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## **SUBROGATION WHITE PAPER**

*2010 Tennessee Floods:  
Subrogation Challenges and Opportunities*

*Prepared by*

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## INTRODUCTION

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Over the weekend of May 1st and 2nd, 2010, torrential rains inundated western and central Tennessee, shattering all previous rainfall records and creating extensive flooding in Nashville and surrounding areas. The National Weather Service reported a new two-day rainfall record of 13.57 inches, which more than doubled the previous record of 6.68 inches set in 1979 by Hurricane Frederic. Similarly, records were set for every rainfall category kept by the National Weather Service, including 6-hour, 12-hour, 24-hour, and calendar day; establishing May 2010 as the wettest May on record and eclipsing in only two days the previous May 1983 record of 11.04 inches.

As would be expected, these rainfalls resulted in a record crest of the Cumberland River at 51.86 feet, almost 12 feet over its flood stage of 40 feet and the highest since 1937. Water poured over the banks of the river and flooded the heart of historic downtown Nashville, including the Grand Ole Opry House country music landmark, and surrounding areas. A large swath of western and central Tennessee, from Memphis to Nashville, was affected. As of May 8, 2010, the Tennessee Emergency Management Agency reported 22 confirmed storm related fatalities, with 30 counties operating under Major Disaster Declarations and 1,400 National Guard soldiers mobilized to support rescue and relief operations. Initial estimates of damage to private residential, commercial and industrial property amounted to \$1.5 billion. This estimate excluded the cost of repairing government owned buildings, roadways, and bridges, and was expected to rise.

This major disaster, which some reports indicate was a 500 year flood event, will undoubtedly present significant challenges to the subrogation professional. The challenge, beyond handling the sheer volume of claims, will be determining if the claims present viable subrogation opportunities. This paper is presented to assist insurers in the identification and resolution of these issues.

## SUBROGATION POTENTIAL

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Contrary to conventional wisdom, a natural disaster is not necessarily an “Act of God” that precludes subrogation. Natural disasters present unique challenges, but with proper investigation and analysis, viable recovery opportunities can be identified. This paper will review the factual and legal issues to be considered that will facilitate the identification of subrogation opportunities.

### FACTORS TO CONSIDER

The subrogation potential of a flood loss is determined by the relative water rights and responsibilities of the landowners surrounding the loss location, often referred to as “riparian rights.” Over one hundred years ago, in *Cox v. Howell*, 65 S.W. 868, 869 (Tenn. 1901), the Tennessee supreme court held that “The relative right of upper and lower proprietors is that the upper has no right to divert or unreasonably retard the natural flow [of water] to the lower, and the lower has no right to turn it back upon the upper, to their injury.” In other words, a property owner may be held liable for altering the natural drainage of surface water if such alteration causes harm to a neighbor. See *Talley v. Baker*, 1926 WL 2057 (Tenn. Ct. App. May 22, 1926). In order to determine whether there has been any such interference that might potentially give rise to a subrogation claim, the following factual circumstances should be considered:

1. What is the topography surrounding the loss location?
2. Has there been any development surrounding the loss location that has altered the natural flow of water onto or off the loss location? For example, has there been paving or construction of buildings, which tend to increase and concentrate runoff? Has there been any downstream construction that impedes the ability of the loss location to shed water?
3. Are there any other factors that might have played a role in altering the preexisting flow of water? For example, has a neighboring property owner failed to properly maintain drainage channels by allowing trash or debris to accumulate and block drainage, or by failing to clear an overgrowth of vegetation? Or has land recently been cleared of vegetation, resulting in an accumulation of silt that affected the loss?

An initial review of these factors should allow the subrogation professional to quickly rule out those losses, probably a great majority, having no potential for subrogation. For example, if the loss location is in a flood plain and all of the factors identified above can be ruled out, then subrogation potential is nil. If, however, one or more of these factors is suspected to have played a role in the flooding, further analysis will likely be required by a qualified hydrologist, probably working in conjunction with a surveyor. The hydrologist will precisely identify the drainage basin affecting the loss location and confirm how such factors as topographic features, vegetation, soil absorption, and man made structures or alterations contributed to the flooding. Such an analysis will likely be time intensive and expensive, so it is crucial to keep in mind cost/benefit considerations when undertaking such an investigation. Assuming the hydrological evaluation confirms human factors contributed to the flooding, there are several legal theories that may be asserted to pursue a recovery, including strict liability, negligence, and nuisance. Special considerations may apply to claims against public entities. All of these factors will be discussed below.

