

Hurricane Katrina: A 'Perfect Storm' For Mold Litigation

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Although damage estimates are still preliminary, Hurricane Katrina is already the most costly insured loss from a single event in U.S. history, eclipsing both Hurricane Andrew (1992) and the terrorist attacks of September 11, 2001.¹ The images of Category Four hurricane winds, storm surge, heavy rain, flooded homes and businesses, damaged and missing offshore oil and gas platforms, and destruction along the Gulf Coast was biblical in proportion. You simply have to see it firsthand to begin to fathom the scope of the problem currently facing homeowners and businesses, who have the overwhelming task of deciding what can be rebuilt and what is better razed. Even as the flood waters are being pumped out of New Orleans and debris removal has begun in earnest up and down a 160 mile stretch of the Gulf Coast, important decisions are facing property owners, which will impact their ability to recover some of their financial losses, and quite possibly, impact their own liability.

Unfortunately, many commercial property owners have not considered including experienced legal counsel as an important member of their disaster response plan. Why include a lawyer? The answer is simple. History has proven that recovery from insurers, municipalities and other responsible parties must frequently be resolved in the courts, and in many cases, years after the wind, rain and flooding have stopped. During this author's recent trips to the Gulf Coast immediately after both Katrina and Rita, he observed a veritable army of insurance adjusters (CAT adjusters), public adjusters (PA's) and restoration contractors conducting their assessment of structures, but no attorneys in the field di-

recting the critical investigative process, helping property owners and insureds assess and document the damage, collect evidence of causation, and marshal forensic experts who may be needed to testify in the inevitable legal battles that will surely follow in the ensuing months and years. That lack of foresight may prove very costly to property owners, employers, and those liability insurers who insure them.

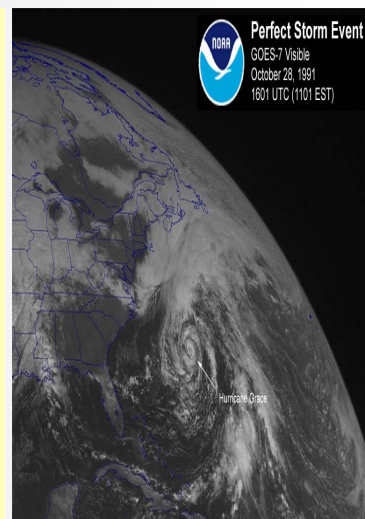
Poor Initial Response

According to the U.S. Environmental Protection Agency (EPA), mold growth can begin on any organic substance, such as wood, paper, carpet, food and insulation, within 48 hours of water damage.² However, in St. Bernard's Parish, Louisiana alone, over 40,000 homes were under 20 feet of water for weeks. Between Hurricanes Katrina and Rita, some areas of New Orleans were even flooded twice! Thus, the general recommendation to dry out water-damaged buildings within 24-48 hours quickly became a moot point in most areas along the Gulf Coast. Even in areas that did not experience direct flooding from broken levees or the storm surge, the lack of electrical power and orders of civil authorities (e.g. evacuation and/or curfew orders) prevented any timely attempt to dry out buildings before mold growth colonized and spread. To make matters worse, relatively few commercial property owners, and even fewer homeowners, can afford the exorbitant cost to hire a disaster remediation contractor to perform restorative drying and mold remediation.

Based upon this author's observations in the Biloxi

and Gulfport areas of Mississippi immediately after both Katrina and Rita, only the largest hotels and only a handful of commercial office buildings were employing any type of emergency dehumidification, which required the use of large diesel power generators, dehumidification units and air filtration devices. These buildings were easily identifiable by the spider-like web of colorful flexible ducts that entombed their victims. One could not help but draw the analogy to a critical care patient on a life support system. Literally, the restoration contractors were battling for the survival of these buildings in a race against time and the elements to dry them out and prevent the spread of additional mold growth. However, the vast majority of hotels and commercial buildings, and all of the homes in that area, had simply given the equivalent of a "DO NOT RESUSCITATE" order, allowing the humidity, temperature, mold and water damage to slowly decompose their structures.

