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TEMPERING THE STORM:
SUBROGATION IN THE WAKE OF HURRICANE KATRINA

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I. INTRODUCTION

On Monday August 29, 2005 Mother Nature showed her raw power as Katrina - a category 4 hurricane - slammed into the gulf coast reeking havoc and devastation all the way from New Orleans to Biloxi, Mississippi to Mobile, Alabama and extending hundreds of miles inland. Tragically, the hurricane was the least of New Orleans’ concern as the levee system failed and 80% of the city was flooded - leaving hundreds of thousands of her citizens destitute and homeless and leaving a toxic cesspool with which to contend.

Unlike previous storms, the damage to New Orleans was greatly exacerbated by the inadequate and dilapidated levee system, which allowed unprecedented flooding and caused delays in emergency response. It will be months before the extent of the damage can be fully assessed. Following Hurricanes Andrew, Ivan, Frances and Charley, Katrina has the potential to become the insurance industry’s most costly natural catastrophe to date - indeed, one expert projected the cost to rebuild the gulf coast will exceed the cost to rebuild 14 countries after WWII under the Marshall Plan.

Although the insurance industry will absorb a significant portion of the costs needed to clean, restore and literally rebuild the gulf coast region, millions of dollars can be saved or recaptured through proper coverage analysis and, ultimately, by virtue of thorough investigation of subrogation opportunities.
This paper serves as an initial analysis of the factual and legal issues affecting your subrogation opportunities with emphasis on Federal, Louisiana, Mississippi and Alabama law. This paper does not address coverage issues and cannot possibly cover all issues relating to subrogation arising from catastrophic losses. We have issued previously four separate subrogation white papers discussing pursuit of subrogation for hurricane losses. Cozen O’Connor has extensive experience in handling catastrophic claims, and stands ready to assist you in addressing all possible issues that will be faced in handling first-party claims and analyzing subrogation potential in the aftermath of Katrina.

II. OVERVIEW OF SUBROGATION ANALYSIS

In any natural catastrophe, the focus of subrogation analysis is not on the naturally occurring event - 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 Mississippi coastline, subrogation will be extremely difficult. Target defendants will argue that regardless of their acts or omissions the power and devastation of Katrina could not have been avoided or curtailed. Further, federal and state authorities will assert governmental immunity or other legal restrictions on liability. Finally, causation/act of God issues will create huge obstacles.

Most subrogation possibilities will lie in the peripheral areas where the winds were below hurricane or tornado strength and measures could have been taken to protect property. 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 a county by county basis. Specifically, we believe there may be subrogation opportunities in those counties of Louisiana, Mississippi and Alabama that were not subject to storm surge, and did not experience sustained winds in excess of 100 m.p.h. In these areas, conditions may not have exceeded what was “expected” from the point of view of building professionals and other persons responsible for safeguarding property. Arguably, losses occurring in these counties were not caused by “the Hurricane of the Century,” but rather were foreseeable and caused by other contributing causes - such as in the following short list of claim scenarios of which to pay particular attention:

1. Construction Defect Claims

We fully anticipate that there will be many building collapses and damaged buildings in areas well removed from the eye of the storm. 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 max-
imum design tolerances for the roof and/or building. A concurrent cause of these losses may have been improper design, construction or maintenance of the particular building. The key legal issue involved in these losses will entail statutes of repose, statutes of limitations and contractual waivers that insulate and shield architects, engineers and contractors with regard to losses occurring years after construction.

Some key questions to ask while adjusting the loss are:

- What were the wind speeds in the immediate area?
- What was the building/roof rated to withstand per the building specifications?
- What were the local code requirements when the building was built?
- When was the building built?
- Have there been any significant upgrades, modifications, or repairs, and if so, when?
- Did other buildings in the immediate area suffer similar damages or remain unscathed?

Potential Experts if subrogation potential looks possible:

- Structural/Civil engineer;
- Metallurgist (tensile strength of steel, brackets, bolts, joists);
- Materials engineer (tensile strength of concrete or other building materials);
- Meteorologist;
- Mechanical Engineer; or
- Design/Construction Engineer.

Key Items to obtain:

- Construction contracts, plans and specifications;
- Warranties;
- Lease agreements;
- Instruction manuals;
- Key physical evidence; and
- Building official’s files.
2. **Maritime Cargo Claims**

We anticipate that there will be substantial losses sustained to cargo being transported in ships and barges along the Mississippi River or left unprotected on the docks. Many of these losses may have been preventable by the carriers or stevedores. Moreover, there may be circumstances under which you may insure a loss to the shipper or consignee, but the actual risk of loss was on the carrier. In some circumstances, the carrier may have the burden of proof to demonstrate the prevention of the loss was beyond its control.

