



**Special Workshop on
Hurricane Preparation and Response**
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Miami, Florida

Hurricane Preparation and Response

Legal Issues

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Florida – No. 1 Hurricane State

More storms hit Florida than any other U.S. state, and since 1851 only eighteen hurricane seasons passed without a known storm impacting the state.

Collectively, hurricanes have caused a death toll of 10,272 people in the region.

Additionally, the cumulative impact from these storms totaled over \$115 billion in damage (2008 USD), primarily from Hurricane Andrew and hurricanes in the 2004 and 2005 seasons.

Still, it seems that all U.S. ports are vulnerable to hurricanes and other severe weather, especially in the Gulf Coast and Atlantic regions.

Hurricane Preparation and Response

Legal Issues

Hurricanes

- Foreseeable events
- Property owners have legal liability – must take ***reasonable*** steps (not strict liability) to protect against foreseeable harm to persons and property
- So, plan, prepare, respond per your plan
- Do “Lessons Learned” after event and update your plans
- Training – keep abreast of Industry Standards and Practices

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Outline of Presentation:

- I. Introduction: Law and the Lawyer as Part of the Emergency Operations Team
- II. Requirements, Recommendations and Resources for Obtaining Financial Help (FEMA Grants under the federal Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§5121 – 5207)
- III. Other Legal Issues Arising in Hurricane Incidents and Emergency Management, Including Potential Liability Based on Negligent Failure to Plan

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Legal Issues

I. Introduction:

Law and The Lawyer as Part of the
Emergency Operations Team

How a Lawyer Prepares for a Hurricane



Larry the
Litigator



DENIED!!!

HURRICANE ANDREW – 1992 – CAT. 5 at Landfall



HURRICANE KATRINA - 2005 – CAT. 5 (3 at Landfall)



HURRICANE IKE – 2008- CAT. 4 (2 at Landfall)



HURRICANE SANDY — CAT. 1 at Landfall



How a (Good) Lawyer Prepares for a Hurricane

- He/she is included on the Port's list of "Essential Personnel" (those employees considered essential in an emergency or situation of disaster)
- Works with Port's Security and Emergency Operation Team which includes representation from all Port areas including: Executive Management, Security, Operations, Public Affairs, Maintenance, Engineering, Real Estate (Tenant Relations) , Procurement Department, Human Resources, Legal
- Pro-actively looks for Seminar and Training Opportunities in the Area of Emergency Management and knows the Port's partners in Emergency Management
- Knows that the Port is a governmental organization that:
 - Needs legal authority for its actions
 - Needs contract drafting and review
 - Requires regulatory compliance
 - Requires review and updating of Emergency Operation Plans, Facility Security Plans (FSPs), Tariffs, Mutual Aid Agreements, and other documents to make sure Legal Duties and Liabilities are not inadvertently assumed
 - May need help in obtaining FEMA Disaster Assistance Grants
- Understands he/she is not the leader, but an important resource (sometimes as a lawyer giving legal advice, etc.; sometimes as a "utility player" backing up other professionals) in all phases of Emergency Management – Preparation, Response, Post-Hurricane

How a (Good) Lawyer Prepares for a Hurricane

Familiar with and has reviewed:

- ✓ AAPA's **Emergency Preparedness and Continuity of Operations Planning – Manual for Best Practices** (September 2006, Phyllis Saathoff, Port Freeport)
- ✓ State's Emergency Management Statutes (e.g. Texas Government Code, Chapter 418)
- ✓ Laws Indicating Who is Responsible for What in Hurricane Management
 - For the Waterways – Closing and Re-Opening Ports
 - For Evacuation in the Port Area – Who is in Charge
- ✓ Laws Indicating What Authority Your Port has in Hurricane Management
- ✓ **NIMS** – National Incident Management System; ICS – Incident Command System
 - As required by federal law, your Port Emergency Operations Plan should use NIMS to organize the response to a major disaster. The Port should adopt NIMS through resolution or order as the Port's official all-hazards, incident response system. NIMS has specific training requirements for specified individuals. And, NIMS is required for federal grants – FEMA disaster assistance as well as port security grants..
- ✓ Area Evacuation Plans; Who is in Charge
- ✓ Port's Emergency Operations Plan
- ✓ Port's Facility Security Plan
- ✓ Port's Safety Plan and Policies
- ✓ Human Resources Department – Laws and Policies; Employee Handbook
- ✓ Procurement Law and Procedures
 - Emergency Procurements (e.g. Texas Water Code Section 60.4035)
 - Pre-Event or "Job Order" Contracts (e.g. Texas Water Code Section 60.454(4))
 - Anti-Gouging Statutes (e.g. Texas Deceptive Trade Practices-Consumer Protection Act, §17.46(b))
- ✓ Laws protecting and immunizing ports
- ✓ FEMA Disaster Assistance Grant requirements
- ✓ Port's insurance with the Risk Manager
- ✓ Contact List for Other Area Attorneys and Professionals Involved in Emergency Operations

How a (Good) Lawyer Prepares for a Hurricane

Knows the Members of the Port Hurricane Team

U.S. Coast Guard District Commander and Captain of the Port (NIMS' Incident Commander)
Port Security Manager
Port Facility Security Officers (FSO's)
Port Police Chief
Port Fire Chief
U.S. Army Corps of Engineers
Port Pilots
County Officials
City Officials
Local Law Enforcement
Carriers (Vessel Owners/Agents)
Others, Federal, State and Local

Conclusions

- Identify your port's legal counsel for Hurricanes and other Emergency Operations well before Hurricane Season
- Get him involved and educated as to your operations, your emergency plan, your stakeholders in the community – don't assume that you can wait to start firing questions at your lawyer once an emergency incident has occurred and get meaningful responses
- Become familiar yourselves with the legal issues surrounding hurricane incidents

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II. Requirements, Recommendations and Resources for Obtaining Financial Help:



FEMA

FEMA Grants under the federal Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§5121 – 5207

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FEMA

Requirements for Obtaining Financial Help (FEMA/Stafford Act Grants)

Some Initial Recommendations:

1. Review FEMA website (www.fema.gov); obtain copy of FEMA's "**Public Assistance Guide**" – FEMA 322/June 2007 (available online as well as hard copy) – tells you all about getting Disaster Assistance for your port from FEMA.
2. Be aware of your legal sources including (a) the **Stafford Act** (42 USC §§5121 – 5207); (b) FEMA regulations (44 CFR Part 13 and Part 206), and (c) RR9500 program guidance.
3. Schedule a meeting with (1) your regional FEMA representatives and (2) your insurance agents about 60 days **before** the start of hurricane season.
4. Show them your port, and go over **procedures and forms** for making a **REQUEST FOR DISASTER ASSISTANCE**
5. Assume you will be **audited** – especially **large projects (over \$67,500)**. The key to successful grants and grant audits is **documentation, documentation, documentation!**

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Requirements for Obtaining Financial Help (FEMA/Stafford Act Grants)

Principles of Subsidiarity, Solidarity (work your way up to the top):

- **Local Government** determines it has inadequate resources and notifies State department of emergency management or Governor's office - important to know who is the local person that is responsible for this
- **State** determines it has inadequate resources; Governor makes Declaration of a Major Disaster or Emergency, and State applies for Major Disaster Relief to the Federal Government
- **President** makes Declaration of Disaster; State becomes eligible for relief

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FEMA

Requirements for Obtaining Financial Help: FEMA/Stafford Act Grants

- File your **REQUEST FOR PUBLIC ASSISTANCE** with FEMA **within 30 days** after damages occur in an incident resulting in a Presidential Declaration of a Major Disaster or Emergency –
- Your Application actually goes up through your State
 - You (the Port) are a “Sub-Grantee”
 - Determine Name and Address and Contact Information for your State

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FEMA

Requirements for Obtaining Financial Help (FEMA/Stafford Act Disaster Grants)

REQUEST FOR PUBLIC ASSISTANCE with FEMA:

- This is a reimbursement program – with two “money up front” exceptions, you pay out of pocket to repair the damage and then get reimbursed
 - Exception No. 1: Small Projects where damage is **\$67,500** or less – funded immediately after approval
 - Exception No. 2: Large Projects (**over \$67,500**) where you can apply, based on need, for partial up-front funding
 - **75% of 75%** (This is called an **Advanced Funding Request**)
- If you have insurance, your insurance proceeds must be used first
- Unlike Port Security Grant Program, you can spend money and sign contracts with rehab contractors prior to Grant Approval, but make sure it's well documented
- 25% Matching (Cost-Share) Requirement: with certain exceptions, you can get reimbursement from FEMA for 75% of the non-insured amount of your damages (10% matching for Ike; no matching for Katrina, Rita, Wilma and Dennis)
- 100% reimbursement for: (1) debris removal; (2) emergency protection measures (e.g., police, fire, generators, satellite phones, port-a-potties)

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FEMA

Requirements for Obtaining Financial Help (FEMA/Stafford Act Disaster Grants)

REQUEST FOR PUBLIC ASSISTANCE with FEMA

Reimbursement Categories:

1. Force Labor – e.g., maintenance department boarding windows
- Can apply for salaries and benefits
2. Equipment – e.g., damaged trucks
3. Material – e/g. wood to board up windows, electrical wire, telephone poles
4. Contractor Services – payments to third party vendors and contractors
E.g., Dredging, Restoration of Communications

Conclusions



Learn about FEMA grants ***before*** Hurricane Season

Document, document, document!

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- III. Other Legal Issues Arising in
Hurricane Incidents and
Emergency Management, Including
Potential Liability Based on Negligent
Failure to Plan

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Procurement Issues:

- **Texas Water Code Section 60.4035 - Exemption for Emergency Purchases**
- **Texas Water Code Section 60.464 - Pre-event or Pre-Bid Contracting (Job Orders)**

Idea: have a contractor on retainer with pre-negotiated rates that will have available resources, personnel and equipment to provide immediate response

- Opportunity to Obtain Contract with Emergency Management Experience – Safety, Training
- Emergency Restoration Procedures:
 - Damage Assessment
 - Debris removal
 - Removal of Standing Water
 - Facility Dehumidification
 - Smoke Removal
 - Corrosion and Mold Control
 - Generators
 - Fuel
 - Plywood
 - Portable toilets
 - Water
 - Channel Sounding and Dredging
 - Engineering services
 - Electrical Restoration

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Tariffs

What do your Tariffs say about your port's liability in the event of a hurricane or other "Act of God" (Force Majeure)?

Liability of Port:

The Port shall not be liable for any delay, damage, injury, or loss arising from strikes (of any person in their employ or in the service of others), nor for any causes arising therefrom, nor for any causes unavoidable or beyond its control, nor for tumult, insurrection, acts of God, breakdown of equipment or shut-off or failure of electric current, nor from any of the consequences of any of these contingencies.

Issue: To what extent will these "Force Majeure" provisions protect ports in event of port's failure to secure its cranes and other equipment or to follow its emergency operation plan?

Same issue re Force Majeure provisions in your contracts with vendors, construction companies, etc.

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Emergency Operation Plans

Issues:

1. Does your port have one (industry standard in response to foreseeable events on your facility)?
2. Do you follow it in a hurricane or other foreseeable emergency incident?
3. Is your plan up to date in accord with industry standards?

If the answer is “no” to any of the above, you may face liability.

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Legislation --

May help to protect the port against inadvertently creating new duties when writing new safety and security manuals:

Texas Water Code: Sec. 60.501. SAFETY AND SECURITY PROCEDURES; NO NEW DUTIES. The adoption and use by a district of a safety or security code, policy, or manual does not create any new or additional legal duties of the district not existing under common law or statutory law.

