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GULF COAST HURRICANE LITIGATION

On August 29, 2005, Hurricane Katrina devastated the Louisiana and Mississippi Gulf Coast region and New Orleans. Less than one month later, Hurricane Rita caused significant damage to the southwest Louisiana and southeast Texas coastal areas. In the wake of these historic storms, litigation of equally historic proportions has already begun.

Litigation following natural disasters is nothing new. What is new and unprecedented in the post-Katrina/Rita situation is the scope of the disasters and how it will affect the social policy issues inherent in the litigation. In cases involving less momentous disasters, such as localized flooding from a heavy rainfall, the social policy issues often are not as apparent or profound. When entire cities and regions are destroyed, however, these policy issues come to the forefront and require careful consideration by the courts.

Since the damage was so widespread, many cases are being filed as class actions. The articles that follow look at two of the many issues that will be raised in this litigation.

Nature's Fury or Human Blunder? The 'Act of God' Defense in Louisiana

BY GLENN M. FARNET

Glenn M. Farnet is a partner with Kean Miller Hawthorne D'Armond McCowan & Jarma LLP in Baton Rouge, La. He can be reached at glenn.farnet@keanmiller.com.

Katrina has already spawned a hurricane of lawsuits. These suits include: suits by individuals who claim they were injured by hazardous substances that leaked from storage facilities, refineries, or pipeline facilities;[1] suits by individuals who claim that oilfield production and pipeline activities caused wetland damage that exacerbated the effects of hurricane Kat-

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rina;[2] and suits by individuals who claim faulty levees caused the widespread flooding that followed in the days after Katrina made landfall.[3] All of these suits have a common thread: Each will require the courts to determine whether the damages sued upon resulted from nature's fury or human blunder.

Louisiana, like many other states, recognizes the general principle that an ''act of God'' can be a complete defense to liability for negligence and strict liability claims. Louisiana courts have generally used a consistent definition of the term ''act of God,'' but the application of that definition in the context of a specific event has not always been consistent or clear, particularly when the issue of contributing human fault is at play.

The two landmark cases in Louisiana most frequently cited in ''act of God'' cases are *Southern Air Transport v. Gulf Air Ways*, 40 So.2d 787, 791 (La. 1949) and *Rector v. Hartford Acc. & Indem. Co. of Hartford*, 120 So.2d 511 (La.App. 1st 1960). In *Southern Air Transport v. Gulf Air Ways*, 40 So.2d 787, 791 (La. 1949), defendant's airplane was parked approximately 200 feet from the plaintiff's plane. The defendant failed to secure his plane by tying it down or setting the brakes. A windstorm with gusts up to 70 miles per hour caused defendant's plane to roll into the plaintiff's plane. The district court ruled in favor of the plaintiff, and the defendant appealed.

The Court defined the act of God defense as follows:

> An Act of God in the legal sense—that which will excuse the discharge of a duty and relieve a defendant from liability for injury—is a *providential occurrence or extraordinary manifestation of the forces of nature which could not have been foreseen and the effect thereof avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation renders reasonable to employ*. 1 *Corpus Juris Secundum*, Act of God, page 1425, *Holden v. Toye Brothers Auto and Taxicab Co.*, 1 La.App. 521. Fortuitous event is that which happens by a cause which we cannot resist. (Emphasis added).

The Court determined that regardless of the winds, the plane could not have rolled if it had been properly secured or the brakes had been set properly. It stated, ''[c]oncurring with the strong winds to cause the accident, it logically follows, was the failure of duty on the part of the defendant to properly secure its plane.'' *Id.* at 790, 791.

'Overwhelming and Destructive Character.' In *Rector v. Hartford Acc. & Indem. Co. of Hartford*, 120 So.2d 511 (La.App. 1st 1960), the plaintiffs, occupants of a trailer park, sued the proprietors of the trailer park to recover for personal injuries and property damage sustained when a tree fell across their trailer during a storm. The plaintiffs alleged that the tree was defective and diseased and that the defendants knew of the defective condition of the tree. The defendants countered that incident was caused by uncontrollable forces of nature. On appeal of the verdict for the plaintiffs, the court discussed the effect of ''concurring negligence'' on the act of God defense:

