

# Recovery Following Hurricane Katrina: Will Litigation and Uncertainty Today Make for an Improved Tomorrow?

BY EDWARD A. THOMAS

*Following the unprecedented disaster of Hurricane Katrina, people with damaged property had three options: self-help, insurance, and litigation. With self-help essentially untenable and many people lacking the necessary insurance, litigation has become an increasingly popular, yet inefficient and uncertain, solution.*

**O**n many levels, the consequences of Hurricane Katrina have been unprecedented in U.S. history. Those consequences include serious loss of life, ongoing suffering and misery for thousands of people, vast destruction of our built and natural environment, hundreds of billions of dollars in damage, and a thus far unmet need for vast additional expenditures. The sheer number and type of lawsuits filed following Katrina—both in size and in dollar amount requested—is also absolutely unprecedented. This article provides a background to those lawsuits and briefly discusses the reasons for, and the policy implications of, that litigation.

## Who Pays for the Damage?

A person can pay for the reconstruction of their damaged property in three ways:

1. *Self-Help.* Rebuilding by the injured party on their own—using savings, borrowed money, assistance from national and local charities, and the help of friends and neighbors—was once common throughout the United States. Today, it survives in many parts of the country for such communal situations as helping a neighbor rebuild a barn destroyed by lightning.
2. *Insurance.* Casualty insurance can provide an excellent and efficient mechanism for recovery, whether the insurance is purchased by the damaged party or made available through some special legislatively created mechanism. Examples of legislatively established insurance coverage include Workers Compensation Insurance, whereby the state requires employers to pay premiums to make such insurance available to injured workers. State and Federal

Disaster Relief Grants are another form of special, legislatively established social insurance for disaster victims.

3. *Litigation.* Beyond self-help and insurance, litigation is the only remaining alternative for recovery when a person suffers damage. Successful litigation requires demonstrating that a person, corporation, or agency caused, or somehow is legally culpable for, the damage that has taken place.

Sometimes the recovery mechanisms can be linked together. For example, Small Business Disaster Loans are a combination of Self-Help (via loans) and Insurance (via special legislation that both authorizes and subsidizes the loan).<sup>1</sup>

Each of these three mechanisms is characterized by distinct advantages and disadvantages, as well as widely varying degrees of efficiency and practical effectiveness, that vary depending on their application to a particular circumstance.

Self-Help worked well in the past and continues to work well for widely scattered serious loss. For optimal use of this mechanism, the community must be tightly knit and committed to helping each other in times of difficulty. This form of recovery cannot work well if most of the self-helpers are themselves suffering damage. Thus, while this form of assistance can be highly efficient, it will not work when virtually the entire community is damaged.

Insurance can be an extremely efficient mechanism for distributing funds, provided the individuals damaged possess a sufficient amount of such insurance or have been provided such insurance by operation of law. The downside of insurance is that a person must generally purchase a policy prior to damage. Experience has shown that people will generally not purchase insurance for infrequent events such as floods without government requiring such insurance.<sup>2</sup> Even when government acts to require insurance, compliance is an issue.<sup>3</sup>

Litigation, meanwhile, is inefficient. It can take many years and has huge costs that do not go to the damaged party but instead to attorneys, courts, expert witnesses, court recorders, and others. Litigation is also uncertain. The damaged party may not be able to find a culpable entity. Sometimes our system of justice is not

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quite perfect. And in other cases a deserving, damaged plaintiff will not recover because the defendant has “deep pockets”—the ability to hire clever expert witnesses and/or attorneys. Litigation is also problematic for economically disadvantaged victims who may have difficulty obtaining counsel.

### **Hurricane Katrina**

Hurricane Katrina was the most costly natural disaster to strike the United States. Katrina was also the most devastating natural disaster to strike our nation in terms of numbers of people displaced. This nation has experienced more devastating natural disasters in terms of loss of life, such as the Galveston Hurricane of 1900. Nevertheless, the magnitude of the misery and suffering of the victims, the dollar damage, and the ability of television to bring that misery and suffering into all our consciousness truly make Katrina unique.

While Hurricane Katrina was devastating, insurance industry experts indicate that our nation is faced with the potential for natural disasters that will be much worse, including: (1) a repeat of the 1906 San Francisco earthquake, with potential damages estimates reaching \$400 billion; (2) a repeat of the 1900 Galveston hurricane, with estimated damage of \$36 billion; (3) a repeat of the 1938 hurricane that hit New England and Long Island New York, with damage estimates exceeding \$300 billion; or (4) a repeat of the series of earthquakes that struck the New Madrid Fault in the Central United States in 1811 and 1812, with potential economic damages around \$300 billion. As a White Paper from the National Association of Insurance Commissioners cautions, “[s]hould any one of [these catastrophes] occur, we are unprepared to deal with the aftermath of an event of this magnitude.”<sup>4</sup>

### **Insurance-Related Litigation and Investigations**

One of the unique aspects of Katrina is the number and magnitude of lawsuits that followed. These lawsuits generally fall into one of three categories: lawsuits between the victim and those involved in the construction and maintenance of levees; lawsuits between the insured and their insurance company; and lawsuits or investigations brought by the government.

