



CLM 2020 Focus: Cannabis, Environmental, Insurance Fraud,  
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## **Natural Disasters and Dealing with the New Reality of Catastrophic Claims**

### **I. Concerns and Questions with Natural Disasters/ Planning for catastrophic events in the Real Estate, Property Management and Construction Industry**

#### **A. History and the current industry status**

##### **1. Recent weather and climate-related events**

Through the course of United States history, the economy and society's well-being at times are challenged by weather and climate-related natural disasters (the combination of human aspects and natural hazards) that impart large social and economic costs.

Extreme weather and climate-related events affect Americans by causing death and large socioeconomic loss. Though a topic for debate, many consider that climate change has caused changes in extreme event frequency, intensity, and geographic distribution, and will continue to be a driver for change in government and insurance policy. Some of these extreme weather and climate-related events include heat waves, droughts, wildfires, dust storms, flooding rains, coastal flooding, storm surges, and hurricanes.

For example, July 2012 was the hottest contiguous U.S. temperature for any month since national records began.

As the most impactful weather and climate-related events and the major hazard in many coastal communities and the US in general, hurricanes have caused enormous economic losses in recent years. In terms of insured loss, eight of the ten most expensive catastrophes in the US are associated with hurricanes.

Just two years ago, 2017 was the costliest hurricane season since records began in the mid-1800's in large part to Hurricanes Harvey, Irma, and Maria. These now infamous hurricanes represent the first time in US history that three category 4 hurricanes struck the United States in one calendar year. Hurricane Harvey's 61 inches of rain stands as the new U.S. rainfall record produced by a single storm. The value of the combined damage has been estimated at \$370 billion dollars.

Except for a few seasons, every year since 1995 hurricane occurrences has exceeded the century and a half long average of the *normal* 10-11 hurricane systems per year.

Increasing the potential damage costs are the increased impacts of the progressively increasing built environment on the natural landscape.

## **2. Preparation**

Most weather scientists agree that natural disasters will likely continue to affect the United States in the immediate and long-term. Current buildings in many instances are along their path of decades' long life and the current existing building stock is vulnerable to natural disaster risk.

Now and for many years prior to now, catastrophic insurance policies are the primary mechanism for transferring risk on residential and commercial properties.

Many of these policies include cost reimbursement from damage due to wind, hail, lightning, snow, and ice, among others, but do not include coverage for inland or coastal flood damage.

Despite this known coverage gap, residences are often underinsured. In 2013, 60% of homes were underinsured in value by an average of 17% and recent studies have shown that only about one-half of single-family homes in special flood hazards have flood insurance policies.

### **B. The insurance storms**

Insurer's goals are to maximize profit while avoiding insolvency, maintaining sufficient yearly profitability (to preserve stock value, financial ratings, and consumer confidence), and maintain sufficient capacity.

To assist in the insurance gap burden and unforeseen nature of these weather events, the government has and will continue to set policy in use of taxpayers' funds - but the government is not an insurer or reinsurer.

Ultimately, the government's burden is passed on to taxpayers, including the homeowners in the affected region to create total government hurricane-related expenditures.

Federal Emergency Management Agency (FEMA) is the chief funding source for assistance to state and local agencies and the taxpayers' gatekeeper of catastrophic claim funding.

In light of these extreme weather and climate-related events, FEMA's challenge has grown to assist in guiding policy to overcome massive scale mega storms such as Harvey and further grow to become an agency that handles both immediate impacts and preparedness for events through individual assistance, public assistance and hazard mitigation grant programs as part of its role in evaluating its funding policies in terms of the agency's long-term financial health.

Insurers are relying on institutional change to help offset the risk of loss.

FEMA understands the risk of certain geographical areas and will further rely on certain local and state policy to consider what preparations might best help it weather hurricanes. In this concept, individual homeowners, property owners, and local and geographically affected governments push forth retrofit and infrastructure change to overcome the risk of catastrophic loss.

FEMA's largest grant program reimburses a share of public works projects' costs to reduce the burden on state and local governments. Hazard mitigation grants fund community efforts including individual home retrofits and infrastructure upgrades to minimize the long-term risks of natural disasters to people and property.