Unfortunately, many commercial property owners have chosen to hire unskilled workers, many of whom were displaced from their own homes and regular jobs due to the hurricanes, to simply "get 'er done" and perform the dangerous task of removing building materials contaminated with a toxic soup of mold, E. coli bacteria, petrochemicals, lead, arsenic, asbestos, etc., without the proper training, personal protective equipment, respiratory protection, or engineering controls. This conscious decision to simply ignore established guidelines and protocols for the sake of expediency could cost these property owners, and their insurers, millions of dollars in the years to come through



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costly litigation filed by injured employees, remediation workers, guests and invitees to these properties that will never be properly remediated. If history is any guide, the litigation that will follow Hurricane Katrina will make all prior mold litigation trends pale in comparison.

Are Stakeholders Ignoring The Standard Of Care For Assessing And Remediating Mold?

Mold actually destroys carbon-based substrates, and thus constitutes property damage in and of itself.³ Inhalation exposure to mold can also cause health problems for certain individuals. Molds produce allergens that can trigger allergic reactions and even asthma attacks in people allergic to mold.⁴ A recent study published by the Institute of Medicine, commissioned by the National Academy of Sciences and Centers for Disease Control and Prevention, found "sufficient evidence of an association" between health outcomes and the presence of mold or other agents in damp indoor environments. These adverse health outcomes include upper respiratory tract symptoms, cough, hypersensitivity pneumonitis in susceptible persons, wheeze and asthma in sensitized persons.

While no federal, state or local regulations exist governing the assessment and remediation of mold, there are several "standard of care" guidelines that have been published by industry trade groups and public health agencies. For instance, in May of 1993 the New York City Department of Health published guide-

lines on the Assessment and Remediation of Stachybotrys Atrium in Indoor Environments, and then revised those guidelines in 2000 to include all species of fungi. See, Guidelines on Assessment and Remediation of Fungi in Indoor Environments, New York City Dept. of Health, (2000).

Thereafter, the EPA adopted many of the recommendations contained in the New York City Dept. of Health guidelines when it published, Mold Remediation in Schools and Commercial Buildings in 2001. In 2003, the restoration industry also promulgated standards to define the criteria and methodology to be used by professional remediators for investigating and remediating abnormal moisture and mold contamination. These standards are known in the industry as the IICRC S520.⁶

Additionally, in 2004 OSHA published a Safety and Health Information Bulletin entitled, A Brief Guide to Mold in the Workplace.⁷ Although the bulletin is not a standard or regulation, it states that it was created to assist building managers, contractors and environmental consultants who respond to mold and moisture situations in buildings. The Occupational Safety and Health Act requires employers to comply with hazard-specific safety and health standards as issued and enforced by either Federal OSHA or and OSHA-approved State Plan. Additionally, Section 5(a)(1), the General Duty Clause, of the Act requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. Employers

can be cited by OSHA for violating the General Duty Clause if there is such a recognized hazard (e.g. mold) and they do not take reasonable steps to prevent or abate the hazard.

The OSHA Bulletin categorizes mold remediation into four (4) categories, depending upon the square footage of contamination. For most buildings that suffered serious water damage from Katrina, Level IV, also called "Extensive Contamination" will apply. This level applies to mold growth that is greater than 100 contiguous square feet. According to OSHA, the following procedures should be implemented under Level IV conditions:

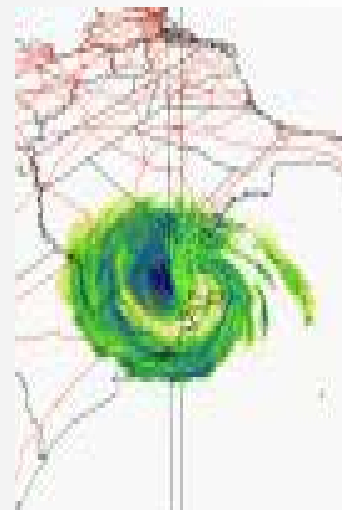
A. Personnel trained in the handling of hazardous materials and equipped with:

1. full face piece respirators with HEPA cartridges;
2. disposable protective clothing covering the entire body including head and shoes; and
3. gloves.

B. Containment of the affected area:

1. complete isolation of work area from occupied spaces using plastic sheeting sealed with duct tape (including ventilation ducts/grills, fixtures and other openings);
2. the use of an exhaust fan with a HEPA filter to generate negative pressurization; and
3. airlocks and decontamination room.

