 (N.C. Ct. App. 1966). However, the landowner will not be liable for damages if the damages would have occurred from an act of God *regardless of that negligence*.

This is said in 1 AM. JUR. 2d, Act of God, § 11: “All the authorities without exception agree that a person is not liable for injuries or damages caused by an act which falls within the meaning of the term ‘act of God,’ where there is no fault or negligence on his part. Even where the law imposes liability irrespective of negligence, liability will not be imposed where the injury or damage is solely the result of an act of God.”

The issue was further developed in *Lea Co. v. North Carolina Board of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (N.C. 1983), wherein the plaintiff instituted an action against the Board of Transportation for flooding on or across the plaintiff's property which flowed from an easement taken by the Board. This flooding was a result of a 100-year flood (*i.e.*, a flood that is statistically predicted to occur once in every 100 years). Nonetheless, the North Carolina Supreme Court upheld the trial court determination that this flood was a reasonably foreseeable event. *Id.* at 175. That court adopted the definition for an Act of God set forth in Black's Law Dictionary, 31 (Revised 5th Edition 1979) as follows:

An Act occasioned exclusively by violence of nature without the interference of any human agency. It means a natural necessity proceeding from physical causes alone without the intervention of man. It is an act, event, happening or occurrence, due to natural causes an inevitable accident, or disaster; a natural and

inevitable necessity which implies entire exclusion of all human agency which operates without interference or aid from man and which results from natural causes and is in no sense attributable to human agency.

Lea, 304 S.E.2d at 172 (emphasis added). See also *Jenkins v. Helgren*, 217 S.E.2d 120 (N.C. Ct. App. 1975) (even if source of spark was an act of God, for which installers of insulation in return duct connected to furnace could not be responsible, installers could be held liable to homeowners for damage caused by fire if their negligence created the hazardous condition upon which the act operated); *Bennett v. Southern Railroad Co.*, 96 S.E.2d 31 (N.C. Ct. App. 1957) (even when an act of God combines or concurs with the negligence of the defendant to produce the injury or when any other efficient cause so combines or concurs; the defendant is liable if the injury would not have resulted but for his/her own negligent act or omission.); *Lawrence v. Power Co.*, 190 N.C. 664, 130 S.E. 735 (1935) (defendant power company, who allowed dry grass to accumulate on its right-of-way under plaintiff's tower, found liable for fire damage to plaintiff's tower after lightning struck defendant's transmission line causing an insulator on the tower to melt and fall upon the combustible grass below); *Lawrence v. Yadkin River Power Co.*, 190 N.C. 664, 130 S.E. 735 (1925); *Supervisor & Commissioner of Pickens Co. v. Jennings*, 181 N.C. 393, 107 S.E. 312 (1921); *Ridge v. Norfolk Southern R.R. Co.*, 167 N.C. 510, 83 S.E. 762 (1914).

4. South Carolina

The South Carolina Supreme Court in *Belue v. City of Greenville*, 226 S. C. 192 (S. C. 1954). In *Belue*, addressed the Act of God defense in a case against a local municipality that had installed curbing and gutters on a street adjacent to the plaintiff's residence. The installation caused excessive surface water to accumulate (as a result of a five inch rain in three hours) on plaintiff's property. The homeowner sued the municipality to recover damages to his home. *Id.* at 632. The Supreme Court of South Carolina held that even if the five inches of rainfall in three hours was unprecedented and exceptional, it did not relieve the defendant of liability because it was not the sole cause of injury to the plaintiff's property. *Id.* The court stated the test as follows:

The principles embodied in all definitions is that the Act must be one occasioned exclusively by the violence of nature and all human agency must be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the Acts of God.

Id. at 633, citing *Mincey v. Dultmeier Manufacturing Co.*, 223 Iowa 252, 272 (1937).

5. Virginia

Virginia law does not allow the Act of God defense where the defendant's negligence was a concurring force that proximately contributed to the damages. As explained long ago by the Supreme Court of Virginia in *E.T. White v. Southern Railway Co.*, 151 Va. 302, 320 (1928):

It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, **including the 'act of God,'** or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage

The Supreme Court of Virginia further discussed the Act of God defense in *City of Portsmouth v. Culpepper*, 192 Va. 362 (1951). In *Culpepper*, Vernon Culpepper sued the City of Portsmouth for damage to his crops that occurred when a city-maintained canal overflowed and flooded Culpepper's farm in 1948. *Id.* at 365. Years before the flood, the city attempted to replace a washed-out dam located within the canal by constructing an earthen dam across the canal with dirt from the eastern bank of the canal. *Id.*

The removal of the dirt by the city lowered the bank to normal ground level for a distance of one hundred yards. *Id.* at 365-66. Before the city finished the dam, however, it was enjoined from completing its work and ultimately abandoned the project, leaving the earthen dam unfinished. *Id.* at 366. When severe rainstorms hit the area in 1948, water in the canal was obstructed by the partially finished dam and overflowed the canal at the very point where the city had lowered its eastern bank, ultimately flooding Culpepper's farm. *Id.*

The City of Portsmouth raised the Act of God Defense and introduced evidence at trial showing that rain that caused the flood was the heaviest downpour on record. *Id.* Specifically, the City showed that the rainfall causing the flood was "in excess of anything shown since the Weather Bureau was created in 1879." *Id.* The jury returned a verdict in favor of Culpepper and the City of Portsmouth appealed.

The Supreme Court of Virginia upheld the jury's verdict and specifically rejected the City's Act of God defense stating: "Undoubtedly the record shows that the rainfall in question was extremely severe, but under the circumstances and facts in this case, it cannot be termed an 'Act of God'. It has been held in Virginia since 1849 that all human agency is to be excluded from creating or entering into the cause of mischief, in order that it may be deemed an Act of God." *Id.* at 367 (citing *Friend v. Woods*, 6 Gratt. (47 Va.) 189).

