I. INTRODUCTION

On Monday August 29, 2005 Mother Nature showed her awesome power as Hurricane Katrina slammed into the Gulf Coast, wreaking havoc and devastation from New Orleans to Mobile, Alabama and extending hundreds of miles inland to Meridian, Mississippi. Mother Nature was not done and on September 24th she unleashed Hurricane Rita, which hammered the Gulf Coast along the Texas and Louisiana border causing extensive damage as far north as Jasper and Pineland, Texas. In addition to the flooding caused by these two storms, countless homes and commercial structures were damaged or destroyed by high winds.

Now that the investigation and adjustment of claims is under way, it is time to focus on where subrogation may be viable.

As a follow up to our September 20, 2005 Alert: Tempering the Storm - Subrogation in the Wake of Hurricane Katrina, we now provide additional information to assist you and your catastrophe-loss adjusters on the ground in making preliminary determinations as to which claims might be viable from a subrogation perspective, and which claims will likely be barred by the Act of God or other defenses. This Alert is not intended to discourage you and your adjusters from calling Cozen O’Connor to ask questions and report losses, but rather is offered to help you handle claims efficiently and effectively and to advise you as to what information will be needed to conduct a thorough subrogation analysis.
II. AREAS SUSTAINING WINDS ABOVE BUILDING CODES

Pictured are two wind-swath maps showing the areas where the wind speeds exceeded nationally recognized building codes and where one would not reasonably expect structures, roof systems and/or building materials to withstand the hurricane-force winds experienced. The maps show the highest, or fastest speed of the wind and also the highest speed for a 3-second gust. The wind speed data is plotted in conjunction with the
American Society of Civil Engineers building codes to create the areas in which it is reasonable to anticipate that no subrogation claims will be viable from either a legal or practical standpoint. Please note that these maps do not show tornados or other conditions that often occur on a hurricane’s periphery. Thus, additional climatological research and expert analysis should be conducted on any claim in which subrogation is considered a possibility - especially in cities just outside of the wind swaths, such as, Beaumont, Texas and Lake Charles and New Orleans, Louisiana.

III. OVERVIEW OF SUBROGATION ANALYSIS

In evaluating losses occurring during a natural catastrophe, the focus of subrogation analysis will not rest solely on the naturally occurring event itself - or “The Act of God” - but on the third parties who may have contributed to or exacerbated the ultimate damages. For the losses occurring in the most severely devastated areas, New Orleans and along the Texas, Louisiana and Mississippi coastlines, pursuing a subrogation claim will be extremely difficult. Even where winds dropped below building code requirements, target defendants will argue that, regardless of their alleged negligent acts or omissions and failure to comply with code, the power and devastating force of Katrina and Rita would have caused the same damage anyway. In addition, it is our experience that jurors, who will have also experienced the devastation of Katrina and Rita, will be very skeptical of any claims asserting someone’s negligence, rather than the sheer force of the storm, caused the damage.

Thus, the claims most likely to have subrogation potential will lie in the peripheral areas outside of the wind swaths - in other words, where the winds were below hurricane or tornado strength, and well below standard building codes. It will be easier to prove that the builder or contractor’s failure to comply with local building codes caused the damage, and the fact that high winds also caused damage will not serve as an automatic defense. Given the limited resources available and the exigencies of adjusting losses, as well as the obvious public pressure that will exist to promptly resolve first-party claims, we recommend that the focus of subrogation be on the areas outside of the wind swaths.

We fully anticipate that there will be numerous claims involving damage to buildings in areas well removed from the eye of the storms. You will encounter a significant number of roof collapses due to heavy rains, roof blow-offs, and other structural damage. In some of these areas, the winds may have been less than the maximum design tolerances for the roof and/or building. A concurrent cause of these losses may involve improper design, construction or maintenance of the particular building. The key legal issues involved in these losses will be the impact of statutes of repose, statutes of limitation and contractual waivers that insulate and shield architects, engineers and contractors with regard to losses occurring years after construction.
These must be ascertained quickly so as to not waive any claim or to avoid incurring significant expenses on claims that will be legally or contractually barred.

The front-line adjuster is in the best position to gather important, if not crucial, information needed to conduct a thorough and effective evaluation of subrogation potential. Obtaining this information will assist in quickly assessing if there are waivers of subrogation or other limitations of liability that can impact the claim. In addition, this information will assist in deciding if further expert investigation is necessary.