C. If containment practices effectively prevent mold from migrating from af-



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affected areas, it may not be necessary to remove people from surrounding work areas. However, removal is still recommended for infants, persons having undergone recent surgery, immune-suppressed people, or people with chronic inflammatory lung diseases (e.g. asthma, hypersensitivity pneumonitis, and severe allergies).

D. Contaminated materials that cannot be cleaned should be removed from the building in sealed impermeable plastic bags. The outside of the bags should be cleaned with a damp cloth and detergent solution or HEPA vacuumed in the decontamination chamber prior to their transport to uncontaminated areas of the building. These materials may be disposed of as ordinary waste.

E. The contaminated area and decontamination room should be HEPA vacuumed and cleaned with a damp cloth or mopped with a detergent solution and be visibly clean prior to the removal of the isolation barriers.

In addition, after Katrina the CDC, OSHA and NIOSH all published fact sheets and guidelines for hurricane recovery and clean-up.⁸ All workers involved in the clean-up and remediation of damaged properties should be informed of these health advisories by their employers, who are required to incorporate these latest guidelines and health warnings into their health and safety plan in order to comply with the General Duty Clause of the Occupational Safety and Health Act.

Neither Mississippi, Louisi-

ana, Alabama or Texas have adopted a state OSHA plan, thus they all must comply with Federal OSHA requirements. Thus, under the General Duty Clause, employers are required to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. Unfortunately, so far OSHA has not been visible in the Gulf Coast inspecting commercial properties undergoing mold remediation and enforcing safety orders to ensure employers are complying with their health and safety plans to provide a safe workplace. To the contrary, media outlets have beamed images for a month now of workers wading literally into a toxic soup of flood waters and sediment, which the U.S. EPA recently confirmed contained elevated levels of E. coli bacteria, oil and gas chemicals, lead, arsenic.⁹ Additionally, the CDC has identified 22 cases of Vibro illness post-hurricane, which have resulted in five deaths caused by wound-infections in Louisiana and Mississippi.

Failure to follow these published guidelines can expose a commercial property owner, remediation contractor and sometimes an insurer who exercises control over the remediation process, to civil liability for personal injuries sustained by employees, remediation workers, guests and invitees. Even prior to Katrina and Rita, highly publicized lawsuits against several hotels, many in the Gulf Coast, have resulted in large financial settlements and adverse publicity for the owners and operators.

It remains to be seen if juries will be sympathetic to

property owners, contractors and others involved in the remediation industry who consciously exposed their own employees, workers and building occupants to these hazards simply because the size and scope of this natural disaster was too overwhelming and the cost too high to do things "the right way." As noted by one IAQ consultant, "These things [mold remediation guidelines] are great and wonderful when you've got one building in a community that needs to be fixed - but we've got the inverse situation, we've got most of the buildings that need to be fixed."

Mold Lawsuits Are Likely To Flood Courts For Next Decade

The Northridge Earthquake occurred on January 17, 1994, and we are still litigating insurance claims from that natural disaster. In California, lawsuits against insurers, contractors, design professionals, realtors and municipalities flooded the courts for nearly a decade after the ground stopped shaking. In the Gulf Coast, prior and far less destructive hurricanes have spawned years of litigation. At least one reported case took six (6) years from the date of the hurricane to reach final resolution in the Louisiana courts. Thus, it is not difficult to predict that litigation arising from the damage caused by Katrina (and later exacerbated by Rita in some cases), will eclipse all past experience from previous hurricanes that damaged the Gulf Coast.

Already, lawsuits have been filed against insurers

concerning denial of homeowner's claims and claim handling practices following Katrina. In Louisiana, a purported class action was filed recently against the state Insurance Commissioner and 15 named insurance companies, alleging "To give the 'rising water' and 'act of God' exclusions broad reading and thus disallow the coverage of the damages arising in this catastrophic disaster ... would contravene the very purpose of homeowners' policies without regard to the realities which precipitated the need for such an exclusion."¹⁴ A second lawsuit filed by the Mississippi Attorney General, blames insurers of trying to hide fine print exclusions that deny coverage for flood damage associated with hurricanes from policyholders. [Id.]