The court pointed to the following definition of "Act of God" in support of its reasoning: "Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected." *Id.*; see also *Ellerson v. Chesapeake & Ohio Railway Co.*, 149 Va. 809 (1928) (defining "Act of God" as such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or foreseen).

Accordingly, defendants raising the Act of God defense in Virginia have the burden of establishing that no human intervention entered into the cause of a loss and that the so-called Act of God was so unusual and extraordinary that it could not have been foreseen. Regarding the "human intervention" element of the defense, early, aggressive and thorough inspections (something Cozen O'Connor attorneys have vast experience in) will be essential to properly evaluate which losses caused by Isabel present the possibility of recovery from third parties and

the best avenue to that recovery. Regarding the “foreseeability” element, a defendant will be hard pressed, in light of today’s weather forecasting technology and reporting, to credibly argue that Isabel’s path and force could not have been foreseen.

6. Other Jurisdictions

Louisiana follows the majority view in imposing liability for negligence on defendants whose acts, coupled with an Act of God, have caused a loss. The fact that Hurricane Andrew was an Act of God should not, as a rule of law, relieve negligent defendants of liability in a subrogation claim. Traditional notions of proximate cause provide that "where an Act of God combines or concurs with the negligence of a defendant to produce an injury, the defendant is liable if the injury would not have resulted but for his own negligent conduct or omission." *Gables v. Regent Development Corp.*, 470 So.2d 149, 152 (La. App. 5 Cir. 1985).

The Pennsylvania Supreme Court has followed a similar analysis concerning damages resulting from, or concurring with, an Act of God. In *Bowman v. Columbia Telephone Company*, 406 Pa. 455 (1962), the Pennsylvania Supreme Court considered a case in which a motorist was injured when four telephone poles snapped and fell on the roadway during a snowstorm. Plaintiff alleged negligent maintenance of the telephone poles. The defendant asserted an Act of God defense claiming that the snowfall was unprecedented and unforeseeable. The court stated:

Sometimes all the ingenuity and industry of man can not avail against the turmoil and turbulence of the elements, but it is not enough to escape responsibility for the owner of the instrumentality which inflicts damage to assert that the instrumentality was propelled by the Supreme Being and that, therefore he could shake the clinging snow of responsibility from off his hands.

Id. at 459.

The Texas Supreme Court held similarly on the Act of God defense in *Texas Supreme Court in Luther Transfer and Storage, Inc. v. Walton*, 296 S.W.2d 750 (Tex. 1956). In *Luther*, a flood case, the court held that while the damages resulting from an Act of God are not ordinarily chargeable to anyone, an exception to this general rule exists when the negligence of another person has concurred with the Act of God. In this regard, the court stated:

The rule of non-liability of a ...company or person for damages caused by an extraordinary and unprecedented flood is subject to the exception that negligence in constructing and maintaining the structure concurring with an extraordinary and unprecedented flood in causing damage to another, makes, ... [the] company or person liable for damages, notwithstanding the fact that the flood was extraordinary and unprecedented.

Id. at 498, quoting *Fort Worth and D.C. Ry. Co. v. Kiel*, 187 S.W.2d 371,373 (Tex. 1945).

For additional cases on this issue, see Annotation, “Failure to Exercise Due Care to Prevent fall of Tree”, 27 AM. JUR. *Proof of Facts* 639, § 6, at 657-59.

C. Government Liability

1. Florida

a. Notice Requirements:

The claimant must provide written notice within 3 years to the governmental agency and the Department of Insurance. Florida Statute § 768.28(6). Claimant must file suit within 4 years. Florida Statute § 95.11(3)(d), § 11.065(1).

b. Liability Limits

In cases where Florida has waived sovereign immunity, the cap on damages is generally \$100,000.

c. Discretionary/Governmental Activities v. Operational Activities

Immunity is given for negligent discretionary policy-making activities, but not negligent operational activities. Discretionary policy-making or planning activities of governmental entities are immune from tort liability. *Lee v. Department of Health and Rehabilitative Servs.*, 698 So.2d 1194, 1198 (Fla.1997). However, immunity from tort liability is waived for negligent activities that are operational and for which a common law or statutory duty of care exists. *Department of Health and Rehabilitative Servs. v. B.J.M.*, 656 So.2d 906 (Fla.1995); *see also Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912 (Fla.1985); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979).

d. Highways, Roads, and Bridges

The decision to install traffic control devices and plan and align road or improve or upgrade roads or intersections is governmental, providing governmental immunity for those decisions. *Polk County v. Sofka*, 2001 WL 1245329, (Fla.App.2.Dist. 2001). However, the general rule has an exception where a governmental entity creates a known dangerous condition which is not readily apparent to persons who could be injured by the condition. *Id.* A city is not an insurer of the motorist or the pedestrian. *Castano v. City of Miami*, 840 So.2d 412 (Fla. 3 DCA 2003). However, the city may be held liable for defects of which the city had actual or construction knowledge, *i.e.*, defects that have been in existence so long that they could have been discovered by the exercise of reasonable care, and repaired.

e. Storm Sewer Systems

City not liable under Florida's waiver of sovereign immunity statute, Florida Statute § 768.28, for claims of negligent design, installation, and maintenance of allegedly dangerous storm sewer system. *Collom v. City of St. Petersburg*, 400 So.2d 507 (Fla. 2d DCA 1981).