Hazard mitigation grants are intended to reduce the total cost—and therefore the federal public assistance cost— of disasters and to assist in the increase of resilience to extreme events. In real dollars, FEMA has awarded over \$100billion in public assistance grants since 1998.

The storm of damage recovery gap grows as some local residents, businesses and governments may systematically underestimate the investment necessary to protect themselves from flood- and storm-related losses, in part because they believe the federal government will cover the majority of costs.

In furtherance of its policy, if FEMA tightens its standards for investing through grant eligibility to reduce its overall spending, the insured may be left holding the bill from the impact of natural disasters.

### **1. Retrofit and re-insurance**

In the commercial realm, 75% of commercial buildings (i.e., physical property) are underinsured by an average of 40% (the percentage of companies with property insurance increases with the size of a company which may reflect better risk management not available for small business).

Furthermore, many businesses lack business interruption insurance which is a large cost driver in the weeks and months following natural disaster events.

Research has shown that only 40-60 % of natural disaster-induced business losses are covered by insurance and that 20-40% of small businesses that close after a major natural disaster never reopen their businesses.

Furthermore, as the economy continues to grow, the reality is that it will cost substantially more to re-build than what is allowed by insurance policies.

The current theory is that two most important risk management mechanisms for property owner and geographical area stakeholders to consider providing an improved regional natural disaster risk management system includes making more effective use of insurance and property and infrastructure retrofit.

Successful practice has included increasing the burden of the catastrophic risk on the local government by providing subsidy for insured homeowners to encourage retrofit, providing both a government subsidy and insurance rebate to reduce retrofit costs, and mandating insurance purchase with a cap on insurance premiums.

### **C. Waiting for the policy to change**

#### **2. The current reality**

With all the factors stated above, a current gap exists within the current reality of previously inconceivable but now regular and immensely costly natural disasters. Resolving claims successfully are increasingly more difficult when there is not enough insurance or public money and not enough time and fortitude to stay the course on multi-year restoration.

New opportunities and challenges for claim professionals result from these disasters as post-disaster lawsuits commence. While public policy attempts to right the industry, the post-disaster claim process continues forward – a process that involves more and more parties being brought into lawsuits to increase the resolution bucket for the claimant.

The drawn line between the damage-causing disaster and existing maintenance and construction *defects* is becoming more and more blurred leaving many claim professionals with uneven footing when determining cause, notice and reasonable damage and coverage values. More challenging still, the number of potential defendants multiplies and twists into local jurisdictions, land, and property owners as the considerable disaster damages total.

Many claim professionals will force, and others will defend against direct damages from disaster exposure. Many other savvy claim professionals may look to force defect and maintenance damage claims on to unsuspecting policy issuers. Still others will see opportunities for follow-on claims on behalf of hardnosed related though not directly affected parties against available property and public policies.

## **II. Opportunities for success**

### **A. The application of sound claimant and defendant practice in the current reality**

Risks are part of any building construction and management. These risks are magnified considering natural disasters.

After the *initial* fallout from a natural disaster is *over*, one of the first issues that an attorney must take on is to determine what is wrong, the cause, liability and defendants in the case, and damage mitigation.

As a long-term catastrophic claim event unfolds, this series of tasks may be too overwhelmingly broad and specialized for some attorneys. To ascertain the coverage dynamics, it may be very difficult understanding the roles and relationships between the different parties – building owners, local governments and FEMA and others.

Insurance coverages are further stressed with potential issues including available coverages and best practices for investigating damages, property owners obligation, liabilities. Expert retention may need to include mass damage cost support and explanation of the difference between acts of God and existing defects. Experts will need to be able to communicate clearly to help clients and third parties understand the natural disaster affecting the current building environment, the value of loss and damages.

Defense attorneys should push even more so for early resolution which proves increasingly difficult as the value of the claim and number of parties magnifies.

## **B. How can insurers and insureds protect themselves right now?**

Send lawyers, guns, and money,  
Get me out of this, hiyah ...

Warren Zevon (1978)

The course of action proposed in Mr. Zevon's lyrics is bit extreme. Natural disaster claims merit structured and long-term response (FEMA's life cycle for involvement in a natural disaster event is planned on 8+ years on average). Developing an understanding of and implementing the following principles will great assist carriers and their clients in supporting and dealing with natural disaster claims.