### STRICT LIABILITY, NEGLIGENCE, NUISANCE

In *Tennessee Elec. Power Co. v. Robinson*, 1928 WL 2125, at \*2 (Tenn. Ct. App. July 13, 1928), the Tennessee court of appeals held that “The elementary law of waters is not in dispute—that one who interferes with the natural current of a stream is responsible absolutely, and without any question of negligence, for damages thereby caused to one who is entitled to have the water flowing in its natural state.” This is a strict liability standard that would not require proof of negligence on the part of the defendant—only proof that the defendant’s actions altered the natural flow of water to plaintiff’s detriment. This strict liability principal was recently affirmed in *Manis v. Gibson*, No. E2005-00007-COA-R3-CV, 2006 WL 521466, at \*7 (Tenn. Ct. App. Mar. 3, 2006), in which the court held that “A landowner who builds a structure across a natural drain-way is charged with the continuing duty to provide for the natural drainage of surface water through that obstruction. . . . Any breach of these duties imposes absolute liability upon the breaching landowner. “

A few cases seem to suggest that a plaintiff, in addition to showing an alteration of natural water flow by the defendant, must also show negligence. *See, e.g., Russell v. Howard*, No. M2005-02956-COA-R3-CV, 2007 WL 432987, (Tenn. Ct. App. Feb. 8, 2007); *Rucker v. Metropolitan Government of Nashville and Davidson County*, No. 89-165-II, 1990 WL 182275 (Tenn. Ct. App. Nov. 28, 1990); *De Kalb County v. Tenn. Elec. Power Co.*, 67 S.W.2d 555 (Tenn. Ct. App. 1934). These cases, however, seem to be the exception and are far from clear cut. Even if a showing of negligence is required, this is an issue that a competent hydrologist should be able to address easily by pointing out what the defendant reasonably should have done to prevent the loss, such as installation of a culvert or retaining wall.

A nuisance is “anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable.” *Morris v. City of Memphis*, No. 02A01-9403-CV-00041, 1995 WL 72539, at \*4 (Tenn. Ct. App. Feb. 22, 1995). Tennessee courts have ruled that “a wrongful interference with the natural drainage of surface water causing injury to an adjoining landowner constitutes an actionable nuisance.” *Butts v. City of South Fulton*, 565 S.W.2d 879, 881 (Tenn. Ct. App. 1977). Therefore, assuming human factors have been established to be at least a contributing cause to a flood loss, a nuisance claim should also be asserted.

### CLAIMS AGAINST PUBLIC ENTITIES

If a local public entity is implicated in a flood loss, it may be sued under the Governmental Tort Liability Act (“GTLA”), Tennessee Code § 29-20-101. Under § 29-20-204 of the GTLA:

Immunity from suit of a governmental entity is removed for any injury caused by the dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement owned and controlled by such governmental entity.

It is a requirement under this provision that the local public entity have actual or constructive notice of the hazardous condition. *Id.* Such notice must be both alleged and proved by the claimant. *Carpenter v. City of Oakridge*, 1987 WL 25139 (Tenn. Ct. App. Dec. 2, 1987). However, the GTLA waives immunity only for local public entities, not the State of Tennessee itself. *Doyle v. Frost*, 49 S.W.3d 853 (Tenn. 2001). In addition, damages under the GTLA are limited. The current cap for property damage claims is \$100,000 or the applicable limits of insurance obtained by the government entity, whichever is greater. Tenn. Code §§ 29-20-311, -403. Any lawsuit must be

commenced within twelve months after the cause of action arises. Tenn. Code § 29-20-305. Pursuant to Tenn. Code § 28-1-116, statutes of limitation and repose may be tolled during disasters. However, it is not clear that such extensions would be applicable to GTLA claims. See *Farmer v. Tenn. Dept. of Safety*, 228 S.W.3d 96 (Tenn. Ct. App. 2007). This is a complex area of law, and any procedural mistakes will likely be fatal to a claim. See *id.* at 101 (holding claims must be brought in “strict compliance” with GTLA). Thus, it is recommended that an attorney be involved early in the process if a potential GTLA claim is identified.

If a public authority is involved in the loss, the incident may also constitute a “taking” under the Tennessee constitution. *Barron v. City of Memphis*, 80 S.W. 832 (Tenn. 1904) (holding that city’s installation of pier that diverted water and eroded plaintiff’s land was unconstitutional taking without compensation). Such a taking would authorize an “inverse condemnation” claim for recovery of the damages incurred. *Hollers v. Campbell County*, 241 S.W.2d 523 (Tenn. 1951). Thus, a “taking” theory should be considered if a public entity is identified as a possible culprit in the loss. A taking theory may be valid against the State of Tennessee, even though a GTLA claim is not. See *Burchfield v. State*, 774 S.W.2d 178 (Tenn. Ct. App. 1988). Pursuant to Tennessee Code § 29-16-124, an action must be filed within twelve months under this theory, as well. See also *Jones v. Hamilton County*, 405 S.W.2d 775 (Tenn. Ct. App. 1966).

