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SUBROGATION AND RECOVERY WHITE PAPER

2011 FLOODS: EVALUATION OF SUBROGATION POTENTIAL DURING NATURAL DISASTERS

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In the spring of 2011, snowmelt from the previous winter's record snowfall combined with April's unusually heavy rainfall to create massive flooding along almost the entire length of the Mississippi River. The Army Corps of Engineers opened the Morganza Spillway for the first time in 37 years, deliberately flooding 4,600 square miles of rural Louisiana in order to avoid flooding in Baton Rouge and New Orleans. The Corps of Engineers also took the extraordinary step of using high explosives to blast a two-mile hole in the Bird's Point-New Madrid levee, displacing 200 residents and flooding 130,000 acres of farmland, in an effort to save Cairo, Ill. Floodwaters caused extensive damage in four other states, in addition to Louisiana and Illinois, estimated at more than $4 billion.

In August 2011, while the damages from the Mississippi flooding were still being repaired, Hurricane Irene began forming in the Atlantic Ocean. Gaining strength as it traveled up the eastern coast of the United States, it made landfall at Cape Lookout, N.C., followed by a second landfall at Little Egg Inlet, N.J., the first New Jersey hurricane landfall in more than 100 years. Downgraded to a tropical storm, it made a third landfall near Coney Island and caused considerable flooding in New York City. The storm then continued north, causing the worst flooding Vermont has seen in more than 100 years. The damage from Irene is still being tallied, but it caused at least 55 deaths and the property damage could exceed $10 billion. And the hurricane season does not end until Nov. 30.

Obviously, insured losses related to such natural catastrophes present significant obstacles to the subrogation professional. Those obstacles, however, are not insurmountable. Hurricane Katrina is a case in point. In *Katrina Canal Breaches Consolidated Litigation (Robinson)*, 577 F. Supp. 2d 802, 824 (E.D. La. 2008), the court ruled that the Army Corps of Engineers could be held liable for the negligent maintenance and operation of the Mississippi River-Gulf Outlet Channel to the extent that negligence contributed to the flooding in Greater New Orleans. Although that trial court decision is currently pending appeal for various issues, the lesson is clear: Natural disasters do not preclude subrogation. Given the recent flood events across much of the United States, now is a good time to review principles of subrogation analysis for flood claims.

ANALYZING SUBROGATION POTENTIAL IN FLOOD CLAIMS

Simply because a loss occurs in the context of a natural disaster does not mean it is an "act of God" in the legal sense such that it absolves all human actors of responsibility. Rather, it has long been recognized that an event is an act of God only if it is caused solely by nature, unmixed with any human negligence. *See The Majestic*, 166 U.S. 375, 386-87 (1897). If human negligence contributed to any degree, then a recovery might be possible. Although the devastating and widespread destruction caused by major flooding presents significant challenges and unique issues, the process by which flood-claim subrogation potential is analyzed is no different from the process for analyzing any other property loss. The first step is to determine the factual circumstances that caused the loss, using appropriate experts as necessary. This includes the identification of any potential subrogation targets that played a role in the loss. The next step is to analyze the available legal theories upon which a recovery may be based.

ANALYZING THE FACTUAL CIRCUMSTANCES OF A FLOOD LOSS

The first question to be answered is: Where did the water come from? Although the answer to this question may seem obvious (i.e., the water came from a stream that overflowed its banks), there are underlying complexities that must be considered. What caused the stream to overflow its banks? Was there sufficient rainfall in the area to account for the flooding, or were other factors at play? For example, has there been recent human activity upstream of the loss location that diverted additional water into the stream, causing it to overflow? Examples of such activity would include new construction of buildings or parking lots that created impermeable barriers to water. If not properly designed and constructed, such structures can alter natural drainage patterns, causing the discharge of large quantities of water in unexpected directions to the detriment of downstream property owners.

Downstream activity may likewise contribute to the flooding of a stream. Has a newly constructed bridge, culvert or similar structure restricted the flow of water through the stream, causing water to accumulate, back up and flood into the loss location? A downstream restriction may also be caused by simple neglect. A property owner

might allow a large quantity of trash to accumulate on his property, which then could wash into a stream or drainage ditch and block it. Other factors to consider include whether the flooding at the loss location was disproportionate either to the rainfall in the area or to what occurred at similarly situated properties nearby. For example, in the recent flooding in upstate New York, a creek overflowed its banks, causing substantial flooding. The seven-foot deep floodwaters, however, appeared disproportionate to the rainfall, and the 100,000 cubic feet per minute water flow found in the stream is what would be expected in a major river, not a creek. This is a situation that bears further investigation.

