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2005 Southeastern Subrogation Seminar

IT'S NOT AN ACT OF GOD:

Losses in the Face of Hurricane Force Winds and Other Natural Disasters

Wednesday, May 4, 2005
Turner Field
755 Hank Aaron Drive
Atlanta, Georgia

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2005 Southeastern Subrogation Seminar

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AREAS OF EXPERIENCE

- Subrogation & Recovery
- Arson & Fraud
- Insurance Coverage

EDUCATION

- J.D. Walter F. George School of Law, Mercer University, 1977; Editor, Lead Articles, Mercer Law Review
- B.S. Georgia Institute of Technology, 1974

MEMBERSHIPS

- State Bar of Georgia
- Georgia Trial Lawyers Association
- American Bar Association, Tort & Insurance Practice Section, Property Insurance Committee
- American Trial Lawyers Association
- International Association of Arson Investigators
- Southern Loss Association
- Metro Arson Association

PUBLICATIONS

- *Regional Update on Subrogation Practice: Law and Procedure in the Southeastern U.S.*, Cozen O'Connor Regional Seminar

Mr. McKenzie has more than 20 years experience litigating disputes for a wide variety of clients. He currently specializes in obtaining subrogation recoveries for the firm's insurance clients.

Mr. McKenzie has tried cases to verdict in Georgia, Florida, South Carolina, Alabama, Mississippi, Louisiana, Texas, Arkansas and Tennessee. He lectures quite often to clients and industry groups on subjects involving subrogation, arson and fraud, and other insurance-related issues.

Michael is a member of the State Bar of Georgia, the American Bar Association (Tort and Insurance Practice Section, Property Insurance Committee), the International Association of Arson Investigators, the Southern Loss Association, the Metro Arson Association, the American Trial Lawyers Association, and the Georgia Trial Lawyers Association.

Michael earned his bachelor of science degree at Georgia Institute of Technology in 1974 and his law degree at Mercer University in 1977. He was admitted to practice in Georgia in 1977.

Prior to joining Cozen O'Connor, Mr. McKenzie was a partner in the Atlanta firm of McKenzie, Martin, Taylor & McConnaughey. McKenzie, Martin, Taylor & McConnaughey specialized in handling first party disputes and pursued subrogation recoveries on behalf of the insurance industry.

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Sam Woodhouse is the Managing Partner of the Atlanta office where he is a trial attorney in the subrogation and recovery department. He practices in the area of personal injury, products liability and general liability claims. Sam is an experienced trial attorney, having tried jury trials, non-jury trials and arbitrations to verdict in federal and state courts. He has an LL.M. in Trial Advocacy from Temple University School of Law where he graduated with Honors.

In addition to being an experienced trial attorney, Sam practices in the field of alternative dispute resolution. He obtained a Certificate in Mediation after receiving formal mediation training. Sam is a Registered Mediator in the State of Georgia. He regularly represents his clients in court-ordered and private mediations.

AREAS OF EXPERIENCE

- Products Liability
- Subrogation & Recovery
- General Negligence
- Alternative Dispute Resolution

EDUCATION

- LL.M. Temple University School of Law, 1999
- J.D. Duquesne University School of Law, 1993
- B.S. Duquesne University, 1990

BAR ADMISSIONS

- Georgia
- New Jersey
- Pennsylvania

COURT ADMISSIONS

- U.S. Courts of Appeal - Fifth, Third , Eleventh and Sixth Circuits
- U.S. District Courts, District of New Jersey, the Northern and Middle Districts of Florida, the Middle and Northern Districts of Georgia , and the Eastern District of Pennsylvania

MEMBERSHIPS

- American Bar Association
- Georgia Trial Lawyers Association
- Association of Trial Lawyers of America
- State Bar of Georgia
- Atlanta Bar Association

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AREAS OF EXPERIENCE

- Subrogation & Recovery
- Employment Practices

EDUCATION

- J.D., West Virginia University Law School, 1987
- B.S., West Virginia University, 1982

MEMBERSHIPS

- New Jersey Bar Association
- Pennsylvania Bar Association
- West Virginia Bar Association
- North Carolina Bar Association

T. David Higgins, Jr. joined the Firm's Philadphia office in 1987. In 1990 he moved to Charlotte, North Carolina where he practiced with the Firm until 1999. David was a member at the law firm of Higgins Minsker, PLLC from 1999 until February 2002, at which time he rejoined the Firm's Charlotte office. He now concentrates his practice on subrogation and recovery.

David received his bachelor of science degree and law degree from West Virginia University in 1982 and 1987 respectively. At West Virginia, he was the Student Works Editor of the *West Virginia University Law Review*. He is admitted to practice in New Jersey, Pennsylvania, North Carolina and West Virginia. He is also admitted to the U.S. Court of Appeals for the Fourth Circuit and the United States District Courts for the Districts of Eastern Pennsylvania, Eastern, Middle and Western Districts of North Carolina, and Northern and Southern Districts of West Virginia.

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AREAS OF EXPERIENCE

- Alternative Dispute Resolution
- Bad Faith Litigation
- Business Torts
- Commercial General Liability
- Construction Liability
- Directors' & Officers' Liability
- Healthcare Malpractice
- Products Liability
- Professional Liability
- Property Insurance

EDUCATION

- J.D. University of South Carolina School of Law, 1982
- B.A. Furman University, *magna cum laude,* 1979

BAR ADMISSIONS

- South Carolina
- North Carolina

COURT ADMISSIONS

- United States Court of Appeals for the Fourth and Fifth Circuits
- United States District Courts for the District of South Carolina and the Eastern, Middle and Western Districts of North Carolina

MEMBERSHIPS

- American Bar Association, Torts and Insurance Practice Section, Litigation Section
- York County Bar Association
- York County Young Lawyers Association

Tracy L. Eggleston joined the Firm in April, 1992 and is resident in the Charlotte office where she concentrates her practice in subrogation and recovery and insurance coverage.

Since joining Cozen O'Connor, Tracy has represented a number of insurers in complex coverage matters, especially involving questions of coverage in construction cases under a Commercial General Liability Policy. She has also been successful in having the United States Court of Appeals, Fifth Circuit uphold the District Court's award of contribution to the firm's client under a professional negligence policy.

Prior to joining Cozen O'Connor, Tracy had a general civil practice in York, South Carolina. She is past president of the York County Bar Association and the York County Young Lawyers.

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SUBROGATION IN THE EYE OF THE HURRICANE: HOW TO RECOVER FROM NATURAL DISASTERS

written by
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Every person with a heartbeat empathizes with the suffering experienced by residents throughout the eastern seaboard, most especially Florida, as a result of a virtually unprecedented series of hard-hitting hurricanes. Weather forecasters predict this will be the continuing pattern for the next decade. The details of Hurricanes Charley, Frances, Ivan, and other tropical storms have begun to blur in our collective memory, but are too important to be forgotten:

Charley left three cities without running water, 2,000,000 people without power, at least 25 dead, and destroyed homes and businesses to the tune of an estimated $15 billion. According to the Insurance Information Institute, the insured losses from this hurricane alone are estimated to reach approximately $7.5 billion.

Similarly large damage estimates were the byproduct of Frances and Ivan, both of which also caused extensive flooding, with over 15" of rain falling in certain eastern seaboard locations.

As part of the process to restore businesses and homes and compensate property owners for their substantial losses, many insurers have been called upon to deploy CAT teams to perform storm duty to adjust these losses. Because of the exigencies entailed in adjusting so many large property losses in such a concentrated area over such a short period of time, subrogation issues inevitably are pushed to the back burner, and possibly entirely off the stove. This is a mistake.

Even for losses caused by acts of nature, there are significant recovery opportunities that should and can be efficiently addressed in a cost effective manner, to make sure that revenue from responsible third-parties is not thrown out together with the damaged possessions of your insureds.

Each company should compile a list of the recorded wind speeds, as measured by approved climatological facilities, in key geographical locations where losses are being adjusted. These wind speeds then should be compared with requirements under applicable building codes

– both local and national – which determine the wind speed ratings to which buildings must be constructed. Frequently, the wind speed requirements will vary based upon whether construction was ongoing or completed; the occupancy of the facility; and construction materials and methods.

In addition, for commercial facilities and certain high-end housing, there may be building specifications, architectural drawings and engineering details which need to be consulted to determine if there were any construction requirements above and beyond the minimum levels mandated by applicable codes.

For rainstorm losses, notwithstanding the severity of the event, the usual suspects must be consulted: were there breaches or penetrations which allowed external elements to enter the household or facility; was there appropriate design, installation and maintenance of the drainage system, in accordance with industry standards; did under-design or deficient maintenance of stormwater drainage system for the municipality cause or contribute to the flow of water in the direction of your insured's facility?

If the wind or storm conditions brought about a structural failure involving steel members, then close analysis must be performed to ascertain if there were installation errors or material defects. Frequently, the key components can be identified and preserved to allow post-adjustment inspection and testing. Even if potentially responsible third-parties cannot be placed on notice at that time, careful recording of the scene photographically, in conjunction with preservation of critical evidentiary artifacts, can discharge obligations to allow for meaningful inspection and evaluation opportunities by prospective defendants in the future.

Basic, but important, written agreements also should be consulted: is there a lease agreement which imposes responsibility for pertinent inspection or maintenance activities, and/or for the cost of repair or restoration? Was there a service agreement in effect, which entailed pre-

loss inspection activities? In this vein, were there any public sector inspections and approvals, prior to the loss, which failed to identify construction deficiencies which contributed to the cause of the loss?

Speaking of causation, it is important to remember that in most jurisdictions, the uniform rule is that despite the involvement of an act of nature, if human conduct was a substantial, contributing factor in bringing about the loss, or some aspect of the damage, then, upon proof of liability, the actor is responsible for the resulting damage. To state it differently, the fact that a natural disaster also was involved does not eliminate legal liability on the part of individuals or companies whose conduct also were substantial contributing factors.

Adjusters will be called upon to perform many important tasks on behalf of their employers and insureds during a concentrated period of time, so it must be borne in mind that outside consultants, including experienced subrogation counsel, should be consulted to assist in this effort, wherever it is deemed appropriate. There are especially critical legal considerations that must be addressed early on in the process, such as potential time bars arising from application of each state's statute of repose (running from the date work was performed, as opposed to the date of loss) which frequently will expire and bar the claim even though the otherwise applicable statute of limitations under that jurisdiction had not yet run. Certain states have enacted statutes requiring notice requirements with an opportunity to cure in claims involving construction defects. Claims against governmental subdivisions frequently are subject to very early notice requirements which must follow a form prescribed by statute. There may be time limitations in lease agreements or construction contracts, and the economic loss rule (which restricts victims to contractual remedies for claims involving primary damage to the failed product itself) may limit remedies to these contractually responsible parties. Similarly, the Uniform Commercial Code may be applicable for which the statute of limitations is four years

from tender of delivery (in other words, sale of the product) which frequently may expire long before the otherwise applicable statute of limitations for tort claims.

In summary, subrogation should not be an afterthought when adjusting property losses resulting from acts of nature. However, in order to evaluate recovery issues in a way that will allow for a meaningful exercise of your company's subrogation rights, there needs to be immediate coordination among all team members: the adjuster, the recovery representative, forensic consultants and legal counsel. It is difficult to implement all of this in the aftermath of a major catastrophe. Good pre-planning by implementation of a subrogation program in advance of these catastrophic events inevitably will allow your company to identify and perfect an enhanced number of viable subrogation claims.

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LIGHTNING STRIKES – SUBROGATION CONSIDERATIONS

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I. Characteristics and Effects of Lightning

A. Direct and indirect lightning strikes can and do cause serious physical damage to property. Damage from direct strikes can be caused by heat, explosion and/or fire, and damage from indirect strikes generally results from voltage surges through electric and telephone lines.

B. The number of amperes discharged can range from 1000 to 270,000 in extreme cases, lasting for a few millionths of a second, with lesser currents present for a longer period. Potentials can range as high as 15,000,000 volts. (Compare a 100 watt bulb using 120 volts and drawing less than one ampere.)

C. The flow of lightning is not steady or uniform; rather it is in the form of an impulse or surge.

D. The length of a lightning stroke averages 3000 to 5000 feet but can vary from 2000 to 16,000 feet. The lightning stroke follows the route of least resistance, choosing the best conductor to travel to earth.

1. Example: A lightning stroke hits a house (TV antenna) jumps to wiring or plumbing and follows the easiest metallic path through the house reaching the earth through a water supply line.

2. Example: A lightning stroke hits electric or telephone lines. The electric charge placed on the line creates a voltage spike or surge which travels through the line seeking an outlet to earth. The design voltage breaking down the insulating qualities of insulation, arcing across the air space separating conductors or tracking across a nonconducting surface, resulting in electrical failure.

3. Example: A lightning surge can travel through electric lines and enter building through service entrance line, continue into wiring system and jump to building steel or other electric equipment, through ground connection or neutral wire, return to electric panel and then to earth through ground connection.

E. Surge can travel miles from strike point in rural areas. In a city or town, it could travel to the nearest building or even skip the nearest building and travel blocks before entering a building.

F. The path which a surge takes after it enters a building (i.e. which appliance, electric outlet or electronic equipment is affected) is determined by resistance of wiring, with the surge following the path of least resistance. Repeated surges of high voltage can cause a deterioration of insulation, resulting in a failure occurring after a number of prior surges.

II. Lightning Protection Systems

A. NFPA 78, Lightning Protection Code, provides specifications for lightning protection systems and is a valuable source of information regarding the proper methods for installing and maintaining such systems. A lightning protection system generally includes air terminals, conductors, ground terminals, interconnecting conductors, arresters and other required connectors or fitting.

B. ANSI/IEEE C62.1 et seq. provides standards and specifications for various types and applications of surge arresters.

C. Underwriters Laboratories, Inc. has a Master Label Service for lightning protection systems providing for both factory inspection and labeling of lightning protection materials and components, as well as field inspections of a substantial number of installations for which Master Labels have been issued.

D. The NFPA 78 Code provides different specifications for different types of structures, including:

Chimneys and Vents Flat, Domed, Rounded and Sloping Roofs Masts, Spires and Flagpoles Metal Towers and Tanks
Grain, Coal and Coke Handling and Processing Structures
Heavy Duty Stacks
Structures Containing Flammable Liquids and Gases
Sailboats, Power Boats, Small Boats and Ships Livestock in Field
Picnic Grounds, Playgrounds, Ball Parks and Open Spaces
Aircraft - parked

E. Maintenance - Proper maintenance of lightning protection systems is essential to effective protection. Particular attention should be given to ground connections, which can be broken at ground level or just below. They may also have been inadvertently disrupted or damaged by repairmen or contractors working in the area.

F. Utility companies install surge arresters on power and communications lines where they enter structures and at power utility plants. (See Article 280 of NFPA 70, National Electric Code.) The arresters take the abnormally high voltage, stop the normal flow of current and momentarily connect the electric lines to earth, reducing the voltage on the line. Most utilities install arresters on primaries of transformers on systems of 44,000 volts or less. An arrester is not always entirely effective. The surge can continue down the line if below the operating value of the arrester or if the arrester does not discharge the surge fast enough.

G. The micro and mini components of printed circuit boards and encapsulated parts of electronic equipment are highly susceptible to damage from surges (i.e. telephone and computer lines.)

III. Lightning Strike Investigation - Subrogation Potential

A. The fact that lightning is the initial factor which results in property damage by way of fire, electrical surge or explosion does not necessarily mean that the resulting property damage is an "Act of God" in the same way that one considers lightning, itself, to be an "Act of God".

B. Third-party liability can often be predicated upon a number of theories and factual circumstances, such as:

1. The failure of a utility or property owner to utilize proper lightning protection systems as specified by the NFPA.

2. The improper installation of a lightning protection system by a contractor, or improper design of a system by an architect or engineer.

3. The disruption or damaging of an otherwise sound and functioning lightning protection system by a contractor or repairman working on the premises.

4. The failure to properly inspect and maintain a lightning protection system by one who has, by contract or otherwise, an obligation to do so.

C. Investigative Considerations

1. Consider immediate engagement of an expert who is qualified to determine the effect of a lightning strike on the affected property and the adequacy of inadequacy of lightning protection systems utilized to prevent property damage.

2. Consider retention of legal counsel to supervise the subrogation investigation to free the adjuster to promptly and properly handle adjustment problems. Counsel will apply technical information received from expert to potential legal causes of actions.

3. Gather as much information as possible concerning lightning activity in the area and the time of the occurrence. Such information can be obtained from local people, the United States Weather Service, local newspapers, the fire department and local utility.

4. Contact local utility companies (electric and telephone) to determine if they recorded any lightning strikes on their lines or if they responded to any trouble calls due to outages in the area.

5. Obtain as much information as possible regarding any lightning protection system which may have failed to control a voltage surge resulting from lightning, including the name, address and telephone number of the designer and installer of the system, the date of installation, the manner or type of installation and the effectiveness of such a system to control lightning induced surges in the past.

6. Find out whose responsibility it is to inspect and maintain the lightning protection system and acquire copies of any documents which confirm this (i.e. a lease, contract, utility tariff, etc.)

7. Determine whether or not any contractor or repairman recently worked at or near any of the components of the lightning protection system including the name of the contractor, the date of the work, the type of work performed, the precise location of the work and the reason for the work. Get written documentation.

8. If electronic equipment damaged by a lightning strike has no protective devices, an expert should be consulted to determine if such devices are normally, or should be, incorporated into the design and installation of the equipment.

9. Photograph, acquire and retain any and all physical evidence which indicates damage to property resulting from a lightning strike, including any failed components of a lightning protection system.

10. Obtain plans and blueprints and wiring diagrams of the electrical circuits.

11. In that "foreseeability" may be an issue, obtain as much information as possible with regard to prior lightning strikes and surges, the effects of them on electrical circuitry and equipment, prior discussions among property owners, tenants and contractors with respect to the need for, or installation of appropriate protective devices, and measures taken to provide such protection after those discussions.

12. While the adjuster assigned to the loss will be immediately concerned with the scope of loss and remedial measures to limit additional damages, any and all of the above can be accomplished by counsel. Cozen and O'Connor stands ready, by telephone notice, at 800/523-2900, to consult, make recommendations or personally appear to direct the investigation.

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PIPE FREEZE-UPS – SUBROGATION CONSIDERATIONS

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1. Consider retention of legal counsel to supervise subrogation investigation; to permit adjuster to be involved in the immediate adjustment problems. Even with the liberalization of discovery rules, protection is still granted to work product of counsel.

2. Consider immediate engagement of expert (may require hands-on trade person, such as a plumber, mechanical engineer, metallurgist, etc.).

3. Obtain photographs of the source of the loss -- as many as possible -- taken as soon after the occurrence as feasible.

4. Obtain and preserve any failed or broken portions of the system (e.g., cracked valves, fittings, etc.).

5. Determine the nature and type of heating system that may have failed or shut down and the reasons why.

6. Get a copy of the Lease Agreement to review for contractual legal obligations, exculpatory clauses, waivers of subrogation, etc.

7. Get names, dates, details and written documentation of recent work performed by a third-party contractor.

8. Obtain plans and blueprints of applicable system that failed (plumbing, sprinkler, HVAC).

9. Determine the age of the installation of the system that failed and which entity was responsible for the location and amount of insulation or protection afforded the system.

10. Obtain meteorological information. Counsel can obtain U.S. Weather Information from local reporting stations, including temperatures, wind velocity and direction.

11. Determine the names of the last occupant prior to the discovery of the loss and get statements from them, as well as the building superintendent, plant engineer, maintenance man, etc., concentrating on:

a. temperatures in the building;
b. time periods unoccupied;
c. time of discovery of the loss;
d. details of any surveillance system, e.g. guards, sprinkler alarms, flow sensors, temperature monitors, etc.;
e. names, contract details of any outside supervising or monitoring services;
f. prior similar occurrences;
g. if already repaired, the names of the repairing entities, and any written documentation;

h. subjective weather information (e.g., localized dusting); and
i. any admissions in post-loss meetings with outside parties.

12. While the adjuster assigned to the loss will be immediately concerned with the scope of loss and remedial measures to limit additional damages, any and all of the above can be accomplished by counsel. Cozen and O'Connor stands ready, by telephone notice, either by contact to the individual attorney or by Watts line number of 800-523-2900, to consult, make recommendations or personally appear to direct the investigation.

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PRESERVATION OF SUBROGATION OPPORTUNITIES IN CATASTROPHIC/MASS DISASTER LOSSES

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The catastrophic/mass disaster loss presents a situation where an insurance company's normal claims adjustment procedures may be modified or not closely followed. The need to adjust a large number of losses in a short period of time, often amid an atmosphere of devastation and chaos, can result in claims adjustment which impairs future subrogation recovery efforts. The first party adjuster's role in such catastrophic losses is crucial to the preservation of subrogation opportunities. The following focuses on what the first party adjuster can do to maximize, preserve, or at least not impair the potential for subrogation recovery.

Liability

Although the majority of catastrophic losses are caused by natural disasters or "acts of God," this does not necessarily mean that there is no potential for subrogation recovery. For instance, the recent Hurricane Andrew in Florida has resulted in claims against the builders of homes which were improperly constructed and were destroyed by wind, while houses similarly situated weathered the storm. The first party adjuster should always be on the lookout for third party liability and should never write off the potential for subrogation recovery in a catastrophic loss.

Damages

The measure of damages which are legally recoverable in a subrogation action often differs from the measure of damages which are payable under the policy. It is important that the adjuster understand the elements of the measure of damages that will be applied in a subrogation lawsuit, and that he/she document the claim file in such a manner that the damages will be easily provable at trial.

The legal measure of damages in California, as in most states, is the difference in the fair market value of the property immediately before and immediately after the accident. If the

damages have been repaired, or are capable of repair, so as to restore the fair market value as it existed immediately before the accident and at a cost less than such difference in value, then the recoverable measure of damage is the cost of such repair rather than the difference in value. (California Approved Jury Instruction, BAJI 14.21.)

PERSONAL PROPERTY

The difference in legally recoverable damages and damages payable under the policy is most distinguishable in personal property losses with a full replacement cost policy. While the adjuster may take great care to determine the replacement cost of a personal property item, there is usually no documentation in the file which shows the fair market value of the item at the time of the loss. Due to the large number of claims involved in a catastrophic loss, and the probability that the litigation will continue for years, it is impractical and often impossible to reconstruct this valuation information at a later date. Accordingly, the adjuster's file should contain all of the information necessary to establish the fair market value of the personal property at the time of the loss.

Evidence necessary to establish the fair market value of an item includes the replacement cost, the purchase price, usage, age, and the condition of the property prior to the loss. The adjuster can establish most of this information by simply interviewing the insured or examining the personal property. For high value items, an opinion of a person who deals in similar goods should be obtained.

REAL PROPERTY

The measure of damages to real property which the subrogation plaintiff will attempt to prove at trial will, in most cases, be the cost of repairing the property. With the exception of a building which is a total loss, the cost of repair will nearly always be less than the difference in the fair market value of the building. Whenever possible, the adjuster should obtain repair

estimates from licensed contractors and include such estimates in their files. Estimates which itemize the repairs are preferred over a lump sum estimate. An adjuster's worksheet which sets forth each item of damage and provides an estimated cost of repair for each item should be included in the file as well.

In the event the insured has made or will make his/her own repairs, the insured's overhead and profit margin is not recoverable. Material cost receipts and a record of the time spent by the insured in making the repairs should be included in the adjustment file whenever possible.

SALVAGE

While items which are sold for salvage are usually noted in the adjuster's file, it can also be important to make a notation regarding items which have no salvage value. Defendants will often claim that plaintiff has failed to mitigate its damages by not salvaging items with value. once the adjuster has established that there is no salvage value, attempts made to salvage the item and the reason why there is little or no salvage value should be recorded in the adjuster's file.

Causation

In addition to proof of damages, the first party adjuster can also play an important role in establishing causation. To prevail in a subrogation lawsuit, the plaintiff must prove that there was a causal link or nexus between the damage complained of and the exposure for which the defendant is allegedly responsible. An adjustment file which contains detailed and accurate information regarding causation can save a great deal of time and expense in proving such causation at trial.

Causation problems often arise in catastrophic/mass disaster litigation when occurrences other than the catastrophe could feasibly have been the cause of the damages. For example, a windstorm damages the roofs of hundreds of homes, and two days later an explosion's shock

wave also damages the roofs of the same homes. Since both types of damages are covered losses under the policy, the adjuster will often pay the insured for all of the damages without documenting the different causes of the damage. This affords defendants the opportunity to contend that all of the roof damage was caused by the windstorm rather than the explosion. As illustrated by this example, it is very important that the adjuster document the file as to the cause of the damage even if it is obvious at the time. In most situations, this can be as simple as writing a few sentences in the adjuster's diary. However, on large items of damage where causation is an issue, the retention of an engineer may be appropriate.

Similar causation problems exist when the catastrophe enhances pre-existing damages. An example of this is a situation where preexisting cracks in a concrete driveway become larger as a result of the catastrophe. In such situations, the adjuster should, to the best of his/her ability, document the file regarding the size and cause of the pre-existing crack, and how and to what degree it was enhanced by the catastrophe.

Photographs

The first party adjuster should supplement the adjustment file with photographs and videos of the damages whenever possible. This is particularly important where issues of causation, enhancement of pre-existing damage, proper repair methods or salvage are involved. The old saying, "A picture is worth a thousand words," rings very true when attempting to prove a case years after the incident.

Subrogation Receipts

The adjuster should make sure that a subrogation receipt is signed by the insured and included in the claim file. In the event a supplemental payment is made on the claim, a new

subrogation receipt which reflects the total amount paid to the insured should be signed and placed in the file.

For a more detailed discussion of subrogation receipts, see "Subrogation Receipts and Their Effect: The Implications of Mock v. Michigan Millers" by Gerard P. Harney, Esq.

Proof of Loss

A sworn statement in proof of loss is not required as a prerequisite to subrogation recovery. However, the statement can be useful as additional evidence in proving the subrogation claim. Most insurance companies require that the proof of loss be signed prior to issuing payment to the insured. If a sworn statement in proof of loss has been signed by the insured, it should be included in the adjuster's file.

CONCLUSION

What the claim file should contain:

1. A complete copy of each insured's policy, including the declarations page and any endorsements, amendments, etc. in each claim file.

2. Signed copies of subrogation receipt for final loss, proof of loss statement, and assignment of the deductible.

3. Copies of all checks paid to the insureds, contractor estimates, receipts, adjuster worksheets, and a summary of damages.

4. The adjuster's diary should include references to causation whenever possible. If engineering reports are obtained they should be included in the claim file.

5. The original prints of photographs should be kept with the file. Negatives should be retained for future copying.

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I. INTRODUCTION

Insurance can provide coverage to compensate insureds for a variety of losses. An inherent, predicate consideration in connection with analyzing the scope of coverage afforded under an insurance policy may involve determining what actually "caused" the loss to occur. Obviously, the very essence of insurance concerns risk analysis, including determining what risk an insurance company actually undertook in any given situation through the issuance of a policy.

Policy language will almost always delineate numerous covered and non-covered risks. Most policies list exclusions applicable to the risk after a preamble that can take a variety of forms depending on the policy and the nature of the exclusions that follow. For example, some exclusions are prefaced by language which states:

> **We will not pay for loss or damage caused by or resulting from any of the following:**

The issue of causation can present problems under the foregoing language even when there is only one cause of loss. However, when there exists a sequence of multiple causes for a certain loss, and the sequence involves both covered and non-covered causes, the causation analysis becomes more complex and, unfortunately, more uncertain. Although, in many cases, the problem of multiple causation is more semantic than real, there are situations in which two or more causes do appear to account for the damage. In many jurisdictions policy language can operate to circumscribe the ultimate methodology employed in any causation analysis.[1] Unfortunately, not all policies so provide, and, not all courts reference sanitized, uniform tests and standards to resolve questions concerning whether a covered/non-covered cause operated to produce a loss; rather, many courts examine policy language through the prism of common law rules governing insurance policy construction.