Cozen O’Connor’s experience has shown that local government entities often have responsibility for a vast array of civil infrastructure projects, such as airports, roadways, bridges, sewage and water systems, and other public structures that tend to alter natural drainage patterns. Further, a local public authority may have an independent responsibility for maintaining roadways, culverts, channels, etc., which may have impacted a loss.

In evaluating a potential claim, one should keep in mind that a public entity may be responsible even if it was not the direct cause of an incident, if its negligence caused additional damage. For example, the failure to properly maintain city-owned culverts or storm water channels, while not the direct cause of flooding in a given area, may have increased the damages sustained by a particular insured at a particular location. In such a case, the city might be liable under general negligence principles for increased damages, and a claim could be brought under Tennessee’s Governmental Tort Liability Act. This principle is also applicable to private tortfeasors.

## PUBLICLY AVAILABLE INFORMATION

Fortunately, there is a wealth of publicly available information that may assist in evaluating a potential claim against both public or private entities without the necessity of filing a lawsuit and issuing subpoenas. First, with respect to public entities, Tennessee’s Open Records Act, which mandates “the fullest possible public access to public records,” can be an important resource in obtaining information regarding any public infrastructure project, building, or service. Tenn. Code § 10-7-505(d). Documents concerning virtually any activity involving the expenditure of public funds, such as stream or culvert maintenance, are subject to disclosure under this act. The reach of the Tennessee Open Records Act extends even to private companies working under contract to a public authority if their work is “the functional equivalent” of a government service. *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.2d 67, 78-79 (Tenn. 2002).

The National Oceanic and Atmospheric Administration maintains two services, the National Weather Service and the National Environmental Satellite, Data, and Information Service (NESDIS) with a wealth of weather-related information useful in evaluating flood related claims against either public or private entities. The National Weather Service data is available at [www.weather.gov](http://www.weather.gov), and the NESDIS’s National Climatic Data Center is available at [www.ncdc.noaa.gov](http://www.ncdc.noaa.gov). The United States Geological Survey (USGS) maintains an Office of Surface Water that reports and analyzes data from a nationwide network of stream gauges. This data is available at [water.usgs.gov](http://water.usgs.gov). The Federal Emergency Management Agency publishes reports after every major disaster that are available on its website, [www.fema.gov](http://www.fema.gov).

## POTENTIAL OBSTACLES

Tennessee’s statute of limitation for property damage claims is three years. Tenn. Code § 28-3-105. However, the statute of repose for claims based upon improvements to real property is only four years, and begins to accrue upon substantial completion of the improvement. Tenn. Code § 28-3-202. Because the full impact of improvements on drainage patterns may not be known until after a severe rainfall, which may not occur until years

after the project is completed, it is imperative to address this issue promptly by determining as soon as possible when the suspect improvement was completed. It would obviously not be a productive use of resources to commission a time consuming and expensive hydrological study only to later learn that the statute of repose had already expired before the loss occurred. There is one favorable exception to the statute of repose: it does not apply to “any person in actual possession or the control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.” Tenn. Code § 28-3-205(a). Thus, although the design and construction professionals who were actually responsible for a flooding incident might not be responsible after four years, a successful recovery could still be achieved against the property owner.

Regardless of the merits, one can expect a defendant to raise the “Act of God” defense to any subrogation claim brought in the context of a major flood. While there is little dispute that the Tennessee flood might be considered an Act of God in the colloquial sense, if any man made factor discussed above contributed to a particular loss, then “Act of God” is not available as a legal defense to an otherwise viable subrogation claim. Under Tennessee law, as in most jurisdictions:

Any misadventure or casualty is said to be caused by the “Act of God” when it happens by the direct, immediate, and *exclusive* operation of the forces of nature, uncontrolled or *uninfluenced* by the power of man and without human intervention.

*Butts v. City of South Fulton*, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977) (emphasis added). Thus, in order to successfully assert an “Act of God” defense, a potential subrogation defendant must show that the flood, and the flood alone, was the exclusive cause of the damages at issue, without the influence of any act or omission of the defendant. If the defendant contributed in any respect to the flooding of a particular location, then this defense is unavailable and there is a potential for subrogation.

## CONCLUSION

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A major disaster such as the Tennessee flood of 2010 presents major challenges to insurance professionals with respect to subrogation issues. The attorneys of Cozen O’Connor are available to advise and assist insurers regarding potential subrogation opportunities arising from this disaster.

For additional information, please contact the following:

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