Sometimes, rather than coming from an obvious source such as a stream or drainage ditch, the water may percolate underneath or overtop a retaining wall or levee. It might also overflow from a retention pond or basin. In each case, this question must be asked: Was there simply too much rainfall that could not be reasonably foreseen, or did a human failure contribute to the incident? In order to answer this question, it will often be necessary to retain the services of a qualified hydrologist.

Hydrology is the engineering discipline that, among other things, studies the flow of water over and through the earth. The hydrologist can analyze how the rainfall in a given area affected the loss location. This analysis may require assessing the rainfall at locations remote from the loss location that are part of the same watershed. It also will include analyses of the topographical features in the watershed that channel water toward or away from the loss location, and the soil conditions that result in either water absorption or runoff. A proper analysis may require sophisticated, and costly, computer modeling.

A hydrologist can also help in determining, where some degree of flooding was unavoidable, whether human activity increased the flood levels, which determination could lead to a recovery. This is precisely what occurred in the Hurricane Katrina cases. The district court found that, although significant flooding came from other sources, it would not have exceeded the first floor of some of the homes involved but for the Army Corps of Engineers' negligent operation and maintenance of the Mississippi River-Gulf Outlet Channel. Thus, the court found the Corps of Engineers liable for property losses on the second floor of those homes. *See In re Katrina Canal Breaches Consolidated Litigation (Robinson)*, 647 F. Supp. 2d 644, 735 (E.D. La. 2009). The same principle holds true in less extreme circumstances. A 6-inch change in water level may mean the difference between a wet crawl space and hundreds of thousands of dollars in damages to the first floor of a home. The hydrologist can determine the extent of flooding that would have naturally occurred and the additional flooding caused by human activity.

Publicly available information sources can assist in determining whether the loss was the unavoidable result of extreme weather conditions or whether other factors might have come into play. For example, the National Weather Service (www.weather.gov) and the National Climatic Data Center (www.ncdc.noaa.gov) maintain large, publicly available data sets on current, recent and historical weather conditions. Hurricane-specific information can be obtained from the National Hurricane Center (www.nhc.noaa.gov). The U.S. Geological Survey Office of Surface Water (water.usgs.gov/osw) has data from a nationwide network of stream gauges. These resources are useful tools for conducting a preliminary screening to determine whether the loss was clearly unavoidable or whether incurring the expense of a hydrologist to investigate further would be prudent.

LEGAL ANALYSIS OF FLOOD SUBROGATION CLAIMS

Once human factors have been identified as having caused or contributed to the flood loss, the next step is to determine whether any viable legal theories will allow a recovery. The 2011 flood events were widespread, covering almost half of the United States. This paper does not attempt to address specific state law issues, which may or may not be relevant to a particular claim. Rather, it discusses general principles of law that should be considered in the analysis of flood claims. Specific jurisdictionally relevant research must be conducted to determine whether a particular principle applies to the specific loss under consideration.

Riparian rights. The common-law doctrine of riparian rights governs the relative rights and responsibilities of property owners sharing a common body of water or stream. All such property owners are entitled to the beneficial use of the water but may not exercise their rights to the detriment of their neighbors. For example, one user may not consume all the water, leaving nothing for his neighbors. Likewise, he may not divert the water from

its natural course so that it floods and damages a neighbor's property. One who alters the natural course of water may be held strictly liable for any resulting damages.

Negligence. A subrogation claim may also be pursued under a conventional tort theory. Under traditional negligence principles, one has a duty to act reasonably so as to avoid injuring other persons or property. A property owner might be held liable if it can be shown, for example, that he unreasonably allowed trash to accumulate on his property that then washed into and blocked a stream, causing the loss. Similarly, if he fails to keep clear a drainage ditch or culvert running through his property (even if he did not cause the obstruction), he might be held liable.

Nuisance. A nuisance is typically considered anything that interferes with another's quiet enjoyment of his property, such as noise, vibrations and noxious smells. Obviously, a condition that causes water to flow onto and damage or destroy an insured's property interferes with the quiet enjoyment of that property. Nuisances are typically continuing or repeated conditions. Therefore, it might be difficult to establish a nuisance claim based on a single instance of flooding. However, if there has been a history of even minor flooding, consider pursuing a nuisance theory.

Public entities. Public entities are responsible for building and maintaining a wide variety of improvements to real property that may significantly affect drainage patterns, such as roads, highways, bridges, sewers, storm water channels and drainage ditches. Obviously, these types of structures have the potential to play a significant role in any flood event. However, when contemplating a claim against a public entity, one must proceed carefully, as there are additional pitfalls beyond what may apply to a private actor.