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[1] However, in the absence of unambiguous policy language addressing causation, policy interpretation and rules governing the construction of insurance policies will often become an important factor with respect to claim resolution.

While most courts have attempted to provide guidance by following various approaches to analyze multiple cause of loss scenarios, the approaches differ from jurisdiction to jurisdiction. This paper is intended to assist the adjuster and claims examiner by identifying and describing the three approaches taken by courts in various jurisdictions, and by briefly discussing the related issues of burdens of proof and so-called "anti-concurrent" causation language in multiple cause of loss scenarios.

II. THREE APPROACHES TO ANALYZING CONCURRENT CAUSATION

A. THE MAJORITY APPROACH - "EFFICIENT CAUSE"

The most frequently adopted approach to concurrent causation attempts to determine the "efficient" proximate cause of the loss.[2] Under this approach, if a covered cause and an excluded cause combine to cause a loss, the court will attempt to determine the "predominant" or "efficient" cause of the loss. In theory, then, if the "efficient" cause is covered, the entire loss is covered. Although the foregoing appears clear at first blush, the actual

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[2] Many courts have not explicitly mentioned the existence of any test, but have analyzed policy language presented in a format which strongly suggests the adoption of the "efficient cause" approach. Courts which appear to follow this approach include the following: **California:** *Garvey v. State Farm Fire & Casualty Co.*, 48 Cal. 3d 395, 257 Cal. Rptr. 292, 770 P.2d 704 (1989); **Colorado:** *Koncilja v. Trinity Universal Ins. Co.*, 528 P.2d 929 (Colo. App. 1974); **Connecticut:** *Frontis v. Milwaukee Ins. Co.*, 242 A.2d 749 (Conn. 1968); **Georgia:** *Ovbey v. Continental Ins. Co.*, 613 F. Supp 726 (N.D. Ga. 1985), aff'd without op., 782 F.2d 178 (11th Cir. 1986); **Hawaii:** *Hawaii Land Co. v. Lion Fire Ins. Co.*, 13 Haw. 164 (1900); **Idaho:** *Burgess Farms v. New Hampshire Ins. Group*, 702 P.2d 869 (Idaho App. 1985); **Indiana:** *Indiana Lumbermen's Mut. Ins. Co. v. Statesman Ins. Co.*, 291 N.E.2d 897 (Ind. 1973); **Iowa:** *Bettis v. Wayne County Mutual Ins. Ass'n*, 447 N.W.2d 569 (Iowa 1989); **Maine:** *Unobskey v. Continental Ins. Co.*, 86 A.2d 160 (Me. 1952); **Maryland:** *Goodman v. Fireman's Fund Ins. Co.*, 600 F.2d 1040 (4th Cir. 1979); **Massachusetts:** *Jussim v. Massachusetts Bay Ins. Co.*, 610 N.E.2d 954 (Mass. 1993); **Michigan:** *Michigan Sugar Co. v. Employers Mutual Liability Ins. Co.*, 308 N.W.2d 684 (Mich. 1981); **Missouri:** *Hahn v. M.F.A. Ins. Co.*, 616 S.W.2d 574 (Mo. App. 1981); **Mississippi:** *Grain Dealers Mut. Ins. Co. v. Belk*, 269 So. 2d 637 (Miss. 1972); **Nebraska:** *Curtis O. Griess & Sons Inc. v. Farm Bureau Ins. Co.*, 528 N.W.2d 392 (Neb. 1995); **New Hampshire:** *Nassif Realty Corp. v. National Fire Ins. Co.*, 109 N.H. 117 (1968); **New Jersey:** *Franklin Packaging Co. v. California Union Ins. Co.*, 408 A.2d 448 (N.J. Super. 1979), *cert. denied,* 420 A.2d 340 (N.J. 1980) (*but see, Brindley v. Fireman's Ins. Co. of Newark*, 35 N.J. Super. 1, 113 A.2d 53 (App.Div. 1955)); **New York:** *Kosich v. Metropolitan Property and Casualty Ins. Co.*, 626 N.Y.S.2d 618 (App. Div. 1995); **North Dakota:** N.D. Cent. Code §26.1-32-01 (Supp. 1985); **Ohio:** *Holmes v. Employers' Liability Assurance Corp.*, 43 N.E.2d 746 (Ohio App. 1941); **Oregon:** *Gowans v. Northwestern Pac. Ind. Co.*, 489 P.2d 947 (Or. 1971); **Pennsylvania:** *Trexler Lumber Company v. Allemania Fire Insurance Company*, 136 A. 856 (Pa. 1927); **South Carolina:** *King v. North River Ins. Co.*, 297 S.E.2d 637 (S.C. 1982); **South Dakota**: *Lummell v. National Fire Ins. Co. of Hartford, Conn.*, 210 N.W. 739 (S.D. 1926); **Tennessee:** *Lunn v. Indiana Lumbermen's Mutual Ins. Co.*, 201 S.W.2d 978 (Tenn. 1947); **Washington:** *Villella v. Public Employees Mut. Ins. Co.*, 725 P.2d 957 (Wash. 1986); **West Virginia:** *Murray v. State Farm Fire & Cas. Ins. Co.*, 509 S.E.2d 1 (W.Va. App. 1998).

approach provides little analytical guidance for determining what is the "efficient" cause and, therefore, prevents any great deal of predictability in a case involving concurrent causation.

According to *The American Heritage® Dictionary of the English Language, Fourth Edition,* "efficient" means "acting directly to produce an effect: *an efficient cause.*" The adjective "direct" is defined by that same dictionary as "having no intervening persons, conditions, or agencies; immediate." If we were to use this dictionary alone for guidance on what constitutes an "efficient" cause, it would seem fairly clear that the "efficient" cause of damage is the cause that acts directly to produce the effect without any intervening conditions or agencies. Unfortunately, however, the courts that have adopted the "efficient cause" approach, as well as the commentators who attempt to clarify the court decisions, seem to mean something different from the ordinary dictionary use of those words.

Resort to the texts authored by leading insurance commentators provides little help. Indeed, commentators have attempted to explain and define efficient proximate causation, but what we see is essentially ubiquitous and murky phraseology. For example, *Couch on Insurance* explains as follows:

> In determining cause of loss for purpose of fixing insurance liability, if there is evidence of concurrent causes for the damage, the "proximate cause" to which loss is to be attributed is the dominant, efficient one that sets the other causes in operation; causes which are incidental are not proximate, even though they may be nearer the loss in both time and place. Where it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in point of time or place to the result is necessarily to be chosen, since there may be a dominant cause even though concurrent or remote in point of time or place.
>
> * * *
>
> Accordingly, a cause has been said to be proximate when it sets in motion a chain of events which results in the loss without the intervention of any new or independent force.

> Where the peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and the final injury, produce the final result for which the insured seeks to recover under his or her policy, the peril insured against will be regarded as the proximate cause of the entire loss, so as to render the insurer liable for the entire loss within the limits fixed by the policy.
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> * * *
>
> In some cases, the concept of proximate cause is defined in terms of the efficient cause or the efficient moving cause. Thus, it has been said that the proximate cause of the happening of a contingency insured against is the fundamental, efficient moving cause thereof, meaning the one that necessarily sets the other causes in motion.
>
> In some instances, the terms have been coupled to serve as a qualifier to speak of the proximate cause as the "predominating efficient one." That is to say, proximate cause is not necessarily the last link in the chain of events, but that which is the procuring, efficient, and predominant cause, that from which the effect might be expected to follow, without the concurrence of any unforeseen circumstances.[3]

Substituting a vague definition for a vague requirement, we also see that the courts have all but invited inconsistent and contradictory decisions on what constitutes the "efficient" cause.

An oft cited case on what constitutes an "efficient" cause is *Murray v. State Farm Fire & Casualty Company.*[4] There, the court offered the following definition of "efficient" cause:

> The efficient proximate cause is the risk that sets others in motion. It is not necessarily the last act in a chain of events, nor is it the triggering cause. The efficient proximate cause doctrine looks to the quality of the links in the chain of causation. The efficient proximate cause is the predominating cause of the loss.[5]

It is difficult to come away from this kind of definition with anything but frustration. The definition offered certainly does not make the resolution of the question any

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3 *Couch on Insurance 3d* §§101: 44-101:46 (1997) (citations omitted).

4 509 S.E.2d 1(W.Va. 1998).

5 *Id.* at 12.

more certain or predictable. If anything, it further confuses the issue by providing another vague description of "efficient" as the "predominating" cause of the loss. To make matters worse, it appears to equate "predominant" and "efficient" cause with the "risk that sets the others in motion." Oddly, in *Garvey v. State Farm Fire & Casualty Company*,[6] the case in which the California Supreme court pulled back from the "liberal" view of concurrent causation (*i.e.*, any covered cause produces coverage, discussed briefly below), the court expressly rejected "moving cause" as the definition of efficient cause precisely because it was concerned that "moving cause" may be interpreted literally as "triggering cause."[7]

The law reporters are full of cases in which courts have upheld findings that point to what appear to be triggering causes as "efficient" causes where those triggering causes are covered causes of loss.[8] In fact, the existence of these cases appears to support the general notion that courts (and juries) will select whatever cause appears to be covered and stamp that cause as the "efficient" cause.

There are some jurisdictions that do appear to follow the dictionary definition of "efficient" cause, although they are few in number. For example, in *Kosich v. Metropolitan*

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6 48 Cal.3d 395, 257 Cal.Rptr. 292, 770 P.2d 704 (1989).

7 770 P.2d at 708.

8 *See, e.g., Sun Ins. Office, Ltd. v. Guest Camera Store, Inc.*, 108 Ga. App. 339, 132 S.E.2d 851 (1963) (efficient cause of loss was covered "force of wind" when wind blew a wall cap onto a roof breaking a hole through which rain entered to cause damage.*); Howell v. State Farm Fire & Casualty Company,* 218 Cal.App.3d 1446, 267 Cal.Rptr. 708 (1990) (efficient cause of loss was covered "fire" where fire destroyed vegetation on a slope, unusually heavy rains drenched the denuded slope and a landslide occurred); *Graham v. Public Employees Mutual Insurance Co.*, 98 Wash. 2d 533, 656 P.2d 1077 (1983) (efficient cause of loss could be covered "explosion" where eruption of Mount St. Helens produced hot ash and debris which melted snow and ice and combined with rain and groundwater to produce mudflows which damaged homes); *Fawcett House, Inc. v. Great Central Insurance Co.*, 280 Minn. 325, 159 N.W.2d 268 (1968) (efficient cause of loss was covered "vandalism" when vandals shut off heating system which exposed plumbing to outside freezing conditions which caused the plumbing to rupture which caused water damage); *Goodman v. Fireman's Fund Insurance Company,* 600 F.2d 1040 (4th Cir. 1979) (efficient cause of loss was covered negligence of yacht owner in preparing yacht for winter even though the yacht sank because of the freezing of water in a cooling system and freezing was an excluded peril); *Griess & Sons, Inc. v. Farm Bureau Insurance Company of Nebraska,* 247 Neb. 526, 528 N.W.2d 329 (1995) (efficient cause of death of swine from pseudo rabies, a non-covered peril, was covered windstorm since the pseudo rabies was carried to insured farm by the windstorm).

Property and Casualty Insurance Company[9] the New York Supreme Court, Appellate Division, made short shrift of an argument by an insured that covered third party negligence was the efficient cause of asbestos contamination. In deciding in favor of the insurer in that case, the court offered the following reasoning:

> To determine causation, one looks to the "efficient or dominant cause of the loss", not the event that "merely set the stage for that later event." [Citations omitted.] Here, the contractor's cutting into vinyl flooring with a chain saw set in motion a chain of events that ultimately resulted in plaintiff's losses. Plaintiffs' losses, however, were proximately caused by asbestos contamination and losses caused by "contamination" are specifically excluded from coverage.[10]

Consider also the case of *Lorio v. Aetna Insurance Company.*[11] There the insured claimed that his horse died of overeating because it was able to break into a feed stall through the walls of a storm weakened temporary barn into which it was placed after the structural integrity of its original barn was weakened by a hurricane. The insured asserted that the horse's death was cause by covered windstorm. The Louisiana Supreme court disagreed stating:

> [T]he windstorm was at most an indirect or remote cause of the animal's death. Obviously, in the absence of convincing evidence to the contrary, it is difficult to perceive that the storm had proximate relation to the animal's pushing down or breaking the slats of the stall in which he was stabled in order to gain access to the wheat in the adjoining stall, the eating of which is the primary cause of his death. Nor does the circumstance, that the windstorm made it necessary that the horse be temporarily quartered in the part of the "L" shaped barn which remained after the destruction of the part in which the animal was usually quartered, constitute a sound basis for concluding that his subsequent loss is attributable to the storm.[12]

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9 214 A.D.2d 992, 626 N.Y.S.2d 618 (1995); Cf. *Jussim v. Massachusetts Bay Ins. Co.,* 415 Mass. 24, 610 N.E. 2d 954 (1993) where the court ruled that covered third party negligence was the efficient cause of a loss resulting in damage from the discharge of excluded "pollutants."

10 626 N.Y.S.2d, at 618.

11 255 La. 721, 232 So.2d 490 (1970).

12 232 So.2d at 494.

The court in *Ovbey v. Continental Insurance Company*[13] also appears to have focused on the direct, unbroken nature of "efficient" cause. In that case, the insured argued that an incomplete sodding project and county roadwork, arguably covered perils under the subject policy, caused a build up of water around the foundation of his home which ultimately caused its collapse. It was undisputed that the wall collapsed because of water pressure on the foundation. Continental Insurance Company asserted that the loss was excluded under an exclusion for "water below the surface of the ground, including water which exerts pressure on . . . a foundation."[14] The court noted that the question was whether "the proximate, dominant, and efficient cause of the loss is an excluded risk."[15] The court apparently agreed that "incomplete sodding project and county roadwork" may have caused the water build-up and noted that if the insured "were seeking to recover for a build-up of water" there might be coverage.

> The loss which plaintiffs suffered, however, is not the build-up of water. Rather, it is the collapse of the wall in the house, which was caused directly and immediately, according to the undisputed expert testimony in this case, by water pressure from below the surface of the ground. The policy exclusion in this case says that damage which results directly or indirectly from water below the surface of the ground exerting pressure on a foundation wall is excluded. Use of the word "direct" in this context is construed to mean "immediate" or "proximate" as distinguished from "remote." (Citations omitted) There is expert testimony in this case that the "immediate" cause of the collapse of the wall in plaintiff's house was water pressure from below the surface of the ground. [16]

The court went on to recognize the difference between "covered risks" and "antecedent contributing circumstances."[17] It noted with approval comments from Couch on Insurance 2d regarding "antecedent contributing circumstances:"

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13 613 F. Supp. 726 (N.D. Ga. 1985).
14 *Id.*
15 *Id.* at 727.
16 613 F. Supp. at 728.
17 *Id.*

> An antecedent contributing circumstance is generally ignored in determining the proximate cause [of a loss]. That is to say, a situation which merely sets the stage for the later event is not regarded as being the proximate cause merely because it made possible the subsequent loss. For example, the explosion of gas, and not the lighting of a match, is the proximate cause of a loss, where the explosion is caused by the lighting of a match in a room filled with gas. 18 *Couch on Insurance 2d* § 74:717 p. 1024 (1982).[18]

The court in Ovbey correctly analyzed causation in the context of the damage for which recovery is sought, the failure of the foundation, and determined that the "efficient" cause of the damage is the agency that directly causes that damage, water pressure, without any intervening act or agency. In the *Kosich* case, *supra*, the "efficient" cause was the asbestos because that was what directly caused the loss or damage to covered property without any intervening cause. In *Lorio*, it was overeating, because that is what caused the loss to covered property without any intervening cause.

As is evident from the foregoing, no concrete test exists defining the meaning of efficient proximate causation. Moreover, because the question of what constitutes the "efficient" or dominant cause of the loss is generally left to the jury,[19] it is unlikely that any uniformity of analytical approach will ever be achieved. It has been commented that "[f]rom every point of view from which we look at the facts, a new cause appears."[20] This comment is the quintessential description of the result of a jury consideration of the issue of causation; every juror will bring a different viewpoint of causation to the table. Given the pliant standards utilized, an insurer must be cognizant that courts will utilize semantic gymnastics employed in order to adopt a result-oriented approach to maximize coverage under the policy. Important

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[18] *Id.*

[19] *See e.g., Garvey v. State Farm Fire & Casualty Co.*, 48 Cal. 3d 395, 257 Cal. Rptr. 292, 770 P.2d 704 (1989); *Sunbreaker Condominium Association v. Travelers Insurance Company*, 79 Wash. App. 368, 901 P.2d 1079 (1995); *Shelter Mutual Insurance Company v. Maples*, 309 F.3d 1068 (8th Cir. 2002).

[20] Green, *Proximate and Remote Cause, 4 Am. L. Rev. 201, 212 (1870),* quoted in Brewer, *Concurrent Causation in Insurance Contracts, 59 Mich. L. Rev. 1141, 1166 (1961).*

factors that impact any analysis, therefore, will concern the sequence of events giving rise to a loss, the relative quality of each event impacting the loss, and timing of events in any given case.

B. THE "LIBERAL" APPROACH

Another approach to concurrent causation, generally considered the more liberal (from the standpoint of the insured) approach, provides that, where a covered cause contributes to a loss, the entire loss is covered irrespective of the concurrence of an excluded cause. Although California has now apparently abandoned this approach,[21] it is well described in the California decision of *State Farm Mutual Automobile Insurance Co. v. Partridge.*[22] Only a handful of states actually appear to expressly follow this liberal reading of the doctrine of concurrent causation.[23]

C. THE "CONSERVATIVE" APPROACH

Some commentators describe a third, more conservative (from the standpoint of the insured) approach. In this approach, the concurrence of an excluded cause of loss results in a lack of coverage, even where a covered cause of loss contributes to the damage. While there do not appear to be any jurisdictions that strictly follow the "conservative" approach, Texas and New Jersey appear to follow a modified version. In those states, where covered and excluded losses combine to cause a loss, the insured has the burden of establishing which portion of the

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21 *Garvey v. State Farm and Casualty Co.*, 48 Cal. 3d 395, 257 Cal. Rptr. 292, 770 P.2d 704 (1989).

22 10 Cal. 3d 94, 109 Cal. Rptr. 811, 514 P.2d 123 (1973).

23 **Arizona:** *Koory v. Western Casualty & Sur. Co.*, 737 P.2d 388 (Ariz. 1987); **Florida:** *Transamerica Ins. Co. v. Snell*, 627 So.2d 1257 (Fla. App. 1993); *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. App.), review denied, 536 So. 2d 246 (Fla. 1988); **Illinois:** *Mattis v. State Farm Fire & Cas. Co.*, 454 N.E.2d 1156 (Ill. App. 1983), but questioned in *Spearman Ind., Inc. v. St. Paul Fire & Marine Ins. Co.*, 139 F. Supp.2d 943 (N.D.Ill. 2001); **Minnesota:** *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co., 383 N.W.2d 645* (Minn. 1986); *Fawcett House, Inc. v. Great Cent. Ins. Co.*, 159 N.W.2d 26 8 (Minn. 1968); **North Carolina:** *Avis v. Hartford Fire Ins. Co.*, 195 S.E.2d 545 (N.C. 1973); *Erie Ins. Exchange v. Bledsoe*, 540 S.E.2d 57 (N.C. App. 2000); **Wisconsin:** *Kraemer Bros. Inc. v. United States Fire Ins. Co.*, 278 N.W.2d 857 (Wis. 1979).

loss is the result of the covered peril, and may only recover damages which result from that covered cause of loss.[24]

III. THE BURDEN OF PROOF

Courts analyzing concurrent causation rarely provide detailed discussions concerning how the burden of proof should be allocated. The following section briefly considers this matter under all risk coverage with reference to whether the jurisdiction adheres to the "efficient cause" approach, the "liberal" approach, or the "conservative" approach.

Generally speaking, under an all-risk policy the insured is covered for any loss to designated property not caused by a specified exclusion. Thus, in a concurrent causation situation in a jurisdiction following the efficient cause approach, the insured will recover if the dominant cause is not an excluded cause. The insurer has the burden to show that the dominant cause of a loss was an excluded cause.[25] *Strubble v. United Services Automobile Association*,[26] a 1973 California decision in which the court followed efficient cause analysis, is illustrative. The insured's all-risk policy covered loss by earthquake but excluded loss due to earth movement. The insured's house was damaged by a landslide which occurred following a mild earthquake; the expert testimony offered by both parties on the extent to which the earthquake contributed to the loss pointed to different conclusions. The court approved the trial court's placing on the insurer the burden to prove the loss was caused by an excluded peril. This meant, according to the court, that the insurer had to prove that the loss was proximately caused by the excluded peril of earth movement, and to accomplish this, the insurer had to prove that the included peril of

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[24] **New Jersey:** *Stone v. Royal Ins. Co.*, 511 A.2d 717 (N.J. Super. 1986); *Brindley v. Fireman's Ins. Co. of Newark*, 113 A.2d 53 (N.J. Super. 1955); **Texas:** *Wallis v. United Services Automobile Assoc.*, 2 S.W.3d 300 (Tex. App. 1999).

[25] **California**: Strubble v. United Servs. Auto. Ass'n, 35 Cal. App. 3d 498, 110 Cal. Rptr. 828 (1973); **Florida**: Hudson v. Prudential Property and Casualty Ins. Co., 450 So. 2d 565 (Fla. App. 1984) (once insured establishes loss within all-risks policy, burden shifts to insurer to prove loss arose from excepted cause); Phoenix Ins. Co. v. Branch, 234 So. 2d 396 (Fla. App. 1970) (in all-risk coverage, burden of proving loss is not covered because it falls within specific exclusion is upon insurer).

[26] *35 Cal. App. 3d 498, 110 Cal. Rptr. 828 (1973)* .

earthquake did not proximately cause the loss. The court also noted that if the policy were specified-risk coverage instead, the burden would have been placed on the insured to prove that the earthquake proximately caused the loss.[27]

Research has failed to disclose the existence of court decisions on the burden of proof required under the so-called "liberal" or "conservative" approaches. One authority suggests that, under the former approach, it would seem that if any contributing cause (which passes the test of remoteness) is not specifically excluded by the coverage, the insured's loss is covered.[28] Thus, "[e]ven if the insurer carries its burden of showing that the dominant clause is excluded, the insured should still prevail if the insured establishes by a preponderance of the evidence that a non-excluded cause passing the test of remoteness contributed to the loss."[29] Under the latter approach, "it would seem that once the insurer carries its burden of showing that an excluded cause passing the test of remoteness contributed to the loss, the insurer should prevail, and the insured should not be able to alter the outcome by showing that a non-excluded cause contributed to the loss or was even dominant."[30]

IV. "ANTI-CONCURRENT CAUSATION" LANGUAGE

Insurers have reacted to the development of the doctrine of concurrent causation by attempting to "opt out" of the application of the doctrine by revision of the "preambles" in the sections of their policies listing excluded causes of loss to include what is generally called "anti-concurrent causation" language. For example, ISO forms and those based on ISO language, preface some of the exclusions with the following language:

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27 **District of Columbia:** *Souza v. Corvick, 441 F.2d 1013 (D.C. Cir. 1971)* (in action under all-risk coverage, burden was on insurer to prove that damage to realty was excluded from coverage of homeowner's policy); **Florida:** *Phoenix Ins. Co. v. Branch, 234 So. 2d 396 (Fla. App. 1970)* (under all-risk coverage, once insured establishes a loss within the terms of the policy, the burden is on the insurer to prove that the loss arose from an excepted cause).

28 *See*, Cozen, , *Insuring Real Property* § 48:04[2] (2004).

29 *Id.*

30 *Id.*

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. [Emphasis supplied.]

Several jurisdictions have denied effect to the "anti-concurrent causation" language holding that the insurer cannot contract out of the doctrine. [31] Other states, however, will permit insurers to avoid the application of the concurrent causation doctrine by modifying policy language. [32]

V. COMPLEXITY OF THE ISSUE: ONE STATE'S APPROACH

North Carolina's handling of the issue of concurrent causation is illustrative of the complexity involved in predicting the outcome in these cases. Under North Carolina law, a loss is covered where either the efficient and proximate cause of the loss is a covered peril or one of the causes of the loss is a covered peril, depending on the type of loss involved.

North Carolina recognizes that there may be multiple or concurrent causes of a loss. In order to avoid coverage in certain cases, the source of liability which is excluded must be the sole cause of the damage or injury.[33] In this regard, the Supreme Court of North Carolina has stated:

> [T]he cases . . . establish two principles with respect to determining the coverage of homeowners policies: (1) ambiguous terms and standards of causation in exclusion provisions of homeowners policies must be strictly construed against the insurer, and (2) homeowners policies provide coverage for injuries so long as a non-excluded cause is either the sole or concurrent cause of the injury giving rise to liability. Stating the second principle in reverse, *the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury in order to exclude coverage under the policy.*[34]

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31 Nevertheless, the result-oriented approach typically seen in North Carolina cases suggests that, in practice, the jurisdiction follows the "liberal" approach.

32 Nevertheless, the result-oriented approach typically seen in North Carolina cases suggests that, in practice, the jurisdiction follows the "liberal" approach.

33 *See State Capitol Ins. v. Nationwide Mut'l Ins.*, 350 S.E. 2d 66, 73 (N.C. 1986).

34 *Id.* at 73 (emphasis added).

More recently, in *Erie Ins. Exchange v.* Bledsoe,[35] the court of appeals reiterated that North Carolina follows the "liberal" approach in certain circumstances, particularly where the Court finds an ambiguity in the policy language. In *Bledsoe* the policy provided coverage for damage caused by certain perils including fire, water damage caused by fire suppression efforts and "collapse." Although the insurer in *Bledsoe* paid for damage to the insured premises determined to have been caused by fire and water, the insurer denied coverage for damage to the floor, claiming such damage was preexisting and the result of "settling" - an excluded event under the policy. The insured in *Bledsoe* alleged the damaged or sagging floor was caused by a "collapse" which resulted from a combination of multiple factors, including fire and water damage, and faulty workmanship. In the declaratory judgment action, the judge instructed the jury on two issues: (1) was the damage caused by fire or water used to extinguish the fire, or (2) was the damage caused by faulty workmanship. The appellate court held that the trial court had committed reversible error in failing to incorporate a proximate concurrent cause instruction, which would have allowed a jury to consider that multiple factors may have combined to cause the damage to the floor.[36]

In deciding that the failure to give the requested instruction was reversible error, the *Bledsoe* court quoted with approval the earlier language in *State Capital, supra*, that "the sources of liability which are excluded from homeowners policy coverage must be the sole cause of the injury in order to exclude coverage under the policy."[37] Moreover, in deciding that the jury could easily have been misled, the court appeared to place importance on the fact that the "collapse" provision under homeowners' policies has been deemed ambiguous. In fact, the court

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35 141 N.C. App. 331, 540 S.E.2d 57 (2000), *rev. denied*, 353 N.C. 371, 547 S.E.2d 442 (2001).

36 *Id.* at 59.

