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**WEB EXCLUSIVES**

## A COMMON-SENSE GUIDE TO MAXIMIZING FLOOD RECOVERY

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An "Act of God" can neither be planned for nor prevented. By contrast, a flood caused or contributed to by an act of negligence, even if the negligence simply exacerbated the flooding, may present a recovery opportunity. The Hurricane Katrina litigation is proof that flood recoveries are possible: the Army Corps of Engineers was held responsible for failing to maintain and operate properly a navigation channel (MRGO). This breakdown was a substantial cause of the failure of the Reach 2 levee, which contributed to the flooding of the plaintiffs' properties. The question was not whether the defendant caused the flood, but rather whether the defendant's negligence contributed to the damage to the plaintiff's property.

Since 2000, the National Flood Insurance Program (NFIP) has paid more than \$25 billion in claims, and claims are expected to grow in size and number. While flood claims present challenges for all insurance professionals, they also present recovery opportunities. Some simple, common-sense guidelines will enhance recovery potential for flood subrogation claims.

### Determine Subrogation Potential Early On

When considering recovery, it is critical to identify the source of the flooding: a restriction or obstruction in a waterway causing a water backup (a downstream problem) or excess water supply causing increased water flow (an upstream problem).

Even before this, an adjuster's first responsibility is to evaluate recovery potential through the available information and determine if an engineer or lawyer should be involved. Was the flood caused by an Act of God, foreclosing recovery, or was some (or all) of the flood damage caused or contributed to by the negligence of some person or entity? Was the storm foreseeable, and could it have been planned for, or was it impossible to predict, plan for or prevent?

While a determination in this regard may be difficult, some things to look for are: a difference between the rainfall and the rise in the water level or stream flow; flooding that seems to be out of proportion to the rainfall; flooding in one area but not in another that received similar rainfall; and obstructions in the waterway. Typically, media reports exaggerate rainfall data. Only a careful scientific evaluation of the rainfall and stream flow data can determine if the damage was the result of rainfall or the combined effects of rainfall and bad planning. If the flood causes significant damage to insured property, then there is little downside in involving an engineer or other recovery professional.

Evidence and opportunity can be lost if decisions are not made promptly. The best time to measure the water and its effects is during or shortly after the storm and flood. Rainfall and stream flow data




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can be gathered later as it is compiled and archived in various databases, such as FEMA and the National Weather Service; however, prompt, on-the-scene investigation can provide valuable factual details that can help prove a case years later. It is easy to attribute flood damage to excess rain, but often floods are caused by subtle problems with bridges, streambed maintenance, or in changes in upstream land use. Catastrophic property damage can be the result of an inch of water in the wrong place at the wrong time, reaching a hospital's technical center, or the computer data center of a manufacturing facility.

#### Hire the Right Experts

Just as it is critical to fast-track the investigation, it is key to retain the right experts. The adjuster may need the help of an expert such as a hydrologist, the most important member of the team, in the initial investigation. Making the investigation investment is an important step in identifying and understanding the design criteria for waterways and surrounding structures, and in determining the adequacy of these designs. A hydrologist can evaluate the movement, distribution and quality of water. This professional can also calculate, measure, and evaluate rainfall and stream flows to determine the size and intensity of storms and their contribution to floods. Hydrologists can calculate peak water discharges (water volume) and determine watershed discharge by analyzing precipitation runoff. In addition, they may interpret and extrapolate data. These calculations and opinions are based on accepted scientific principals and theories, and should thus be admissible in court.

The hydrologist can test different variables in channel configurations, including channel width, depth and bottom surfaces, to evaluate the stream bed and maintenance. It may be necessary to consider the addition or removal of obstructions such as bridges, highways, or utility conveyances to judge their impact on water flow and elevation. Computer models can enable the hydrologist to evaluate these different scenarios. With a model, the engineer can manipulate the configuration of the channel to pinpoint how a change affects the water level at the insured property. He or she can determine if the channel was maintained properly, and if not, demonstrate how the lack of maintenance affected the water level. These tools have been used to successfully demonstrate, even in 500-year storms, how a lack of maintenance caused the flood waters to be several inches higher at an insured property causing significant damage. An effective hydrologist can describe in vivid but concise detail what caused the water to enter the specific property and how changes (sometimes minor) in a stream bed or watershed could have prevented the damage.

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Other scientific disciplines may be used in flood litigation; a meteorologist who can testify about weather patterns and rainfall levels; a surveyor who can verify elevations taken in the field by the hydrologist; and a municipal liability expert who is knowledgeable about the standards for waterway maintenance. In addition, civil engineers for dam and obstruction cases, zoning experts in cases involving over-development of the watershed and geotechnical engineers may be called upon to testify regarding dams, levees, and earth movement. The goal is to coordinate all of these specialties and develop and present a coherent case.