Additionally, claims against municipalities and private property owners are likely concerning the broken levees in New Orleans. Several media outlets have reported damage to canal levees were caused by private barges that broke loose from their moorings during the storm.¹⁵ If it can be proved that the barges were negligently secured, the owner, operator and facility to which they were docked may face liability for flooding entire neighborhoods. A recently release report disputes that the storm surge from Katrina was ever high enough to spill over the walls of two canals, whose failure caused massive flooding in western and central New Orleans. Instead, the team of

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engineers from the National Science Foundation and American Society of Civil Engineers found evidence of massive soil movement of the embankment underneath sections of the floodwalls.¹⁶ If construction or design flaws are ultimately to blame for these levee failures, the contractors and designers of these levees could face hundreds if not thousands of claims from owners of flooded homes and businesses for property damage, business interruption, loss of use, personal injuries, etc.

For real estate lenders, the exclusion of mold coverage from property insurance policies could be catastrophic. "The recent hurricanes have brought the financially catastrophic aspect of the mold issue to the forefront, much the same way that 9/11 highlighted the terrorism liabilities for financial institutions", said Charles Perry, principal of Environmental Assurance Group (EAG) of West Hartford, Ct.¹⁷ Lenders who secured their loans on water-damaged property contaminated with mold from Katrina could be left with little to no value in the collateral.

In the insurance arena, many property owners may currently fail to comprehend that causation of the damage will be a major issue in resolving their insurance claims and that the burden of proof rests upon the insured to prove causation. Unfortunately, many property owners will discover this realization long after the evidence has been hauled away to the landfill. The insurance coverage analysis will likely focus on the "proximate cause" of the damage. Because some causes of damage may be

excluded under particular insurance policies, it is not difficult to predict long and expensive legal battles between insureds and their insurers over causation. One commentator has already predicted much litigation over the terms "efficient proximate cause" and "anti-concurrent causation."¹⁸ In the first party context, some courts have adopted the "efficient proximate cause" doctrine, which provides that if a covered peril causes an excluded peril, coverage is available even for damage caused by the excluded peril. For example, if mold is an excluded peril, but wind-driven rain causes mold to grow as a result, then the damage caused by both the wind and rain and resulting mold growth is covered under the policy. However, mold that did not grow as a result of a covered peril (e.g. wind-driven rain) would not be covered. The Louisiana Supreme Court adopted the efficient proximate cause analysis in *Lorio v. Aetna Insurance Company*, 232 So. 2d 490 (La. 1970), a Hurricane Betsy case.

On the other hand, some ISO insurance forms contain anti-concurrent causation clauses to override efficient proximate cause by precluding coverage for a specified peril, even if caused by an otherwise covered peril. Recently, a Mississippi appeals court analyzed such an anti-concurrent causation lead-in clause in a policy and found no coverage for property damage. See, *Boteler v. State Farm Casualty Insurance Company*, 876 So. 2d 1067 (Miss. App. 2004).

Much effort will be focused on trying to determine whether property damage was caused by wind and

rain versus flooding. Typically, private insurance covers wind and rain damage, but not flood damage. Instead, flood insurance is offered by the National Flood Insurance Program (NFIP). As reported by the *Wall Street Journal*, according to data from the NFIP, only one-fifth of the homes and businesses in Mississippi in the areas most at risk for flooding were covered by flood insurance before Katrina. In Louisiana, the *Journal* reported that less than half of such properties were covered.

Based upon past hurricane cases, the task of allocating the amount of property damage caused by wind and rain, and thus potentially covered by private insurance policies, versus damage caused by flooding that may be covered under the NFIP, will likely be resolved in the courts. In *Urrate v. Argonaut Great Central Insurance Company*, 881 So. 2d 787 (La. App. 2004) a restaurant located in Jefferson Parish, La. was damaged from Hurricane Georges in 1998, which made landfall near Biloxi, Mississippi. Part of the restaurant was swept away. The owner had a flood insurance policy issued by Omaha Property and Casualty, which covered damages from flooding and tidal waves. The owner also had a policy issued by Argonaut, which excluded such damage. Each insurer determined the amount of damage it believed was caused by covered perils, however, the owner was not satisfied and filed suit. The court was forced to make factual determinations as to what caused certain types of damage and allocate the repair costs to each policy.