3. **Security Companies**

You likely will encounter losses to property protected by a security company or some other entity such as a building management company. These parties owe a duty to protect the monitored property, which they may not have fulfilled. They had a duty to foresee the storm and to have undertaken reasonable efforts to protect the property. Unfortunately, civil disobedience may also come into play - which, however, may not be a covered loss.

4. **Bailment Claims**

There will certainly be many claims involving damage to bailed property that was in the care, custody and control of a third party. Under typical bailment law, these parties had a duty to reasonably safeguard property despite the storm. The occurrence of the storm may not relieve the bailee of the goods from establishing that he was free of negligence with regard to taking all appropriate action to prevent damage to the goods.

5. **Post Loss-Related Electrical Issues**

It will be difficult to proceed against municipal and private electrical utilities for power outages and other unusual electrical losses given the magnitude of this storm. Still, we anticipate that during efforts to restore power, many losses may occur from improper, rushed or shoddy work by utilities or contractors hired to perform the work. It is not at all unforeseeable that there will be fires due to unusual electrical supply issues in the wake of the clean-up of this storm. These losses, as well, must be closely examined in order to preserve subrogation opportunities.

6. **Claims against Adjoining Landowners for Debris Damage**

A common subject of legal problems for disaster victims involves rights and responsibilities relating to fall-
en trees and other storm debris. In most jurisdictions, a property owner owes a duty of care to maintain man-made structures, cultivated trees and other pieces of human-cultivated landscaping and naturally occurring objects that he/she knows are in an unreasonably dangerous condition. The scope of the duty of care generally extends to lawful visitors, drivers on neighboring public roads and adjoining property owners, so long as the landowner had actual or constructive knowledge of the dangerous condition. The property owner is required to take reasonable precautions against damage to neighboring property caused by a storm or other natural disaster. The extent of precautions necessary depends upon the likelihood and probable severity of the disaster and the efficacy and cost of precautions. Assuming that the property owner has been negligent in some manner, the property owner may escape liability if the damage would have occurred even in the absence of the property owner’s negligence. If, however, the property owner’s negligence concurred in causing the disaster, then the property owner can be held liable. If the disaster is so unexpected as to be deemed unforeseeable, then the disaster is a superseding cause, relieving the property owner of liability.

7. **Claims against FEMA and The Army Corps of Engineers**

Statutory immunities are discussed below. There is likely to be complete immunity for pre-loss design, construction and maintenance activities. However, the federal government enjoys only limited immunity with regard to its disaster relief functions. It is immune only with regard to discretionary functions implicating economic, social or policy issues. In other words, where the exercise of judgment is involved, the United States generally cannot be sued. If, however, the United States actively causes a loss or exacerbates existing losses it may be held liable. We anticipate that such losses may occur in the wake of this hurricane.

**III. BARS TO SUBROGATION**

Every disaster will involve some aspect of governmental activity. Disasters affect public roadways, sewage systems, storm drains, power lines, firefighting activities and other governmental property or functions. Each state has peculiar rules on whether and to what extent a governmental entity may be held liable in tort for such damages. Below is a brief list of the legal obstacles of pursuing a subrogation claim:

1. **The Flood Control Act**

Liability of the federal government for inadequate or improperly maintained levees or other waterworks is dependent upon the Flood Control Act of 1928, 33 U.S.C. § 702(c), which provides that “no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.” The United States Supreme Court in 2001 interpreted the Flood Control Act as providing a broad
grant of immunity regarding any damages caused by flood waters from flood control projects. *Central Green Co. v. United States*, 531 U.S. 425 (2000). The Court recognized that the Act encompassed “all waters contained in or carried through a federal flood control project, for purposes of or related to flood control as well as waters that such projects cannot control.” *Central Green Co.*, 531 U.S. at 430.

2. **The Disaster Relief Act**

The federal government, FEMA, and the Army Corps of Engineers also have broad-based immunity with regard to clean-up operations. In that regard, the Disaster Relief Act of 1974, also known as the Stafford Act, immunizes the Federal Government from liability arising out of its performance of a “discretionary function.”