f. Fire Protection Services

Fire protection services are discretionary and thus protected. In *City of Daytona Beach v. Palmer*, 469 So. 2d 121 (Fla. 1985), the court held: (1) there is no common-law duty of individual property owners to provide fire protection services; (2) there is no statutory duty of care upon which to base governmental liability for discretionary actions of fire fighters in combating fires; (3) decisions of how to properly fight a particular fire, how to rescue victims in a fire, or what and how much equipment to send to a fire are discretionary judgmental decisions which are inherent in public safety function of fire protection; and (4) governmental entities are clearly liable for negligent conduct resulting in personal injury while fire equipment is being driven to the scene of a fire or personal injury to a spectator from the negligent handling of equipment at the scene, as a result of the enactment of section 768.28, Florida Statutes (1983).

g. Police protection

Some police actions are discretionary and thus protected but some are statutorily mandated and thus not protected:

i. *Protected Police Activities:*

Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970): City and County not liable for riot damage to plaintiffs' businesses incurred during Republican National Convention in Miami Beach, because even though the duty of police protection is owed to the public generally, the duty does not inure to the benefit of particular private citizens.

Everton v. Willard, 468 So. 936 (Fla. 1985): Approving dismissal of wrongful death action for deputy sheriff citing and releasing, rather than arresting, intoxicated motorist who then caused fatal collision 15 minutes later, the court held: (1) the decision to arrest is a discretionary judgmental power basic to police power function of governmental entities for which police are afforded governmental immunity, (2) although there could be a duty of care owed to an individual if a special relationship exists between an individual and a governmental entity, such as where police accept responsibility to protect an individual who has assisted them and the individual is in danger due to that assistance. The court reasoned as follows:

In our opinion, there is no distinction between the immunity offered the police officer in making a determination of whether to arrest an individual for an offense and the discretionary decision of the prosecutor of whether to prosecute an individual or the judge's decision of whether to release an individual on bail or to place him on probation. All of these decisions are basic discretionary, judgmental decisions that are inherent in enforcing the laws of the state. They are clearly not ministerial acts as contemplated by the Huhn [v. Dixie Insurance Co.], 453 So. 2d 70 (Fla. 5th DCA 1984) decision or the dissent.

ii. *Unprotected Police Activities*

White v. City of Waldo, 659 So. 2d 707 (Fla. 1st DCA 1995): In claim by motorcyclist injured when his motorcycle collided with a stray horse being pursued by a city police officer in unlit patrol car, the court held that: (1) officer owed duty to exercise reasonable care to make his acts safe for others; (2) officer's decision to conduct pursuit in unlit patrol car with private citizen on hood was not discretionary one for which immunity from tort liability was available; and (3) evidence was for jury on issue of whether chasing horse created danger that did not previously exist and whether doing so in unlit patrol car deprived motorists of any notice of such danger. In its decision, however, the court noted:

Law enforcement officers must exercise discretion in enforcing laws and protecting the public safety. For that reason, state and local government enjoys sovereign immunity for actions law enforcement personnel take or omit in performing "discretionary activities ... inherent in the act of governing." *City of Jacksonville v. Mills*, 544 So. 2d 190 (Fla. 1989). Determining probable cause for arrest is an example. A plaintiff victimized by a person the authorities failed to arrest cannot recover damages from the public fisc on that account. *Everton v. Willard*, 468 So. 2d 936 (Fla. 1985) (no recovery where driver who had been drinking was involved in fatal accident some fifteen minutes after sheriff's deputy stopped but did not arrest him.) The decision when or whether to make an arrest is within the discretion of law enforcement officers in the executive branch, *Rodriguez v. City of Cape Coral*, 468 So. 2d 963 (Fla. 1985); *City of Daytona Beach v. Huhn*, 468 So. 2d 963 (Fla. 1985); *Everton*, subject, of course, to judicially enforceable rights against unlawful arrest.

Simpson v. City of Miami, 700 So. 2d 87 (Fla. 3d DCA 1997): City not entitled to sovereign immunity in wrongful death claim for police releasing from cruiser a violator of a domestic violence injunction:

If it is determined that the City of Miami Police Officer Fuentes' action of securing the domestic violence injunction violator in the police cruiser, after having responded to a call about an injunction violation, constituted an arrest of the violator, then pursuant to the section 741.30(9)(b), Florida Statutes (1993) provision that upon arrest the violator "shall be held in custody until brought before the court as expeditiously as possible[.]" (emphasis added), the officer had no discretion under sovereign immunity principles to release the violator, *see Everton v. Willard*, 468 So. 2d 936 (Fla. 1985), and was required by statute to take the arrested violator before a judge.

h. *School Boards*

School boards are not immune from premises liability, which is operational negligence. *Green v. School Board of Pasco County*, 2000 WL 192148 (Fla. 2d DCA 2/18/00). In *Green*, the court held that a police officer who fell from unprotected retaining wall on school premises was

allowed to bring premises liability action against school board, because (1) school board's alleged failure to illuminate area or erect guardrail on retaining wall was operational negligence for which it was not shielded by sovereign immunity, and (2) issues of fact existed as to whether officer's prior knowledge of retaining wall obviated duty to warn of unprotected ledge. Once a government entity builds or takes control of property or an improvement, it has the same common law duty as a private landowner to properly maintain and operate the property.

2. Georgia

a. State Liability

State sovereign immunity is governed by the Ga. Const. 1983, Art. I, §2, par. 9, which reads:

- (a) The General Assembly may waive the state's sovereign immunity from suit by enacting a State Tort Claims Act, in which the General Assembly may provide by law for procedures for the making, handling, and disposition of actions or claims against the state and its department, agencies, officers, and employees, upon such terms and subject to such conditions and limitations as the General Assembly may provide. ...