### **1. Legal Considerations**

#### **a. Preservation Notices**

When faced with a claim involving a natural disaster where critical evidence may have been altered or destroyed, preservation may be limited but is not less warranted. Value and maintenance records are imperative to recover. All efforts to obtain and certify these records should be taken. Furthermore, expert retention to document the scene is even more imperative to case management.

#### **b. Restraining Orders**

If you learn that local records have been destroyed and that data is critical to your case, requests for record support actions and a motion seeking a restraining order amongst any available parties may be filed. The motion should be done via an emergency basis and the opposing party should be given notice. A preservation notice should also be served. It has the added benefit of court's oversight.

### **c. Rules of Evidence Regarding Admissibility**

Simply stated, the rules surrounding the admissibility of evidence are to make sure that the evidence placed before a jury is reliable. Today, eyewitness testimony can be enhanced, corroborated, or refuted by a technical data that comes in a myriad of forms: maintenance records, cost receipts, GPS data, local land records and real estate records as well as others. How is a Judge supposed to deal with varying times of scattered evidence? The answer is that the Judge will require that the party offering evidence lay a foundation which shows that the evidence is reliable before it is placed before the trier of fact. Industry trends are forcing organizations such as Google Earth to certify satellite imagery ahead of admission into court.

The first step in establishing the proper foundation is authenticating the data. That is, the proponent must show that the evidence is what it is represented to be. For example, a witness may testify that she is familiar with the image taken from a satellite or drone and identify the items shown in the imagery. The evidence must also be relevant. That is, it must tend to either prove or disprove a fact at issue in the case. Finally, the probative value of the evidence must outweigh any prejudicial effect.

### **d. Spoliation**

The most critical aspect of any successful investigation is the preservation of evidence for use at trial. In *Landry v. Charlotte Motors Cars, LLC*, District Court of Appeal of Florida, Second District, 2017, the Court reiterated the severe sanctions for spoliation of evidence: "Generally speaking, sanctions may be appropriate when a party has spoliated, lost, or misplaced evidence. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015). Spoliation is defined as "[t]he destruction, or significant and meaningful alteration of [evidence]," *Vega v. CSCS Int'l, N.V.*, 795 So. 2d 164, 167 n.2 (Fla. 3d DCA 2001) (quoting *Black's Law Dictionary* 728 (5th ed. 1983)); or "the failure to preserve property for another's use as evidence in pending" or reasonably foreseeable litigation, *id.* (quoting Jay E. Rivlin, Note, *Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor*, 26 *Hofstra L.Rev.* 1003, 1004 (1998)). See also *Aldrich v. Roche Biomedical Labs., Inc.*, 737 So. 2d 1124, 1125 (Fla. 5th DCA 1999) (similar definition); Spoliation, *Black's Law Dictionary* 1620 (10th ed. 2014) (defining spoliation as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence"). Evidence is deemed "lost" when it is "beyond the possession and custody of its owner and not locatable by diligent search." *Lost*, *Black's Law Dictionary* 1089 (10th ed. 2014).

To guard against spoliation, ensure that your experts carefully observe legal protocols concerning the preservation of evidence and data when removing evidence for the scene, inspecting the loss, and during subsequent analysis. Written agreements should be obtained among all potentially interested parties whenever feasible prior to alteration of evidence (including removal from scene). Obtain an emergency court protective order when agreement cannot be reached. Consult with legal counsel and your experts early on about this crucial issue - the credibility of your expert testimony can be weakened or destroyed by the mishandling of evidence.

## **Legal Issue Summary**

Carriers and insureds can best protect themselves by adhering to the following practical pointers:

- Put together the right team upon the notice of a claim.
- Consider retaining experts early on to guide investigation and weigh in on discovery and assist in the development of a theme.
- Be thorough in your investigation and document retention practices.
- Be thorough in obtaining system data held by others- your experts will need them.
- Be sure to provide your expert with all relevant data to protect him or her on cross examination
- Communicate early and often to avoid spoliation; and
- Finally, make sure that all portions of the piece of evidence to be shown to the jury have proper foundations.