#### Get to the Source

Whatever experts you retain, the threshold determination for a recovery claim is to understand the source of the flood water. Often floods have multiple sources and multiple causes. It is crucial to note that the focus must be on the insured property and the water that damaged it:

- Did the water come from a nearby creek, stream, or river?
- Did it originate at an overflowing sewer system, a municipal water supply, or a broken water main?
- Does the municipality have a combined sanitary/storm drain system that contributed to the flooding? Was the flood the result of too much rain in the storm system resulting in an overflow and/or backup?
- Did a local water authority (or the Army Corps of Engineers) release water from a retention pond, catch basin, or reservoir?
- Did a dam leak or break, or was it intentionally relieved?
- Did a land developer neglect to install proper water retention facilities, causing excess water to run off land adjacent to a water way?

There are hundreds of similar questions that need to be raised for every flood loss. To a property owner with 6 inches of water in his property, the difference between a 500-year flood and a 1,000-



year flood is unimportant. The owner wishes that either his building was 6 inches higher or the water was 6 inches lower.

#### Evaluate the Cause

Once the source of the water is identified, you can evaluate the cause. Was there a waterway restriction (a downstream problem) or excess water supply (an upstream problem)?

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Restrictions can be caused by blockage of the waterway, a lack of waterway maintenance, resulting in an inability of the channel to carry water, poor design of bridges or roadways, or waterway construction resulting in a blocked or restricted channel. Anything that impedes the flow of water can contribute to flooding conditions upstream of the restriction.

Excess supply can be as simple as a historic rainstorm that overwhelmed all the systems. Or, it can be the result of improper upstream development, box store parking lots, apartment buildings, or other institutional development that alters drainage patterns.

Typically a combination of factors, including historic rainfalls and negligent construction and maintenance, contribute to flooding. Replacing soil, grass, and brush with impermeable asphalt, blacktop, buildings, parking lots, and swimming pools changes the drainage characteristics of the watershed. Therefore, such development must be monitored and controlled. The enlightened view is that storm water runoff is an asset, a natural resource that has to be managed rather than a problem to be avoided.

#### Identify Responsible Parties

Responsibility may rest with local governments and governmental entities, which are obligated to maintain waterways and appurtenant structures. All states have statutes governing immunity, recovery caps, notice requirements, and statutes of limitations for these claims. These statutes can compromise a viable recovery claim and must be carefully considered.

If you are seeking recovery, then other potentially responsible parties include contractors who negligently develop land or buildings in the floodplain, waterway or watershed; engineers who contributed to the negligent design or maintenance of a waterway, waterway obstruction (such as a bridge) or watershed development; railroads took part in negligently designing, constructing or maintaining a bridge or other structure which might have obstructed a waterway or floodplain; and highway departments that designed highways, ramps, bridges, or support structures that affected waterways or watersheds.

The Army Corps of Engineers (ACOE) participates in one way or another in most major water projects in the United States. They design flood control projects, operate dams, supervise creek and streambed maintenance. Claims against the ACOE may be difficult, as the ACOE often is protected by immunity. Section 3 of the Flood Control Act of 1928 (33 U.S.C. § 702c) immunizes the U.S. and its agencies from liability for any damage resulting from river floodwaters or the operation of a flood control project. There is a limited waiver of immunity in the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) (Refer to the Katrina Opinion). The FTCA allows private parties to sue the U.S. in federal court for torts committed by persons acting on behalf of the government. It is limited because it does not allow claims for discretionary functions or other specified conduct.

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In the Katrina litigation, U.S. District Judge Stanwood Duval held that the ACOE was not immune from claims that it failed to properly maintain and operate a navigation channel (MRGO) that was not a flood control project. It was a cause of the failure of the levee. The [opinion](#) discusses federal immunity in detail, expert testimony, and many theories of flood liability. It is recommended reading for anyone involved in flood litigation.

Most states have statutes of repose that protect design professionals and contractors. Many states require that a plaintiff file a notice of claim as a prerequisite for filing a lawsuit. Some states have unique statutes of limitation and liability caps for claims against governmental entities. Many of these defenses are part of a state's sovereign immunity scheme. Sovereign immunity is typically codified in one or more statutes commonly known as Tort Claims Acts — for example, North Carolina's State Tort Claims Act (N.C.G.S 143-291). These acts must be considered when making

claims against governmental entities.

Flood claims present challenges but also opportunities. Following the steps above can help you minimize expense while maximizing recovery.

#### **Further Reading**

Stream gauges, rain gauges, flood maps, and a variety of other resources are available — and necessary — to understand floods and their causes. Much of this information is available online. There are numerous web sites that chronicle floods and their causes. You may want to check out these resources: the [Army Corps of Engineers](#), [FEMA](#), the [United States Geologic Survey](#), local water authorities, and even [You Tube](#). Additionally, the National Oceanic and Atmospheric Administration maintains two services: the [National Weather Service](#); and the National Environmental Satellite, Data, and Information Service (NESDIS); both have a wealth of weather-related information useful in evaluating flood related claims against either public or private entities. The NESDIS National Climatic Data Center is available [here](#).

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