O.C.G.A §50-21-24, however, sets forth certain exceptions to state liability.

b. County Liability

County sovereign immunity is premised upon O.C.G.A. §36-1-4, entitled "When county liable to be sued" and states: "A County is not liable to suit for any cause of action unless made so by statute." The Georgia Supreme Court in *Gilbert v. Richardson*, 452 S.E.2d 476, 264 Ga. 744 (1994) held that the 1991 amendment to the constitutional doctrine of sovereign immunity, extending immunity to state and all of its departments and agencies, [Const. Art. I, §2, Par. (e)] applied to counties. However, the Court also held that the enactment of a state torts claims act was only one of the ways the legislature could constitutionally waive sovereign immunity. Thus, the Code provisions allowing a waiver of sovereign immunity when a county purchases liability insurance were upheld. Furthermore, the court also noted that the county's participation in GIRMA, the Georgia Interlocal Risk Management Association, did constitute liability insurance and thus a waiver of sovereign immunity. Claims against counties are governed by O.C.G.A §36-11-1 which provides that claims must be presented within 12 months. Presentation of the claim includes service or process as well as filing of the suit. Failure in this regard is an absolute bar to the claim.

c. City Liability

As to municipal sovereign immunity, the Georgia Supreme Court in *City of Thomaston v. Bridges*, 264 Ga. 4, 439 S.E.2d 906 (1994) held that the constitutional amendment language enacted in 1991 was not a complete blanket reinstatement of sovereign immunity. Thus, as to municipalities, O.C.G.A. §36-33-1 remains viable.

The primary exception to the doctrine of sovereign immunity as it applies in the context of municipal and county immunity is the doctrine of nuisance. Several decisions discuss the theory of nuisance, particularly in the context of water and sewage backups. In *City of Thomasville v. Shank*, 263 Ga. 624, 437 S.E.2d 306 (1993), Mrs. Shank filed suit against the City when her home was flooded with raw sewage. The Supreme Court first defined the nuisance exception:

A municipality like any other individual or private corporation may be liable for damages it causes to a third party from the operation or maintenance of a nuisance, irrespective of whether it is exercising a governmental or ministerial function.

(citations omitted). Next, the court expressly upheld the validity of the nuisance exception since the most recent constitutional amendment:

Accordingly, we reaffirm the long-standing principle that a municipality is liable for creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property. This holding is not in conflict with the 1990(1) amendment as that amendment deals with the concept of waiver, and in the case of nuisance we are dealing not with a waiver of but an exception to sovereign immunity.

d. Highways, Roads, and Bridges

In *Department of Transp. v. Montgomery Tank Lines, Inc.*, 558 S.E.2d 723 (Ga.App. 2001) the court held that under the Georgia Tort Claims Act, the Department of Transportation (DOT) was not immune from suit by insured and motor vehicle insurer for contribution or indemnity after insured and insurer paid damages for settlement of wrongful death action arising from motor vehicle collision, where insured and insurer alleged that DOT negligently designed and maintained intersection where collision occurred, and DOT could have been joined as defendant in wrongful death action.; O.C.G.A. § 50-21-21 et seq.

e. Storm Sewage System

The law in Georgia is mixed on whether a city can be held liable for negligence associated with storm sewer systems. The majority of the cases, however, deem a city immune from maintenance activities, but liable for situations that pose a significant nuisance or health hazard, as demonstrated by the cases discussed below.

In *Trax, Inc. v. City of College Park*, 221 S.E.2d 595 (Ga. 1976), the city had a duty to take steps to maintain flow of water in creek which was part of city's surface water drainage system whenever it became known that changes had occurred which reduced flow of water and made flooding of public or private property likely.

In *City of Douglas v. Cartrett*, 137 S.E.2d 358 (Ga.App. 1964), the court held that an effluent line from sewage disposal plant, being a part of the sewage system of a municipality, is for the protection of the public health and its maintenance is a governmental function.

In *City of Macon v. Cannon*, 79 S.E.2d 816 (Ga.App. 1954), the court held that the city had duty to provide for drainage of the increased run-off of surface water from increased impervious areas within city limits, whether such areas were made directly by municipality or by state with federal funds. A municipal corporation is liable in damages for nuisance created by the grading and drainage of its streets in such a manner as to impair the health of families and produce noxious scents rendering enjoyment of their property impossible. Code, §§ 69-301, 72-101.

In *City Council of Augusta v. Williams*, 58 S.E.2d 208 (Ga.App. 1950), the court held that the authorized maintenance by a municipality of a drainage system for purpose of surface water is a governmental function, and where no nuisance was involved, the owner of realty was not entitled to damages to his realty suffered by negligent maintenance and by overflow of system.

In *Foster v. Mayor and Aldermen of City of Savannah*, 48 S.E.2d 686 (Ga.App. 1948), the court held that the duty of a city to maintain its sewerage and drainage system in a good working and sanitary condition is a governmental function for which there is no liability based on negligence where the system is not operated for profit, and no substantial charges are made for the ordinary use, enjoyment and benefits of the system. Code, § 69-301. Action by private property owners would not lie against city for alleged negligence in failing to remove obstructions in its sewerage system causing overflow into property owners' store where system was not operated for profit and no substantial charges were made for ordinary use, enjoyment and benefits of the system. Code, § 69-301.