37 *Id.* at 61.

specifically stated: "We reiterate that our holding here is based on the ambiguity of the term "collapse" as it appears in Erie's policy with Bledsoe."[38]

The Court in *Bledsoe*, took particular care to distinguish its decision from prior windstorm cases that applied the "efficient and proximate cause" approach.[39] In *Wood v. Michigan Millers Mut'l Fire Ins. Co.*, the court stated the rule applicable to building insurance policies as follows:

> Where an insurance policy expressly covers the risk of loss to a building ..., liability for such loss is established where it is shown that the [risk of loss] by its own unaided action was of sufficient violence to be *the efficient and proximate cause of the damage* or where, as the efficient and proximate cause - though not the sole cause - it brings about such a material weakening of the building that it collapses from the weight of accumulated snow, and which collapse would not have taken place had not the structure first been weakened by the wind. *It is immaterial that the damage following from the efficient and proximate cause may have been indirectly and incidentally enhanced by another cause expressly excluded from coverage.*[40]

The insurer in *Wood* argued that the damage was the result of high water, a risk of loss expressly excluded under the policy. By endorsement, the policy extended coverage for direct loss by windstorm, but stated the "Company shall not be liable for loss caused directly or indirectly by ... high water ... whether driven by wind or not."[41] Therefore, the insurer requested an instruction "that if water was a contributing cause to plaintiff's loss, he could not recover."[42] In rejecting the insurer's argument, the court stated "if plaintiff's loss was caused by windstorm, the fact that the rains may have created a condition which would permit the

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38 *Id.* at 62.

39 *See, Wood v. Michigan Millers Mut'l Fire Ins. Co.*, 245 N.C. 383, 96 S.E.2d 28 (1957), *Harrison v. Insurance Co.*, 11 N.C. App. 367, 181 S.E. 2d 253 (1971); and *Miller v. Insurance Association,* 198 N.C. 572, 152 S.E. 684 (1930).

40 *Id.* at 30 (emphasis added) (citation omitted).

41 *Id.* at 29.

42 *Id.* at 30.

destruction by windstorm would not relieve [the insurer] from liability."[43] The *Bledsoe* court pointed out that these windstorm cases "uphold a 'dominant or efficient' cause standard," but were distinguishable because they did not deal with "collapse" an ambiguous term, but with "windstorm", an unambiguous term.

VI. CONCLUSION

As suggested throughout this paper, the complexity and inconsistency of relevant case law foster, rather than ameliorate, questions involving concurrent causation. Based on the vague analyses often provided by courts it is difficult, if not impossible, to predict with a winning degree of certainty how courts will apply the causation "approach" within a given jurisdiction. What does seem certain is that insureds will endeavor to use multiple causation arguments to avoid the effect of seemingly applicable exclusions. While much of the case law regarding causation is result-driven, with the end result being coverage for the insured – the fact remains that insurers have frequently avoided coverage by focusing the court's attention on the details and mechanism of the loss as often as possible.

Thus, in connection with the presentation of any claim, an insurer should first conduct some type of investigation in order to ensure whether causation is an issue. The facts adduced from the initial claim presentation through continuing investigation and discovery, if necessary, will delineate the scope of further investigation. And, a review of the complete policy and applicable caselaw should occur in connection with the presentation of most, if not all, claims. Indeed, prior to rendering a final coverage decision, the insurer should always consider the retention of experts in order to buttress its position.

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43 *Id.*

Finally, and irrespective of the approach followed in a given jurisdiction, insurers should always be cognizant of efforts by insureds to allocate amounts of loss between or among causes to attempt to circumvent unfavorable policy language or caselaw.

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A Practicum on Identifying Potential Conflicts of Interest and Charting A Course for Ethical Behavior in the Context of the Complex Subrogation Case

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I. INTRODUCTION

In the context of handling substantial subrogation claims, the insured frequently will attempt to be made whole by recovering its self-insured retention or other uninsured limits, while at the same time property and workers' compensation insurers will seek to protect their subrogation interests. Numerous issues typically arise implicating the rights and duties of the insured and insurers in their joint or separate claims to recover reimbursement for their respective losses. This discussion will highlight some of the broad areas of concern and issues to be addressed in connection with the investigation, pursuit and perfection of subrogation and recovery claims.

II. LOSS SITE INVESTIGATIONS/SPOLIATION AND PRESERVATION OF EVIDENCE

Every investigation in a property or workers' compensation subrogation claim will entail some aspect of physical evidence. Subrogating insurers – as well as the self-insured entity – have affirmative obligations to protect and preserve evidence, and to place potentially responsible parties on notice in order to afford them an opportunity to conduct loss site investigations. Specific requirements will differ on a jurisdictional basis. The relationship between the insurer and the insured should be focused upon for purposes of understanding the implications that arise if the insured is advised that the insurer is undertaking a subrogation investigation. Does such an undertaking necessarily include protection of the insured's rights and entitlements against responsible third parties? Is the insured entitled to obtain information from the insurer regarding the results of the subrogation investigation? Who ultimately is responsible for ensuring that pertinent physical evidence is identified, collected and preserved? What potential liability exposures, if any, may arise if these obligations are not satisfactorily performed?

On this latter point, case law in various jurisdictions makes it clear that if an insurer or its agents undertake to conduct a subrogation investigation, such an undertaking will result in the imposition of the duty of acting with due care, and potential liability if such duties are not carried out, with respect to the subrogation investigation activities being performed. Such a responsibility has been extended by certain courts to forensic consultants.

III. PURSUIT OF CLAIMS AGAINST COMMON DEFENDANTS

A prudent approach must be followed in determining whether and how to combine the insured's recovery claim with the insurer's subrogation claim. Again, there are important differences on a jurisdictional basis with respect to issues such as entitlement to first monies and obligation for costs. Most states will enforce an arm's length negotiation of a pro rata agreement, when supported by legal consideration. Query whether such consideration can take the form of the insurer advancing costs on behalf of the insured, to be repaid, in part, in the event of a recovery, and/or in providing information yielded from the insurer's own subrogation investigation? Consideration should be given to whether the pro rata agreement also needs to be in writing and signed by representatives of both parties.

Case law makes it clear that the issue of apportionment of recovery between an insurer and an insured will vary from state to state, requiring compliance with each state's specific requirements. In general, litigation agreements must be fair and reasonable and should address topics such as cooperation between the parties, control of the litigation, and apportionment of responsibility for costs and entitlement to share in any recovery by settlement or verdict.

IV. HOW TO ADDRESS A GROUNDLESS, EXCESSIVE AND/OR FRAUDULENT CLAIM

Lawyers are bound by the Rules of Professional Conduct including Rule 3.1: Meritorious Claims and Contentions, which prohibits an attorney from bringing or defending a proceeding, or prosecuting or defending a claim, unless there is a suitable basis in law or fact for doing so.

Duty of candor towards the tribunal supersedes the otherwise sacrosanct confidentiality of the attorney-client relationship.

There similarly are obligations, albeit less clearly defined, on the part of a subrogating insurer if it learns that the subrogation claim is factually unfounded or contains elements of fraud. It may be necessary to withdraw the claim and to report this to governmental authorities. Resolution of these issues will depend, in large part, upon particular circumstances at issue: there is a significant difference between a change in recollection or new and different information, on the one hand, versus misrepresentation and/or fraud, on the other. A determination also must be made regarding the level of proof required to support the institution of arbitration and/or legal proceedings for a subrogation claim.

V. CONCLUSION

It is important for all subrogation professionals to be sensitive to potential conflicts of interest and other ethical dilemmas which frequently arise in handling subrogation claims. It is advisable for subrogating insurers to develop, maintain and update a code of conduct to assist employees and independent adjusters in addressing these issues, including documenting discussions and subsequent review and approval of the decision making process by senior management. Consultation with legal counsel should be encouraged, especially counsel with extensive experience in subrogation, ethical and insurance industry matters. Adherence to ethical guidelines and best practices of the industry will inure to the overall success of an insurer's subrogation and recovery program.

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NATURAL CATASTROPHES:
Recovering Damages in the Aftermath of Disaster

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INTRODUCTION

A hurricane sweeps across the Southeast shattering its structures. Fires rage through the West ravaging the landscape. A flood runs through the Midwest ruining crops and city buildings. A blizzard blasts through the Northeast bringing businesses to the brink of bankruptcy. Lives are lost, and livelihoods. Whole industries take a hit, the insurance industry in particular.

But something can be done. With today's technological advancements, the onset of natural disasters is often predictable and the hazards can be contained. Those who fail to properly prepare for and respond to the danger can increase the zone of risk to others. The insurance industry can and should look for recovery opportunities from third parties whose carelessness contributed to the damages of their insureds.

Cozen O'Connor has extensive experience in pursuing those recovery opportunities. From Hurricane Andrew in '92 to the Blizzard of '96 to the Western fires of 2002, we have identified and recovered against third parties whose failures and omissions exacerbated the damages.

About This Guide

This is a guideline to legal recovery against third parties in the natural disaster context. It addresses hurricanes, tornadoes, wildland fires, floods, severe winter storms, and earthquakes. Section I provides an overall legal analysis of third-party liability in the face of natural disasters. Section II addresses construction practices and response systems to consider when evaluating third-party liability for improper disaster preparedness. Section III addresses the six primary disasters and their particular planning considerations. Section IV provides a list of disaster resources.

I. OVERVIEW OF LIABILITY IN THE DISASTER CONTEXT

Negligence

As with any negligence claim, the elements for a negligence claim against a third party for damage caused to adjoining or affected businesses or property owners are: (1) duty of care, (2) breach of the duty, (3) proximate cause, and (4) actual damages. In the natural disaster context, these elements have special considerations.

Duty of Care

Almost all jurisdictions agree that a party with actual or constructive knowledge of an unreasonably dangerous condition owes a duty to adjoining property owners to make the condition safe. In addition, courts in an increasing number of jurisdictions will impose the added duty of *inspecting* the property for potential defects.

Breach

The question of whether a party failed to take the appropriate precautions and thus breached the standard of care is typically an issue for the jury to decide after hearing all of the evidence.

Proximate Cause
Even if a landowner breached a duty of care and was thus technically negligent, the landowner will not be liable if the damages would have occurred from an act of God regardless of that negligence. However, the party will be liable for negligence committed in *concurrence* with an act of God:

> "He whose negligence joins with the act of God in producing injury is liable therefor." 1 Am.Jur.2d, Act of God, § 11.

Trespass and Nuisance
Even if negligence cannot be proven, an action for trespass or nuisance may still lie. A trespass is generally defined as an unauthorized entry onto property which results in interference with the property owner's possessory interest therein. The owner must prove an invasion of the land that interfered with the right of exclusive possession of the land as a direct result of some act committed by the defendant. Any physical entry upon the land constitutes such an invasion, whether the entry is "walking upon it, flooding it with water, casting objects upon it, or otherwise." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 13, at 70 (5th ed. 1984). Similarly, nuisance is any act that unreasonably interferes with the quite use and enjoyment of the land of another. Unlike trespass, however, a nuisance can occur without actual physical entry upon the land. Sounds, smells, and other detractors can suffice.

In the natural disaster context, trespass or nuisance claims can provide a basis for third-party liability even when "the act" of that third party was not technically "negligent." In Akers v. Mathieson Alkali Works, 151 Va. 1, 144 S.E. 492 (1928), for example, the plaintiff sued under theories of continuing trespass and nuisance for leakage of chemical "muck" from the defendant's storage basin. Defendant argued that the right of recovery was predicated upon a finding of negligence by defendant. The court rejected that argument, stating:

> The law requires that every person so use his own property as not to injure the property of another .... When defendant permitted the muck to escape from its land and injure land of the plaintiff, without his fault, defendant was liable for the damages sustained by the plaintiff. The loss in such cases must be borne by plaintiff or defendant and it seems just that it fall upon the defendant by whose conduct it was made possible.

Maritime Law
Coastal storms will often involve at least some damage to marinas, docks, and other structures along the coastline, often implicating federal maritime law. Admiralty jurisdiction will be triggered if the loss arises out of the storage and maintenance of boats in a marina on navigable waters.

The elements of a negligence claim under maritime law essentially mirror the common law elements: duty, breach, proximate cause, and damages. Determining the duty element, however, requires a balancing between (1) the likelihood of the disaster causing injury to others, (2) the potential extent of the injury, and (3) the expense and effort of adequate precautions to avoid the occurrence.

In states with statutory guidelines governing the conduct of marina and boat owners, the question can arise as to whether the state law is pre-empted by federal maritime law. Under the "maritime-but-local" doctrine, federal law will generally govern unless (1) the matter is one which has great local significance and (2) the state law to be applied does not threaten the uniformity of federal maritime law.

II. THIRD-PARTY PREPAREDNESS AND RESPONSE

Disaster Preparedness

Disaster preparedness is the process of planning for, responding to, and mitigating the damages of the event. The process should start early and stay dynamic, including:

a. Proper construction of buildings and other structures
b. Regular inspection of structures and landscaping
c. Testing of equipment
d. Keeping emergency back-up power and communication systems
e. Keeping a NOAA Weather Radio with a warning alarm tone and battery backup.
f. Establishing emergency training and drills
g. Coordinating the preparations with adjoining property owners, businesses, and community organizations.

Contractors, property owners, and businesses should consider whom they might affect by failing to properly prepare against the effects of a natural disaster. The ramifications of improper planning can be widespread, affecting customers, suppliers, other contractors, shareholders, related businesses, tenants, landlords, and neighbors.

Structural Considerations

There are several ways to build, fortify, and/or retrofit a structure to prevent or minimize the effects of natural disasters, including:

a. Upgrading facilities to withstand the shaking of an earthquake or high winds.
b. "Floodproofing" facilities by constructing flood walls or other flood protection devices
c. Installing fire sprinkler systems
d. Installing fire-resistant materials and furnishing
e. Installing storm shutters for all exterior windows and doors
f. Removing dead or decaying trees or limbs
g. Securing light fixtures and other items that could fall or shake loose in an emergency
h. Moving heavy or breakable objects to low shelves
i. Attaching cabinets and files to low walls or bolting them together
j. Placing Velcro strips under typewriters, tabletop computers and television monitors
k. Moving work stations away from large windows

l. Installing curtains or blinds that can be drawn over windows to prevent glass from shattering onto employees
m. Anchoring water heaters and bolting them to wall studs

Establishing Response Systems

Property owners and businesses can and should develop response systems that minimize the impact of natural catastrophes. When a third party fails to adopt such a response system, an affected party may have a basis for recovery against that party. Some issues to consider are whether the third party conducted an analysis of and developed a plan for addressing the following:

a. Potential damage to adjoining property or connected businesses as a result of:
    1. Inadequate construction
    2. Inadequate foundation
    3. Inadequate fire protection systems and/or fire walls
    4. Inadequate floodproofing
    5. Susceptible gas mains
    6. Explosive materials
    7. Poorly secured chemicals
b. Proximity to flood plains, seismic faults, dams, dry wildlands, and heavy storms.
c. Governing codes, laws, or ordinances, including:
    1. Occupational safety and health regulations
    2. Environmental regulations
    3. Fire codes
    4. Seismic safety codes
    5. Transportation regulations
    6. Zoning regulations
d. In-house response teams, including:
    1. Fire brigade teams
    2. hazardous materials response team
    3. security teams
    4. emergency management group
    5. evacuation team
    6. public information officer
e. In-house response equipment, including
    1. fire protection and suppression equipment
    2. communications equipment
    3. first aid supplies
    4. emergency supplies
    5. warning systems
    6. emergency power equipment
    7. decontamination equipment.
f. In-house site maps that indicate:
    1. Utility shutoffs
    2. Water hydrants
    3. Water main valves

4. Water lines
5. Gas main valves
6. Gas lines
7. Electrical cutoffs
8. Electrical substations
9. Storm drains
10. Sewer lines
11. Location of each building (include name of building, street name and number)
12 Floor plans
13. Alarm and enunciators
14. Fire extinguishers
15. Fire suppression systems
16. Exits
17. Stairways
18. Designated escape routes
19. Restricted areas
20. Hazardous materials (including cleaning supplies and chemicals)
21. High-value items

Post-Disaster Mitigation

Damages in the aftermath of a disaster, especially business interruption losses, can sometimes exceed the initial physical losses. It is therefore critical to initiate repairs and bring systems back on-line as quickly as possible. Failure to do so can extend the damages not only of the affected property owner or business but also of lessees, renters, and adjoining property owners or businesses. In determining whether a third party has exacerbated the post-disaster damage, consider whether that party did the following:

a. Promptly assessed and protected against remaining hazards.
b. Protected undamaged property by:
    1. Closing building openings
    2. Removing smoke, water, and debris
    3. Protecting equipment against moisture
    4. Restoring sprinkler systems
    5. Physically securing the property
    6. Restoring power
c. Kept detailed records, including photographs, videotape, audiotape.
d. Coordinated actions with appropriate government agencies.

III. SPECIAL PLANNING CONSIDERATIONS FOR EACH DISASTER

This section provides specific planning considerations for each of the most common, significant natural disasters. These planning considerations apply primarily to businesses, building landlords, and building tenants, though some apply to any property owner including homeowners. A third party's failure to follow some or all the considerations can, in some circumstances, form the basis of a cause of action against that party.

Hurricanes

Hurricanes are severe tropical storms with winds that rotate clockwise and reach sustained levels of at least 64 knots (74 miles per hour). They develop over warm tropical oceans and can produce torrential rains and flooding. They can also spawn tornadoes. The winds can reach 160 miles per hour and extend inland for hundreds of miles causing tremendous property damage along the seaboard states. The hurricane season lasts from June through November. Satellite systems and hurricane hunters provide ready information on the development of hurricanes over the ocean. The National Hurricane Center in Miami will issue hurricane watches and warnings as soon as a hurricane appears to be a threat. A hurricane watch will typically provide advance warning one to two days before the hit.

Planning considerations include:

a. Listening for hurricane watches and warnings.
b. Having the facility inspected by a structural engineer, especially awnings and roofing systems.
c. Code compliance when constructing a facility or making major renovations.
d. Protecting windows, preferably with permanent storm shutters or with 5/8' marine plywood.
e. Listening for community evacuation plans from the local emergency management office.
f. Establishing warning and evacuation procedures for the facility.
g. Establishing shutdown procedures for the facility.
h. Considering the need for backup systems, including:
    1. Portable pumps to remove flood water
    2. Alternate power sources such as generators or gasoline-powered pumps
    3. Battery-powered emergency lighting
i. Preparing to protect or move records, computers and other items within the facility or to another location.

Tornadoes

Tornadoes are storms with violent whirling winds that extend from thunderstorm clouds down toward the ground. The winds can reach 300 miles per hour, uprooting trees, buildings, and other objects and turning them into devastating projectiles in the process. They can create paths of damage over a mile wide and fifty miles long. They form with little advance warning. Every state is susceptible to potential tornadoes, but they occur most often in the Midwest, Southeast and Southwest. It should be noted that auditoriums, cafeterias, and gymnasiums that are covered with a flat, wide-span roof are not considered safe shelter areas.

Planning considerations include:

a. Asking the local emergency management office about the community's tornado warning system.
b. Listening for tornado watches and warnings.
c. Designating "spotters" to look out for approaching storms.
d. Establishing protective areas underground or in:
    1. Small interior rooms on the lowest floor and without windows
    2. Hallways on the lowest floor away from doors and windows

3. Rooms constructed with reinforced concrete, brick or block with no windows and a heavy concrete floor or roof system overhead

e. Conducting tornado drills.

Wildland Fires

Wildland fires are quasi-natural events. They can arise both from natural forces, as from lightning, and from human hands, accidental or otherwise. Most wildland fires are relatively harmless and, indeed, are prescribed by land managers – governmental and private -- in an effort to stimulate biotic processes and/or reduce the potential fuel load of dried wildlands should lightning or errant human hands strike. Whether a minor wildland fire will become catastrophic depends upon such factors as wind, temperature, humidity, slope, topography, and the surrounding fuel load. Strong winds can carry burning embers or sparks to other areas, causing spot fires, or can push the flames toward new fuel sources. Wind can also dry out the surrounding fuel sources. The convection currents of wildland fires can also create additional winds, thus fanning their own flames. Solar heating affects the spread of wildland fires by speeding up the time it takes for surrounding fuel loads to reach their ignition point. Humidity affects the spread in that the lower it gets, the less moisture there is to dampen the fuel load. Topography can affect the spread in several ways. The shape of the land determines how much sunlight or shade it gets and how much wind gets through. Rock formations can affect the amount of fuel that can grow. Certain natural or manmade barriers can stop or slow the spread, including highways, boulders, and bodies of water. Elevation and slope can contribute to how quickly the fire will reach the crest of the land form. Fires that start at the bottom of the slope will preheat the uphill fuels by the rising air, increasing the chances of ignition. Fires that start uphill can also roll downward when burning material drops by the force of gravity.

Planning considerations

a. Learning the history of wildfires in the area.
b. Inspecting the roof and exterior structure of the structure for non-combustible or fire resistant materials such as tile, slate, sheet iron, aluminum, brick, or stone.
c. Replacing wood roofing or exterior paneling or applying fire retardant chemicals.
d. Clearing roof surfaces and gutters of pine needs, leaves, branches, and other combustible materials.
e. Creating a "fuel break" around all structures by clearing away foliage or other combustibles (e.g., picnic tables)
f. Protecting the flue opening of every stovepipe or chimney with a non-combustible screen with mesh openings no larger than 1/2 inch in diameter.
g. Clearing the flue opening of any foliage with ten feet.
h. Spacing the trees and bushes away from the structure or surrounding vegetation.
i. Pruning away tree branches less than 15 feet high.
j. Storing gasoline and propane in approved containers away from occupied buildings.
k. Making sure roads and driveways are at least 16 feet wide.
l. Keeping fire equipment and tools on hand, such as:
    1. Extinguishers
    2. Ladder long enough to reach the roof
    3. Shovel
    4. Rake

5. Water buckets.

m. Keeping garden hoses connected to the outlets.

Floods and flash floods

Of all the natural disasters, floods are perhaps the most common and widespread throughout the states. Most floods develop from spring rains, heavy thunderstorms, or winter snow thaws. They often develop slowly over a period of days. Flash floods, however, come without warning, descending upon communities in a crash of water in mere minutes, usually from intense storms or dam failure.

Planning considerations include:

a. Asking the local emergency management office whether the facility is located in a flood plain.
b. Learning the history of flooding in the area.
c. Learning the elevation of the facility in relation to streams, rivers and dams.
d. Inspecting areas in the facility subject to flooding.
e. Considering the feasibility of floodproofing the facility, such as:
    1. Protecting windows, doors, and other openings with bricks, blocks, flood shields, or other water-resistant materials.
    2. Equipping water and sewer lines with check valves.
    3. Sealing or reinforcing walls to resist water seepage or pressure.
    4. Protecting equipment or work areas with water-tight walls.
    5. Building outdoor floodwalls or levees to protect the facility, without causing water diversion to neighboring property owners.
    6. Elevating the facility on walls, columns or compacted fill.
    7. Installing permanent watertight doors
    8. Constructing movable floodwalls
    9. Installing permanent pumps to remove flood waters
    10. Stacking sandbags against building walls.
    11. Constructing a double row of walls with boards and posts to create a "crib," then filling the crib with soil
    12. Constructing a single wall by stacking small beams or planks on top of each other
f. Considering the need for backup systems, including:
    1. Portable pumps to remove flood water
    2. Alternate power sources such as generators or gasoline-powered pumps
    3. Battery-powered emergency lighting
g. Participating in community flood control projects.
h. Reviewing the community's emergency plan and learning the community's evacuation routes.
i. Knowing where to find higher ground in case of a flood.
j. Establishing warning and evacuation procedures for the facility.
k. Listening for flood watches and warnings.
l. Identifying records and equipment that can be moved to a higher location and making plans to move them.

Severe Winter Storms

Winter storms can bring heavy snow, heavy winds, hail, ice, and freezing rains. Each region is equipped to handle them differently depending on the historical frequency and severity the storms. When they hit, however, they can shut down even the most prepared of cities.

Planning considerations include:

a. Listening for storm warnings and watches.
b. Having the facility inspected by a structural engineer.
c. Assuring that the roofing system complies with code.
d. Code compliance when constructing a facility or making major renovations.
e. Storing food, water, blankets, battery-powered radios with extra batteries and other emergency supplies for employees who become stranded at the facility.
f. Providing a backup power source for critical operations.
g. Arranging for snow and ice removal from parking lots, walkways, loading docks, roofs, etc.

Earthquakes

Earthquakes are perhaps the most sudden and unpredictable of the natural disasters. Though they are mostly confined to the states west of the Rocky Mountains, the most violent earthquakes in history have occurred in the central United States. In addition to damaging buildings and utility services, they can trigger avalanches, landslides, flash floods, and tsunamis. They are often followed by aftershocks that can last for weeks.

Planning considerations:

a. Assessing the facility's vulnerability to earthquakes.
b. Asking local government agencies for seismic information for the area.
c. Inspections of the facility by a structural engineer.
d. Developing and prioritizing strengthening measures, which may include:
    1. Adding steel bracing to frames
    2. Adding sheer walls to frames
    3. Strengthening columns and building foundations
    4. Replacing unreinforced brick filler walls
e. Following safety codes when constructing a facility or making major renovations.
f. Inspecting non-structural systems such as air conditioning, communications and pollution control systems.
g. Assessing the potential for damage and prioritizing measures to prevent damages.
h. Inspecting the facility for any item that could fall, spill, break or move during an earthquake and taking steps to reduce these hazards.
i. Moving large and heavy objects to lower shelves or the floor.
j. Hanging heavy items away from where people work.
k. Securing shelves, filing cabinets, tall furniture, desktop equipment, computers, printers, copiers and light fixtures.
l. Securing fixed equipment and heavy machinery to the floor; ; larger equipment can be placed on casters and attached to tethers which attach to the wall.
m. Adding bracing to suspended ceilings, if necessary.
n. Installing safety glass where appropriate.

o. Securing large utility and process piping.
p. Keeping copies of design drawings of the facility to be used in assessing the facility's safety after an earthquake.
q. Reviewing processes for handling and storing hazardous materials and storing incompatible chemicals separately.
r. Establishing procedures to determine whether an evacuation is necessary after an earthquake.
s. Designating areas in the facility away from exterior walls and windows where occupants should gather after an earthquake if an evacuation is not necessary.
t. Conducting earthquake drills.

IV. RESOURCES

This section provides the following information sources:

Publications
The Federal Emergency Management Agency (FEMA) provides numerous publications on their website, www.fema.gov. Hardcopies can also be obtained by writing to: FEMA, Publications, P.O. Box 70274, Washington, DC 20024. Useful publications include:

- Disaster Mitigation Guide for Business and Industry (FEMA 190) --Technical planning information for building owners and industrial facilities on how to reduce the impact of natural disasters and man-made emergencies.
- Principal Threats Facing Communities and Local Emergency Management Coordinators (FEMA 191) -- Statistics and analyses of natural disasters and man-made threats in the U.S.
- Floodproofing Non-Residential Structures (FEMA 102) -- Technical information for building owners, designers and contractors on floodproofing techniques (200 pages).
- Non-Residential Flood-proofing -- Requirements and Certification for Buildings Located in Flood Hazard Areas in Accordance with the National Flood Insurance Program (FIA-TB-3).
- Building Performance: Hurricane Andrew in Florida (FIA 22) -- Technical guidance for enhancing the performance of buildings in hurricanes.
- Building Performance: Hurricane Iniki in Hawaii (FIA 23) -- Technical guidance for reducing hurricane and flood damage.
- Answers to Questions About Substantially Damaged Buildings (FEMA 213) -- Information about regulations and policies of the National Flood Insurance Program regarding substantially damaged buildings (25 pages).
- Design Guidelines for Flood Damage Reduction (FEMA 15) -- A study on land use, watershed management, design and construction practices in flood- prone areas.
- Comprehensive Earthquake Preparedness Planning Guidelines: Corporate FEMA 71) -- Earthquake planning guidance for corporate safety officers and managers.

Publications from other sources include:

- Mullins, G.W. 1999. *Wildfire–Feel the Heat Study Guide.* Bethesda, MD: Discovery Pictures, Inc.

- National Wildfire Coordinating Group. 1994. "Introduction to Wildland Fire" Behavior S-190, Student Workbook NFES 1860. Boise, ID: National Interagency Fire Center.
- Pyne, S.J., P.L. Andrews, and R.D. Laven. 1996. *Introduction to Wildland Fire*, 2nd Edition. New York: John Wiley & Sons, Inc.