#### *Lawsuits Between Disaster Victims and Agencies, Companies, and Individuals Involved in the Construction and Maintenance of Levees*

As of May 2007, approximately 250,000 people seeking over \$278 billion in Katrina-related damages have had lawsuits filed on their behalf against the U.S. government alone.<sup>5</sup> Numerous other organizations, corporations, public officials, levee boards, insurance companies, and others are being sued for additional billions of dollars in damages—the list of attorneys involved in some of these cases goes on for pages.<sup>6</sup>

Under the doctrine of sovereign immunity, the United States may not be sued without its consent.<sup>7</sup> The Federal Tort Claims Act (FTCA) waives this immunity in certain situations, providing that: “the United States shall be liable, respecting the provision of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .”<sup>8</sup> But §3 of the Flood Control Act of 1928 (FCA) states that “[n]o liability of any kind shall attach to or rest upon the United States

for any damage from or by floods or flood waters at any place.”<sup>9</sup> As such, the United States is normally immune from suit from failed flood control works.

On February 2, 2007, many of the plaintiffs in a massive lawsuit against the U.S. government—*In re Katrina Canal Breaches Consolidated Litigation*—made progress in their claims that the Mississippi River Gulf Outlet (MRGO) caused the catastrophic damage to the Lower Ninth Ward, New Orleans East, and St. Bernard Parish. The plaintiffs pointed to at least two defective conditions known by the U.S. Army Corps of Engineers for decades: (1) the destruction of the marshlands surrounding MRGO, which intensified an east-west storm surge, resulting in the flooding of much of New Orleans; and (2) the funnel effect stemming from MRGO’s faulty design, which accelerated the force and strength of that surge. In essence, the plaintiffs maintained that but for MRGO, there would not have been the devastating flooding that damaged them.<sup>10</sup> The United States argued that it was immune under the FCA because the damages were caused by “flood waters” that federal works failed to control. The district court ruled that because the plaintiffs are suing for damages caused by MRGO—the decimation of wetlands over a long period of time that created the hazard that resulted in flooding that could not have been controlled by any flood control project—the plaintiffs are not seeking damages for the failure of the levees or flood projects. The court also rejected the government’s claim that the “due care” and “discretionary function” exceptions to the FTCA warrant dismissal at this early stage of the litigation.

The MRGO canal had previously been the subject of a suit against the United States following Hurricane Betsy in 1965. The courts ruled in *Graci v. United States* that the federal immunity from lawsuits due to “floods or flood waters at any place” referred to flood control projects only, not to navigation projects, and that MRGO was a navigation project.<sup>11</sup>

The final court ruling in *Graci* that the United States was not immune to suit from damages allegedly caused by MRGO was made eight years after Hurricane Betsy. It may well take as many or more years of legal wrangling before a final decision is made in *In re Katrina*. Sustaining such a suit against the federal government is extremely difficult. However, the difficulty usually faced by a plaintiff in proving a causal link between the harm and the government’s action or inaction could be more easily overcome given existing studies on the levee and floodwall failures in Katrina.<sup>12</sup>

#### *Lawsuits Between Insureds and Their Insurance Companies*

Hundreds of lawsuits have been filed by homeowners and other insureds against their insurance carriers in Mississippi and Louisiana. Attorneys are actively seeking more people throughout the Gulf Coast to file additional suits.<sup>13</sup>

Some of these cases have resulted in awards for huge sums of money. In one case, a jury ordered an insurance company to pay \$2,500,000 (reduced by the judge to \$1,000,000) in punitive damages for rejecting a Mississippi homeowner’s insurance claims. The award followed a directed verdict by the court ordering the insurance company to pay the homeowner \$223,292 in actual damages. The insurance policy at issue categorically excluded any

damage caused through negligence, and the insurers argued that Katrina's storm surge, resulting from negligent engineering of the levees, caused the damage. But the court disagreed, concluding that the home was damaged by wind preceding the hurricane, prior to obliteration or near obliteration by Katrina's storm surge.<sup>14</sup>

#### *Lawsuits and Investigations by Regulatory Officials Concerning Insurance Companies*

*Private Insurance.* Because National Flood Insurance backed by the Federal Emergency Management Agency (FEMA) is designed to cover flood damage, homeowners' policies usually only cover wind and wind-driven rain damage.