3. North Carolina

a. Notice Requirements

Any actions against the state or a state agency or state employee must be submitted to the Industrial Commission by affidavit, N.C.G.S. §143-297 (must list various things), within three (3) years of accrual of the claim, N.C.G.S. §143-299. The limit of liability is \$150,000. N.C.G.S. §143-291. There appear to be no notice limitations for claims against municipalities.

b. Governmental vs. "Proprietary" Functions

Whether a governmental body will be held liable in tort for negligence depends upon the nature of the acts or omissions constituting negligence. North Carolina distinguishes between two categories of governmental functions: "governmental" and "proprietary" functions *Sides v. Hospital*, 287 N.C. 14, 213 S.E. 2d 297 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972), *pet. for reh. denied*, 281 N.C. 516 (1972); and *Casey v. Wake County*, 45 N.C. App. 522, 263 S.E. 2d 360 (1980), *pet. for discr. rev. denied*, 300 N.C. 371, 267 S.E. 2d 673 (1980). A municipality would enjoy sovereign immunity for "governmental" functions, but not for "proprietary" ones.

A good definition of the distinction between governmental and proprietary functions is the following:

Any activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

See generally Kizer v. City of Raleigh, 121 N.C. App. 526, 466 S.E.2d 336 (1996).

Case law in North Carolina has helped clarify what functions are governmental and what are proprietary. For example, firefighting activities of a municipal fire department are generally considered governmental or discretionary functions for which the city is immune. *See, e.g., Willis v. Town of Beaufort*, 544 S.E.2d 600 (N.C. Ct. App. 2001). That immunity, however, can be waived to the extent of the limits of any insurance the department has obtained. N.C. Gen. Stat. §§ 153A-435 and 160A-485. Volunteer fire departments are immune from civil liability for any conduct in connection with their fire suppression efforts. N.C. Gen. Stat. § 58-82-5(b) (1999); *see Spruill v. Lake Phelps Volunteer Fire Department, Inc.*, 351 N.C. 318, 523 S.E.2d 672 (N.C. 2000).²

c. Storm Sewage Systems

Sewage maintenance is generally considered proprietary in nature, thus conferring liability to municipalities for failure to maintain sewage systems, including storm drains. *Howell v. City of Lumberton*, 548 S.E.2d 835 (N.C. Ct. App. 2001) (“The general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof,” quoting *Hotels, Inc. v. Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966)); *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 754, 407 S.E.2d 567, 567 (1991) (municipality “not immune from tort liability in the operation of its sewer system.”). However, if some other entity besides the municipality assumed control over the sewage system, the municipality may not be liable. *See, e.g., Milner Hotels, Inc. v. City of Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966), *modified on reh’g*, 271 N.C. 224, 155 S.E.2d 543 (1967) (a municipality is responsible for negligent maintenance of drains constructed by third persons only if it adopted them as part of its drainage system or assumed control and management thereof).

d. Highways, Roads, and Bridges

As to debris and/or traffic on state highways, the North Carolina State Highway Commission is immune from suit, except insofar as the right to sue is conferred by the Tort Claims Act. *Ayscue v. Highway Comm’n*, 270 N.C. 100, 102 (1967). As the Act has been interpreted, the Highway Commission is not liable for negligent omissions of failures to act. *Id.* at 103. Therefore, the owner of a car damaged by a tree that fell in the roadway cannot maintain an action against the

²Also to note, under the public duty doctrine, certain law enforcement agencies may be shielded from liability in connection with an alleged failure to provide protection to specific individuals. *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991); *see also Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000). However, this protection is limited and should be analyzed carefully.

highway commission for failure to maintain the tree. Moreover, a plaintiff probably cannot maintain an action for negligent failure to maintain manmade objects such as telephone poles. See *id.* (plaintiff could not maintain an action against the Commission based on the Commission's negligent failure to removal gravel from a paved intersection, where the gravel had been strewn by cars from a nearby gravel road).

4. South Carolina

a. Notice Requirements

In order to bring a claim against a governmental agency, the South Carolina Tort Claims Act requires that the claim be verified under oath. §15-78-80. The purpose of the oath is to discourage questionable claims. *Pollard v. County of Florence*, 314 S.C. 397, 444 S.E.2d 534 (S.C. Ct. App. 1994), *rehearing denied, certiorari denied*. The statute that previously had a 180-day notice requirement for municipalities, §5-7-70, was repealed in 1986 with the enactment of the South Carolina Tort Claims Act, so that now there is a two-year period to file a notice. §15-78-100 and §15-78-110.

b. Police and Fire Protection

Under the South Carolina Tort Claims Act, governmental entities - including cities, city police departments, fire departments, and state colleges - are immune from liability for certain actions or inactions. In particular, Code of Laws of South Carolina §15-78-60, sets forth the following immunity provisions applicable to many subrogation cases:

The governmental entity is not liable for a loss resulting from:

....

(5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;

(6) civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection;

....

(20) an act or omission of a person other than an employee including but not limited to the criminal actions of third persons;

....

(25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner;

These provisions explicitly protect governmental entities from (1) a decision not to perform a service, (2) failure to provide police, (3) criminal actions of non-governmental employees, and (4) failure of a school to protect against or control its students (unless grossly negligent). Courts interpreting these immunity provisions have not been reluctant to grant governmental immunity. See, e.g., *Clyburn v. Sumter County School Dist. 17*, 311 S.C. 521, 429 S.E.2d 862 (SC Ct. App.