Websites

- National Weather Service: www.nws.noaa.gov
- The Weather Channel: www.weather.com
- Accuweather.Com: www.accuweather.com
- The Weather Network: www.theweathernetwork.com
- Weather Underground: www.wunderground.com
- Intellicast Weather: www.intellicast.com
- Online Meteorology Guide: http://ww2010.atmos.uiuc.edu
- World Climate: www.worldclimate.com
- National Climatic Data Center: www.ncdc.noaa.gov
- Automated Weather Service: www.aws.com
- The Weather Center/WeatherWatch.Com: www.weatherwatch.com
- WeatherNet: http://cirrus.sprl.umich.edu/wxnet
- WeatherConcepts: www.weatherconcepts.com
- National Interagency Fire Center: www.nifc.com
- Stormtrack: www.stormtrack.com
- Center for Analysis and Prediction of Storms, Univ. Oklahoma: www.caps.ou..edu

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HURRICANE ISABEL:
A PRELIMINARY FACTUAL AND LEGAL ANALYSIS OF THE SUBROGATION ISSUES

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Subrogation & Recovery
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October 1, 2003

HURRICANE ISABEL
A Preliminary Factual and Legal Analysis of the Subrogation Issues

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I. INTRODUCTION

On September 18, 2003, the huge mass of Hurricane Isabel slammed the shores of North Carolina and surged its way through Virginia and beyond. It left over four million people without power. It damaged buildings and businesses over several states. It caused damages roughly estimated at over $1 billion. It was one of the largest hurricanes the Atlantic Coast – and the insurance industry -- has ever faced.

As with any catastrophic loss, recovery is difficult. But it is not impossible. Millions of dollars can be saved or recovered by insurers who have armed themselves with professionals trained to handle coverage and subrogation issues in the disaster context. Cozen O'Connor has extensive experience serving that function. From Hurricanes Hugo to Andrew to Fran to Floyd, we have saved our clients multiple millions in claims payments.

This paper serves as an initial analysis of the factual and legal issues affecting subrogation opportunities, providing various theories of recovery in the catastrophe context, with emphasis on North Carolina and Virginia law.

II. THE STORM AND ITS CONSEQUENCES

The large eye of Hurricane Isabel descended on the coast of North Carolina mid-day September 18, 2003. The storm struck at 12:15 p.m. between Cape Lookout and Ocracoke Island in the southern part of North Carolina's Outer Banks. Upon landfall, winds were sustained at 95 miles per hour and gusts reached up to 105 miles per hour. Dubbed "Izzy" by coastal residents, the storm eased down to 80 miles per hour in sustained winds as it crossed the west end of Ocracoke Island, but gusts reached at least 98 miles per hour. At Cape Lookout, gusts reached 89 miles per hour. At Frying Pan Shoals, the automated reporting station

recorded sustained winds of 70 mph with gusts of 84 mph. The station at Cape Hatteras reported wind gusts up to 79 mph and rains of six to ten inches. Highway 12, which runs along the chain of barrier islands, was entirely destroyed in Hatteras Island and rendered impassable in the remaining chain of islands from Kitty Hawk to Frisco, covered in sand and water and power lines. The bridge on the north end of Hatteras Island was severed on both ends by the force of the waves.

Before the storm, North Carolina and Virginia had furiously prepared for the worst. A hurricane warning was issued several days before which stretched from Cape Fear, North Carolina, northward to Chincoteague, Virginia. In addition, tropical storm warnings were issued from Cape Fear southward to South Santee River in South Carolina, and north from Chincoteague to Sandy Hook, New Jersey. The governors of Virginia, North Carolina, Delaware, and Maryland declared states of emergency. In excess of 100,000 people evacuated North Carolina and Virginia. As the storm approached, government offices North Carolina, Virginia, and Washington area were ordered closed.

Although the storm only reached Category 2 level, its sheer size and sustained force left a significant amount of destruction in its wake. In the words of Max Mayfield, National Hurricane Center Director, "This hurricane will not be remembered for how strong it is. It will be remembered for how large it is." After crossing the islands, Isabel continued to maintain hurricane-force winds – at least 74 miles per hour – to a radius of over 115 miles from the center. Tropical storm-force winds extended up to 345 miles from the eye. On September 18, President Bush signed an emergency disaster declaration covering 26 counties in eastern North Carolina, and 18 counties and 13 cities in Virginia. On September 19th, as Isabel was moving through northern Pennsylvania, downgraded to a tropical storm but still carrying sustained winds of up to 40 miles per hour.

The storm left nearly two dozen people dead and more than four million people without power. Structures collapsed and were flooded over a wide geography. Countless trees toppled over homes and other buildings. Seventy-five percent of residential properties were destroyed in several coastal cities, some containing standing water several feet high. There is still tremendous concern regarding the aftermath of the storm, including rising rivers and the response of utilities companies and government agencies. As with many other major storms, the total damage will not be fully assessed until several weeks after Isabel's strike.

III. SUBROGATION ISSUES

In any large loss, the potential for subrogation should never be overlooked, not even when the loss is caused by a so-called "act of God" such as Isabel. Indeed, Cozen O'Connor has recovered millions of dollars in several "storms of the century." The focus on such claims is on third parties who played a contributing role by failing to properly prepare for or respond to the danger -- supporting players in the Act of God.

This section addresses not just hurricanes, but also the tornadoes, floods, and lightning they can spawn. Section A provides an overview of the nature of hurricanes and their "offspring." Section B provides an overall legal analysis of third-party liability in the face of such natural

disasters. Section C addresses the liability of adjoining landowners. Section D discusses how to overcome the act of God defense. Section E discusses particular forms of improper preparedness and response in the hurricane context. Section F addresses governmental liability. Section G provides a list of disaster resources.

A. Overview of Hurricanes and Their Offspring

Hurricanes are severe tropical storms with winds that rotate clockwise and reach sustained levels of at least 64 knots (74 miles per hour). They develop over warm tropical oceans and can produce torrential rains and flooding. They can also spawn tornadoes and cause flooding and flash floods. The winds can reach 160 miles per hour and extend inland for hundreds of miles causing tremendous property damage along the seaboard states. The hurricane season lasts from June through November. Satellite systems and hurricane hunters provide ready information on the development of hurricanes over the ocean. The National Hurricane Center in Miami will issue hurricane watches and warnings soon as a hurricane appears to be a threat. A hurricane watch will typically provide advance warning one to two days before the hit.

Tornadoes are storms with violent whirling winds that extend from thunderstorm clouds down toward the ground. The winds can reach 300 miles per hour, uprooting trees, buildings, and other objects and turning them into devastating projectiles in the process. They can create paths of damage over a mile wide and fifty miles long. They form with little advance warning. Every state is susceptible to potential tornadoes, but they occur most often in the Midwest, Southeast and Southwest. It should be noted that auditoriums, cafeterias, and gymnasiums that are covered with a flat, wide-span roof are not considered safe shelter areas.

Of all the natural disasters, floods are perhaps the most common and widespread throughout the states. Most floods develop from spring rains, heavy thunderstorms, or winter snow thaws. They often develop slowly over a period of days. Flash floods, however, come without warning, descending upon communities in a crash of water in mere minutes, usually from intense storms, like hurricanes, or dam failure.

Lightning strikes are common in the course of a hurricane, often resulting in fires. If the structure was improperly equipped with lightning strike protection or fire protection, an action may lie against the architects, contractors, or others that failed to provide, or install, such equipment.

B. Overview of Liability in the Disaster Context

Most liability scenarios in the hurricane context involve claims in the peripheral areas where the winds were *below* the level of a hurricane or tornado. In such cases, liability is premised on the argument that the property in question failed to conform with building codes, which usually require buildings to withstand winds in the range of 70 to 90 miles per hour. Liability may be relatively straightforward in such claims as long as the claim is supported by experts who can opine on the standard of care in construction and in the degree of force applied to that construction. It will be important for those experts to analyze the degree of damages to surrounding structures to assess how well they held up to similar conditions.

Because hurricanes can spawn tornadoes, it will be important to look for a tornado path. If the damaged structure is outside that path, it is possible to make the case that the structure was only subjected to partial impact. When feasible, an aerial photograph of the structure and its surrounding structures should be taken.

In cases involving direct-path damage from a true hurricane or tornado, other possible theories may also be available. For example, consider the property owner who fails to "batten down the hatches," *e.g.*, fails to protect the windows or close the garage door. Such failure can result in the roof blowing off from uplift – a condition that could have been prevented if these openings had been properly secured. If neighboring landowners incur damage from the debris of that home, a possible claim may lie for improperly securing the structure. Other theories may include lack of post-disaster governmental response, *e.g.*, pre-storm failure to maintain sewage systems or post-storm failure to install new stop signs or traffic signals within a reasonable time after the storm.

Regardless of whether the claim is a peripheral damage or direct damage case, some basic theories of liability can be used to make the case.

1. Negligence

As with any negligence claim, the elements for a negligence claim against a third party for damage caused in the disaster context are: (1) duty of care, (2) breach of the duty, (3) proximate cause, and (4) actual damages. In the natural disaster context, these elements have special considerations.

a. Duty of Care

Almost all jurisdictions agree that a party with actual or constructive knowledge of an unreasonably dangerous condition owes a duty to adjoining property owners to make the condition safe. In addition, courts in an increasing number of jurisdictions will impose the added duty of *inspecting* the property for potential defects or hazards, as discussed more fully in Section C, below.

b. Breach

The question of whether a party failed to take the appropriate precautions and thus breached the standard of care is typically an issue for the jury to decide after hearing all of the evidence.

c. Proximate Cause

Even if a landowner breached a duty of care and was thus technically negligent, the landowner will not be liable if the damages would have occurred from an act of God regardless of that negligence. However, the party will be liable for negligence committed in *concurrence* with an act of God, as discussed more fully in Section C, below.

2. Trespass and Nuisance

Even if negligence cannot be proven, an action for trespass or nuisance may still lie. A trespass is generally defined as an unauthorized entry onto property which results in interference with the property owner's possessory interest therein. The owner must prove an invasion of the land that interfered with the right of exclusive possession of the land as a direct result of some act committed by the defendant. Any physical entry upon the land constitutes such an invasion, whether the entry is "walking upon it, flooding it with water, casting objects upon it, or otherwise." W. Page

Keeton et al., Prosser and Keeton on the Law of Torts § 13, at 70 (5th ed. 1984). Similarly, nuisance is any act that unreasonably interferes with the quite use and enjoyment of the land of another. Unlike trespass, however, a nuisance can occur without actual physical entry upon the land. Sounds, smells, and other detractors can suffice.

In the natural disaster context, trespass or nuisance claims can provide a basis for third-party liability even when "the act" of that third party was not technically "negligent." In *Akers v. Mathieson Alkali Works*, 151 Va. 1, 144 S.E. 492 (1928), for example, the plaintiff sued under theories of continuing trespass and nuisance for leakage of chemical "muck" from the defendant's storage basin. Defendant argued that the right of recovery was predicated upon a finding of negligence by defendant. The Virginia Supreme Court rejected that argument, stating:

> The law requires that every person so use his own property as not to injure the property of another .... When defendant permitted the muck to escape from its land and injure land of the plaintiff, without his fault, defendant was liable for the damages sustained by the plaintiff. The loss in such cases must be borne by plaintiff or defendant and it seems just that it fall upon the defendant by whose conduct it was made possible.

3. Maritime Law

Coastal storms will often involve at least some damage to marinas, docks, and other structures along the coastline, often implicating federal maritime law. Admiralty jurisdiction will be triggered if the loss arises out of the storage and maintenance of boats in a marina on navigable waters.

The elements of a negligence claim under maritime law essentially mirror the common law elements: duty, breach, proximate cause, and damages. Determining the duty element, however, requires a balancing between (1) the likelihood of the disaster causing injury to others, (2) the potential extent of the injury, and (3) the expense and effort of adequate precautions to avoid the occurrence.

In states with statutory guidelines governing the conduct of marina and boat owners, the question can arise as to whether the state law is pre-empted by federal maritime law. Under the "maritime-but-local" doctrine, federal law will generally govern unless (1) the matter is one which has great local significance and (2) the state law to be applied does not threaten the uniformity of federal maritime law.

C. Liability of Adjoining Landowners for Debris Damage

A common subject of legal problems for disaster victims involves rights and responsibilities relating to fallen trees and other storm debris. Determining liability depends on an analysis of duty, breach of duty, and proximate cause.

1. Duty

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 which he/she knows are in an unreasonably dangerous condition. The duty 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.

2. Breach

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 probably severity of the disaster and the efficacy and cost of precautions.

3. Proximate Cause

Assuming that the property owner has been negligent in some manner, the property owner may escape liability of the damage would have occurred even in the absence of the property owner's negligence. However, if 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 superceding cause, relieving the property owner of liability.

North Carolina

North Carolina subscribes to the general rule of negligence requiring the plaintiff to show that (1) the defendant owed a duty of care to the plaintiff under the circumstances, (2) the defendant failed to exercise the degree of care what would be exercised by a reasonably prudent person under similar circumstances, (3) the defendant's negligence was a proximate cause of damage; and (4) the plaintiff suffered actual loss or damage. *See Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709 (1988), *McMurray v. Surely Federal Savings & Loan Ass'n.*, 82 N.C. App. 729, 731, *cert. denied* 318 N.C. 694 (1987); Keeton, *Prosser and Keeton on the Law of Torts,* § 30 (5th ed, 1981); *Hester v. Miller*, 41 N.C. App. 509, 512 (1979), *cert. denied*, 298 N.C. 296.

As of September 2003, no North Carolina cases have been uncovered which directly discuss the degree of precaution necessary in the context of an approaching storm. Absent direct law on the issue, establishing liability of adjoining property owners should begin with the principle that the law imposes a duty or ordinary care upon every person who engages in an active course of conduct. *Toone v. Adams*, 262 N.C. 403, 409 (1964). In addition, North Carolina law imposes a duty of care on a property owner to maintain man-made structures, cultivated trees, and other pieces of human-cultivated landscaping, and naturally occurring objects which the owner knows are in an unreasonably dangerous condition. *Matheny v. Stonecutter Mills Corp.*, 107 S.E.2d 143 (NC 1959). The duty generally applies to lawful visitors but not to trespassers. *Nelson v. Freedland*, 507 S.E.2d 882, 892 (NC 1998). It extends, however, to drivers on public roads and to neighboring property owners, so long as the property owner had actual or constructive knowledge of the dangerous condition. *Gibson v. Hunsberger*, 428 S.E.2d 489 (NC Ct. App. 1993) (landowner is liable to drivers on public roads adjacent to land for dangerous conditions of which the owner had actual or constructive notice, but is not obligated to inspect property in rural, wooded settings); *cf. Rowe v. McGee*, 168 S.E.2d 77 (NC Ct. App. 1969) (owner who knows its tree is decayed and likely to fall and damage plaintiffs' property has duty to eliminate danger but is not liable to defendant if plaintiff had equal ability to control the condition); Annotation, "Failure to Exercise Due Care to Prevent all of Tree", 27 AM. JUR. 2d, *Proof of Facts* 639, section 1, at 645 (noting that both owners and occupiers of property have been held liable where the requisite control was found.).

The *Gibson* case held that in a rural, wooded setting, a property owner is not obligated to inspect the property to uncover

dangerous conditions of which the owner was not previously aware. This is consistent with the common law rule absolving the landowner of any duty to find or remedy naturally occurring conditions, a rule designed to avoid burdening rural landowners with inspection of large unpopulated woodlands. *See generally* Keeton, *Prosser and Keeton on the Law of Torts*, § 57 (5th ed. 1984). Other jurisdictions have held similarly. *See, e.g., Ivancic v. Olmstead*, 66 N.Y.2d 349, 488 N.E.2d, *cert. denied* 90 L. Ed 658, 106 S. Ct. 1975 (1985) (a duty to remedy the hazard arises where the landowner has actual or constructive knowledge of it, but landowner has no duty to inspect regularly for non-visible decay of trees). However, the *Gibson* case did not specifically address the duty of a landowner in a more populated setting.

Virginia

In Virginia, "[t]he law requires that every person so use his own property as not to injure the property of another, *sic utere tuo ut alienum non laedas.*" *Akers v. Mathieson Alkali Works*, 151 Va. 1, 144 S.E. 492 (1928). As stated in *City of Portsmouth v. Culpepper*, 192 Va. 362 (1951), "Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected."

Other Jurisdictions

The trend in other jurisdictions has been to impose upon a landowner in an urban or residential setting the duty to inspect the property for defects in trees and other naturally occurring objects. *See, e.g., Mahurin v. Lockhart*, 71 Ill. App. 3d 691, 390 N.E.2d 523 (1979); *Barker v. Brown*, 236 Pa.Super 75, 340 A.2d 566 (1975). Some jurisdictions have abolished the common law exception for naturally occurring hazards regardless of whether the setting was rural or urban. *See, e.g., Sprecher v. Adamson Cos.*, 30 Ca.3d 358, 636 P.2d 1121 (1981) (tree); *Dudley v. Meadowbrook, Inc.*, 166 A.2d 743 (D.C. Mun. Ct. App. 1960) (same); *see also* Annotation, "Tree of Limb Falls onto Adjoining Private Property: Personal Injury and Property Damage Liability", 54 A.L.R. 4th 530, 541 (1987).

D. The "Act of God" Defense

The general rule in most states is that an Act of God is no defense if the damages occurred in concurrence with another act. The principle has been stated succinctly as follows: "He whose negligence joins with the act of God in producing injury is liable therefor." 1 AM. JUR. 2d, Act of God, § 11.

North Carolina

As held in *Safeguard Ins. Co. v. Wilmington Cold Storage Co.*, 149 S.E.2d 27 (NC Ct. App. 1966), the landowner will be liable if the landowner's negligence acted in concurrence with an act of God:

> "[One may be held liable for his own negligence even through it concurs with an act of God." To the same effect, Southern Ry. Co. v. Cohen Weenen & Co., 156 Va. 313, 157 S.E. 563. Reducing the principle to the terseness of a maxim, "He whose negligence joins with the act of God in producing injury is liable therefor." Kindell v. Franklin Sugar Refining Co., 286 Pa. 359, 133 A. 566.

Safeguard Ins., 149 S.E.2d 27 (N.C. Ct. App. 1966). However, the landowner will not be liable for damages if the damages would have occurred from an act of God *regardless of that negligence.*

> This is said in 1 AM. JUR. 2d, Act of God, § 11: "All the authorities without exception agree that a person is not liable for injuries or damages caused by an act which falls within the meaning of the term 'act of God,' where there is no fault or negligence on his part. Even where the law imposes liability irrespective of negligence, liability will not be imposed where the injury or damage is solely the result of an act of God."

The issue was further developed in *Lea Co.* v. *North Carolina Board of Transp.*, 308 N.C. 603,304 S.E.2d 164 (N.C. 1983), wherein the plaintiff instituted an action against the Board of Transportation for flooding on or across the plaintiff's property which flowed from an easement taken by the Board. This flooding was a result of a 100-year flood (*i.e.*, a flood that is statistically predicted to occur once in every 100 years). Nonetheless, the North Carolina Supreme Court upheld the trial court determination that this flood was a reasonably foreseeable event. *Id.* at 175. That court adopted the definition for an Act of God set forth in Black's Law Dictionary, 31 (Revised 5th Edition 1979) as follows:

> An Act occasioned exclusively by violence of nature without the interference of any human agency. It means a natural necessity proceeding from physical causes alone without the intervention of man. It is an act, event, happening or occurrence, due to natural causes an inevitable accident, or disaster; a natural and inevitable necessity which implies entire exclusion of all human agency which operates without interference or aid from man and which results from natural causes and is in no sense attributable to human agency.

Lea, 304 S.E.2d at 172 (emphasis added). *See also Jenkins v. Helgren*, 217 S.E.2d 120 (N.C. Ct. App.1975) (even if source of spark was an act of God, for which installers of insulation in return duct connected to furnace could not be responsible, installers could be held liable to homeowners for damage caused by fire if their negligence created the hazardous condition upon which the act operated); *Bennett v. Southern Railroad Co.*, 96 S.E.2d 31 (N.C. Ct. App. 1957) (even when an act of God combines or concurs with the negligence of the defendant to produce the injury or when any other efficient cause so combines or concurs; the defendant is liable if the injury would not have resulted but for his/her own negligent act or omission.); *Lawrence* v. *Power Co.*, 190 N. C. 664, 130 S.E. 735 (1935) (defendant power company, who allowed dry grass to accumulate on its right-of-way under plaintiff's tower, found liable for fire damage to plaintiff's tower after lightning struck defendant's transmission line causing an insulator on the tower to melt and fall upon the combustible grass below); *Lawrence v. Yadkin River Power Co.*, 190 N.C. 664, 130 S.E. 735 (1925); *Supervisor & Commissioner of Pickens Co. v. Jennings*, 181 N.C. 393, 107 S.E. 312 (1921); *Ridge v. Norfolk Southern R.R. Co.*, 167 N.C. 510, 83 S.E. 762 (1914).

Virginia

Virginia law does not allow the Act of God defense where the defendant's negligence was a concurring force that proximately contributed to the damages. As explained long ago by the Supreme Court of Virginia in *E.T. White v. Southern Railway Co.*, 151 Va. 302, 320 (1928):

> It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, **including the 'act of God,'** or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage . . ..

The Supreme Court of Virginia further discussed the Act of God defense in *City of Portsmouth v. Culpepper*, 192 Va. 362 (1951). In *Culpepper*, Vernon Culpepper sued the City of Portsmouth for damage to his crops that occurred when a city-maintained canal overflowed and flooded Culpepper's farm in 1948. *Id.* at 365. Years before the flood, the city attempted to replace a washed-out dam located within the canal by constructing an earthen dam across the canal with dirt from the eastern bank of the canal. *Id.*

The removal of the dirt by the city lowered the bank to normal ground level for a distance of one hundred yards. *Id.* at 365-66. Before the city finished the dam, however, it was enjoined from completing its work and ultimately abandoned the project, leaving the earthen dam unfinished. *Id.* at 366. When severe rainstorms hit the area in 1948, water in the canal was obstructed by the partially finished dam and overflowed the canal at the very point where the city had lowered its eastern bank, ultimately flooding Culpepper's farm. *Id.*

The City of Portsmouth raised the Act of God Defense and introduced evidence at trial showing that rain that caused the flood was the heaviest downpour on record. *Id.* Specifically, the City showed that the rainfall causing the flood was "in excess of anything shown since the Weather Bureau was created in 1879." *Id.* The jury returned a verdict in favor of Culpepper and the City of Portsmouth appealed.

The Supreme Court of Virginia upheld the jury's verdict and specifically rejected the City's Act of God defense stating: "Undoubtedly the record shows that the rainfall in question was extremely severe, but under the circumstances and facts in this case, it cannot be termed an 'Act of God'. **It has been held in Virginia since 1849 that all human agency is to be excluded from creating or entering into the cause of mischief, in order that it may be deemed an Act of God.**" *Id.* at 367 (citing Friend v.*Woods*, 6 Gratt. (47 Va.) 189) (emphasis added).

The court pointed to the following definition of "Act of God" in support of its reasoning: "Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected." *Id.*; *see also Ellerson v. Chesapeake & Ohio Railway Co.*, 149 Va. 809 (1928) (defining "Act of God" as such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or foreseen).

Accordingly, defendants raising the Act of God defense in Virginia have the burden of establishing that no human intervention entered into the cause of a loss and that the so-called Act of God was so unusual and extraordinary that it could not have been foreseen. Regarding the "human intervention" element of the defense, early, aggressive and thorough inspections (something Cozen O'Connor attorneys have vast experience in) will be essential to properly evaluate which losses caused by Isabel present the possibility of recovery from third parties and the best avenue to that recovery. Regarding the "foreseeability" element, a defendant will be hard pressed, in light of today's weather forecasting technology and reporting, to credibly argue that Isabel's path and force could not have been foreseen.

Other Jurisdictions

Florida follows the general rule on the Act of God defense, deeming it inapplicable where defendant's act contributed to the damages. In *Atlantic Coast Line R. Co. v. Hendry*, 150 So. 598 (Fla. 1933), a railroad company constructed a railroad track which bisected the plaintiff's farm. There was a natural waterway near the farm and in order to cross the waterway, the railroad constructed a fill for its trackbed in which it placed a four-foot culvert for the passage of water. During heavy rains, the culvert overflowed and flooded the farm, destroying the plaintiff's crops and the plaintiff sued for damages.

The defendant railroad asserted that the plaintiff's crops were damaged solely as a result of an Act of God. The Florida Supreme Court upheld the determination that the defendant's negligence was a contributing proximate cause of the crop damage. The court determined that the burden was on the defendant who asserts the Act of God defense to show that the damages resulted solely from the Act of God. Further, the Court stated:

> The defense of vis major may be successfully interposed in an action for damages resulting solely from an Act of God; but if the defendant's negligence is a present contributing proximate cause, which, commingled with the Act of God, produces the injury, then the defendant is liable notwithstanding the Act of God. Citing *Davis* v. *Ivey,* 112 So. 264 (Fla. 1927).

Louisiana follows the majority view in imposing liability for negligence on defendants whose acts, coupled with an Act of God, have caused a loss. The fact that Hurricane Andrew was an Act of God should not, as a rule of law, relieve negligent defendants of liability in a subrogation claim. Traditional notions of proximate cause provide that "where an Act of God combines or concurs with the negligence of a defendant to produce an injury, the defendant is liable if the injury would not have resulted but for his own negligent conduct or omission." *Gables* v. *Regent Development Corp.*, 470 So.2d 149, 152 (La. App. 5 Cir. 1985).

The Pennsylvania Supreme Court has followed a similar analysis concerning damages resulting from, or concurring with, an Act of God. In *Bowman* v. *Columbia Telephone Company*, 406 Pa. 455 (1962), the Pennsylvania Supreme Court considered a case in which a motorist was injured when four telephone poles snapped and fell on the roadway during a snowstorm. Plaintiff alleged negligent maintenance of the telephone poles. The defendant asserted an Act of God defense claiming that the snowfall was unprecedented and unforeseeable. The court stated:

> Sometimes all the ingenuity and industry *of* man can not avail against the turmoil and turbulence of the elements, but it is not enough to escape responsibility for the owner *of* the instrumentality which inflicts damage to assert that the instrumentality was propelled by the Supreme Being and that, therefore he could shake the clinging snow of responsibility from off his hands.

Id. at 459.

The South Carolina Supreme Court in *Belue* v. *City of Greenville,* 226 S. C. 192 (S. C. 1954). In *Belue*, addressed the Act of God defense in a case against a local municipality that had installed curbing and gutters on a street adjacent to the plaintiff's residence. The installation caused excessive surface water to accumulate (as a result of a five inch rain in three hours) on plaintiff's property. The homeowner sued the municipality to recover damages to his home. *Id.* at 632. The

Supreme Court of South Carolina held that even if the five inches of rainfall in three hours was unprecedented and exceptional, it did not relieve the defendant of liability because it was not the sole cause of injury to the plaintiff's property. *Id.* The court stated the test as follows:

> The principles embodied in all definitions is that the Act must be one occasioned exclusively by the violence of nature and all human agency must be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the Acts of God.

Id. at 633, citing *Mincey v. Dultmeier Manufacturing Co.*, 223 Iowa 252, 272 (1937).

The Texas Supreme Court held similarly on the Act of God defense in *Texas Supreme Court* in *Luther Transfer* and *Storage, Inc.* v. *Walton,* 296 S.W2d 750 (Tex. 1956). In *Luther*, a flood case, the court held that while the damages resulting from an Act of God are not ordinarily chargeable to anyone, an exception to this general rule exists when the negligence of another person has concurred with the Act of God. In this regard, the court stated:

> The rule of non-liability of a ...company or person for damages caused by an extraordinary and unprecedented flood is subject to the exception that negligence in constructing and maintaining the structure concurring with an extraordinary and unprecedented flood in causing damage to another, makes, ... [the] company or person liable for damages, notwithstanding the fact that the flood was extraordinary and unprecedented.