Mississippi Attorney General Jim Hood has sued five insurance companies—Allstate, State Farm, Nationwide, USAA, and Mississippi Farm Bureau—alleging that it is “an unfair or deceptive trade practice” to not pay for storm surge damage resulting from Hurricane Katrina.<sup>15</sup> Hood believes that hurricane force, wind-induced water damage from Katrina's storm surge should be covered as wind-related damage. The insurance companies do not agree. Neither does the Mississippi State Insurance Commissioner, George Dale, although he is on record as indicating that when it is unclear how the damage was caused, the decision should favor policyholders.

The insurance companies argue that if this case is decided in favor of the Attorney General, their ability to meet current and future payment obligations will be undermined.<sup>16</sup> Robert Hartwig of the Insurance Information Institute, an industry trade group, has stated that if the insurance companies are forced to pay for hurricane surge, “it could quite possibly be destabilizing and lead to the insolvency of smaller insurers in the area.”<sup>17</sup> Although a settlement was announced in this case in January 2007,<sup>18</sup> the judge refused to approve the settlement agreement without clarifying details concerning the amount of settlement the insured victims would actually receive.<sup>19</sup> Continued efforts to settle this case have thus far not been successful.

*Government-Backed Insurance.* The Department of Homeland Security (DHS) Inspector General has oversight of the payment of claims under FEMA's National Flood Insurance Program (NFIP). Those claims are usually settled by a private insurance carrier who writes flood insurance on behalf of the federal government. Claims for wind damage under a homeowner's policy and for flood damage under the NFIP are often adjusted by an individual adjuster who works for the private insurance company. The DHS Inspector General is currently investigating whether or not some of those adjusters have improperly determined that damage caused by Katrina was due to flood, which would be reimbursed by the federal government, as opposed to wind, which would be paid by the private insurance company.<sup>20</sup>

#### **Public Policy Implications of the Katrina Disaster**

Insurance companies are getting nervous and leaving coastal markets in droves.<sup>21</sup> For example, State Farm, Mississippi's largest insurer, has decided that it will no longer write new homeowners or commercial policies in that state.<sup>22</sup> In a disaster the magnitude of

Katrina or some inevitable and even more damaging event, it is simply not possible for the thousands of affected persons to rely on their own resources, the help of neighbors, limited disaster assistance, or charity to rebuild their lives. Disaster survivors who, for whatever reason, do not have insurance are confronted with a stark choice: litigate or nothing. Litigation is time-consuming, costly, and not very efficient. And those who have no choice but to stay the course face continued suffering and misery.

Organizations as disparate as ProtectingAmerica.org, the National Association of Realtors, The National Association of Insurance Commissioners, and many others agree that our nation needs legislation setting up some sort of national catastrophic insurance program to better prepare for the financial consequences of human occupancy in hazardous locations.<sup>23</sup> Any such catastrophic insurance program must provide for proper building codes and land use planning to protect wetlands and floodplains so that the consequences of future floods and other hazards are not exacerbated due to poor planning, engineering, and land use.<sup>24</sup> Legislation facilitating such a concept is currently being considered by Congress.<sup>25</sup>

As Katrina so clearly demonstrated, we must do a better job of providing for the rebuilding of shattered lives following a catastrophe. At the same time, our land use and building decisions must improve dramatically. Otherwise, the problems we currently face in hazard management will only get worse. ■