1993), *rehearing denied, certiorari granted, affirmed* 317 S.C. 50, 451 S.E.2d 885 (SC 1993) (School district was entitled to summary judgment in an action, brought by a student who was attacked by a non-student on a school bus, which was based on the district's alleged failure to enforce §59-67-245 (penalties for interference with a school bus), even though the student had been threatened on the bus prior to the attack and the district did not call the police, where the district counseled the student and her assailant after the threat, and attempted to contact their parents; the district exercised at least slight care and thus was not grossly negligent.); *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (SC Ct. App. 1993) (Defendant county entitled to summary judgment in an action to recover for the death of a bicyclist who was fatally injured when she was chased into traffic by several vicious dogs, since the gravamen of the complaint was the county's failure to enforce an animal control ordinance, and thus the county was immune from liability under §15-78-60); *see also Wells v The City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746, (S.C. Ct. App.1998) (barring homeowners suit against city for failure to maintain or inspect inactive fire hydrants because §15-78-60(6) protects government entity from liability for failure to provide police or fire protection or the method of providing police or fire protection)(citing with approval *City of Columbus v. McIlwain*, 205 Miss. 473, 38 So.2d 921 (1949) (municipality is not responsible for the destruction of property within its limits by a fire merely because, through the negligence or other default of the municipality or its employees, the members of the fire department failed to extinguish the fire regardless of whether this failure is due to an insufficient supply of water, the interruption of the service during the course of a fire, the neglect or incompetence of the firemen, the defective condition of the fire apparatus, negligence in permitting fire hydrants to become clogged or defective, etc.); *Ross v. City of Houston*, 807 S.W.2d 336 (Tex.App.1990) (city's policy of inspecting fire hydrants was directly connected to the city's method of providing fire protection; therefore, the state tort claims act exclusion from governmental liability for claims arising from the failure to provide or the method of providing fire protection barred suit by homeowner); *Triplett v. City of Columbia*, 96 S.E. 675 (S.C. 1918) (although city can be liable for bodily injury or damages to person or property through defect in street by reason of mismanagement, this does not render city liable to property owner made ill by depression in street filled with stagnant water).

c. Highways, Roads, and Bridges

In South Carolina, “the Department of Transportation can be held liable for damages caused by the fall of a tree standing within the limits of or in close proximity to a public highway” depending on “whether the Department knew, or in the exercise of reasonable care should have known, that the condition of the tree would make it hazardous to persons or property in the immediate vicinity.” *Ford v. South Carolina Department of Transportation*, 328 S.C. 481, ___, 492 S.E.2d 81, 814 (Ct. App. 1997). The Department, “because of its responsibility to the public,” has a higher duty of care than does a landowner “to discover and potentially remedy potential obstructions, even those obstructions originating on private property.” *Id.*

5. Virginia

a. Notice Requirements

Virginia has a specific six-month requirement for actions against a governmental agency. Virginia Code 1950 § 8.01-222. Fortunately, in *Miles v. City of Richmond*, 373 S.E.2d 715 (Va. 1988), the Virginia Supreme Court found the notice-of-claim statute, Virginia Code 1950 § 8.01-222, to be mandatory but not jurisdictional. The statute is to be construed liberally, and substantial compliance with its terms is sufficient. The statute reads as follows:

§ 8.01-222 Notice to be given cities and towns of claims for damages for negligence.

No action shall be maintained against any city or town for injury to any person or property or for wrongful death alleged to have been sustained by reason of the negligence of the city or town, or of any officer, agent or employee thereof, unless a written statement by the claimant, his agent, attorney or representative of the nature of the claim and of the time and place at which the injury is alleged to have occurred or been received shall have been filed with the city attorney or town attorney, or with the mayor, or chief executive, within six months after such cause of action shall have accrued, except if the complainant during such six-month period is able to establish by clear and convincing evidence that due to the injury sustained for which a claim is asserted that he was physically or mentally unable to give such notice within the six-month period, then the time for giving notice shall be tolled until the claimant sufficiently recovers from said injury so as to be able to give such notice; and statements pursuant to this section shall be valid, notwithstanding any contrary charter provision of any city or town.

This must be sent by certified mail, return receipt requested.

b. Governmental vs. Proprietary Functions

Similar to North Carolina, Virginia deems a governmental entity immune for governmental functions but not for proprietary functions. While the planning, designing, laying out, and construction of streets and roads are governmental functions, the routine maintenance of existing streets and roads is proprietary. *Bialk v. City of Hampton*, 242 VA 56, 58, 405 S.E.2d 619 (1991); *Taylor v. City of Charlottesville*, 240 Va. 367, 370-71, 397 S.E.2d 832 (1990).

c. Storm Sewage Systems

For sewage systems, the general rule is in Virginia that the maintenance and operation of a sewer system is a governmental function for which a municipality is entitled immunity from tort liability. *See, e.g., Gayda v. Gibbs*, 45 Va. Cir. 176, 1998 Va. Cir. LEXIS 122 (Va. Cir. Ct. City of Norfolk 1998); *Mitchum v. Albemarle County Service Authority*, 34 Va. Cir. 208, 1994 Va. Cir. LEXIS 14 (Va. Cir. Ct., Albemarle County 1994) (Sewage authority acted as municipal corporation performing governmental functions in servicing a manhole which was part of its sewer system, and was thus entitled to immunity from liability and tort: “If collecting garbage

and removing trash and debris are governmental functions, then collecting and disposing of other forms of waste must also be.”); *Stover v. Keystone Builders, Inc.*, 36 Va. Cir. 595, 1993 Va. Cir. LEXIS 717 (Va. Cir. Ct., Fairfax County 1993); *Linda Lee Corp.v. Covington Company*, 36 Va. Cir. 590, 1993 Va. Cir. LEXIS 716 (Va. Cir. Ct. Bedford County 1993) (The doctrine of sovereign immunity applies to the maintenance and operation of a storm water drainage system by a municipal corporation.); *Wilshin v. City of Fredericksburg*, 26 Va. Cir. 329, 1992 Va. Cir. LEXIS 577 (Va. Cir. Ct., City of Fredericksburg 1992) (Plaintiff’s, neighbors sued for damages caused by sewage backup, claiming the system malfunctioned, backed up or overflowed causing raw sewage to invade the lower levels of their homes; court held, “If collecting garbage and removing trash and debris are governmental functions, then collecting and disposing of other forms of waste must also be. In cities--which almost by definition are densely populated--where drain fields and other individualized modes of sewage disposal are impractical or not impossible, it is difficult to imagine anything more tied to public safety and safety for the benefit of all than the provision of a sanitary sewer system. . . . Therefore, the Court is of the opinion that in Virginia the operation and maintenance of a sewer system is a governmental function.”); *Jackson v. City of Danville*, 26 Va. Cir. 488, 1990 Va. Cir. LEXIS 444 (Va. Cir. Ct., City of Danville 1990) (Plaintiff alleged that her goods and property were damaged by sewage which backed up and flowed into her home as a result of the negligence of the City: “In this case, the City of Danville’s operation of a sanitary sewer system, in the Court’s opinion, falls within the Protective Doctrine of Sovereign Immunity. For this reason, the Court is of the opinion that the City of Danville is entitled to summary judgment as requested in its Motion.”).