Id. at 498, quoting *Fort Worth* and D.C. Ry. *Co.* v. *Kiel*, 187 S.W.2d 371,373 (Tex. 1945).

For additional cases on this issue, see Annotation, "Failure to Exercise Due Care to Prevent fall of Tree", 27 AM. JUR. *Proof of Facts* 639, § 6, at 657-59.

E. Particular Forms of Improper Preparedness and Response

Disaster preparedness is the process of planning for, responding to, and mitigating the damages of the event. The process should start early and stay dynamic. Contractors, property owners, and businesses should consider whom they might affect by failing to properly prepare against the effects of a natural disaster. The ramifications of improper planning can be widespread, affecting customers, suppliers, other contractors, shareholders, related businesses, tenants, landlords, and neighbors.

1. Structural Considerations

There are several ways to build, fortify, and/or retrofit a structure to prevent or minimize the effects of natural disasters, including:

a. Upgrading facilities to withstand the shaking of an earthquake or high winds.
b. "Floodproofing" facilities by constructing flood walls or other flood protection devices
c. Installing storm shutters for all exterior windows and doors
d. Removing dead or decaying trees or limbs
e. Securing light fixtures and other items that could fall or shake loose in an emergency

f. Moving heavy or breakable objects to low shelves
g. Attaching cabinets and files to low walls or bolting them together
h. Placing Velcro strips under typewriters, tabletop computers and television monitors
i. Moving work stations away from large windows
j. Installing curtains or blinds that can be drawn over windows to prevent glass from shattering onto employees
k. Anchoring water heaters and bolting them to wall studs

2. Response Systems

When a third party fails to adopt a feasible response system, an affected party may have a basis for recovery against that party. Some issues to consider are whether the third party conducted an analysis of and developed a plan for addressing the following:

a. Potential damage to adjoining property or connected businesses as a result of:

1. Inadequate construction
2. Inadequate foundation
3. Inadequate floodproofing
4. Susceptible gas mains
5. Explosive materials
6. Poorly secured chemicals

b. Governing codes, laws, or ordinances, including:

1. Occupational safety and health regulations
2. Environmental regulations
3. Transportation regulations
4. Zoning regulations

c. In-house site maps that indicate:

1. Utility shutoffs
2. Water hydrants
3. Water main valves
4. Water lines
5. Gas main valves
6. Gas lines
7. Electrical cutoffs
8. Electrical substations
9. Storm drains
10. Sewer lines
11. Location of each building (include name of building, street name and number)
12. Floor plans
13. Alarm and enunciators
14. Fire extinguishers
15. Fire suppression systems
16. Exits
17. Stairways
18. Designated escape routes
19. Restricted areas
20. Hazardous materials (including cleaning supplies and chemicals)
21. High-value items

3. Post-Disaster Mitigation

Damages in the aftermath of a disaster, especially business interruption losses, can sometimes exceed the initial physical losses. It is therefore critical to initiate repairs and bring systems back on-line as quickly as possible. Failure to do so can extend the damages not only of the affected property owner or business but also of lessees, renters, and adjoining property owners or businesses. In determining whether a third party has exacerbated the post-disaster damage, consider whether that party did the following:

a. Promptly assessed and protected against remaining hazards.
b. Protected undamaged property by:

1. Closing building openings
2. Removing smoke, water, and debris
3. Protecting equipment against moisture
4. Restoring sprinkler systems
5. Physically securing the property
6. Restoring power

c. Kept detailed records, including photographs, videotape, audiotape.
d. Coordinated actions with appropriate government agencies.

F. Governmental Liability

Every disaster will involve some aspect of governmental activity. Disasters affect the roadways, sewage systems, storm drains, power lines, firefighting activities, and so forth. However, each state has peculiar rules on whether and to what extent a governmental entity may be liable in tort for such damages.

North Carolina

Whether a governmental body will be held liable in tort for negligence depends upon the nature of the acts or omissions constituting negligence. There are two categories of governmental functions: "governmental" and "proprietary." *Sides v. Hospital*, 287 N.C. 14, 213 S.E. 2d 297 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972), *pet. for reh. denied*, 281 N.C. 516 (1972); and *Casey v. Wake County*, 45 N.C. App. 522, 263 S.E. 2d 360 (1980), *pet. for discr. rev. denied*, 300 N.C. 371, 267 S.E. 2d 673 (1980). A municipality would enjoy sovereign immunity for "governmental" functions, but not for "proprietary" ones.

A good definition of the distinction between governmental and proprietary functions is the following:

> Any activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

See generally Kizer v. City of Raleigh, 121 N.C. App. 526, 466 S.E.2d 336 (1996).

Case law in North Carolina has helped clarify what functions are governmental and what are proprietary. For example, firefighting activities of a municipal fire department are generally considered governmental or discretionary functions for which the city is immune. *See, e.g., Willis v. Town of Beaufort*, 544 S.E.2d 600 (N.C. Ct. App. 2001). That immunity, however, can be waived to the extent of the limits of any insurance the department has obtained. N.C. Gen. Stat. §§ 153A-435 and 160A-485. Volunteer fire departments are immune from civil liability for any conduct in connection with their fire suppression efforts. N.C. Gen. Stat. § 58-82-5(b) (1999); *see Spruill v. Lake Phelps Volunteer Fire Department, Inc.*, 351 N.C. 318, 523 S.E.2d 672 (N.C. 2000).[1]

[1] Also to note, under the public duty doctrine, certain law enforcement agencies may be shielded from liability in connection with an alleged failure to provide protection to specific individuals. *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991); *see also Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000). However, this protection is limited and should be analyzed carefully.

Sewage maintenance is generally considered proprietary in nature, thus conferring liability to municipalities for failure to maintain sewage systems, including storm drains. *Howell v. City of Lumberton*, 548 S.E.2d 835 (N.C. Ct. App. 2001) ("The general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof," quoting *Hotels, Inc. v. Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966)); *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 754, 407 S.E.2d 567, 567 (1991) (municipality "not immune from tort liability in the operation of its sewer system."). However, if some other entity besides the municipality assumed control over the sewage system, the municipality may not be liable. *See, e.g.*, *Milner Hotels, Inc. v. City of Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966), *modified on reh'g*, 271 N.C. 224, 155 S.E.2d 543 (1967) (a municipality is responsible for negligent maintenance of drains constructed by third persons only if it adopted them as part of its drainage system or assumed control and management thereof).

As to debris and/or traffic on state highways, the North Carolina State Highway Commission is immune from suit, except insofar as the right to sue is conferred by the Tort Claims Act. *Ayscue v. Highway Comm'n*, 270 N.C. 100, 102 (1967). As the Act has been interpreted, the Highway Commission is not liable for negligent omissions of failures to act. *Id.* at 103. Therefore, the owner of a car damaged by a tree that fell in the roadway cannot maintain an action against the highway commission for failure to maintain the tree. Moreover, a plaintiff probably cannot maintain an action for negligent failure to maintain manmade objects such as telephone poles. See id. (plaintiff could not maintain an action against the Commission based on the Commission's negligent failure to removal gravel from a paved intersection, where the gravel had been strewn by cars from a nearby gravel road).

Virginia

Unlike North Carolina, Virginia has a specific **six-month notice** requirement for actions against a governmental agency. Virginia Code 1950 § 8.01-222. Fortunately, in *Miles v. City of Richmond*, 373 S.E.2d 715 (Va. 1988), the Virginia Supreme Court found the notice-of-claim statute, Virginia Code 1950 § 8.01-222, to be mandatory but not jurisdictional. The statute is to be construed liberally, and substantial compliance with its terms is sufficient. The statute reads as follows:

> § 8.01-222 Notice to be given cities and towns of claims for damages for negligence. No action shall be maintained against any city or town for injury to any person or property or for wrongful death alleged to have been sustained by reason of the negligence of the city or town, or of any officer, agent or employee thereof, unless a written statement by the claimant, his agent, attorney or representative of the nature of the claim and of the time and place at which the injury is alleged to have occurred or been received shall have been filed with the city attorney or town attorney, or with the mayor, or chief executive, within six months after such cause of action shall have accrued, except if the complainant during such six-month period is able to establish by clear and convincing evidence that due to the injury sustained for which a claim is asserted that he was physically or mentally unable to give such notice within the six-month period, then the time for giving notice shall be tolled until the claimant sufficiently

> recovers from said injury so as to be able to give such notice; and statements pursuant to this section shall be valid, notwithstanding any contrary charter provision of any city or town.

This must be sent by certified mail, return receipt requested.

Similar to North Carolina, Virginia deems a governmental entity immune for governmental functions but not for proprietary functions. While the planning, designing, laying out, and construction of streets and roads are governmental functions, the routine maintenance of existing streets and roads is proprietary. *Bialk v. City of Hampton*, 242 VA 56, 58, 405 S.E.2d 619 (1991); *Taylor v. City of Charlottesville*, 240 Va. 367, 370-71, 397 S.E.2d 832 (1990).

For sewage systems, the general rule is in Virginia that the maintenance and operation of a sewer system is a governmental function for which a municipality is entitled immunity from tort liability. *See, e.g., Gayda v. Gibbs*, 45 Va. Cir. 176, 1998 Va. Cir. LEXIS 122 (Va. Cir. Ct. City of Norfolk 1998); *Mitchum v. Albemarle County Service Authority*, 34 Va. Cir. 208, 1994 Va. Cir. LEXIS 14 (Va. Cir. Ct., Albemarle County 1994) (Sewage authority acted as municipal corporation performing governmental functions in servicing a manhole which was part of its sewer system, and was thus entitled to immunity from liability and tort: "If collecting garbage and removing trash and debris are governmental functions, then collecting and disposing of other forms of waste must also be."); *Stover v. Keystone Builders, Inc.*, 36 Va. Cir. 595, 1993 Va. Cir. LEXIS 717 (Va. Cir. Ct., Fairfax County 1993); *Linda Lee Corp.v. Covington Company*, 36 Va. Cir. 590, 1993 Va. Cir. LEXIS 716 (Va. Cir. Ct. Bedford County 1993) (The doctrine of sovereign immunity applies to the maintenance and operation of a storm water drainage system by a municipal corporation.); *Wilshin v. City of Fredericsburg*, 26 Va. Cir. 329, 1992 Va. Cir. LEXIS 577 (Va. Cir. Ct., City of Fredericksburg 1992) (Plaintiff's, neighbors sued for damages caused by sewage backup, claiming the system malfunctioned, backed up or overflowed causing raw sewage to invade the lower levels of their homes; court held, "If collecting garbage and removing trash and debris are governmental functions, then collecting and disposing of other forms of waste must also be. In cities--which almost by definition are densely populated--where drain fields and other individualized modes of sewage disposal are impractical of not impossible, it is difficult to imagine anything more tied to public safety and safety for the benefit of all than the provision of a sanitary sewer system. . . . Therefore, the Court is of the opinion that in Virginia the operation and maintenance of a sewer system is a governmental function."); *Jackson v. City of Danville*, 26 Va. Cir. 488, 1990 Va. Cir. LEXIS 444 (Va. Cir. Ct., City of Danville 1990) (Plaintiff alleged that her goods and property were damaged by sewage which backed up and flowed into her home as a result of the negligence of the City: "In this case, the City of Danville's operation of a sanitary sewer system, in the Court's opinion, falls within the Protective Doctrine of Sovereign Immunity. For this reason, the Court is of the opinion that the City of Danville is entitled to summary judgment as requested in its Motion.").

However, a few cases are distinguishable from the general rule. In *Mjornell v. Town of Front Royal*, 41 Va. Cir. 399, 1997 Va. Cir. LEXIS 44 (Va. Cir. Ct., Warren County 1997), the court held that a municipality is

immune from liability for an alleged negligent design of a sewer system, but may be liable for damages caused by its negligence with regard to the construction, operation and maintenance of water and sewer systems, which activities are proprietary functions. In addition, the case of *Hampton Road's Sanitation District v. McDonnell*, 234 Va. 235, 360 S.E.2d 841, (Va. 1987) allowed recovery where the action of the municipality was done as a continuing trespass. Similarly, in *McConnell v. Board of Supervisors of Fairfax County*, 20 Va. Cir. 5, 1989 Va. Cir. LEXIS 402 (Va. Cir. Ct., Fairfax County 1989), the court allowed plaintiff to maintain a cause of action for inverse condemnation in the case of an alleged continuing trespass. The case involved a storm drain which backed up from time to time, causing flooding which damages Plaintiffs' nearby property. The court held as follows:

> Plaintiffs alleged that the Defendant is responsible for this flooding since they are charged with the allegation of designing and maintaining this storm sewer system. In their second amended petition, Plaintiffs allege one court for declaratory relief and one count for inverse condemnation. They presently seek leave to add a count for trespass. ... [A] claim for inverse condemnation is essentially a claim that the government has 'taken' property without the due process of law in violation of the Fifth Amendment to the U.S. Constitution. As explained in Barnes v. United States, 538 F2d 865 (Ct. Cl. 1976), case law has developed the law of eminent domain as applied to instances of flooding. Property may be taken by the invasion of water where subjected to "intermittent, but inevitably recurring, inundation due to authorized government action." Id. at 870, citations omitted. A cause of action for unconstitutional taking therefore does not accrue until the flooding becomes inevitable. . . . [T]he Court simply cannot say on the basis of this record that flooding became inevitable at least three years prior to the commencement of this suit, as the defendant contends. Rather, this poses a question of fact to be determined at trial.

As to post-disaster remediation, in *Fenon v. City of Norfolk*, 203 Va. 551, 125 S.E.2d 808 (1962), the Virginia Supreme Court considered a tort claim against a city for failure to clear a tree from the road and found the city immune. Plaintiff claimed injury for striking a tree that fell by a storm and was obstructing a street. The fallen tree was one of some 800 downed trees blocking the streets of Norfolk in the wake of Hurricane Donna, which struck the area in 1960. The Court held that the city's effort to cope with the "emergency situation" resulting from the storm was the exercise of a governmental function, not routine street maintenance. 203 Va. at 555-56.

Similarly, in *Bialk v. City of Hampton*, 242 Va. 56, 58, 405 S.E.2d 619, 620 (1991), the City of Hampton was deemed immune from plaintiff's suit for personal injuries received when he was struck by snow thrown from the blade of a snowplow which was being operated by a city employee. The Court cited *Fenon* and held that the City of Hampton was entitled to sovereign immunity for negligence committed during its snow-removal efforts. Specifically, the court stated:

> Because the City's snow-removal operations in this case were acts done for the common good in coping with an emergency, they constituted the exercise of a governmental function. Although that function coincided with the City's proprietary function of keeping its streets in safe condition for travel, where those functions coincide, "the governmental function is the overriding factor." The trial court correctly ruled, therefore, that the City was entitled to governmental immunity.

242 Va. At 59

However, the case of *Burson v. City of Bristol*, 10 S.E.2d 541 (Va. 1940) found the city liable in post-fire repair efforts to a building. Five days after a fire had been extinguished members of city volunteer fire department were employed to pull down walls of burned building to make streets safe for passers-by. The court held that the members of volunteer fire department were not acting in the discharge of their duties as firemen so as to relieve city from liability for damages to adjoining property caused by firemen's negligence, nor was city relieved from liability under the statute relating to the destruction of houses to prevent the spread of fire. Code 1936, §§ 3133-3135.

G. Resources

This section provides the following information sources:

1. Publications

The Federal Emergency Management Agency (FEMA) provides numerous publications on their website, www.fema.gov. Hardcopies can also be obtained by writing to: FEMA, Publications, P.O. Box 70274, Washington, DC 20024. Useful publications include:

- Disaster Mitigation Guide for Business and Industry (FEMA 190) --Technical planning information for building owners and industrial facilities on how to reduce the impact of natural disasters and man-made emergencies.
- Principal Threats Facing Communities and Local Emergency Management Coordinators (FEMA 191) -- Statistics and analyses of natural disasters and man-made threats in the U.S.
- Floodproofing Non-Residential Structures (FEMA 102) -- Technical information for building owners, designers and contractors on floodproofing techniques (200 pages).
- Non-Residential Flood-proofing -- Requirements and Certification for Buildings Located in Flood Hazard Areas in Accordance with the National Flood Insurance Program (FIA-TB-3).
- Building Performance: Hurricane Andrew in Florida (FIA 22) -- Technical guidance for enhancing the performance of buildings in hurricanes.
- Building Performance: Hurricane Iniki in Hawaii (FIA 23) -- Technical guidance for reducing hurricane and flood damage.
- Answers to Questions About Substantially Damaged Buildings (FEMA 213) -- Information about regulations and policies of the National Flood Insurance Program regarding substantially damaged buildings (25 pages).
- Design Guidelines for Flood Damage Reduction (FEMA 15) -- A study on land use, watershed management, design and construction practices in flood- prone areas.
- Comprehensive Earthquake Preparedness Planning Guidelines: Corporate FEMA 71) --Earthquake planning guidance for corporate safety officers and managers.

Publications from other sources include:

- Mullins, G.W. 1999. *Wildfire–Feel the Heat Study Guide*. Bethesda, MD: Discovery Pictures, Inc.
- National Wildfire Coordinating Group. 1994. "Introduction to Wildland Fire" Behavior S-190, Student Workbook NFES 1860. Boise, ID: National Interagency Fire Center.

- Pyne, S.J., P.L. Andrews, and R.D. Laven. 1996. *Introduction to Wildland Fire*, 2nd Edition. New York: John Wiley & Sons, Inc.

2. Websites

- National Oceanic and Atmospheric Administration website: www.noaanews.noaa.gov
- National Weather Service: www.nws.noaa.gov
- Rainfall data: http://www.srh.noaa.gov (gives rainfall and other data for a particular area, and narrows it down to specific cities.)
- Mapping of precipitation: http://www.srh.noaa.gov/lub/wx/precip_freq/precip_index.htm (provides maps which classify rainfall events by time interval -- 30 minute, 1 hour, 2 hour, 3 hour, 6 hour, 12 hour, 24 hour -- and according to severity -- 1 year, 2 year, 5 year, 10 year, 25 year, 50 year and 100 year).
- National Climatic Data Center: www.ncdc.noaa.gov
- The Weather Channel: www.weather.com
- Accuweather.Com: www.accuweather.com
- The Weather Network: www.theweathernetwork.com
- Weather Underground: www.wunderground.com
- Intellicast Weather: www.intellicast.com
- Online Meteorology Guide: http://ww2010.atmos.uiuc.edu
- World Climate: www.worldclimate.com
- Automated Weather Service: www.aws.com
- The Weather Center/ WeatherWatch.Com: www.weatherwatch.com
- WeatherNet: http://cirrus.sprl.umich.edu/wxnet
- WeatherConcepts: www.weatherconcepts.com
- National Interagency Fire Center: www.nifc.com
- Center for Analysis and Prediction of Storms, Univ. Oklahoma: www.caps.ou..edu

3. Experts

Cozen O'Connor maintains a database of forensic experts, including engineers, contractors, meteorologists, and numerous others. Recommendations for experts are available from Cozen O'Connor upon request.

The above is just a short list of possible areas for subrogation. Cozen O'Connor, at no charge, will provide an attorney to investigate subrogation potential on those claims exceeding $100,000. Cozen O'Connor is prepared to handle your company's subrogation claims arising from the losses caused by Hurricane Isabel.

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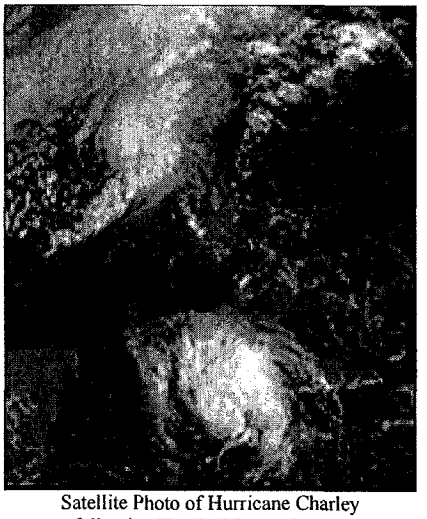
HURRICANE CHARLEY

A PRELIMINARY FACTUAL AND LEGAL ANALYSIS OF THE SUBROGATION ISSUES: August 2004



Satellite Photo of Hurricane Charley
following Tropical Storm Bonnie

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I. INTRODUCTION

On August 14, 2004, Hurricane Charley slammed into the west coast of Florida at Punta Gorda and ripped a path across the state and beyond. To make matters worse, Charley hit land approximately 36 hours after Tropical Storm Bonnie made landfall near Apalachicola in the Panhandle of Florida. It is the first time since 1906 that two storms have struck Florida within such a short period of time.

Charley left homes destroyed, three cities without running water, 2 million homes without power, and at least 25 dead. The personal losses are immeasurable. In Florida alone the property damages are currently estimated at over $15 billion. According to Insurance Information Institute chief economist Bob Hartwig, the insured losses in Florida will reach 7.4 billion dollars. The state-run Citizens Property Insurance Corp., the insurer of last resort for over 815,000 Florida policyholders, estimates it will pay out over 1.2 billion. This makes Charley the second-most expensive U.S. hurricane, surpassed only by 1992's Hurricane Andrew and its 15.5 billion in insured losses.

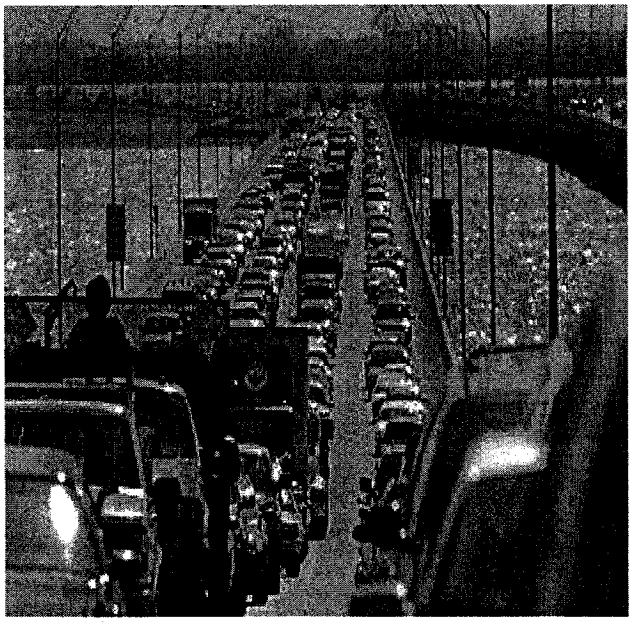
Recovery will be a long an arduous process. But it will not be impossible. The insurance industry will contribute much to the cost of that recovery. But insurers too can recover a significant portion of what they will bear. Millions of dollars can be saved or recaptured by insurers who have armed themselves with professionals trained to handle coverage and subrogation issues in the disaster context. Cozen O'Connor has extensive experience serving that function. From Hurricanes Hugo to Andrew to Fran to Floyd to Isabel, we have saved our clients multiple millions in claims payments.

This paper serves as an initial analysis of the factual and legal issues affecting subrogation opportunities, providing various theories of recovery in the catastrophe context, with emphasis on the law of Florida, Georgia, South Carolina, North Carolina, and Virginia.

II. THE STORM

After lashing Cuba with torrential rains and pounding surf, Hurricane Charley descended on Cayo Costa, a barrier island just west of Cape Coral, Florida as a Category 4 storm at

approximately 3:45 pm on Friday, August 13, 1004. Winds were estimated at 145 m.p.h.[1] with greater gusts. At the same time, seven-foot storm surges were recorded in Fort Myers. At 4:35 pm Punta Gorda Airport registered winds at 111 m.p.h. before the equipment failed. In the Naples area, the maximum storm tide was about 10 to 11 feet above sea level while the area from Vanderbilt Beach to the Lee County Line sustained maximum storm tide of about 10 to 13 feet above sea level.



Charley was not supposed to land there. Proving how dangerous and unpredictable any hurricane can be, Charley increased in speed and changed its track at the last moment surprising meteorologists. On Thursday evening, August 12, Charley was heading to the West Coast of Florida as a Category 2 storm. Forecasters predicted that the storm would hit the Tampa Bay area around 8:00 pm on Friday, August 13. Over 800,000 residents in the Tampa Bay area were told to evacuate. State meteorologist Ben Nelson was quoted as saying that MacDill Air Force Base and parts of downtown Tampa would be underwater if the storm increased to a Category 3 hurricane . He predicted that Pinellas County would become a virtual island. Residents were told to take a last look at the Tampa Bay because it would never look that way again.

As late as 11:00 am on Friday morning, the National Weather Center was still issuing bulletins declaring Charley's maximum wind speeds at 110 m.p.h., still a Category 2 storm. Forecasters were still assuming landfall near the Tampa Bay area. Then around 1:00 pm things started changing. The maximum sustained winds spiked to 125 m.p.h., a Category 3 storm the forward speed of the storm increased and the landfall track moved slightly right and south of Tampa Bay. At 2:00 pm, the winds had jumped up to 145 m.p.h., a rare Category 4 storm. A Special Advisory was issued warning for the first time that Charlotte Harbor, Florida was the likely landfall area.

However, National Weather Advisories are not always heard by the public the second they are issued. Around 3:00 pm Friday in the town of Punta Gorda, located on Charlotte Harbor, Pat and Jerry Presseller were monitoring weather reports when they learned for the first time that they were in the direct path of a Category 4 hurricane. With the storm roughly an hour away they had no where to run and were trapped in their house. Grabbing their three daughters, a son-in-law and four dogs, they crowded in their windowless bathroom while Mr. Presseller tried to hold

[1] As of the time this document was published, NOAA had not published its final wind speed data. The wind speeds in this paper have been taken from National Weather Service bulletins and the Florida Division of Emergency Management.

the door shut against the increasing, wind-driven pressure. While the first 45 minutes of the storm were frightening, the winds that came after the eye passed over were worse. While Mr. Presseller continued to hold the door, the entire house lifted off the ground rattling the Pressellers' remaining nerves. Fortunately for them when the storm passed, they had survived the ordeal, even though their home had not.

After battering the Charlotte Harbor area, Charley then moved northeast across DeSoto, Harde, Polk, and Osceola counties making its way to Kissimmee by 9:15 pm. Orlando International Airport reported a gust to near 105 m.p.h. at 9:15 pm EDT, with sustained winds anywhere from 60-70 m.p.h.

The Hurricane reached Daytona Beach at approximately 11:30 pm with winds registering at 70 m.p.h. and 80+ m.p.h. gusts. The Hurricane went out to the Atlantic past the Volusia County coast at approximately 1:00 am on Saturday, August 14, 2004.

Appreciating the danger of the unpredictable storm, South Carolina Governor Mark Sanford declared a state of emergency and ordered residents and vacationers in two counties along South Carolina's Grand Strand to evacuate. State Troopers began redirecting all traffic away from the Myrtle Beach area.

While in the Atlantic, Hurricane Charley reached maximum sustained winds of 85 m.p.h. and moved north-northeast at 25 m.p.h. past the Jacksonville coast. The storm traveled past the Georgia coast with the highest winds registering at 35 m.p.h. on the Georgia coast. By 7:00 am Saturday the hurricane had reached South Carolina. Charley made landfall once again at McClellanville, South Carolina near the borders of Charleston and Georgetown Counties. At 11:00 am the sustained winds had fallen to 75 m.p.h. The storm then moved into the grand strand of Myrtle Beach, South Carolina where at least 65,000 people lost power and even more had evacuated.

The Hurricane moved into Brunswick County, North Carolina near Supply with maximum sustained winds of 75 m.p.h. and gusts of more than 80 m.p.h. It traveled toward the north-northeast at about 30 m.p.h. past Wilmington, North Carolina and through coastal Virginia. It then made its way north-northeast touching areas off the coast of New Jersey, New York,

Connecticut, Rhode Island, and Massachusetts. By 2:00 pm, on August 14, 2004, Charley was downgraded to a tropical storm with sustained wind speeds of 69 m.p.h. The Storm took the same path north-northeast and was finally downgraded to a Tropical Depression at 11:00 am on August 15, 2004.

