

SUBROGATION IN THE EYE OF THE HURRICANE: HOW TO RECOVER FROM NATURAL DISASTERS

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Every person with a heartbeat empathizes with the suffering experienced by residents throughout the eastern seaboard, most especially Florida, as a result of a virtually unprecedented series of hard-hitting hurricanes. Weather forecasters predict this will be the continuing pattern for the next decade. The details of Hurricanes Charley, Frances, Ivan, and other tropical storms have begun to blur in our collective memory, but are too important to be forgotten:

Charley left three cities without running water, 2,000,000 people without power, at least 25 dead, and destroyed homes and businesses to the tune of an estimated \$15 billion. According to the Insurance Information Institute, the insured losses from this hurricane alone are estimated to reach approximately \$7.5 billion.

Similarly large damage estimates were the byproduct of Frances and Ivan, both of which also caused extensive flooding, with over 15" of rain falling in certain eastern seaboard locations.

As part of the process to restore businesses and homes and compensate property owners for their substantial losses, many insurers have been called upon to deploy CAT teams to perform storm duty to adjust these losses. Because of the exigencies entailed in adjusting so many large property losses in such a concentrated area over such a short period of time, subrogation issues inevitably are pushed to the back burner, and possibly entirely off the stove. This is a mistake.

Even for losses caused by acts of nature, there are significant recovery opportunities that should and can be efficiently addressed in a cost effective manner, to make sure that revenue from responsible third-parties is not thrown out together with the damaged possessions of your insureds.

Each company should compile a list of the recorded wind speeds, as measured by approved climatological facilities, in key geographical locations where losses are being adjusted. These wind speeds then should be compared with requirements under applicable building codes

– both local and national – which determine the wind speed ratings to which buildings must be constructed. Frequently, the wind speed requirements will vary based upon whether construction was ongoing or completed; the occupancy of the facility; and construction materials and methods.

In addition, for commercial facilities and certain high-end housing, there may be building specifications, architectural drawings and engineering details which need to be consulted to determine if there were any construction requirements above and beyond the minimum levels mandated by applicable codes.

For rainstorm losses, notwithstanding the severity of the event, the usual suspects must be consulted: were there breaches or penetrations which allowed external elements to enter the household or facility; was there appropriate design, installation and maintenance of the drainage system, in accordance with industry standards; did under-design or deficient maintenance of stormwater drainage system for the municipality cause or contribute to the flow of water in the direction of your insured's facility?

If the wind or storm conditions brought about a structural failure involving steel members, then close analysis must be performed to ascertain if there were installation errors or material defects. Frequently, the key components can be identified and preserved to allow post-adjustment inspection and testing. Even if potentially responsible third-parties cannot be placed on notice at that time, careful recording of the scene photographically, in conjunction with preservation of critical evidentiary artifacts, can discharge obligations to allow for meaningful inspection and evaluation opportunities by prospective defendants in the future.

Basic, but important, written agreements also should be consulted: is there a lease agreement which imposes responsibility for pertinent inspection or maintenance activities, and/or for the cost of repair or restoration? Was there a service agreement in effect, which entailed pre-

loss inspection activities? In this vein, were there any public sector inspections and approvals, prior to the loss, which failed to identify construction deficiencies which contributed to the cause of the loss?

Speaking of causation, it is important to remember that in most jurisdictions, the uniform rule is that despite the involvement of an act of nature, if human conduct was a substantial, contributing factor in bringing about the loss, or some aspect of the damage, then, upon proof of liability, the actor is responsible for the resulting damage. To state it differently, the fact that a natural disaster also was involved does not eliminate legal liability on the part of individuals or companies whose conduct also were substantial contributing factors.

Adjusters will be called upon to perform many important tasks on behalf of their employers and insureds during a concentrated period of time, so it must be borne in mind that outside consultants, including experienced subrogation counsel, should be consulted to assist in this effort, wherever it is deemed appropriate. There are especially critical legal considerations that must be addressed early on in the process, such as potential time bars arising from application of each state's statute of repose (running from the date work was performed, as opposed to the date of loss) which frequently will expire and bar the claim even though the otherwise applicable statute of limitations under that jurisdiction had not yet run. Certain states have enacted statutes requiring notice requirements with an opportunity to cure in claims involving construction defects. Claims against governmental subdivisions frequently are subject to very early notice requirements which must follow a form prescribed by statute. There may be time limitations in lease agreements or construction contracts, and the economic loss rule (which restricts victims to contractual remedies for claims involving primary damage to the failed product itself) may limit remedies to these contractually responsible parties. Similarly, the Uniform Commercial Code may be applicable for which the statute of limitations is four years

from tender of delivery (in other words, sale of the product) which frequently may expire long before the otherwise applicable statute of limitations for tort claims.

In summary, subrogation should not be an afterthought when adjusting property losses resulting from acts of nature. However, in order to evaluate recovery issues in a way that will allow for a meaningful exercise of your company's subrogation rights, there needs to be immediate coordination among all team members: the adjuster, the recovery representative, forensic consultants and legal counsel. It is difficult to implement all of this in the aftermath of a major catastrophe. Good pre-planning by implementation of a subrogation program in advance of these catastrophic events inevitably will allow your company to identify and perfect an enhanced number of viable subrogation claims.

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