The doctrine of sovereign immunity will typically preclude many claims against governmental entities. However, many jurisdictions have also passed tort claims acts that waive sovereign immunity for certain negligence claims. These tort claims acts often impose specific procedural requirements, different from or in addition to requirements for claims against private parties. For example, there may be a requirement that a claimant provide administrative notice or make an administrative claim before filing a lawsuit. This requirement is often viewed as a condition precedent to a lawsuit, and a failure to comply with it may absolutely bar a lawsuit.

Depending on the jurisdiction, there may be varying time requirements for providing notice. The notice may be required within 90 days, six months or a year of the loss, and the time requirement may vary depending on the level of government involved. For example, notice might be required within six months of a loss for a claim against a city, while the period might be one year for a claim against a county. A claimant might then be required to wait a certain period while the government entity has the opportunity to investigate and consider the claim. Again, this time period will vary depending on the jurisdiction and the level of government involved. This can be tricky because statutes of limitation may well continue to run during the notice period. If one waits too long to provide the required notice, the statute of limitations might well lapse during the consideration period, during which the claimant is barred from filing suit. The government entity may also enjoy the benefit of a different, and shorter, statute of limitations.

Even after compliance with all procedural requirements, further pitfalls await. Although tort claims acts typically waive sovereign immunity for broad categories of claims that would be considered common-law negligence claims, there will likely be exceptions for "discretionary functions." Discretionary functions are typically described as activities involving the exercise of policy formulation or decision-making by government officials, as opposed to "ministerial actions," which merely require the execution of policies and decisions. Thus, although a particular subrogation claim may initially appear to fall within the waiver of sovereign immunity described in a tort claims act, the claim might still be barred if the alleged negligent act is considered a discretionary function. For example, a contemplated claim against a county government for negligently designing a drainage system may well be barred by the discretionary-function exception if the design was decided upon by a government official after considering alternative designs or based upon budget or land-use considerations or other factors. However, it might not be barred if the designer simply failed to follow established policies and standards in designing the system.

Even after successfully navigating the procedural requirements and avoiding the discretionary-function defense, a potential claim may still be barred by the "public duty doctrine." Under that doctrine, governmental entities owe a duty to the public at large in the exercise of their responsibilities but owe no duty to any particular individual.

Thus, the public duty doctrine undercuts an essential element of a negligence claim: the existence of a duty owed by the defendant to the plaintiff.

There are various exceptions to the public duty doctrine, the specifics of which will vary among jurisdictions. For example, the public duty doctrine may not apply if the governmental entity is exercising a proprietary function (e.g., running a public golf course) as opposed to exercising a governmental function (e.g., running a police or fire department). The public duty doctrine might not apply if the governmental entity entered into a "special relationship" with the plaintiff (e.g., if it provided specific assurances on which the plaintiff relied). As this section makes clear, the subrogation professional contemplating a claim against a governmental entity must be extremely wary and is highly advised to seek advice from qualified counsel before proceeding.

CASE EXAMPLE

The insured's home flooded during extremely heavy rains, resulting in extensive damage to real and personal property. Although the rains were extremely heavy, they did not cause similar flooding to nearby properties—only the insured's home flooded. This circumstance raised sufficient questions to warrant further investigation by a qualified hydrologist.

The hydrologist found that the flood emanated from the drainage system of a nearby municipal golf course. The drainage system was designed with 24-inch headwall openings. One of the headwall openings had been restricted by the installation of a 12-inch orifice plate. This plate restricted the flow of water through the headwall, leading to an accumulation of debris behind the headwall that further restricted water flow. The combined effects of the orifice plate and the debris restricted the flow of water to the point that it could not follow its natural drainage path. Instead, it overflowed into an alternate drainage path in the direction of the insured's home.

Cozen O'Connor is currently pursuing a claim against the municipal government for the improper maintenance of the drainage system. The case addresses many of the issues discussed, including sovereign immunity, the discretionary-function exception to the state's waiver of sovereign immunity and the public duty doctrine.

CONCLUSION

Flood claims, like all other natural disaster-related claims, present unique challenges and significant obstacles to a subrogation recovery. However, a thorough factual investigation and legal analysis may well reveal a diamond in the rough. Do not simply "write off" subrogation potential for flood claims because they superficially appear related to a natural disaster. Cozen O'Connor is currently pursuing numerous subrogation investigations related to the spring Mississippi River floods, including more than $100 million in claims for casino floods in Mississippi, Missouri and Iowa, as well as other losses. Cozen O'Connor is also actively investigating subrogation potential in several Hurricane Irene-related floods in Pennsylvania and New York amounting to more than $4 million. We are ready to assist you with your flood claim as well.