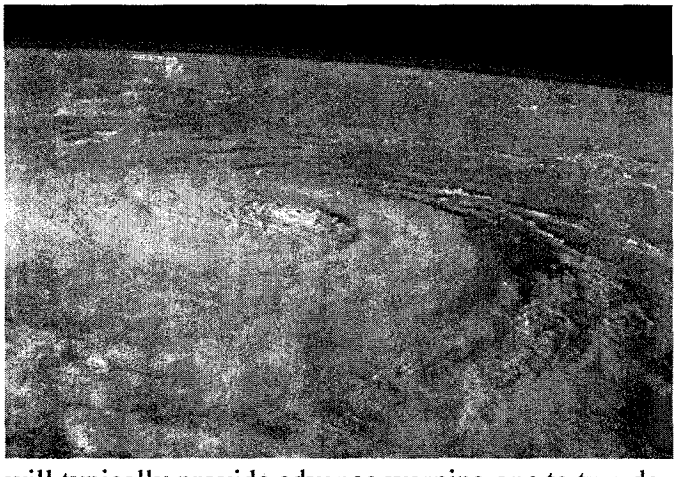
III. OVERVIEW OF THE SUBROGATION ISSUES

In any natural catastrophe, the focus is not on the naturally occurring event but on third parties who played a contributing role to the ultimate damages -- supporting players in the Act of God.

This section addresses not just hurricanes, but also the tornadoes, floods, and lightning they can spawn. Section A provides an overview of the nature of hurricanes and their "offspring." Section B provides an overall legal analysis of third-party liability in the face of such natural disasters. Section C discusses particular forms of negligent preparedness and response in the disaster context.

A. Overview of Hurricanes and Their Offspring

Hurricanes are severe tropical storms with winds that rotate counter clockwise and reach sustained levels of at least 64 knots (74 miles per hour). They develop over warm tropical oceans and can produce torrential rains and flooding. They can also spawn tornadoes and cause



flooding and flash floods. The winds can reach 160 miles per hour and extend inland for hundreds of miles causing tremendous property damage along the seaboard states. The hurricane season lasts from June through November. Satellite systems and hurricane hunters provide ready information on the development of hurricanes over the ocean. The National Hurricane Center in Miami will issue hurricane watches and warnings as soon as a hurricane appears to be a threat. A hurricane watch will typically provide advance warning one to two days before the hit.

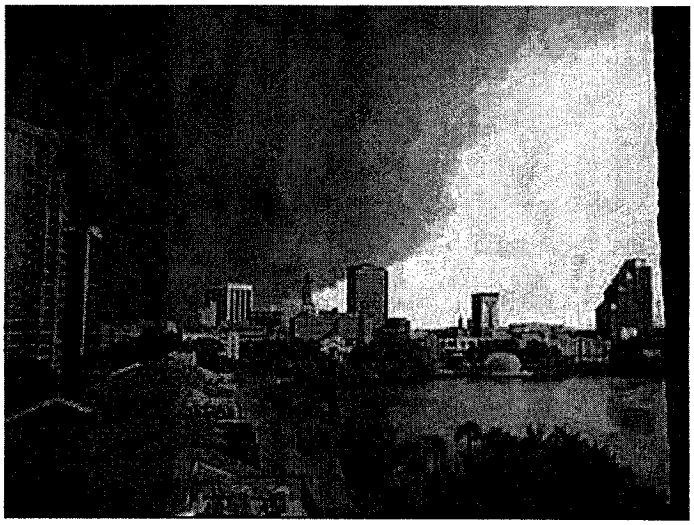
Tornadoes are storms with violent whirling winds that extend from thunderstorm clouds down toward the ground. The winds can reach 300 miles per hour, uprooting trees, buildings, and other objects and turning them into devastating projectiles in the process. They can create paths of damage over a mile wide and fifty miles long. They form with little advance warning. Every state is susceptible to potential tornadoes, but they occur most often in the Midwest, Southeast and Southwest. It should be noted that auditoriums, cafeterias, and gymnasiums that are covered with a flat, wide-span roof are not considered safe shelter areas.

Of all the natural disasters, floods are perhaps the most common and widespread throughout the states. Most floods develop from spring rains, heavy thunderstorms, or winter snow thaws. They often develop slowly over a period of days. Flash floods, however, come without warning, descending upon communities in a crash of water in mere minutes, usually from intense storms, like hurricanes, or dam failure.

Lightning strikes are common in the course of a hurricane, often resulting in fires. If the structure was improperly equipped with lightning strike protection or fire protection, an action may lie against the architects, contractors, or others that failed to provide, or install, such equipment.

B. Overview of Liability in the Disaster Context

The first question in the hurricane context is the path of the hurricane and the intensity of the winds in its path and periphery. Most liability scenarios in the hurricane context involve claims



in the peripheral areas where the winds were *below* the level of a hurricane or tornado. In such cases, liability is premised on the argument that the property in question failed to conform with building codes, which usually require buildings to withstand winds in the range of 70 to 90 miles per hour. Liability may be relatively straightforward with such claims as long as the claim is supported by experts who can opine on the standard of care in construction and in the degree of force applied to that construction. It will be important for those experts to analyze the degree of damages to surrounding structures to assess how well they held up to similar conditions.

Because hurricanes can spawn tornadoes, it will be important to look for a tornado path. If the damaged structure is outside that path, it is possible to make the case that the structure was only subjected to partial impact. When feasible, an aerial photograph of the structure and its surrounding structures should be taken.

In cases involving direct-path damage from a true hurricane or tornado, other possible theories may also be available, such as failure to remove debris or properly secure a structure before the storm. Other theories may include lack of post-disaster governmental response, e.g., pre-storm failure to maintain sewage systems or post-storm failure to install new stop signs or traffic signals within a reasonable time after the storm.

Regardless of whether the claim is a peripheral damage or direct damage case, some basic theories of liability can be used to make the case.

1. Negligence

As with any negligence claim, the elements for a negligence claim against a third party for damage caused in the disaster context are: (1) duty of care, (2) breach of the duty, (3) proximate cause, and (4) actual damages. In the natural disaster context, these elements have special considerations.

a. Duty of Care

Almost all jurisdictions agree that a party with actual or constructive knowledge of an unreasonably dangerous condition owes a duty to adjoining property owners to make the condition safe. In addition, courts in an increasing number of jurisdictions will impose the added duty of *inspecting* the property for potential defects or hazards, as discussed more fully in Section C, below.

b. Breach

The question of whether a party failed to take the appropriate precautions and thus breached the standard of care is typically an issue for the jury to decide after hearing all of the evidence.

c. Proximate Cause

Even if a landowner breached a duty of care and was thus technically negligent, the landowner will not be liable if the damages would have occurred from an act of God regardless of that negligence. However, the party will be liable for negligence committed in *concurrence* with an act of God, as discussed more fully in Section C, below.

2. Trespass and Nuisance

Even if negligence cannot be proven, an action for trespass or nuisance may still lie. A trespass is generally defined as an unauthorized entry onto property which results in interference with the property owner's possessory interest therein. The owner must prove an invasion of the land that interfered with the right of exclusive possession of the land as a direct result of some act committed by the defendant. Any physical entry upon the land constitutes such an invasion, whether the entry is "walking upon it, flooding it with water, casting objects upon it, or otherwise." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 13, at 70 (5th ed. 1984). Similarly, nuisance is any act that unreasonably interferes with the quite use and enjoyment of the land of another. Unlike trespass, however, a nuisance can occur without actual physical entry upon the land. Sounds, smells, and other detractors can suffice.

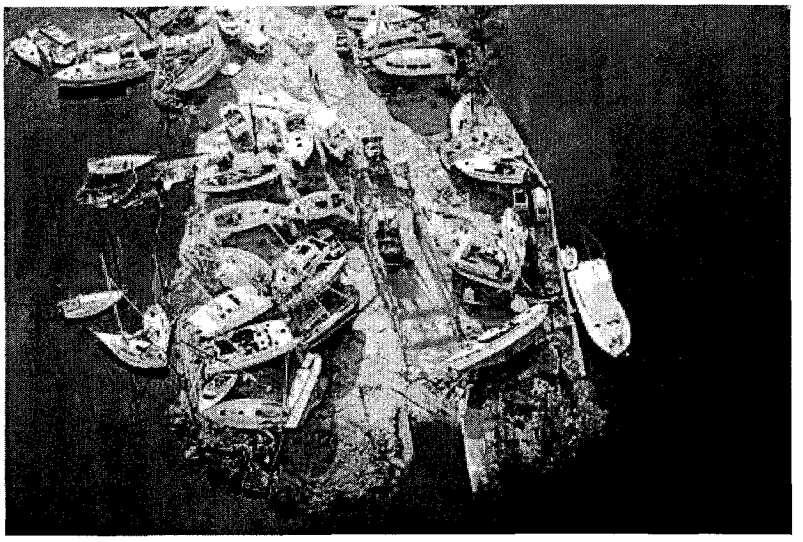
In the natural disaster context, trespass or nuisance claims can provide a basis for third-party liability even when "the act" of that third party was not technically "negligent." In *Akers v. Mathieson Alkali Works*, 151 Va. 1, 144 S.E. 492 (1928), for example, the plaintiff sued under

theories of continuing trespass and nuisance for leakage of chemical "muck" from the defendant's storage basin. Defendant argued that the right of recovery was predicated upon a finding of negligence by defendant. The Virginia Supreme Court rejected that argument, stating:

> The law requires that every person so use his own property as not to injure the property of another .... When defendant permitted the muck to escape from its land and injure land of the plaintiff, without his fault, defendant was liable for the damages sustained by the plaintiff. The loss in such cases must be borne by plaintiff or defendant and it seems just that it fall upon the defendant by whose conduct it was made possible.

3. Maritime Law

Coastal storms will often involve at least some damage to boats, marinas, docks, and other structures along the coastline, often implicating federal maritime law. Admiralty jurisdiction will be triggered if the loss arises out of the storage and maintenance of boats in a marina on navigable waters.



The elements of a negligence claim under maritime law essentially mirror the common law elements: duty, breach, proximate cause, and damages. Determining the duty element, however, requires a balancing between (1) the likelihood of the disaster causing injury to others, (2) the potential extent of the injury, and (3) the expense and effort of adequate precautions to avoid the occurrence.

In states with statutory guidelines governing the conduct of marina and boat owners, the question can arise as to whether the state law is pre-empted by federal maritime law. Under the "maritime-but-local" doctrine, federal law will generally govern unless (1) the matter is one which has great local significance and (2) the state law to be applied does not threaten the uniformity of federal maritime law.

C. Overview of Negligent Preparedness and Response Issues

Disaster preparedness is the process of planning for, responding to, and mitigating the damages of the event. The process should start early and stay dynamic. Contractors, property owners, and businesses should consider whom they might affect by failing to properly prepare against the effects of a natural disaster. The ramifications of improper planning can be widespread,

affecting customers, suppliers, other contractors, shareholders, related businesses, tenants, landlords, and neighbors.

1. Structural Considerations

There are several ways to build, fortify, and/or retrofit a structure to prevent or minimize the effects of natural disasters, including:

a. Upgrading facilities to withstand the shaking of an earthquake or high winds.
b. "Floodproofing" facilities by constructing flood walls or other flood protection devices
c. Installing storm shutters for all exterior windows and doors
d. Removing dead or decaying trees or limbs
e. Securing light fixtures and other items that could fall or shake loose in an emergency
f. Moving heavy or breakable objects to low shelves
g. Attaching cabinets and files to low walls or bolting them together
h. Placing Velcro strips under typewriters, tabletop computers and television monitors
i. Moving work stations away from large windows
j. Installing curtains or blinds that can be drawn over windows to prevent glass from shattering onto employees
k. Anchoring water heaters and bolting them to wall studs

2. Response Systems

When a third party fails to adopt a feasible response system, an affected party may have a basis for recovery against that party. Some issues to consider are whether the third party conducted an analysis of and developed a plan for addressing the following:

a. Potential damage to adjoining property or connected businesses as a result of:
    1. Inadequate construction
    2. Inadequate foundation
    3. Inadequate floodproofing
    4. Susceptible gas mains
    5. Explosive materials
    6. Poorly secured chemicals
b. Governing codes, laws, or ordinances, including:
    1. Occupational safety and health regulations
    2. Environmental regulations
    3. Transportation regulations
    4. Zoning regulations
c. In-house site maps that indicate:
    1. Utility shutoffs
    2. Water hydrants
    3. Water main valves

4. Water lines
5. Gas main valves
6. Gas lines
7. Electrical cutoffs
8. Electrical substations
9. Storm drains
10. Sewer lines
11. Location of each building (include name of building, street name and number)
12 Floor plans
13. Alarm and enunciators
14. Fire extinguishers
15. Fire suppression systems
16. Exits
17. Stairways
18. Designated escape routes
19. Restricted areas
20. Hazardous materials (including cleaning supplies and chemicals)
21. High-value items

3. Post-Disaster Mitigation

Damages in the aftermath of a disaster, especially business interruption losses, can sometimes exceed the initial physical losses. It is therefore critical to initiate repairs and bring systems back on-line as quickly as possible. Failure to do so can extend the damages not only of the affected property owner or business but also of lessees, renters, and adjoining property owners or businesses. In determining whether a third party has exacerbated the post-disaster damage, consider whether that party did the following:

a. Promptly assessed and protected against remaining hazards.
b. Protected undamaged property by:
    1. Closing building openings
    2. Removing smoke, water, and debris
    3. Protecting equipment against moisture
    4. Restoring sprinkler systems
    5. Physically securing the property
    6. Restoring power
c. Kept detailed records, including photographs, videotape, audiotape.
d. Coordinated actions with appropriate government agencies.

IV. PARTICULAR LEGAL THEORIES IN THE DISASTER CONTEXT

A. Duties for Construction Defects

Structural damage in a hurricane generally is caused by flooding, wind or wind-driven debris. Structures in the immediate path of a 145 m.p.h. storm would be expected to have some damage. However, sometimes structures on the storm's periphery sustain wind-related damage even

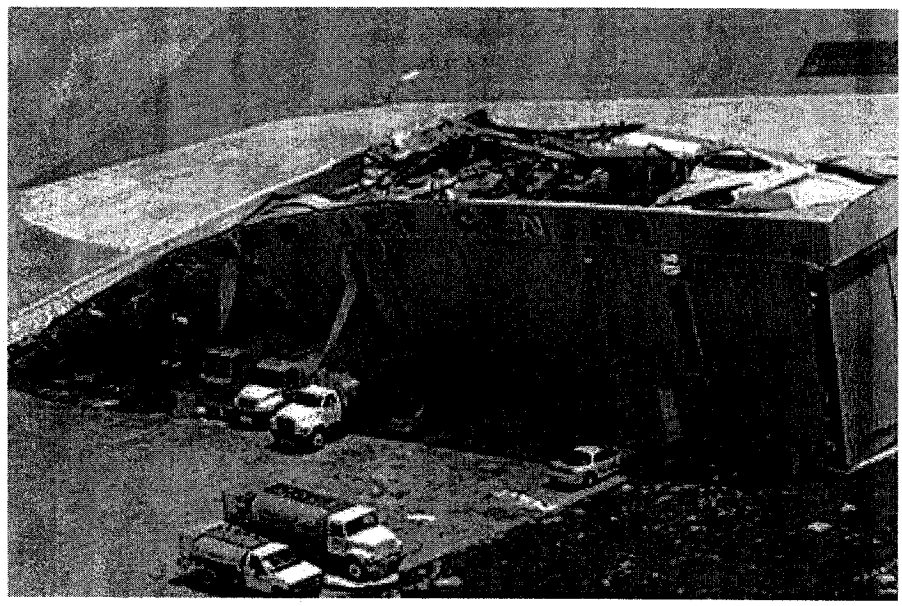
though the wind speeds do not exceed the local building code's design requirements. In these cases one should consider if a construction defect contributed to the damage.

1. Duties arising by contract

There are three types of construction defects: improper design, defective building materials, and faulty workmanship. In each situation, one can look to the terms of the contract between the builder and owner and the terms of the plans and specifications to determine if the builder deviated from those documents. While a breach of the terms of these documents may give rise to a breach of contract claim against the builder, in most instances the same document may include defenses, waivers of claims, or limitations of liability that could adversely impact a claim against the builder. One must carefully review these documents along with ancillary documents, such as Change Orders and Requests for Information, to determine the strength of a breach of contract or breach of warranty claim against the builder.

2. Duties arising by Code or Statute

Regardless of the jurisdiction where your structure is located, building codes may exist that govern the actions of the designer, the supplier, and the builder. Failure to adhere to such codes



can be used to form the basis for a separate negligence cause of action. In Florida, such code violations may give rise to a statutory cause of action under Florida Statute § 553.84, which provides for a statutory civil remedy for violation of the State Minimum Building Codes and the Florida Building Code. For example, in *Comptech International, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219 (Fla. 1999) a commercial tenant sued the building owner in negligence for losses to Comptech's computers allegedly damaged while the owner was making an addition to a portion of the building being leased to and occupied by Comptech. The court upheld the count alleging that Milam violated Fla.Stat. § 553.84. This section can be reviewed online at www.leg.state.fl.us/Statutes/index.cfm.

Note, however, that after Comptech, the legislature amended section 553.84 to create an "escape clause." The escape clause states:

> [H]owever, if the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, and if there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections, this section does not apply unless the person or party knew or should have known that the violation existed.

If the building in question was built before the enactment of the escape clause, the old version of section 553.84 should apply.

Also, in most states the violation of a building code may assist you in getting around certain defenses raised by the builder such as the Economic Loss Doctrine. Because building codes can vary even among counties in the same state, one should always determine what code applies in the particular jurisdiction where the structure is located.

B. Liability of Adjoining Landowners for Debris Damage

A common subject of legal problems for disaster victims involves rights and responsibilities relating to fallen trees and other storm debris. Determining liability depends on an analysis of duty, breach of duty, and proximate cause.

1. Duty

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 which he/she knows are in an unreasonably dangerous condition. The duty 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.

2. Breach

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 probably severity of the disaster and the efficacy and cost of precautions.

3. Proximate Cause

Assuming that the property owner has been negligent in some manner, the property owner may escape liability of the damage would have occurred even in the absence of the property owner's negligence. However, if 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.

C. Governmental Liability

Every disaster will involve some aspect of governmental activity. Disasters affect the roadways, sewage systems, storm drains, power lines, firefighting activities, and so forth. However, each state has peculiar rules on whether and to what extent a governmental entity may be liable in tort for such damages.

D. The "Act of God" Defense

The general rule in most states is that an Act of God is no defense if the damages occurred in concurrence with another act. The principle has been stated succinctly as follows: "He whose negligence joins with the act of God in producing injury is liable therefor." 1 AM. JUR. 2d, Act of God, § 11.

E. Statutes of Repose

A significant barrier to a claim against a builder for negligent construction is the statute of repose. A statute of repose, unlike statute of limitations, does not begin to run when the loss occurs but begins to run when a structure, or an improvement to that structure, has been "born." What constitutes the "born on" date will vary from state to state but can include the date of the certificate of occupancy, the date of actual occupancy, the last work by the builder, or some other date. The length of time of the statute also varies from state to state. In all states, the effect is the same: a claim against a contractor whose negligence caused damage to the structure will be barred as a matter of law if the contractor's work was done on a date that is "outside" (older than) the statutory time period. There are, however, exceptions in some states, as discussed in Section V.D. below.

V. THE LAW OF THE AFFECTED STATES

A. Liability of Adjoining Landowners

1. Florida

Liability of a landowner to an adjoining landowner for conditions on the owner's property is determined on a case by case basis under established principles of negligence law, regardless of whether the conditions on the landowner's property are man-made or natural conditions, such as foliage. *Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001). As noted in *Short v. Lakeside Community Church*, 700 So.2d 772 (Fla. 2d DCA 1997), the common law duty of all landowners to protect invitees also imposes a duty toward of invitees on nearby property, so long as the landowner's "foreseeable zone of risk" extends beyond the boundaries of the landowner's own property. *See also Gunlock v. Gill Hotels Co., Inc.*, 622 So.2d 163 (Fla. 4th DCA 1993); *Johnson v. Howard Mark Productions, Inc.*, 608 So.2d 937 (Fla. 2d DCA 1992). However, the landowner owes no duty of care to invitees off the premises for events that occur solely off the premises and which are wholly unconnected to any activity on the landowner's premises. *Concepcion By and Through Concepcion v. Archdiocese of Miami By and Through McCarthy*, 693 So.2d 1103 (Fla. 3d DCA 1997).

2. Georgia

A landowner owes a duty to the public to guard, cover, or protect artificial conditions on property immediately adjacent to a public way. *International Paper Realty Co. v. Bethune*, 344 S.E.2d 228 (Ga. 1986). The duty extends to those persons lawfully using the public way might be accidentally injured thereon. *See also Sinkovitz v. Peters Land Co.*, 64 S.E. 93 (Ga.App. 1909) (owner of a building abutting upon a highway owes duty to use ordinary care to keep it from being a source of danger to the public after its construction, as much as it is his duty originally to see that it is not a source of danger by improper construction. Though the owner of a building abutting on a street is not an insurer, he must exercise reasonable care to keep it in such condition that neither the building nor any part thereof will fall and injure passers-by.)

In addition, a landowner owes a duty of ordinary care to those who reasonably could be affected by a dangerous condition to the "approach" to the landowner's property. In *Motel Properties, Inc. v. Miller*, 436 S.E.2d 196 (Ga. 1993), the Georgia Supreme Court held that an "approach" to property, which an owner or occupier of property has duty of ordinary care to keep safe, generally means that property directly contiguous, adjacent to and touching those entryways to premises, through which owner or occupier, by express or implied invitation, has induced or led others to come upon his premises for any lawful purpose, and through which such owner or occupier could foresee reasonable invitee would find it necessary or convenient to traverse while entering or exiting in course of business for which invitation was extended; "contiguous, adjacent to, and touching" means that property within last few steps taken by invitees, as opposed to mere pedestrians, as they enter or exit premises. O.C.G.A. § 51-3-1. Under certain circumstances, noncontiguous property can be deemed "approach" which owner or occupier of land has duty to exercise ordinary care to keep safe, because owner or occupier has extended approach to his premises by some positive action, such as constructing sidewalk, ramp or other direct approach; exception is based on fact that owner or occupier, for his own particular benefit, has affirmatively exerted control over public way or another's property. O.C.G.A. § 51-3-1.

3. North Carolina

North Carolina subscribes to the general rule of negligence requiring the plaintiff to show that (1) the defendant owed a duty of care to the plaintiff under the circumstances, (2) the defendant failed to exercise the degree of care what would be exercised by a reasonably prudent person under similar circumstances, (3) the defendant's negligence was a proximate cause of damage; and (4) the plaintiff suffered actual loss or damage. *See Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709 (1988), *McMurray v. Surely Federal Savings & Loan Ass'n.*, 82 N.C. App. 729, 731, *cert. denied* 318 N.C. 694 (1987); Keeton, *Prosser and Keeton on the Law of Torts,* § 30 (5th ed, 1981); *Hester v. Miller*, 41 N.C. App. 509, 512 (1979), *cert. denied*, 298 N.C. 296.

As of August 2004, no North Carolina cases have been uncovered which directly discuss the degree of precaution necessary in the context of an approaching storm. Absent direct law on the issue, establishing liability of adjoining property owners should begin with the principle that the law imposes a duty or ordinary care upon every person who engages in an active course of conduct. *Toone v. Adams*, 262 N.C. 403, 409 (1964). In addition, North Carolina law imposes a

duty of care on a property owner to maintain man-made structures, cultivated trees, and other pieces of human-cultivated landscaping, and naturally occurring objects which the owner knows are in an unreasonably dangerous condition. *Matheny v. Stonecutter Mills Corp.*, 107 S.E.2d 143 (NC 1959). The duty generally applies to lawful visitors but not to trespassers. *Nelson v. Freedland*, 507 S.E.2d 882, 892 (NC 1998). It extends, however, to drivers on public roads and to neighboring property owners, so long as the property owner had actual or constructive knowledge of the dangerous condition. *Gibson v. Hunsberger*, 428 S.E.2d 489 (NC Ct. App. 1993) (landowner is liable to drivers on public roads adjacent to land for dangerous conditions of which the owner had actual or constructive notice, but is not obligated to inspect property in rural, wooded settings); *cf. Rowe v. McGee*, 168 S.E.2d 77 (NC Ct. App. 1969) (owner who knows its tree is decayed and likely to fall and damage plaintiffs' property has duty to eliminate danger but is not liable to defendant if plaintiff had equal ability to control the condition); Annotation, "Failure to Exercise Due Care to Prevent all of Tree", 27 AM. JUR. 2d, *Proof of Facts* 639, section 1, at 645 (noting that both owners and occupiers of property have been held liable where the requisite control was found.).

The *Gibson* case held that in a rural, wooded setting, a property owner is not obligated to inspect the property to uncover dangerous conditions of which the owner was not previously aware. This is consistent with the common law rule absolving the landowner of any duty to find or remedy naturally occurring conditions, a rule designed to avoid burdening rural landowners with inspection of large unpopulated woodlands. *See generally* Keeton, *Prosser and Keeton on the Law of Torts*, § 57 (5th ed. 1984). Other jurisdictions have held similarly. *See, e.g., Ivancic v. Olmstead*, 66 N.Y.2d 349, 488 N.E.2d, *cert. denied* 90 L. Ed 658, 106 S. Ct. 1975 (1985) (a duty to remedy the hazard arises where the landowner has actual or constructive knowledge of it, but landowner has no duty to inspect regularly for non-visible decay of trees). However, the *Gibson* case did not specifically address the duty of a landowner in a more populated setting.

4. South Carolina

While landowner in a residential or urban area has duty to others outside property to prevent unreasonable risk of harm from defective or unsound trees on premises, the duty does not extend to owner of trees of natural origin growing on rural, undeveloped land. *Ford v. South Carolina Dept. of Transp.*, 492 S.E.2d 811 (S.C.App. 1997): *See also Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123 (Ct. App. 1987), *cert. denied*, 293 S.C. 406, 360 S.E.2d 824 (1987).

5. Virginia

In Virginia, "[t]he law requires that every person so use his own property as not to injure the property of another, *sic utere tuo ut alienum non laedas.*" *Akers v. Mathieson Alkali Works*, 151 Va. 1, 144 S.E. 492 (1928). As stated in *City of Portsmouth v. Culpepper*, 192 Va. 362 (1951), "Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected."

6. Other Jurisdictions

The trend in other jurisdictions has been to impose upon a landowner in an urban or residential setting the duty to inspect the property for defects in trees and other naturally occurring objects. *See, e.g., Mahurin v. Lockhart*, 71 Ill. App. 3d 691, 390 N.E.2d 523 (1979); *Barker v. Brown*, 236 Pa.Super 75, 340 A.2d 566 (1975). Some jurisdictions have abolished the common law exception for naturally occurring hazards regardless of whether the setting was rural or urban. *See, e.g., Sprecher v. Adamson Cos.*, 30 Ca.3d 358, 636 P.2d 1121 (1981) (tree); *Dudley v. Meadowbrook, Inc.*, 166 A.2d 743 (D.C. Mun. Ct. App. 1960) (same); *see also* Annotation, "Tree of Limb Falls onto Adjoining Private Property: Personal Injury and Property Damage Liability", 54 A.L.R. 4th 530, 541 (1987).

B. Act of God Defense

1. Florida

Florida imposes liability, even in the face of a so-called Act of God, so long as the result was caused by a "congruence" of the defendant's own negligent act with the natural force or condition. *Marrero v. Salkind*, 433 So.2d 1224 (Fla. 3d DCA. 1983); *Goodman v. Becker*, 430 So.2d 560 (Fla. 3d DCA 1983).