3. **State and Municipal Immunity**

   a) **Louisiana**

   Louisiana’s constitution waives sovereign immunity. LA. CONST. art. 12. Certain statutory provisions have carved out exceptions to the blanket waiver of sovereign immunity contained in article 12, and sovereign immunity is the only exculpatory principle that will relieve a public body or municipality of the obligation to compensate those whose property they have damaged in carrying on public works. *E.g.*, *Lombard v. Sewerage & Water Bd. of New Orleans*, 284 So. 2d 905 (La. 1973).

   One exception to the waiver of sovereign immunity is LA. REV. STAT. ANN. § 9:2800, which provides immunity for governmental entities for damages flowing from buildings or objects that are in their custody or control, but only under the following circumstances: (1) other structures are placed upon state property by someone other than the state; (2) the state does not have constructive or actual notice of the particular defect that caused the damage prior to the occurrence; and (3) a public entity takes steps to examine or inspect a public site or area in response to complaints, and takes steps to alert the public to a defective condition, though it does not have custody or control over the site.

   Another statutory exception to the waiver of sovereign immunity is LA. REV. STAT. ANN. § 9:2798, which makes public agents and entities immune from suit for causes of action arising from discretionary acts when such acts are within the course and scope of the agent or entity’s lawful duties. “Discretionary” or “policy-making” acts are shielded from liability while so-called “operational” or “ministerial” acts are not shielded. “Policymaking” means the planning of a course of action in furtherance of the social or political well-being of the state. *Gregor v. Argenot Great Cent. Ins. Co.*, 851 So. 2d 959 (La. 2003).
For instance, in *Hontex Enterprises, Inc. v. City of Westwego*, 833 So. 2d 1234 (La. App. 5 Cir. 2003), a state of emergency had been declared in the parish due to the impending arrival of Tropical Storm Frances. A faulty pump near the plaintiff’s seafood plant was leaking water from the Bayou onto an adjacent landowner’s property, and the city decided to take remedial action to build a ring levee around the pump, which, in turn, caused the plant to flood. The Court of Appeals held that the city had discretionary immunity for acts taken to prepare for an emergency.

**b) Mississippi**

The Mississippi Tort Claims Act (MTCA) waives sovereign immunity for the state and its political subdivisions. MISS. CODE ANN. § 11-46-7. The Act provides that, for all claims arising out of a single occurrence for all damages permitted by the Act, the limit of liability for claims or causes of action arising from acts or omissions occurring on or after July 1, 2001 is $500,000.

**c) Alabama**

There is no right to sue the state for monetary damages in Alabama. Section 14 of the Alabama Constitution provides that “the State of Alabama shall never be made a defendant in any court of law or equity.” The Supreme Court of Alabama has held:

> The wall of immunity erected by § 14 is nearly impregnable . . . This immunity may not be waived . . .” This means not only that the state itself may not be sued, but that this cannot be *indirectly* accomplished by suing its officers or agents in their official capacity, when a result favorable to plaintiff would be directly to *affect the financial status of the state treasury.*


**4. The Act of God Defense**

Aside from governmental immunity issues, the primary issue arising from potential subrogation claims associated with Hurricane Katrina will be the so-called “Act of God” defense. “Act of God” is a common law principle that precludes defendants from being held liable for completely fortuitous acts of nature, above
and beyond those expected in design parameters for buildings, drainage, and other building systems. The term “by the Act of God” was first coined by the Superior Court of Errors and Appeals of Delaware in *McHenry v. Philadelphia, W.&B.R.Co.*, 4 Harr. 448 (Del. Super. 1846), to mean “such inevitable accident as cannot be prevented by human care, skill, or foresight.”

All three states affected by Katrina have adopted the Act of God defense: Louisiana - *Gabler v. Regent Development Co.*, 470 So. 2d 149 (La. App. 5 Cir. 1985) (but only if the natural weather conditions are above and beyond those that were reasonably expected when a building was designed and constructed); Mississippi - *Harry Dole Dodge of Pascagoula, Inc. v. Cox*, 246 So. 2d 918 (Miss. 1971); and Alabama - *Bradford v. Universal Construction Co.*, 644 So. 2d 864 (Ala. 1994). But even armed with this defense, architects, builders, contractors and even property owners cannot shirk responsibility and liability for their own negligent acts or omissions that caused or exacerbated damages.

**IV. CONCLUSION**

Many legal issues will arise in the coming months as the gulf coast begins to assess the damage and rebuild. Subrogation may be limited, but armed with the knowledge of what questions to ask and where to look, carriers may be able to recapture money that it pays out and spread the loss to responsible third parties.
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