However, a few cases are distinguishable from the general rule. In *Mjornell v. Town of Front Royal*, 41 Va. Cir. 399, 1997 Va. Cir. LEXIS 44 (Va. Cir. Ct., Warren County 1997), the court held that a municipality is immune from liability for an alleged negligent design of a sewer system, but may be liable for damages caused by its negligence with regard to the construction, operation and maintenance of water and sewer systems, which activities are proprietary functions. In addition, the case of *Hampton Road’s Sanitation District v. McDonnell*, 234 Va. 235, 360 S.E.2d 841, (Va. 1987) allowed recovery where the action of the municipality was done as a continuing trespass. Similarly, in *McConnell v. Board of Supervisors of Fairfax County*, 20 Va. Cir. 5, 1989 Va. Cir. LEXIS 402 (Va. Cir. Ct., Fairfax County 1989), the court allowed plaintiff to maintain a cause of action for inverse condemnation in the case of an alleged continuing trespass. The case involved a storm drain which backed up from time to time, causing flooding which damages Plaintiffs’ nearby property. The court held as follows:

Plaintiffs alleged that the Defendant is responsible for this flooding since they are charged with the allegation of designing and maintaining this storm sewer system. In their second amended petition, Plaintiffs allege one count for declaratory relief and one count for inverse condemnation. They presently seek leave to add a count for trespass. . . . [A] claim for inverse condemnation is essentially a claim that the government has ‘taken’ property without the due process of law in violation of the Fifth Amendment to the U.S. Constitution. As explained in *Barnes v. United States*, 538 F2d 865 (Ct. Cl. 1976), case law has developed the law of eminent domain as applied to instances of flooding. Property may be taken by the invasion of water where subjected to “intermittent, but inevitably recurring, inundation due to authorized government action.” Id. at 870, citations omitted. A

cause of action for unconstitutional taking therefore does not accrue until the flooding becomes inevitable. . . . [T]he Court simply cannot say on the basis of this record that flooding became inevitable at least three years prior to the commencement of this suit, as the defendant contends. Rather, this poses a question of fact to be determined at trial.

d. Highways, Roads, and Bridges

As to post-disaster remediation, in *Fenon v. City of Norfolk*, 203 Va. 551, 125 S.E.2d 808 (1962), the Virginia Supreme Court considered a tort claim against a city for failure to clear a tree from the road and found the city immune. Plaintiff claimed injury for striking a tree that fell by a storm and was obstructing a street. The fallen tree was one of some 800 downed trees blocking the streets of Norfolk in the wake of Hurricane Donna, which struck the area in 1960. The Court held that the city's effort to cope with the "emergency situation" resulting from the storm was the exercise of a governmental function, not routine street maintenance. 203 Va. at 555-56.

Similarly, in *Bialk v. City of Hampton*, 242 Va. 56, 58, 405 S.E.2d 619, 620 (1991), the City of Hampton was deemed immune from plaintiff's suit for personal injuries received when he was struck by snow thrown from the blade of a snowplow which was being operated by a city employee. The Court cited *Fenon* and held that the City of Hampton was entitled to sovereign immunity for negligence committed during its snow-removal efforts. Specifically, the court stated:

Because the City's snow-removal operations in this case were acts done for the common good in coping with an emergency, they constituted the exercise of a governmental function. Although that function coincided with the City's proprietary function of keeping its streets in safe condition for travel, where those functions coincide, "the governmental function is the overriding factor." The trial court correctly ruled, therefore, that the City was entitled to governmental immunity.

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However, the case of *Burson v. City of Bristol*, 10 S.E.2d 541 (Va. 1940) found the city liable in post-fire repair efforts to a building. Five days after a fire had been extinguished members of city volunteer fire department were employed to pull down walls of burned building to make streets safe for passers-by. The court held that the members of volunteer fire department were not acting in the discharge of their duties as firemen so as to relieve city from liability for damages to adjoining property caused by firemen's negligence, nor was city relieved from liability under the statute relating to the destruction of houses to prevent the spread of fire. Code 1936, §§ 3133-3135.

D. Statutes of Repose

1. Florida

Florida subscribes to a 15-year statute of repose for improvements to real property, running from “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.”. Florida Statute § 95.11(3)(c):

2. Georgia

Georgia’s limitation/repose statute compilation is slightly misleading. Although Georgia Code § 9-3-51 contains an 8-year statute of repose for construction defect claims, the Georgia Supreme Court has rejected any application of a discovery rule with respect to such claims. Georgia Code § 9-3-30 contains a four-year statute of limitation for damages to real property that begins to run from the date of completion of the structure. Therefore, the four-year statute of limitation begins to run upon substantial completion of the structure, even if no damage other than the faulty construction occurs. Accordingly, any action for construction defects is barred after four years, regardless of whether any real harm has manifested itself by tangible loss, as the loss is deemed to have occurred when the structure was completed in a defective state. This scheme essentially treats construction defects as if they are a contractual breach, for which a claim accrues immediately, instead of a tort, for which a claim accrues when injury occurs or the claimant knows or has reason to know that the faulty work has occurred. For example, if a five-year old dwelling contains a modular fireplace which has been incorrectly installed at the time of original construction, and a fire ensues in the fifth year because of the defective installation, any claim for injury to the building is time-barred by the four-year statute of limitation, notwithstanding the eight-year statute of repose.