In *Atlantic Coast Line R. Co. v. Hendry*, 150 So. 598 (Fla. 1933), a railroad company constructed a railroad track which bisected the plaintiff's farm. There was a natural waterway near the farm and in order to cross the waterway, the railroad constructed a fill for its trackbed in which it placed a four-foot culvert for the passage of water. During heavy rains, the culvert overflowed and flooded the farm, destroying the plaintiff's crops and the plaintiff sued for damages.

The defendant railroad asserted that the plaintiff's crops were damaged solely as a result of an Act of God. The Florida Supreme Court upheld the determination that the defendant's negligence was a contributing proximate cause of the crop damage. The court determined that the burden was on the defendant who asserts the Act of God defense to show that the damages resulted solely from the Act of God. Further, the Court stated:

> The defense of vis major may be successfully interposed in an action for damages resulting solely from an Act of God; but if the defendant's negligence is a present contributing proximate cause, which, commingled with the Act of God, produces the injury, then the defendant is liable notwithstanding the Act of God. Citing *Davis v. Ivey,* 112 So. 264 (Fla. 1927).

2. Georgia

Where damages are caused by the combination of an act of God and the fault of man, such damages must be attributed entirely to human error; the presence of one excludes the existence of the other. *Strange v. Bartlett*, 513 S.E.2d 246 (Ga.App. 1999). Georgia subscribes to a statutory definition of "act of God" that will preclude liability in a negligence action, incorporating three basic elements: (1) an accident produced by (2) an irresistible or inevitable

force of nature or God, (3) which excludes all idea of human agency or conduct. O.C.G.A. §1-3-3(3).

An act which may be prevented by exercise of ordinary care is not "act of God." *Mann v. Anderson*, 426 S.E.2d 583 (Ga.App. 1992); O.C.G.A. § 1-3-3(3). As noted in *Zayre of Georgia, Inc. v. Haynes*, 213 S.E.2d 163 (Ga.App. 1975), an "accident" is defined in the statute as that which takes place without one's foresight or expectation or begins to exist without design, is something which would not have been precluded by exercise of ordinary care on part of either plaintiff or defendant.

3. North Carolina

As held in *Safeguard Ins. Co. v. Wilmington Cold Storage Co.*, 149 S.E.2d 27 (NC Ct. App. 1966), the landowner will be liable if the landowner's negligence acted in concurrence with an act of God:

> "[One may be held liable for his own negligence even through it concurs with an act of God." To the same effect, Southern Ry. Co. v. Cohen Weenen & Co., 156 Va. 313, 157 S.E. 563. Reducing the principle to the terseness of a maxim, "He whose negligence joins with the act of God in producing injury is liable therefor." Kindell v. Franklin Sugar Refining Co., 286 Pa. 359, 133 A. 566.

Safeguard Ins., 149 S.E.2d 27 (N.C. Ct. App. 1966). However, the landowner will not be liable for damages if the damages would have occurred from an act of God *regardless of that negligence.*

> This is said in 1 AM. JUR. 2d, Act of God, § 11: "All the authorities without exception agree that a person is not liable for injuries or damages caused by an act which falls within the meaning of the term 'act of God,' where there is no fault or negligence on his part. Even where the law imposes liability irrespective of negligence, liability will not be imposed where the injury or damage is solely the result of an act of God."

The issue was further developed in *Lea Co.* v. *North Carolina Board of Transp.*, 308 N.C. 603,304 S.E.2d 164 (N.C. 1983), wherein the plaintiff instituted an action against the Board of Transportation for flooding on or across the plaintiff's property which flowed from an easement taken by the Board. This flooding was a result of a 100-year flood (*i.e.*, a flood that is statistically predicted to occur once in every 100 years). Nonetheless, the North Carolina Supreme Court upheld the trial court determination that this flood was a reasonably foreseeable event. *Id.* at 175. That court adopted the definition for an Act of God set forth in Black's Law Dictionary, 31 (Revised 5th Edition 1979) as follows:

> An Act occasioned exclusively by violence of nature without the interference of any human agency. It means a natural necessity proceeding from physical causes alone without the intervention of man. It is an act, event, happening or occurrence, due to natural causes an inevitable accident, or disaster; a natural and

> inevitable necessity which implies entire exclusion of all human agency which operates without interference or aid from man and which results from natural causes and is in no sense attributable to human agency.

Lea, 304 S.E.2d at 172 (emphasis added). *See also Jenkins v. Helgren*, 217 S.E.2d 120 (N.C. Ct. App. 1975) (even if source of spark was an act of God, for which installers of insulation in return duct connected to furnace could not be responsible, installers could be held liable to homeowners for damage caused by fire if their negligence created the hazardous condition upon which the act operated); *Bennett v. Southern Railroad Co.*, 96 S.E.2d 31 (N.C. Ct. App. 1957) (even when an act of God combines or concurs with the negligence of the defendant to produce the injury or when any other efficient cause so combines or concurs; the defendant is liable if the injury would not have resulted but for his/her own negligent act or omission.); *Lawrence* v. *Power Co.*, 190 N. C. 664, 130 S.E. 735 (1935) (defendant power company, who allowed dry grass to accumulate on its right-of-way under plaintiff's tower, found liable for fire damage to plaintiff's tower after lightning struck defendant's transmission line causing an insulator on the tower to melt and fall upon the combustible grass below); *Lawrence v. Yadkin River Power Co.*, 190 N.C. 664, 130 S.E. 735 (1925); *Supervisor & Commissioner of Pickens Co. v. Jennings*, 181 N.C. 393, 107 S.E. 312 (1921); *Ridge v. Norfolk Southern R.R. Co.*, 167 N.C. 510, 83 S.E. 762 (1914).

4. South Carolina

The South Carolina Supreme Court in *Belue* v. *City of Greenville,* 226 S. C. 192 (S. C. 1954). In *Belue*, addressed the Act of God defense in a case against a local municipality that had installed curbing and gutters on a street adjacent to the plaintiff's residence. The installation caused excessive surface water to accumulate (as a result of a five inch rain in three hours) on plaintiff's property. The homeowner sued the municipality to recover damages to his home. *Id.* at 632. The Supreme Court of South Carolina held that even if the five inches of rainfall in three hours was unprecedented and exceptional, it did not relieve the defendant of liability because it was not the sole cause of injury to the plaintiff's property. *Id.* The court stated the test as follows:

> The principles embodied in all definitions is that the Act must be one occasioned exclusively by the violence of nature and all human agency must be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the Acts of God.

Id. at 633, citing *Mincey v. Dultmeier Manufacturing Co.*, 223 Iowa 252, 272 (1937).

5. Virginia

Virginia law does not allow the Act of God defense where the defendant's negligence was a concurring force that proximately contributed to the damages. As explained long ago by the Supreme Court of Virginia in *E.T. White v. Southern Railway Co.*, 151 Va. 302, 320 (1928):

> It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, **including the 'act of God,'** or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage . . ..

The Supreme Court of Virginia further discussed the Act of God defense in *City of Portsmouth v. Culpepper*, 192 Va. 362 (1951). In *Culpepper*, Vernon Culpepper sued the City of Portsmouth for damage to his crops that occurred when a city-maintained canal overflowed and flooded Culpepper's farm in 1948. *Id.* at 365. Years before the flood, the city attempted to replace a washed-out dam located within the canal by constructing an earthen dam across the canal with dirt from the eastern bank of the canal. *Id.*

The removal of the dirt by the city lowered the bank to normal ground level for a distance of one hundred yards. *Id.* at 365-66. Before the city finished the dam, however, it was enjoined from completing its work and ultimately abandoned the project, leaving the earthen dam unfinished. *Id.* at 366. When severe rainstorms hit the area in 1948, water in the canal was obstructed by the partially finished dam and overflowed the canal at the very point where the city had lowered its eastern bank, ultimately flooding Culpepper's farm. *Id.*

The City of Portsmouth raised the Act of God Defense and introduced evidence at trial showing that rain that caused the flood was the heaviest downpour on record. *Id.* Specifically, the City showed that the rainfall causing the flood was "in excess of anything shown since the Weather Bureau was created in 1879." *Id.* The jury returned a verdict in favor of Culpepper and the City of Portsmouth appealed.

The Supreme Court of Virginia upheld the jury's verdict and specifically rejected the City's Act of God defense stating: "Undoubtedly the record shows that the rainfall in question was extremely severe, but under the circumstances and facts in this case, it cannot be termed an 'Act of God'. It has been held in Virginia since 1849 that all human agency is to be excluded from creating or entering into the cause of mischief, in order that it may be deemed an Act of God." *Id.* at 367 (citing Friend v.*Woods*, 6 Gratt. (47 Va.) 189).

The court pointed to the following definition of "Act of God" in support of its reasoning: "Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected." *Id.*; *see also Ellerson v. Chesapeake & Ohio Railway Co.*, 149 Va. 809 (1928) (defining "Act of God" as such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or foreseen).

Accordingly, defendants raising the Act of God defense in Virginia have the burden of establishing that no human intervention entered into the cause of a loss and that the so-called Act of God was so unusual and extraordinary that it could not have been foreseen. Regarding the "human intervention" element of the defense, early, aggressive and thorough inspections (something Cozen O'Connor attorneys have vast experience in) will be essential to properly evaluate which losses caused by Isabel present the possibility of recovery from third parties and

the best avenue to that recovery. Regarding the "foreseeability" element, a defendant will be hard pressed, in light of today's weather forecasting technology and reporting, to credibly argue that Isabel's path and force could not have been foreseen.

6. Other Jurisdictions

Louisiana follows the majority view in imposing liability for negligence on defendants whose acts, coupled with an Act of God, have caused a loss. The fact that Hurricane Andrew was an Act of God should not, as a rule of law, relieve negligent defendants of liability in a subrogation claim. Traditional notions of proximate cause provide that "where an Act of God combines or concurs with the negligence of a defendant to produce an injury, the defendant is liable if the injury would not have resulted but for his own negligent conduct or omission." *Gables* v. *Regent Development Corp.*, 470 So.2d 149, 152 (La. App. 5 Cir. 1985).

The Pennsylvania Supreme Court has followed a similar analysis concerning damages resulting from, or concurring with, an Act of God. In *Bowman* v. *Columbia Telephone Company*, 406 Pa. 455 (1962), the Pennsylvania Supreme Court considered a case in which a motorist was injured when four telephone poles snapped and fell on the roadway during a snowstorm. Plaintiff alleged negligent maintenance of the telephone poles. The defendant asserted an Act of God defense claiming that the snowfall was unprecedented and unforeseeable. The court stated:

> Sometimes all the ingenuity and industry *of* man can not avail against the turmoil and turbulence of the elements, but it is not enough to escape responsibility for the owner *of* the instrumentality which inflicts damage to assert that the instrumentality was propelled by the Supreme Being and that, therefore he could shake the clinging snow of responsibility from off his hands.

Id. at 459.

The Texas Supreme Court held similarly on the Act of God defense in *Texas Supreme Court* in *Luther Transfer* and *Storage, Inc.* v. *Walton,* 296 S.W2d 750 (Tex. 1956*)*. In *Luther*, a flood case, the court held that while the damages resulting from an Act of God are not ordinarily chargeable to anyone, an exception to this general rule exists when the negligence of another person has concurred with the Act of God. In this regard, the court stated:

> The rule of non-liability of a ...company or person for damages caused by an extraordinary and unprecedented flood is subject to the exception that negligence in constructing and maintaining the structure concurring with an extraordinary and unprecedented flood in causing damage to another, makes, ... [the] company or person liable for damages, notwithstanding the fact that the flood was extraordinary and unprecedented.

Id. at 498, quoting *Fort Worth* and D.C. Ry. *Co.* v. *Kiel*, 187 S.W.2d 371,373 (Tex. 1945).

For additional cases on this issue, see Annotation, "Failure to Exercise Due Care to Prevent fall of Tree", 27 AM. JUR. *Proof of Facts* 639, § 6, at 657-59.

C. Government Liability

1. Florida

a. Notice Requirements:

The claimant must provide written notice within 3 years to the governmental agency and the Department of Insurance. Florida Statute § 768.28(6). Claimant must file suit within 4 years. Florida Statute § 95.11(3)(d), § 11.065(1).

b. Liability Limits

In cases where Florida has waived sovereign immunity, the cap on damages is generally $100,000.

c. Discretionary/Governmental Activities v. Operational Activities

Immunity is given for negligent discretionary policy-making activities, but not negligent operational activities. Discretionary policy-making or planning activities of governmental entities are immune from tort liability. *Lee v. Department of Health and Rehabilitative Servs.*, 698 So.2d 1194, 1198 (Fla.1997). However, immunity from tort liability is waived for negligent activities that are operational and for which a common law or statutory duty of care exists. *Department of Health and Rehabilitative Servs. v. B.J.M.*, 656 So.2d 906 (Fla.1995); *see also Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912 (Fla.1985); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979).

d. Highways, Roads, and Bridges

The decision to install traffic control devices and plan and align road or improve or upgrade roads or intersections is governmental, providing governmental immunity for those decisions. *Polk County v. Sofka*, 2001 WL 1245329, (Fla.App.2.Dist. 2001). However, the general rule has an exception where a governmental entity creates a known dangerous condition which is not readily apparent to persons who could be injured by the condition. Id. A city is not an insurer of the motorist or the pedestrian. *Castano v. City of Miami*, 840 So.2d 412 (Fla. 3 DCA 2003). However, the city may be held liable for defects of which the city had actual or construction knowledge, *i.e.*, defects that have been in existence so long that they could have been discovered by the exercise of reasonable care, and repaired.

e. Storm Sewer Systems

City not liable under Florida's waiver of sovereign immunity statute, Florida Statute § 768.28, for claims of negligent design, installation, and maintenance of allegedly dangerous storm sewer system. *Collom v. City of St. Petersburg*, 400 So.2d 507 (Fla. 2d DCA 1981).

f. Fire Protection Services

Fire protection services are discretionary and thus protected. In *City of Daytona Beach v. Palmer*, 469 So. 2d 121 (Fla. 1985), the court held: (1) there is no common-law duty of individual property owners to provide fire protection services; (2) there is no statutory duty of care upon which to base governmental liability for discretionary actions of fire fighters in combating fires; (3) decisions of how to properly fight a particular fire, how to rescue victims in a fire, or what and how much equipment to send to a fire are discretionary judgmental decisions which are inherent in public safety function of fire protection; and (4) governmental entities are clearly liable for negligent conduct resulting in personal injury while fire equipment is being driven to the scene of a fire or personal injury to a spectator from the negligent handling of equipment at the scene, as a result of the enactment of section 768.28, Florida Statutes (1983).

g. Police protection

Some police actions are discretionary and thus protected but some are statutorily mandated and thus not protected:

i. *Protected Police Activities:*

Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970): City and County not liable for riot damage to plaintiffs' businesses incurred during Republican National Convention in Miami Beach, because even though the duty of police protection is owed to the public generally, the duty does not inure to the benefit of particular private citizens.

Everton v. Willard, 468 So. 936 (Fla. 1985): Approving dismissal of wrongful death action for deputy sheriff citing and releasing, rather than arresting, intoxicated motorist who then caused fatal collision 15 minutes later, the court held: (1) the decision to arrest is a discretionary judgmental power basic to police power function of governmental entities for which police are afforded governmental immunity, (2) although there could be a duty of care owed to an individual if a special relationship exists between an individual and a governmental entity, such as where police accept responsibility to protect an individual who has assisted them and the individual is in danger due to that assistance. The court reasoned as follows:

> In our opinion, there is no distinction between the immunity offered the police officer in making a determination of whether to arrest an individual for an offense and the discretionary decision of the prosecutor of whether to prosecute an individual or the judge's decision of whether to release an individual on bail or to place him on probation. All of these decisions are basic discretionary, judgmental decisions that are inherent in enforcing the laws of the state. They are clearly not ministerial acts as contemplated by the Huhn [v. Dixie Insurance Co., 453 So. 2d 70 (Fla. 5th DCA 1984)] decision or the dissent.

ii. Unprotected Police Activities

White v. City of Waldo, 659 So. 2d 707 (Fla. 1st DCA 1995): In claim by motorcyclist injured when his motorcycle collided with a stray horse being pursued by a city police officer in unlit patrol car, the court held that: (1) officer owed duty to exercise reasonable care to make his acts safe for others; (2) officer's decision to conduct pursuit in unlit patrol car with private citizen on hood was not discretionary one for which immunity from tort liability was available; and (3) evidence was for jury on issue of whether chasing horse created danger that did not previously exist and whether doing so in unlit patrol car deprived motorists of any notice of such danger. In its decision, however, the court noted:

> Law enforcement officers must exercise discretion in enforcing laws and protecting the public safety. For that reason, state and local government enjoys sovereign immunity for actions law enforcement personnel take or omit in performing "discretionary activities ... inherent in the act of governing." *City of Jacksonville v. Mills*, 544 So. 2d 190 (Fla. 1989). Determining probable cause for arrest is an example. A plaintiff victimized by a person the authorities failed to arrest cannot recover damages from the public fisc on that account. *Everton v. Willard*, 468 So. 2d 936 (Fla. 1985) (no recovery where driver who had been drinking was involved in fatal accident some fifteen minutes after sheriff's deputy stopped but did not arrest him.) The decision when or whether to make an arrest is within the discretion of law enforcement officers in the executive branch, *Rodriguez v. City of Cape Coral*, 468 So. 2d 963 (Fla. 1985); *City of Daytona Beach v. Huhn*, 468 So. 2d 963 (Fla. 1985); *Everton*, subject, of course, to judicially enforceable rights against unlawful arrest.

Simpson v. City of Miami, 700 So. 2d 87 (Fla. 3d DCA 1997): City not entitled to sovereign immunity in wrongful death claim for police releasing from cruiser a violator of a domestic violence injunction:

> If it is determined that the City of Miami Police Officer Fuentes' action of securing the domestic violence injunction violator in the police cruiser, after having responded to a call about an injunction violation, constituted an arrest of the violator, then pursuant to the section 741.30(9)(b), Florida Statutes (1993) provision that upon arrest the violator "shall be held in custody until brought before the court as expeditiously as possible[,]" (emphasis added), the officer had no discretion under sovereign immunity principles to release the violator, *see Everton v. Willard*, 468 So. 2d 936 (Fla. 1985), and was required by statute to take the arrested violator before a judge.

h. School Boards

School boards are not immune from premises liability, which is operational negligence. *Green v. School Board of Pasco County*, 2000 WL 192148 (Fla. 2d DCA 2/18/00). In *Green*, the court held that a police officer who fell from unprotected retaining wall on school premises was

allowed to bring premises liability action against school board, because (1) school board's alleged failure to illuminate area or erect guardrail on retaining wall was operational negligence for which it was not shielded by sovereign immunity, and (2) issues of fact existed as to whether officer's prior knowledge of retaining wall obviated duty to warn of unprotected ledge. Once a government entity builds or takes control of property or an improvement, it has the same common law duty as a private landowner to properly maintain and operate the property.

2. Georgia

a. State Liability

State sovereign immunity is governed by the Ga. Const. 1983, Art. I, §2, par. 9, which reads:

> (a) The General Assembly may waive the state's sovereign immunity from suit by enacting a State Tort Claims Act, in which the General Assembly may provide by law for procedures for the making, handling, and disposition of actions or claims against the state and its department, agencies, officers, and employees, upon such terms and subject to such conditions and limitations as the General Assembly may provide. ...

O.C.G.A §50-21-24, however, sets forth certain exceptions to state liability.

b. County Liability

County sovereign immunity is premised upon O.C.G.A. §36-1-4, entitled "When county liable to be sued" and states: "A County is not liable to suit for any cause of action unless made so by statute." The Georgia Supreme Court in *Gilbert v. Richardson*, 452 S.E.2d 476, 264 Ga. 744 (1994) held that the 1991 amendment to the constitutional doctrine of sovereign immunity, extending immunity to state and all of its departments and agencies, [Const. Art. I, §2, Par. (e)] applied to counties. However, the Court also held that the enactment of a state torts claims act was only one of the ways the legislature could constitutionally waive sovereign immunity. Thus, the Code provisions allowing a waiver of sovereign immunity when a county purchases liability insurance were upheld. Furthermore, the court also noted that the county's participation in GIRMA, the Georgia Interlocal Risk Management Association, did constitute liability insurance and thus a waiver of sovereign immunity. Claims against counties are governed by O.C.G.A §36-11-1 which provides that claims must be presented within 12 months. Presentation of the claim includes service or process as well as filing of the suit. Failure in this regard is an absolute bar to the claim.

c. City Liability

As to municipal sovereign immunity, the Georgia Supreme Court in *City of Thomaston v. Bridges*, 264 Ga. 4, 439 S.E.2d 906 (1994) held that the constitutional amendment language enacted in 1991 was not a complete blanket reinstatement of sovereign immunity. Thus, as to municipalities, O.C.G.A. §36-33-1 remains viable.

The primary exception to the doctrine of sovereign immunity as it applies in the context of municipal and county immunity is the doctrine of nuisance. Several decisions discuss the theory of nuisance, particularly in the context of water and sewage backups. In *City of Thomasville v. Shank*, 263 Ga. 624, 437 S.E.2d 306 (1993), Mrs. Shank filed suit against the City when her home was flooded with raw sewage. The Supreme Court first defined the nuisance exception:

> A municipality like any other individual or private corporation may be liabile for damages it causes to a third party from the operation or maintenance of a nuisance, irrespective of whether it is exercising a governmental or ministerial function.

(citations omitted). Next, the court expressly upheld the validity of the nuisance exception since the most recent constitutional amendment:

> Accordingly, we reaffirm the long-standing principle that a municipality is liabile for creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property. This holding is not in conflict with the 1990(1) amendment as that amendment deals with the concept of waiver, and in the case of nuisance we are dealing not with a waiver of but an exception to sovereign immunity.

d. Highways, Roads, and Bridges

In *Department of Transp. v. Montgomery Tank Lines, Inc.*, 558 S.E.2d 723 (Ga.App. 2001) the court held that under the Georgia Tort Claims Act, the Department of Transportation (DOT) was not immune from suit by insured and motor vehicle insurer for contribution or indemnity after insured and insurer paid damages for settlement of wrongful death action arising from motor vehicle collision, where insured and insurer alleged that DOT negligently designed and maintained intersection where collision occurred, and DOT could have been joined as defendant in wrongful death action.; O.C.G.A. § 50-21-21 et seq.

e. Storm Sewage System

The law in Georgia is mixed on whether a city can be held liable for negligence associated with storm sewer systems. The majority of the cases, however, deem a city immune from maintenance activities, but liable for situations that pose a significant nuisance or health hazard, as demonstrated by the cases discussed below.

In *Trax, Inc. v. City of College Park*, 221 S.E.2d 595 (Ga. 1976), the city had a duty to take steps to maintain flow of water in creek which was part of city's surface water drainage system whenever it became known that changes had occurred which reduced flow of water and made flooding of public or private property likely.

In *City of Douglas v. Cartrett*, 137 S.E.2d 358 (Ga.App. 1964), the court held that an effluent line from sewage disposal plant, being a part of the sewage system of a municipality, is for the protection of the public health and its maintenance is a governmental function.

In *City of Macon v. Cannon*, 79 S.E.2d 816 (Ga.App. 1954), the court held that the city had duty to provide for drainage of the increased run-off of surface water from increased impervious areas within city limits, whether such areas were made directly by municipality or by state with federal funds. A municipal corporation is liable in damages for nuisance created by the grading and drainage of its streets in such a manner as to impair the health of families and produce noxious scents rendering enjoyment of their property impossible. Code, §§ 69-301, 72-101.

In *City Council of Augusta v. Williams*, 58 S.E.2d 208 (Ga.App. 1950), the court held that the authorized maintenance by a municipality of a drainage system for purpose of surface water is a governmental function, and where no nuisance was involved, the owner of realty was not entitled to damages to his realty suffered by negligent maintenance and by overflow of system.

In *Foster v. Mayor and Aldermen of City of Savannah*, 48 S.E.2d 686 (Ga.App. 1948), the court held that the duty of a city to maintain its sewerage and drainage system in a good working and sanitary condition is a governmental function for which there is no liability based on negligence where the system is not operated for profit, and no substantial charges are made for the ordinary use, enjoyment and benefits of the system. Code, § 69-301. Action by private property owners would not lie against city for alleged negligence in failing to remove obstructions in its sewerage system causing overflow into property owners' store where system was not operated for profit and no substantial charges were made for ordinary use, enjoyment and benefits of the system. Code, § 69-301.

3. North Carolina

a. Notice Requirements

Any actions against the state or a state agency or state employee must be submitted to the Industrial Commission by affidavit, N.C.G.S.§143-297 (must list various things), within three (3) years of accrual of the claim, N.C.G.S. §143-299. The limit of liability is $150,000. N.C.G.S. §143-291. There appear to be no notice limitations for claims against municipalities.

b. Governmental vs. "Proprietary" Functions

Whether a governmental body will be held liable in tort for negligence depends upon the nature of the acts or omissions constituting negligence. North Carolina distinguishes between two categories of governmental functions: "governmental" and "proprietary" functions *Sides v. Hospital*, 287 N.C. 14, 213 S.E. 2d 297 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972), *pet. for reh. denied*, 281 N.C. 516 (1972); and *Casey v. Wake County*, 45 N.C. App. 522, 263 S.E. 2d 360 (1980), *pet. for discr. rev. denied*, 300 N.C. 371, 267 S.E. 2d 673 (1980). A municipality would enjoy sovereign immunity for "governmental" functions, but not for "proprietary" ones.

A good definition of the distinction between governmental and proprietary functions is the following:

> Any activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

See generally Kizer v. City of Raleigh, 121 N.C. App. 526, 466 S.E.2d 336 (1996).

Case law in North Carolina has helped clarify what functions are governmental and what are proprietary. For example, firefighting activities of a municipal fire department are generally considered governmental or discretionary functions for which the city is immune. *See, e.g., Willis v. Town of Beaufort*, 544 S.E.2d 600 (N.C. Ct. App. 2001). That immunity, however, can be waived to the extent of the limits of any insurance the department has obtained. N.C. Gen. Stat. §§ 153A-435 and 160A-485. Volunteer fire departments are immune from civil liability for any conduct in connection with their fire suppression efforts. N.C. Gen. Stat. § 58-82-5(b) (1999); *see Spruill v. Lake Phelps Volunteer Fire Department, Inc.*, 351 N.C. 318, 523 S.E.2d 672 (N.C. 2000).[2]

c. Storm Sewage Systems

Sewage maintenance is generally considered proprietary in nature, thus conferring liability to municipalities for failure to maintain sewage systems, including storm drains. *Howell v. City of Lumberton*, 548 S.E.2d 835 (N.C. Ct. App. 2001) ("The general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof," quoting *Hotels, Inc. v. Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966)); *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 754, 407 S.E.2d 567, 567 (1991) (municipality "not immune from tort liability in the operation of its sewer system."). However, if some other entity besides the municipality assumed control over the sewage system, the municipality may not be liable. *See, e.g., Milner Hotels, Inc. v. City of Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966), *modified on reh'g*, 271 N.C. 224, 155 S.E.2d 543 (1967) (a municipality is responsible for negligent maintenance of drains constructed by third persons only if it adopted them as part of its drainage system or assumed control and management thereof).

d. Highways, Roads, and Bridges

As to debris and/or traffic on state highways, the North Carolina State Highway Commission is immune from suit, except insofar as the right to sue is conferred by the Tort Claims Act. *Ayscue v. Highway Comm'n*, 270 N.C. 100, 102 (1967). As the Act has been interpreted, the Highway Commission is not liable for negligent omissions of failures to act. *Id.* at 103. Therefore, the owner of a car damaged by a tree that fell in the roadway cannot maintain an action against the

[2]Also to note, under the public duty doctrine, certain law enforcement agencies may be shielded from liability in connection with an alleged failure to provide protection to specific individuals. *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991); *see also Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000). However, this protection is limited and should be analyzed carefully.

highway commission for failure to maintain the tree. Moreover, a plaintiff probably cannot maintain an action for negligent failure to maintain manmade objects such as telephone poles. See id. (plaintiff could not maintain an action against the Commission based on the Commission's negligent failure to removal gravel from a paved intersection, where the gravel had been strewn by cars from a nearby gravel road).

