Sinkhole losses have been increasing in magnitude and volume throughout the country, especially in certain jurisdictions such as Florida. A study by the Florida Office of Insurance Regulation found that the number of sinkhole claims in Florida more than tripled between 2006 and 2009. Studies by other state agencies have found comparable increases in sinkhole losses. This Alert will focus on Florida sinkhole losses to provide a technical overview and discussion of the statutory and forensic basis for identifying subrogation opportunities arising out of these claims.

I. SINKHOLE CLAIMS
A sinkhole is a natural depression or hole in the Earth’s surface. Sinkholes can be formed through the natural process of erosion by percolating water, the collapse of a cave roof, the lowering of the water table, or through the process of suffusion.

In 2006, there were 2,360 sinkhole claims reported in Florida. In 2009, the number of sinkhole claims jumped to 7,244. As of November 15, 2010, Florida insurers reported nearly 6,700 sinkhole claims for the year 2010. In 2009, the cost of sinkholes was a staggering $406 million, up from $209 million in 2006.

Sam Miller, executive vice president of the Florida Insurance Council, has identified the situation as “a crisis.” According to Miller, sinkhole claims are the main reason that insurance rates are increasing in Florida.

The majority of sinkhole claims do not involve gaping holes that can swallow cars. Rather, most claims involve cracks in driveways or garages and windows that do not close properly. Of the total claims reported by insurance companies, repairs were initiated in only about 20 percent of cases. According to Lynne McChristian, Florida representative of the Insurance Information Institute, there is no obligation to fix sinkhole damages under Florida law.

II. SINKHOLE LEGISLATION – FLORIDA STATUTE §627.707
McChristian and Miller agree that legislative action is necessary. Legislative reform has been attempted in the past. In 2005, Florida Statute § 627.707 was amended to revise the standards for investigating sinkhole claims. Section 627.702(2) requires an insurer who receives a sinkhole claim to hire an engineer or professional geologist to conduct testing to determine the cause of the property loss. Section 627.7072 provides specific standards to test for the presence or absence of sinkholes. The testing must comply with the standards set forth in the Florida Geological Survey Special Publication No. 57 (2005). Section 627.7072 requires that a report be issued, which must include certain information. However, the results of the current study would seem to indicate that the 2005 amendments were not adequate to address the critical sinkhole insurance problem in Florida. It is suggested that future legislation include a definition of structural damage caused by sinkholes based on sound engineering principles.

III. SINKHOLES AND SUBROGATION
For subrogation purposes, property damage caused by sinkholes may allow for a variety of claims. The insurance company could pursue a claim against the developer, builder, and/or any other entity that had a duty to inspect the soil and area on which the structure was built. Furthermore, if anything in the surrounding area caused or contributed to the sinkhole, a viable claim may exist. Examples include: (1) local governments failing to properly maintain storm drains, sewers, and pipes; (2) negligent construction by neighbors on bordering property; (3) improperly constructed pools; and (4) improperly diverted drainage.

In pursuing a sinkhole claim against a developer, builder, or other entity, one should consider the following: (1) whether the sinkhole could have been predicted; (2) whether the developer, builder, or other entity had a duty under the
relevant code requirements and industry standards to inspect the area prior to undertaking construction; (3) whether the developer, builder, or other entity knew or should have known of the propensity for the area to sustain damage caused by sinkholes; and (4) whether the developer, builder, or other entity had a duty to determine if the area was susceptible to sinkholes. Finally, as with all construction claims, it is necessary to confirm whether the claim arises within Florida’s 10 year statute of repose. **Florida Statute § 95.11(3)(c).**

In order to determine whether a viable subrogation claim exists, an engineering expert should be retained to assist in the evaluation of the claim. Thereafter, an in-depth analysis should be undertaken, which would include an inspection of the property and surrounding area, an interview with the property owner, a review of relevant code requirements and industry standards, and a review of building plans. Considering Florida Statute §627.707 requires a majority of this investigation to determine whether a sinkhole damaged the property, it is in the insurer’s best interest to evaluate subrogation at the same time.

Cozen O’Connor has been successfully handling construction claims for decades, including those arising from natural disasters. We stand ready to address the ever increasing issues of sinkhole damage. We are available for further consultation to discuss any recovery issues that you may be confronting.