To make things even more confusing, the homeowner would be able to prosecute a claim for damage to his personal property and dwelling contents, because that claim does not accrue until the actual damage happens, and so long as the injury is within the eight-year window for construction defect claims, that part of the loss is viable for subrogation.

3. North Carolina

North Carolina subscribes to a six-year statute of repose for products and improvement to real property. N.C.G.S. § 1-50(6) (“no action for the recovery of damages shall be brought more than six years. . .”). The only recognized exception to this rule is if the defendant committed wanton and wilful misconduct. *Cacha v. Montaco*, 554 SE2d 388 (Ct App 2001).

4. South Carolina

South Carolina subscribes to a thirteen year statute of repose for improvements to real property, but no such statute or repose for product. S.C.Code Ann. § 15-3-640.

5. Virginia

Virginia subscribes to a 5-year statute of repose running from the date of the performance of the services. Virginia Code § 8.01-250.

VI. Resources

This section provides the following information sources:

A. Publications

The Federal Emergency Management Agency (FEMA) provides numerous publications on their website, www.fema.gov. Hardcopies can also be obtained by writing to: FEMA, Publications, P.O. Box 70274, Washington, DC 20024. Useful publications include:

- Disaster Mitigation Guide for Business and Industry (FEMA 190) -- Technical planning information for building owners and industrial facilities on how to reduce the impact of natural disasters and man-made emergencies.
- Principal Threats Facing Communities and Local Emergency Management Coordinators (FEMA 191) -- Statistics and analyses of natural disasters and man-made threats in the U.S.
- Floodproofing Non-Residential Structures (FEMA 102) -- Technical information for building owners, designers and contractors on floodproofing techniques (200 pages).
- Non-Residential Flood-proofing -- Requirements and Certification for Buildings Located in Flood Hazard Areas in Accordance with the National Flood Insurance Program (FIA-TB-3).
- Building Performance: Hurricane Andrew in Florida (FIA 22) -- Technical guidance for enhancing the performance of buildings in hurricanes.
- Building Performance: Hurricane Iniki in Hawaii (FIA 23) -- Technical guidance for reducing hurricane and flood damage.
- Answers to Questions About Substantially Damaged Buildings (FEMA 213) -- Information about regulations and policies of the National Flood Insurance Program regarding substantially damaged buildings (25 pages).
- Design Guidelines for Flood Damage Reduction (FEMA 15) -- A study on land use, watershed management, design and construction practices in flood-prone areas.
- Comprehensive Earthquake Preparedness Planning Guidelines: Corporate (FEMA 71) -- Earthquake planning guidance for corporate safety officers and managers.

Publications from other sources include:

- Mullins, G.W. 1999. *Wildfire—Feel the Heat Study Guide*. Bethesda, MD: Discovery Pictures, Inc.
- National Wildfire Coordinating Group. 1994. "Introduction to Wildland Fire" Behavior S-190, Student Workbook NFES 1860. Boise, ID: National Interagency Fire Center.
- Pyne, S.J., P.L. Andrews, and R.D. Laven. 1996. *Introduction to Wildland Fire*, 2nd Edition. New York: John Wiley & Sons, Inc.

B. Websites

National Oceanic and Atmospheric Administration website: www.noaanews.noaa.gov
National Weather Service: www.nws.noaa.gov
Rainfall data: <http://www.srh.noaa.gov> (gives rainfall and other data for a particular area, and narrows it down to specific cities.)
Mapping of precipitation: http://www.srh.noaa.gov/lub/wx/precip_freq/precip_index.htm
(provides maps which classify rainfall events by time interval -- 30 minute, 1 hour, 2 hour, 3 hour, 6 hour, 12 hour, 24 hour -- and according to severity -- 1 year, 2 year, 5 year, 10 year, 25 year, 50 year and 100 year).
National Climatic Data Center: www.ncdc.noaa.gov
The Weather Channel: www.weather.com
Accuweather.Com: www.accuweather.com
The Weather Network: www.theweathernetwork.com
Weather Underground: www.wunderground.com
Intellicast Weather: www.intellicast.com
Online Meteorology Guide: <http://ww2010.atmos.uiuc.edu>
World Climate: www.worldclimate.com
Automated Weather Service: www.aws.com
The Weather Center/WeatherWatch.Com: www.weatherwatch.com
WeatherNet: <http://cirrus.sprl.umich.edu/wxnet>
WeatherConcepts: www.weatherconcepts.com
National Interagency Fire Center: www.nifc.com
Center for Analysis and Prediction of Storms, Univ. Oklahoma: www.caps.ou.edu

C. Experts

Cozen O'Connor maintains a database of forensic experts, including engineers, contractors, meteorologists, and numerous others. Recommendations for experts are available from Cozen O'Connor upon request.

VII. CONTACT INFORMATION

The above is just a short list of possible areas for subrogation. Cozen O'Connor, at no charge, will provide an attorney to investigate subrogation potential on those claims exceeding \$100,000. Cozen O'Connor is prepared to handle your company's subrogation claims arising from the losses caused by Hurricane Charley.

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Fax: 316.634-3837
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707 17th Street, Suite 3100
Denver, CO 80202
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Contact: Brad W. Breslau, Esq. or Thomas Dunford, Esq.

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One Houston Center
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