> The concurring negligence which when combined with the Act of God produces the injury must be such as is in itself a real, producing cause of the injury, and not merely fanciful or speculative or microscopic negligence which may not have been in the least degree the cause of the injury. In other words, if the Act of God is of such an overwhelming and destructive character as by its own force, and independently of the particular negligence alleged or shown, to produce the injury, there is no liability, although there is some negligence. * * * If the injury was caused by some extraordinary or unusual natural force or condition that could not have been foreseen, or that would have caused the injury if there had been no negligence, the negligence is not the proximate cause of the injury. 38 Am.Jur., Neg. 65.
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> One who is himself without fault has, in justice and common fairness, a right to recover from one who has caused him loss by a negligence act, although an ordinary natural occurrence entered into the chain of events which culminated in the loss. If negligence is of a character which according to the usual experience of mankind is likely to afford an opportunity for the intervention of a natural cause, an injury caused by the negligence in conjunction with the natural cause is the proximate result of the negligence, although the particular details of the damage cannot be anticipated accurately.[4]

Applying these precepts, the Court concluded that the issue of ''concurrent fault'' was not applicable because the defendant had no reason to know that the tree was defective, and hence, was not negligent for failing to take precautions prior to the storm. *Id.* at 522. The opinion recognizes, however, that not all negligence will bar application of the defense. If the overwhelming force of the event would likely have caused the damage regardless of the negligence, then the defense will apply.

'Heavy Weather.' This concept was also recognized in *Terre Aux Boeufs Land Co. Inc. v. J.R. Gray Barge Co.*, 803 So.2d 86 (La. App. 4 Cir.), *writ denied*, 811 So.2d 88 (La. 2002). There, a barge that was moored to a fuel dock during Hurricane Georges broke free of its restraints. The hurricane's winds carried the barge nearly 1,000 feet away, where it landed on plaintiff's marshland property. The vessel owner claimed a constructive total loss of the barge, was indemnified by its insurer, and left the abandoned barge on the plaintiff's property. Terre Aux Boeufs sought an injunction to compel the removal of the barge from its property. The defendants raised the act of God defense.[5] Referring to *Rector*, the Court stated:

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[1] *See, e.g., Maus v. Murphy Oil USA Inc.,* No. 05-4160, E.D. La. (property owners in St. Bernard parish claiming damages as a result of the release of thousands of barrels of petroleum hydrocarbons from a refinery storage tank); *Blanchard v. Sundown Energy LP,* No. 05-4198, E.D. La. (damages allegedly caused by leak of petroleum storage facility in Port Sulfur, Louisiana).

[2] *See, e.g., Barasich v. Columbia Gulf Transmission Co.,* No. 05-4161, E.D. La. (proposed class action alleging that exploration, production, and pipeline activities in Louisiana's coastal wetlands have deprived ''. . . areas such as New Orleans from its natural protection against hurricane winds and storm surges.'').

[3] *See, e.g., Slaton v. St. Paul Fire and Marine Insurance Co. and the Board of Commissioners for the Orleans Levee District,* No. 536664, La. Dist. Ct., 19th Jud. Dist., East Baton Rouge Parish.

[4] *Citing,* Vol. 38 American Jurisprudence, Sec. 75, page 734—Negligence; The Mariner (C.C.A. 5) 17 F.2d 253; *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 So. 732; 20 LRA(NS), 92.

[5] The Court in *Terre* examined the act of God defense under federal admiralty law and stated, ''In admiralty law, such overwhelming forces as those characteristic of Hurricane Georges are generally considered ''heavy weather'' and may

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> A defendant may be found negligent but still be exonerated from liability of the ''Act of God'' if it would have produced the same damage, regardless of that negligence, because the defendant's negligence was not the proximate cause. See *Warrior & Gulf Navigation Co. v. United States*, 864 F.2d 1550, 1553 (11th Cir. 1989).

Likewise, the Court in *Gabler v. Regent Development Corp*., 470 So.2d 149 (La.App. 5 Cir. 1985) held that ''[n]ot every act or omission of negligence on the part of the defendant, when combined with an 'act of God,' will produce liability.'' 470 So.2d at 152. There, several subdivisions were severely flooded during torrential rainstorms that produced over 13.5 inches of rain in a 24-hour period, 11 inches of which fell during a three-hour period. Several homeowners sued the developers and the parish. They alleged that the developers improperly constructed streets and houses at certain elevations despite knowledge that the elevations of those streets and houses were inadequate to prevent severe flooding. The Parish was alleged to be negligent in approving the subdivision extension for construction and in negligently maintaining the drainage system. Both defendants raised the act of God defense. After finding these rainstorms to be an ''act of God,'' the court turned to whether there was any fault on behalf of the defendants such as would prevent application of the defense. The court explained the analysis as follows:

> On the other hand, if the natural cause is disconnected from the negligence and is self-operative in producing an injury, the negligence is not actionable, since the element of proximate cause is absent. If the injury was caused by some extraordinary or unusual natural force or condition that could not have been foreseen, or that would have caused the injury if there had been no negligence, the negligence is not the proximate cause of the injury. If the natural condition or force that affects the negligent act or omission is unusual or extraordinary, the negligent party will not, in general, be held to have known of or contemplated it, unless the circumstances of the particular negligent act or omission are such that the negligent party should have known of or contemplated the probable appearance and effect of such unusual or extraordinary natural condition or force.

After a lengthy discussion of the manner in which the subdivisions were developed, the Court concluded that the defendants were relieved from liability because the rain storm was of such intensity[6] that the properties would likely have flooded regardless of any fault on behalf of the defendants.

In contrast, the Court in *Saden v. Kirby*, 660 So.2d 423 (La. 1995), refused to apply the act of God defense in a case involving widespread flooding after an historic rainfall event. There, the court found that the defendants were negligent in failing to timely repair pumps that were inoperative at the time of the rainfall event, and that the inability of the pumps to function properly was a ''substantial factor'' in the flooding.

'Reasonable' Precautions and Proximate Cause. Thus, the ''act of God'' defense in Louisiana requires the defendant to prove either that he took ''reasonable'' precautions or that the ''proximate cause'' of plaintiff's damages was the force of nature and not the substandard conduct of the defendant. Regardless of whether the issue is framed in terms of legal ''duty'' (did the defendant's duty encompass this particular risk), ''proximate cause,'' or ''reasonableness'' of precautions, the analysis ultimately will force the court to make considerable policy choices. *See, Benoit Roberts v. Benoit,* 605 So.2d 1032, 1052 (La. 1991) (''The problem [of proximate cause is] not one of causation for which it has been so often mistaken, but one of defining the boundaries of the rule invoked. . . . This is a policy decision in purest form''); and *Landry v. State of Louisiana and the Board of Levee Commissioners of the Orleans Levee District*, 495 So.2d 1284 (La.1986) (the ''reasonable'' standard ''. . . involves consideration of moral, social, and economic values as well as the ideal of justice.'')

How far will the courts require individuals, companies, and governments to go in protecting from the effects of a catastrophic storm like Katrina? Technological advances in engineering, design, construction, and materials are such that structures can be made to withstand tremendous forces—but at significant cost. Will the law require industry to construct their facilities so that they can withstand a category 5 hurricane and flood waters of 20 feet? Will the law require state and local governments to construct levees that can withstand 20 foot storm surges?

Government Responsibility? A related issue is the extent to which private individuals or companies can rely on federal, state, and local governments or agencies to protect the community at large from the flooding effects of storms. Is it reasonable for a developer or a company to rely on the fact that regional levee systems are designed to withstand flooding of a certain level or must the developer or company assume that protection levees may fail? This will be particularly contentious since the protection levees in the New Orleans area had several breaches. Lawsuits have been filed alleging that the levee breaches ''. . . were the result of poor design, faulty construction, or both. . . .''[7]

Also, prior to Katrina, most everyone who lived in the New Orleans area for any length of time was aware that, one day, ''the big one'' could strike and flood the entire area. To what extent will the courts place emphasis on this knowledge when crafting the boundaries of liability, and can this knowledge be used as a ''double-edged sword'' against plaintiffs who knowingly lived in low-lying areas?

These are the difficult questions facing the courts in the Katrina litigation, and they are not answered by the pre-Katrina ''act of God'' jurisprudence. The devastation caused by Katrina far exceeds that which was involved in the cases of the past and provides a completely new context in which to balance the interests at stake. The answers to these questions will have long-term political, economic, and social consequences for Louisiana and the region.

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be sufficient to successfully invoke the defense of Act of God.''

[6] The evidence showed the rainfall was a ''100 year'' rainfall—that is, a rainstorm of that intensity likely would not recur for 100 years.

[7] *Slaton v. St. Paul Fire and Marine Insurance Co. and the Board of Commissioners for the Orleans Levee District,* No. 536664, La. Dist. Ct., 19th Jud. Dist., East Baton Rouge Parish.