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First Responders and Volunteers

1. State statutes protecting first responders
2. State statutes (Good Samaritan laws) protecting volunteers

The Texas Good Samaritan Law limits the civil liability of persons administering emergency care in good faith at the scene of an emergency or in a health care facility - unless their actions are wilfully and wantonly negligent. Not available for a person whose negligence was a producing cause of the emergency for which care is being administered.

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Other Protections and Immunities

1. State Tort Claims Acts and other statutes protecting state sovereignty

Discretionary Function Exception bars a claim based on the exercise or performance or the failure to exercise or perform a discretion function.

Discretionary Function Exception restores the government's immunity in situations where its employees are carrying out governmental or regulatory duties.

2. Anti-gouging statutes and other Deceptive Trade statutes

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1. Interjurisdictional Mutual Aid Agreements

Issues:

Who is responsible for acts of an Employee of one jurisdiction or agency working at or for another jurisdiction

Workers Comp for injured employee working in another jurisdiction

Sovereign Immunity protection

2. Organizations that Provide Mutual Aid

Texas - Channel Industries Mutual Aid
(www.cimatexas.org/cima)

Provides protection in event of fires, hazmat incidents, emergency medical action, hurricane preparedness and response and other emergencies, both natural and man-made, in the Houston Ship Channel area

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State Emergency Management laws

Texas (Chapter 418, Texas Government Code):

1. Governor has authority to use or “commandeer” your assets in the event of an emergency
2. Ports and other governmental agencies must provide information as to emergency assets so Governor’s office knows what is available in event of emergency

Negligent Failure to Plan



Negligent failure to plan: Case Studies

- Negligent failure to plan is an emerging area in the liability context. In this regard, the primary questions a port must ask itself in order to properly confront its risks are:
 - Has the port taken reasonable precautions to prevent a reasonably foreseeable critical event, which could take a significant toll on our work force or our customers?
 - Are we prepared in such an event to respond with proper protective and palliative actions for individuals following a reasonably foreseeable critical event?
 - An employer might be considered negligent if it does not take reasonable steps to eliminate or diminish known or reasonably foreseeable risks that could cause harm. Repeated acts of terrorism on American soil are almost certain to occur in the future; this is no longer an unthinkable event. Reports of natural disasters seem to appear with increasing regularity. Corporations and governmental entities are reasonably expected to prepare for such foreseeable risks.

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Legal Issues:

- Negligent Failure to Plan and Update(lawsuit in Mississippi alleging Port's hurricane preparedness plan was inadequate cited previous storms that should have resulted in changes in plan before Katrina)
- Negligent Failure to Implement Emergency Plans and Failure to Secure or Protect Cargo

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Tagging hospitals with liability for all patient harms that, in hindsight, could have been prevented by better preparedness creates a nearly impossible legal standard for entities to meet – that they be prepared for nearly every contingency in an emergency.

However, this does not mitigate the need for corporations and other organizations to seek a level of sufficient emergency preparedness to be considered prudent and reasonable. Failure to do so may in fact guarantee a negative outcome to any potential litigation on the matter.”

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Two Cases:

1. U.S. Army Corps of Engineers

In re: Katrina Canal Breaches Litig., No. 10-30249 (5th Cir. 9/24/12).

<http://www.ca5.uscourts.gov/opinions/pub/10/10-30249-CV1.wpd.pdf>

USACE held to have immunity by 5th Circuit after District Court found it liable for millions of dollars

2. Tenet Healthcare Corporation case

\$25 million settlement in class-action lawsuit where hospital corporation alleged to have failed to provide adequate emergency preparedness for those for whom it was responsible.

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2. Tenet Healthcare Corporation case

Negligent failure to plan is an emerging area in the liability context.

Questions for ports:

Have you taken reasonable precautions to prevent a reasonably foreseeable critical event which could take a significant toll on people and property?

Are you prepared to respond with proper actions using industry standards following a reasonably foreseeable critical event?

Tagging hospitals with liability for all patient harms that, in hindsight, could have been prevented by better preparedness creates a nearly impossible legal standard for entities to meet – that they be



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QUESTIONS?

**THANKS
FOR YOUR PARTICIPATION!**