4. South Carolina

a. Notice Requirements

In order to bring a claim against a governmental agency, the South Carolina Tort Claims Act requires that the claim be verified under oath. §15-78-80. The purpose of the oath is to discourage questionable claims. *Pollard v. County of Florence*, 314 S.C. 397, 444 S.E.2d 534 (S.C. Ct. App. 1994), *rehearing denied, certiorari denied.* The statute that previously had a 180-day notice requirement for municipalities, §5-7-70, was repealed in 1986 with the enactment of the South Carolina Tort Claims Act, so that now there is a two-year period to file a notice. §15-78-100 and §15-78-110.

b. Police and Fire Protection

Under the South Carolina Tort Claims Act, governmental entities - including cities, city police departments, fire departments, and state colleges - are immune from liability for certain actions or inactions. In particular, Code of Laws of South Carolina §15-78-60, sets forth the following immunity provisions applicable to many subrogation cases:

> The governmental entity is not liable for a loss resulting from:
> ....
> (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;
> (6) civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection;
> ....
> (20) an act or omission of a person other than an employee including but not limited to the criminal actions of third persons;
> ....
> (25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner;

These provisions explicitly protect governmental entities from (1) a decision not to perform a service, (2) failure to provide police, (3) criminal actions of non-governmental employees, and (4) failure of a school to protect against or control its students (unless grossly negligent). Courts interpreting these immunity provisions have not been reluctant to grant governmental immunity. *See, e.g., Clyburn v. Sumter County School Dist. 17*, 311 S.C. 521, 429 S.E.2d 862 (SC Ct. App.

1993), *rehearing denied, certiorari granted, affirmed* 317 S.C. 50, 451 S.E.2d 885 (SC 1993) (School district was entitled to summary judgment in an action, brought by a student who was attacked by a non-student on a school bus, which was based on the district's alleged failure to enforce §59-67-245 (penalties for interference with a school bus), even though the student had been threatened on the bus prior to the attack and the district did not call the police, where the district counseled the student and her assailant after the threat, and attempted to contact their parents; the district exercised at least slight care and thus was not grossly negligent.); *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (SC Ct. App. 1993) (Defendant county entitled to summary judgment in an action to recover for the death of a bicyclist who was fatally injured when she was chased into traffic by several vicious dogs, since the gravamen of the complaint was the county's failure to enforce an animal control ordinance, and thus the county was immune from liability under §15-78-60); *see also Wells v The City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746, (S.C. Ct. App.1998) (barring homeowners suit against city for failure to maintain or inspect inactive fire hydrants because §15-78-60(6) protects government entity from liability for failure to provide police or fire protection or the method of providing police or fire protection)(citing with approval *City of Columbus v. McIlwain*, 205 Miss. 473, 38 So.2d 921 (1949) (municipality is not responsible for the destruction of property within its limits by a fire merely because, through the negligence or other default of the municipality or its employees, the members of the fire department failed to extinguish the fire regardless of whether this failure is due to an insufficient supply of water, the interruption of the service during the course of a fire, the neglect or incompetence of the firemen, the defective condition of the fire apparatus, negligence in permitting fire hydrants to become clogged or defective, etc.); *Ross v. City of Houston*, 807 S.W.2d 336 (Tex.App.1990) (city's policy of inspecting fire hydrants was directly connected to the city's method of providing fire protection; therefore, the state tort claims act exclusion from governmental liability for claims arising from the failure to provide or the method of providing fire protection barred suit by homeowner); *Triplett v. City of Columbia*, 96 S.E. 675 (S.C. 1918) (although city can be liable for bodily injury or damages to person or property through defect in street by reason of mismanagement, this does not render city liable to property owner made ill by depression in street filled with stagnant water).

c. Highways, Roads, and Bridges

In South Carolina, "the Department of Transportation can be held liable for damages caused by the fall of a tree standing within the limits of or in close proximity to a public highway" depending on "whether the Department knew, or in the exercise of reasonable care should have known, that the condition of the tree would make it hazardous to persons or property in the immediate vicinity." *Ford v. South Carolina Department of Transportation*, 328 S.C. 481, __, 492 S.E.2d 81, 814 (Ct. App. 1997). The Department, "because of its responsibility to the public," has a higher duty of care than does a landowner "to discovery and potentially remedy potential obstructions, even those obstructions originating on private property." *Id.*

5. Virginia

a. Notice Requirements

Virginia has a specific six-month requirement for actions against a governmental agency. Virginia Code 1950 § 8.01-222. Fortunately, in *Miles v. City of Richmond*, 373 S.E.2d 715 (Va. 1988), the Virginia Supreme Court found the notice-of-claim statute, Virginia Code 1950 § 8.01-222, to be mandatory but not jurisdictional. The statute is to be construed liberally, and substantial compliance with its terms is sufficient. The statute reads as follows:

> § 8.01-222 Notice to be given cities and towns of claims for damages for negligence.
> No action shall be maintained against any city or town for injury to any person or property or for wrongful death alleged to have been sustained by reason of the negligence of the city or town, or of any officer, agent or employee thereof, unless a written statement by the claimant, his agent, attorney or representative of the nature of the claim and of the time and place at which the injury is alleged to have occurred or been received shall have been filed with the city attorney or town attorney, or with the mayor, or chief executive, within six months after such cause of action shall have accrued, except if the complainant during such six-month period is able to establish by clear and convincing evidence that due to the injury sustained for which a claim is asserted that he was physically or mentally unable to give such notice within the six-month period, then the time for giving notice shall be tolled until the claimant sufficiently recovers from said injury so as to be able to give such notice; and statements pursuant to this section shall be valid, notwithstanding any contrary charter provision of any city or town.

This must be sent by certified mail, return receipt requested.

b. Governmental vs. Proprietary Functions

Similar to North Carolina, Virginia deems a governmental entity immune for governmental functions but not for proprietary functions. While the planning, designing, laying out, and construction of streets and roads are governmental functions, the routine maintenance of existing streets and roads is proprietary. *Bialk v. City of Hampton*, 242 VA 56, 58, 405 S.E.2d 619 (1991); *Taylor v. City of Charlottesville*, 240 Va. 367, 370-71, 397 S.E.2d 832 (1990).

c. Storm Sewage Systems

For sewage systems, the general rule is in Virginia that the maintenance and operation of a sewer system is a governmental function for which a municipality is entitled immunity from tort liability. *See, e.g., Gayda v. Gibbs*, 45 Va. Cir. 176, 1998 Va. Cir. LEXIS 122 (Va. Cir. Ct. City of Norfolk 1998); *Mitchum v. Albemarle County Service Authority*, 34 Va. Cir. 208, 1994 Va. Cir. LEXIS 14 (Va. Cir. Ct., Albemarle County 1994) (Sewage authority acted as municipal corporation performing governmental functions in servicing a manhole which was part of its sewer system, and was thus entitled to immunity from liability and tort: "If collecting garbage

and removing trash and debris are governmental functions, then collecting and disposing of other forms of waste must also be."); *Stover v. Keystone Builders, Inc.*, 36 Va. Cir. 595, 1993 Va. Cir. LEXIS 717 (Va. Cir. Ct., Fairfax County 1993); *Linda Lee Corp.v. Covington Company*, 36 Va. Cir. 590, 1993 Va. Cir. LEXIS 716 (Va. Cir. Ct. Bedford County 1993) (The doctrine of sovereign immunity applies to the maintenance and operation of a storm water drainage system by a municipal corporation.); *Wilshin v. City of Fredericsburg*, 26 Va. Cir. 329, 1992 Va. Cir. LEXIS 577 (Va. Cir. Ct., City of Fredericksburg 1992) (Plaintiff's, neighbors sued for damages caused by sewage backup, claiming the system malfunctioned, backed up or overflowed causing raw sewage to invade the lower levels of their homes; court held, "If collecting garbage and removing trash and debris are governmental functions, then collecting and disposing of other forms of waste must also be. In cities--which almost by definition are densely populated--where drain fields and other individualized modes of sewage disposal are impractical of not impossible, it is difficult to imagine anything more tied to public safety and safety for the benefit of all than the provision of a sanitary sewer system. . . . Therefore, the Court is of the opinion that in Virginia the operation and maintenance of a sewer system is a governmental function."); *Jackson v. City of Danville*, 26 Va. Cir. 488, 1990 Va. Cir. LEXIS 444 (Va. Cir. Ct., City of Danville 1990) (Plaintiff alleged that her goods and property were damaged by sewage which backed up and flowed into her home as a result of the negligence of the City: "In this case, the City of Danville's operation of a sanitary sewer system, in the Court's opinion, falls within the Protective Doctrine of Sovereign Immunity. For this reason, the Court is of the opinion that the City of Danville is entitled to summary judgment as requested in its Motion.").

However, a few cases are distinguishable from the general rule. In *Mjornell v. Town of Front Royal*, 41 Va. Cir. 399, 1997 Va. Cir. LEXIS 44 (Va. Cir. Ct., Warren County 1997), the court held that a municipality is immune from liability for an alleged negligent design of a sewer system, but may be liable for damages caused by its negligence with regard to the construction, operation and maintenance of water and sewer systems, which activities are proprietary functions. In addition, the case of *Hampton Road's Sanitation District v. McDonnell*, 234 Va. 235, 360 S.E.2d 841, (Va. 1987) allowed recovery where the action of the municipality was done as a continuing trespass. Similarly, in *McConnell v. Board of Supervisors of Fairfax County*, 20 Va. Cir. 5, 1989 Va. Cir. LEXIS 402 (Va. Cir. Ct., Fairfax County 1989), the court allowed plaintiff to maintain a cause of action for inverse condemnation in the case of an alleged continuing trespass. The case involved a storm drain which backed up from time to time, causing flooding which damages Plaintiffs' nearby property. The court held as follows:

> Plaintiffs alleged that the Defendant is responsible for this flooding since they are charged with the allegation of designing and maintaining this storm sewer system. In their second amended petition, Plaintiffs allege one court for declaratory relief and one count for inverse condemnation. They presently seek leave to add a count for trespass. ... [A] claim for inverse condemnation is essentially a claim that the government has 'taken' property without the due process of law in violation of the Fifth Amendment to the U.S. Constitution. As explained in Barnes v. United States, 538 F2d 865 (Ct. Cl. 1976), case law has developed the law of eminent domain as applied to instances of flooding. Property may be taken by the invasion of water where subjected to "intermittent, but inevitably recurring, inundation due to authorized government action." Id. at 870, citations omitted. A

> cause of action for unconstitutional taking therefore does not accrue until the flooding becomes inevitable. . . . [T]he Court simply cannot say on the basis of this record that flooding became inevitable at least three years prior to the commencement of this suit, as the defendant contends. Rather, this poses a question of fact to be determined at trial.

d. Highways, Roads, and Bridges

As to post-disaster remediation, in *Fenon v. City of Norfolk*, 203 Va. 551, 125 S.E.2d 808 (1962), the Virginia Supreme Court considered a tort claim against a city for failure to clear a tree from the road and found the city immune. Plaintiff claimed injury for striking a tree that fell by a storm and was obstructing a street. The fallen tree was one of some 800 downed trees blocking the streets of Norfolk in the wake of Hurricane Donna, which struck the area in 1960. The Court held that the city's effort to cope with the "emergency situation" resulting from the storm was the exercise of a governmental function, not routine street maintenance. 203 Va. at 555-56.

Similarly, in *Bialk v. City of Hampton*, 242 Va. 56, 58, 405 S.E.2d 619, 620 (1991), the City of Hampton was deemed immune from plaintiff's suit for personal injuries received when he was struck by snow thrown from the blade of a snowplow which was being operated by a city employee. The Court cited *Fenon* and held that the City of Hampton was entitled to sovereign immunity for negligence committed during its snow-removal efforts. Specifically, the court stated:

> Because the City's snow-removal operations in this case were acts done for the common good in coping with an emergency, they constituted the exercise of a governmental function. Although that function coincided with the City's proprietary function of keeping its streets in safe condition for travel, where those functions coincide, "the governmental function is the overriding factor." The trial court correctly ruled, therefore, that the City was entitled to governmental immunity.

242 Va. At 59

However, the case of *Burson v. City of Bristol*, 10 S.E.2d 541 (Va. 1940) found the city liable in post-fire repair efforts to a building. Five days after a fire had been extinguished members of city volunteer fire department were employed to pull down walls of burned building to make streets safe for passers-by. The court held that the members of volunteer fire department were not acting in the discharge of their duties as firemen so as to relieve city from liability for damages to adjoining property caused by firemen's negligence, nor was city relieved from liability under the statute relating to the destruction of houses to prevent the spread of fire. Code 1936, §§ 3133-3135.

D. Statutes of Repose

1. Florida

Florida subscribes to a 15-year statute of repose for improvements to real property, running from "the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.". Florida Statute § 95.11(3)(c):

2. Georgia

Georgia's limitation/repose statute compilation is slightly misleading. Although Georgia Code § 9-3-51 contains an 8-year statute of repose for construction defect claims, the Georgia Supreme Court has rejected any application of a discovery rule with respect to such claims. Georgia Code § 9-3-30 contains a four-year statute of limitation for damages to real property that begins to run from the date of completion of the structure. Therefore, the four-year statute of limitation begins to run upon substantial completion of the structure, even if no damage other than the faulty construction occurs. Accordingly, any action for construction defects is barred after four years, regardless of whether any real harm has manifested itself by tangible loss, as the loss is deemed to have occurred when the structure was completed in a defective state. This scheme essentially treats construction defects as if they are a contractual breach, for which a claim accrues immediately, instead of a tort, for which a claim accrues when injury occurs or the claimant knows or has reason to know that the faulty work has occurred. For example, if a five-year old dwelling contains a modular fireplace which has been incorrectly installed at the time of original construction, and a fire ensues in the fifth year because of the defective installation, any claim for injury to the building is time-barred by the four-year statute of limitation, notwithstanding the eight-year statute of repose.

To make things even more confusing, the homeowner would be able to prosecute a claim for damage to his personal property and dwelling contents, because that claim does not accrue until the actual damage happens, and so long as the injury is within the eight-year window for construction defect claims, that part of the loss is viable for subrogation.

3. North Carolina

North Carolina subscribes to a six-year statute of repose for products and improvement to real property. N.C.G.S. § 1-50(6) ("no action for the recovery of damages shall be brought more than six years. . . ."). The only recognized exception to this rule is if the defendant committed wanton and wilful misconduct. *Cacha v. Montaco*, 554 SE2d 388 (Ct App 2001).

4. South Carolina

South Carolina subscribes to a thirteen year statute of repose for improvements to real property, but no such statute or repose for product. S.C.Code Ann. § 15-3-640.

5. Virginia

Virginia subscribes to a 5-year statute of repose running from the date of the performance of the services. Virginia Code § 8.01-250.

VI. Resources

This section provides the following information sources:

A. Publications

The Federal Emergency Management Agency (FEMA) provides numerous publications on their website, www.fema.gov. Hardcopies can also be obtained by writing to: FEMA, Publications, P.O. Box 70274, Washington, DC 20024. Useful publications include:

- Disaster Mitigation Guide for Business and Industry (FEMA 190) --Technical planning information for building owners and industrial facilities on how to reduce the impact of natural disasters and man-made emergencies.
- Principal Threats Facing Communities and Local Emergency Management Coordinators (FEMA 191) -- Statistics and analyses of natural disasters and man-made threats in the U.S.
- Floodproofing Non-Residential Structures (FEMA 102) -- Technical information for building owners, designers and contractors on floodproofing techniques (200 pages).
- Non-Residential Flood-proofing -- Requirements and Certification for Buildings Located in Flood Hazard Areas in Accordance with the National Flood Insurance Program (FIA-TB-3).
- Building Performance: Hurricane Andrew in Florida (FIA 22) -- Technical guidance for enhancing the performance of buildings in hurricanes.
- Building Performance: Hurricane Iniki in Hawaii (FIA 23) -- Technical guidance for reducing hurricane and flood damage.
- Answers to Questions About Substantially Damaged Buildings (FEMA 213) -- Information about regulations and policies of the National Flood Insurance Program regarding substantially damaged buildings (25 pages).
- Design Guidelines for Flood Damage Reduction (FEMA 15) -- A study on land use, watershed management, design and construction practices in flood- prone areas.
- Comprehensive Earthquake Preparedness Planning Guidelines: Corporate FEMA 71) -- Earthquake planning guidance for corporate safety officers and managers.

Publications from other sources include:

-Mullins, G.W. 1999. *Wildfire–Feel the Heat Study Guide*. Bethesda, MD: Discovery Pictures, Inc.
- National Wildfire Coordinating Group. 1994. "Introduction to Wildland Fire" Behavior S-190, Student Workbook NFES 1860. Boise, ID: National Interagency Fire Center.
- Pyne, S.J., P.L. Andrews, and R.D. Laven. 1996. *Introduction to Wildland Fire*, 2nd Edition. New York: John Wiley & Sons, Inc.

B. Websites

National Oceanic and Atmospheric Administration website: www.noaanews.noaa.gov
National Weather Service: www.nws.noaa.gov
Rainfall data: http://www.srh.noaa.gov (gives rainfall and other data for a particular area, and narrows it down to specific cities.)
Mapping of precipitation: http://www.srh.noaa.gov/lub/wx/precip_freq/precip_index.htm (provides maps which classify rainfall events by time interval -- 30 minute, 1 hour, 2 hour, 3 hour, 6 hour, 12 hour, 24 hour -- and according to severity -- 1 year, 2 year, 5 year, 10 year, 25 year, 50 year and 100 year).
National Climatic Data Center: www.ncdc.noaa.gov
The Weather Channel: www.weather.com
Accuweather.Com: www.accuweather.com
The Weather Network: www.theweathernetwork.com
Weather Underground: www.wunderground.com
Intellicast Weather: www.intellicast.com
Online Meteorology Guide: http://ww2010.atmos.uiuc.edu
World Climate: www.worldclimate.com
Automated Weather Service: www.aws.com
The Weather Center/WeatherWatch.Com: www.weatherwatch.com
WeatherNet: http://cirrus.sprl.umich.edu/wxnet
WeatherConcepts: www.weatherconcepts.com
National Interagency Fire Center: www.nifc.com
Center for Analysis and Prediction of Storms, Univ. Oklahoma: www.caps.ou..edu

C. Experts

Cozen O'Connor maintains a database of forensic experts, including engineers, contractors, meteorologists, and numerous others. Recommendations for experts are available from Cozen O'Connor upon request.

VII. CONTACT INFORMATION

The above is just a short list of possible areas for subrogation. Cozen O'Connor, at no charge, will provide an attorney to investigate subrogation potential on those claims exceeding $100,000. Cozen O'Connor is prepared to handle your company's subrogation claims arising from the losses caused by Hurricane Charley.

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I. INITIAL CHECKLIST FOR STRUCTURAL DAMAGE

- What were the wind speeds in the area?
- What wind speed was the building rated to withstand per the building specifications?
- What are the wind speed requirements under applicable codes?
- When was the building built?
- Have there been any significant renovations?
- Were other buildings in this area similarly damaged?

If indicated by preliminary findings based on the above analysis, consider retaining one or more of the following experts:

- Structural/Civil engineer
- Metallurgist (analysis of building members)
- Materials science expert (analysis of concrete, polymers, roof membranes)
- Weather Expert
- Mechanical Engineer

II. LEGAL OBSTACLES

Issues to Be Wary Of

- Statute of Repose (15 years in Florida for real property)
- Notice requirements:

Florida's "Contractor Friendly" statute, Fla.Stat. § 558.002: For residential buildings, including condominiums, the building owner "shall endeavor" to serve notice on the contractor of a potential claim within 15 days of notice of the defective condition in the structure.

Governmental notice: The claimant must provide written notice within 3 years to the governmental agency and the Department of Insurance. Florida Statute § 768.28(6).

- Statute of Limitations: Claimant must file suit within 4 years if a latent defect. Fla.Stat. § 95.11(3)(d).
- Waivers of Subrogation (AIA contracts, other construction contracts)
- Limitations in lease agreements
- Limitations in construction contracts or warranties

III. KEY ITEMS TO OBTAIN/RETAIN

- Construction documents (contracts, plans, specifications)
- Lease agreements
- Instruction manuals and warranties
- Key physical evidence (defective brackets, roofing materials, bracing, etc.)
- Pre-loss photographs and diagrams
- Post-loss photos (consider aerial photos to compare building damage)
- Building officials' files

IV. PARTICULAR DESIGN, INSTALLATION, AND MATERIALS ISSUES TO CONSIDER

Assuming there is reason to further investigate the subrogation potential, the following are some of the issues one would expect the retained expert to consider:

Particular Design Errors to Consider

- Improper load calculations
- Improper location of load bearing walls/devices
- Insufficient number of load bearing walls
- Improper spacing/positioning of trusses
- Improper number of trusses
- Improper size of trusses
- Under designed for expected snow/rainfall/wind

Particular Installation Errors to Consider

- Improper spacing
- Deficient welds
- Missing parts/bracing
- Inadequate/missing/improper connections
- Selection of improper materials
- Inadequate adhesion of roofing materials
- Improper drainage

Particular Defective Materials Issues to Consider

- Metallurgical defect (improper forging)
- Polymer defect
- Bad concrete
- Corrosive agents
- Material Degradation
- Bad roofing membranes

Particular Maintenance/Preparation Issues to Consider

- Failure to install storm shutters for all exterior windows and doors
- Failure to remove dead or decaying trees or limbs
- Failure to secure movable objects or to move them low to the ground
- Failure to protect against potential damage to adjoining property or connected businesses as a result of:
  1. Inadequate construction
  2. Inadequate foundation
  3. Inadequate flood proofing
  4. Susceptible gas mains
  5. Explosive materials
  6. Poorly secured chemicals
- Failure to keep drains unclogged

- Failure to upgrade facilities to retroactive code requirements?
- Failure to flood proof facilities by constructing flood walls or other flood protection devices

V. CONTACT INFORMATION

The above is just a short list of possible subrogation issues. For further assistance, please contact:

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Subrogation & Recovery Alert!

News Concerning Recent Subrogation & Recovery Issues

October 22, 2004

Hurricanes Charley & Frances:

Overview of Code Requirements and Engineering Considerations for Subrogation Opportunities

Prepared for
Cozen O'Connor

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Hurricane Charley made landfall at Port Charlotte, Florida located on the south end of the west coast of Florida on Friday, August 13, 2004. The storm continued on a north-northeast track crossing Orlando, Florida on Saturday, August 14, 2004. Hurricane Frances made landfall on the east coast of Florida near West Palm Beach on Saturday, September 4, 2004. Damages contributed to the two storms are expected to be in the billions of dollars.

Hurricane Charley was a Category 4 storm with wind speeds in the range of 145 mph at landfall. Damage from high winds was severe and flooding accompanied the storm. Hurricane Frances was a slow moving Category 2 storm at landfall and caused severe flooding in its path.

The 2001 Florida Building Code (Code) addresses design wind speeds by referencing Chapter 6 of ASCE-7. Also included in the Code is Figure 1606 for the state of Florida. Design wind speeds in Figure 1606 vary from a minimum of 100 miles per hour in the north central section of the state to 150 miles per hour at the southern tip of the state. Most coastal areas fall within the 120-130 mile per hour design wind. The values for design wind speeds are for three second gusts in miles per hour 33 feet above ground for exposure Category C.

The exposure category reflects the characteristics of ground surface irregularities for the site where a building is to be erected. Exposure Category C is that area which lies within 1500 feet of the coastal construction control line or within 1500 feet of the mean high tide line, whichever is less.

Design for wind loading allows for increased stresses due to the transient nature of wind loading. Gust wind speeds are generally higher than sustained wind speeds experienced in a specific location. The design wind speed is customarily considered to be the sustained wind speed. Shape and use factors allow for increased wind speeds due to gusts.

The Code requires a design wind speed of 130 mph in the Punta Gorda / Port Charlotte area. Hurricane Charley had sustained winds of approximately 145 mph at landfall. Gust speeds likely were in the range of 150+ mph. To withstand the sustained wind forces associated with the design wind (i.e., 130 mph), a structural engineer would have to provide an over design of 11+% for what could be considered an already extremely high wind design environment. Weather data over a widespread area is recorded by the National Oceanic and Atmospheric Administration (NOAA). While some locations in the Punta Gorda and Port Charlotte areas may have experienced winds in excess of the 130 mph design requirement, it is unlikely that maximum wind speeds extended to all areas of damage. Once hurricanes make landfall, wind speeds tend to drop as the hurricane moves over the landmass. Thus, it is likely that damage in some areas was the result of winds below the code mandated design wind speeds. Maximum wind speed data for a specified area may be available from the National Climatic Weather Data Center in Asheville, North Carolina.

For commercial structures, the question of whether or not the structure could have resisted code winds may be determined by evaluating the main wind force resisting systems that were in place prior to the storm. Documentation, in the way of blueprints and specifications should be available from either the building owner or the architect of record. Data derived from the plans and specifications, can be evaluated to determine the adequacy of the design.

It should be expected that these plans and specifications would provide, in detail, the methods of resisting wind forces for the main structure as well as for all sub-assemblies associated with the building. Curtain wall details, cladding details and other detailed information should be provided in a complete set of contract drawings for a specific structure.

For residential structures, the question of determining if the structure was adequate for code specified winds may be a more complex issue. Typically, residential structures are designed and built by a contractor. Certainly, for some custom built residences, plans and specifications will be available. Claims for inadequate design of homes for which there are plans and specifications can be investigated in a manner similar to commercial structures. Most tract type homes, however, will have neither plans nor specifications. In some instances, a survey of what is left of the residence may be beneficial in determining exactly how a particular residence was built. Weather records may provide the only recognizable resource for assessing wind speeds in a particular area. If no part of a structure remains, the process of determining the adequacy of the design prior to the storm may become an impossible task.

Partially damaged residences and structures present the most challenging problems as they relate to damage assessment. Structures which are partially damaged may be required to be brought up to current building code requirements, or, in some cases, may be required to be replaced. In accordance with Section 3401.7.2.2 of the Code, structural repairs that do not exceed 25 percent of the value of the existing building may not be required to meet current code requirements. The upgrade requirements are at the discretion of the local building official.

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Repairs which exceed 25 percent of the value of the existing building but are less than 50 percent of the value of the existing building are required to be brought up to current codes. If the value of repairs exceeds 50 percent of the value of the existing building, the entire structure must be brought up to current code requirements. Exceptions to the 50 percent rule are noted for slabs, foundations, tie beams and masonry provided there is no change in the use of the building and the excepted items met the code under which they were originally constructed. Also excepted are involuntary improvements resulting from the right of eminent domain.

The value of repairs represents an interesting and sometimes difficult challenge to those professionals assessing damage. The value of a structure is generally accepted as the cost to rebuild the same structure on a clear site. Issues relating to demolition are sure to cloud the issue. Further difficulty can be anticipated in determining if a structure is 50 percent damaged versus one that may be 51 percent damaged. A significant cost difference must be decided based on the 1 percentage point in question.

The linchpin in the Code is the reference to "structural." The definition of structural is obscure and may raise questions as to what constitutes a structural element. An interior wall in one residence may be structural, while an interior wall in a similar residence may not be structural. As an example, a load bearing brick wall is structural, while brick veneer is not structural. Further, not everything attached to a structure can be considered structural. It is likely that, in cases where disputes arise over what constitutes a structural element, the elements will have to be evaluated on a case by case basis.

For more information, contact the Cozen O'Connor Hurricane Task Force. The Task Force can be reached through Jay M. Goldstein or T. David Higgins at 1.800.762.3575.

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