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#### ENDNOTES

1. For a more complete discussion of the complex process of funding post-disaster rebuilding, see E.A. THOMAS, POST DISASTER RECONSTRUCTION: THE “PATCHWORK QUILT” A CREATIVE STRATEGY FOR SAFE POST-DISASTER REBUILDING (June 2007), available at [http://www.floods.org/PDF/Post\\_Disaster\\_Reconstruction\\_Patchwork\\_Quilt\\_ET.pdf](http://www.floods.org/PDF/Post_Disaster_Reconstruction_Patchwork_Quilt_ET.pdf).
2. See, e.g., Lisa M. DeClark, *Flood Insurance Helps Manage Risk of Financial Loss, COMMUNITY DIVIDEND* (Federal Reserve Bank of Minneapolis), Fall/Winter 1997, at <http://www.minneapolisfed.org/pubs/cd/97F-w/flood-ins.cfm>.
3. See, e.g., *Future of the National Flood Insurance Program: Hearing before the Senate Comm. on Banking, Housing and Urban Affairs*, 109th Cong., Oct. 18, 2005 (testimony of J. Robert Hunter, Director of Insurance, Consumer Federation of America), available at [http://www.consumerfed.org/pdfs/Flood\\_Insurance\\_Senate\\_oversight\\_testimony\\_101805.pdf](http://www.consumerfed.org/pdfs/Flood_Insurance_Senate_oversight_testimony_101805.pdf).
4. See NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, DRAFT NATURAL CATASTROPHE RISK: CREATING A COMPREHENSIVE NATIONAL PLAN (Dec. 2006), available at [http://www.naic.org/documents/committees\\_c\\_catastrophe\\_naic\\_plan.pdf](http://www.naic.org/documents/committees_c_catastrophe_naic_plan.pdf).
5. See Peter Whoriskey, WASH. POST, May 13, 2007, at A.3
6. See, e.g., *In re Katrina Canal Breaches Consol.*, 2007 U.S. Dist. LEXIS 101180 (E.D. La., Feb. 2, 2007).
7. See *United States v. Mitchell*, 463 U.S. 206, 212 (1983).
8. 28 U.S.C. §2674.
9. 33 U.S.C. §702c.
10. See *In re Katrina Canal Breaches*.
11. See *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971), cert. denied, 412 U.S. 928 (1973).
12. See, e.g., AMERICAN SOCIETY OF CIVIL ENGINEERS, THE NEW ORLEANS HURRICANE PROTECTION SYSTEM: WHAT WENT WRONG AND WHY (2007), available at <http://www.asce.org/files/pdf/ERPreport.pdf>.
13. See, e.g., *Levee Litigation Group*, at <http://www.levelaw.com/category/legal-news-updates/>.
14. See, e.g., *Broussard v. State Farm*, No. 1:06cv6-LTS-RHW, (S.D. Miss. Jan. 31, 2007) (punative damages reduced).
15. See, e.g., Kathy Chu, *Insurers sued to force them to pay for storm-surge coverage*, USA TODAY, Sept. 15, 2005, at [http://www.usatoday.com/money/industries/insurance/2005-09-15-katrina-insurance-lawsuit\\_x.htm](http://www.usatoday.com/money/industries/insurance/2005-09-15-katrina-insurance-lawsuit_x.htm).

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16. See Adam Scales, *How Will Homeowners Insurance Litigation After Hurricane Katrina Play Out?*, FINDLAW, Sept. 19, 2005, at [http://writ.news.findlaw.com/commentary/20050919\\_scales.html](http://writ.news.findlaw.com/commentary/20050919_scales.html).
17. See Chu, *supra* note 15.
18. See Joseph Treaster, *Big Insurer Will Pay 640 Katrina Claims*, N.Y. TIMES, Jan. 24, 2007, at <http://www.nytimes.com/2007/01/24/business/24insure.html?ex=1185422400&en=87b9f8b851669b92&ei=5070>.
19. See Joseph Treaster, *Judge Puts Katrina Settlement in Question*, N.Y. TIMES, Jan. 27, 2007, at <http://www.nytimes.com/2007/01/24/business/24insure.html?ex=1185422400&en=87b9f8b851669b92&ei=5070>.
20. See, *National Flood Insurance Program: Issues Exposed by the 2005 Hurricanes: Hearing Before the H. Subcomm. on Oversight and Investigation and the H. Subcomm. on Management, Investigations and Oversight of the Committee on Homeland Security*, 110th Cong., June 12, 2007 (Statement for the Record, Matt Jadacki, Deputy Inspector General for Disaster Assistance Oversight, U.S. Department of Homeland Security).
21. See Liam Plevin, *As Insurers Flee Coast States Face New Threat*, WALL STREET J., June 7, 2007, at A.1.
22. See Gary Michiels, *State Farm Won't Seek New Mississippi Policies*, NAT'L PUB. RADIO, June 22, 2007, at <http://www.npr.org/templates/story/story.php?storyId=7416262>.
23. See, e.g., ProtectingAmerica.org, at <http://www.protectingamerica.org/>.
24. See Edward A. Thomas, *No Adverse Impact: Working Together To Prevent Harm*, NAT'L WETLANDS NEWSL., Jan.-Feb. 2007, at 11.
25. See, e.g., The Homeowners Defense Act of 2007, HR 3355, and The Multiple Peril Insurance Act of 2007, H.R. 920.

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In short, Katrina caught us with our risk up and our guard down. To address these issues, we must think big picture and long term. Reform of individual organizations or practices of the overall process will not solve the problem. It will require a holistic look at how the entire system of governments behaves, what drives it, and the interdependencies in the context of time, space, and knowledge. ■

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Integrated coastal planning founded on a sustainable coastal landscape is an enormous scientific and political challenge that will require very large financial investments, will, and determination, as well as innovative and critical contributions from the science and engineering community. Given changes in the global climate, our options are quickly becoming more narrow and less desirable with time, thereby requiring urgent action. ■

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