Some key questions to ask while adjusting the loss are:

**Information particular to your loss/building:**

- Is the loss site within or immediately adjacent to areas where the wind speeds exceeded building code requirements? [see wind swath maps above]
- What were the wind speeds in the immediate area?
- What wind speeds are referenced in the local building codes when the building was built or roof installed?
- What wind speed was the building/roof rated to withstand per the building specifications?
- When was the building built, or the roof last installed/replaced/repairs?
- Have there been any significant upgrades, modifications, or repairs to the building or roof, and if so, when?
- Did other buildings in the immediate area suffer similar damages or remain unscathed?
- Has an expert/engineer already examined the loss?
- Is there enough of the building or roof remaining in order for an expert to examine and reach a conclusion as to the cause or contributing factors of the loss?
- Are you willing to incur the costs of having an expert examine the building to reach a conclusion to determine if the building or roof failed to meet codes, specifications and reasonable expectations in light of the wind speeds experienced?
- Can the building be kept in its “as is” condition until the appropriate engineers and third parties have an opportunity to inspect it?
- Were the damages caused solely by wind or was water damage a contributing factor to the damages claimed? (if flooding was also involved in the loss - as opposed to rain entering through a roof penetration or failure - you might have a problem delineating...
your damage claim into recoverable/unrecoverable damages).

- When was the building substantially completed?
- When were the construction contracts signed?
- Were there any prior problems related to the original construction, repair or maintenance of the building or roof?

We have learned that the best time to obtain the information needed to analyze a loss for subrogation potential is during the initial adjustment of the claim. Too often the adjuster, under the intense pressure to complete claims, will leave the loss site without gathering or even requesting pertinent evidence and documentation. Subsequently, that evidence or documentation is discarded, lost or destroyed - leaving the subrogation specialist without the means to complete a proper analysis. Thus, we recommend that the adjuster request and gather the following items during the initial site visit:

**Key evidence and documentation to obtain:**

- Construction contracts, plans, permits and specifications;
- Warranties;
- Lease agreements;
- Instruction manuals;
- Key physical evidence;
- Building official’s files;
- Maintenance records (will indicate if any prior problems)
- Thoroughly photo-document/record the scene;
- Aerial photos to compare damage to surrounding buildings/property;
- Photos of the building /roof pre loss;
- For commercial losses, a copy of the policy of insurance.

After obtaining the information listed above, and the decision is reached that incurring the expense of an expert is warranted, you will need to determine what type of expert is required. The following is a list of types of experts and engineers to consider and some general questions you might expect that they will ultimately be able to answer:
Potential Experts if subrogation potential looks possible:

- Civil/Structural Engineer;
- Metallurgist (tensile strength of steel, brackets, bolts, joists);
- Materials Engineer (tensile strength of concrete or other building materials);
- Meteorologist;
- Mechanical Engineer;
- Hydrologist;
- Weatherproofing Expert;
- Construction Expert;
- Roofing Expert;
- Architects and/or Construction Expert.

Specific building code considerations and conditions of the building immediately prior to the loss:

- What were the specific load specifications for the part of the building that failed?
- Was the roofing membrane properly adhered or fastened?
- Did the roof have the proper clips/brackets for the roofing material used?
- Were the trusses, brackets, joists, and supports properly spaced?
- Was there proper number of trusses, brackets, joists and supports?
- Were the trusses, brackets, joists and supports properly sized?
- Were connections, joints, or welds properly done?
- What were the condition(s) of storm drains, culverts, downspouts, scuppers or gutters?

IV. COZEN O’CONNOR SUBROGATION TASK FORCE FOR HURRICANE LOSSES

Cozen O'Connor has a number of attorneys with extensive experience in evaluating and handling hurricane and catastrophe losses. For additional information and/or assignments, please contact any of the following attorneys:
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VI. CONCLUSION

Although the extent of the damage is not yet fully known, subrogation analysis will be considered in the very beginning of the adjustment process. Subrogation will be limited, but armed with the right questions to ask and knowing where to look and what information to collect or preserve, carriers may be able to recover a portion of the money paid resulting during this record breaking hurricane season.

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ENDNOTES

1. If these two devastating storms were not enough, Hurricane Wilma hit the southern part of Florida on October 23rd. The same legal issues and questions arising out of Katrina and Rita have been previously addressed for Florida. Please refer to our 2004 subro alerts and papers entitled: Hurricane Frances - A Subrogation Guideline; Hurricanes Charley & Frances - Overview of Code Requirements and Engineering Considerations for Subrogation Opportunities; and Hurricane Charley - A Preliminary Factual and Legal Analysis of the Subrogation Issues.

2. The ASCE standards may not be identical to the actual building codes and ordinances adopted in specific locations, but the ASCE codes are standard across the country. If the local codes and ordinances are different, they are generally less stringent than the ASCE codes.
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