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For example, the court concluded that \$35,000 of glass damage was caused solely by wind, and thus covered only under Argonaut's policy. The court disagreed with Argonaut's assessment that its share of business loss was only \$9,500 while electricity was knocked out, and instead ruled that the restaurant suffered a business loss for the last quarter of 1998 of \$80,000 and attributed 25% of that loss to wind damage. The court also determined that the plaintiff suffered a business loss in 1999 in the amount of \$70,000 and attributed 15% of that loss to wind damage. The Louisiana Court of Appeal affirmed the trial court's decision.

Further, the importance of an insured protecting itself and documenting damage, and the cause of that damage, was highlighted by the federal court in *Southern Hotels Limited Partnership v. Lloyd's Underwriters at London Companies, et. al.* (1997 U.S. Dist. Lexis 8384 (E.D., La.)). In that case, the Travelodge Hotel in Harvey, Louisiana sustained wind, rain and flood damage from Hurricane Andrew in 1992. The hotel was insured by a policy that covered wind and water damage, but flood damage was subject to a \$200,000 deductible. The hotel had a separate flood insurance policy up to \$200,000 in coverage from the NFIP. The court stated, "The plaintiff has the burden of proving both the damage and the causal connection between the damage and the covered cause of loss. This proof must be shown by a reasonable preponderance of the

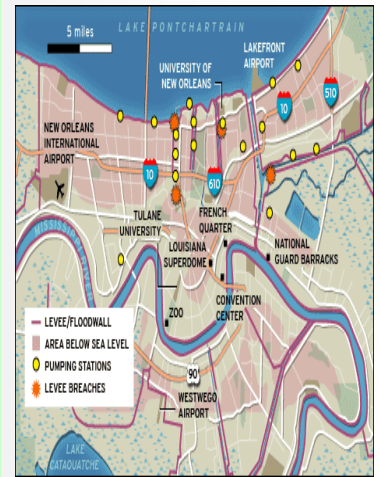
evidence, and with some detail and specificity. A mere possibility of causation and damage are insufficient." *Id.* at 16. In analyzing the claim for damage to furniture, the court looked to whether the walls and roof were blown away to determine if the damage was caused by wind-driven rain or flooding.

Conclusion

The first wave of Katrina-related litigation has already been filed in the first-party property insurance context. The second wave will likely be third party liability claims filed against municipalities, contractors and design professionals over the failed levees in New Orleans. The third wave may involve bodily injury claims brought by unskilled workers hired to perform the demolition and "remediation" of contaminated buildings in hazardous conditions without the proper training or personal protective equipment. Next, claims for construction defects and mold that predated the hurricane, but were first discovered during the damage assessment following Katrina, may be likely. Another predictable wave of lawsuits will be filed by employees, guests and invitees of hotels and other public buildings that are not properly remediated and cause personal injuries when the buildings are re-occupied. Finally, the chain may come full circle, with both property damage and personal injury lawsuits filed against the environmental consultants and mold remediation contractors who were first on the scene, but left behind hidden mold in the walls, carpets and HVAC systems of buildings. Thus, it is not hard to see why Hurricane Katrina can be called the

"Perfect Storm" that will spawn years of mold litigation over both property damage and personal injury.

[Editor's Note: Alexander Robertson, IV is the senior partner of Robertson & Vick, LLP. He concentrates his national practice in multi-party construction defect, commercial construction claims and toxic mold litigation on behalf of hotels, casinos, universities, public entities, commercial building owners and homeowners. His experience with representing owners in complex commercial mold litigation involves high rise hotels, condo hotels and courthouses in both Las Vegas and Miami. He is one of the few practicing attorneys who has firsthand experience in both field and management positions with a large general contractor. Alex is a member of the Global Alliance for Hospitality Attorneys, the Indoor Environmental Institute (Legal Subcommittee and Joint IICRC/IEI Mold Remediation Standard Committee), and holds a prestigious AV rating from Martindale-Hubbell Law Directory. He has co-chaired 9 national mold litigation conferences around the country, and is a frequent lecturer and author on mold and construction defect litigation. Within days following Hurricanes Katrina and Rita, Mr. Robertson made several trips to Biloxi, Miss. with a team of forensic environmental and construction experts assessing damage and collecting evidence to support his hospitality clients' insurance claims arising from Hurricane Katrina. Mr. Robertson is admitted to practice in California, Nevada, Texas and Colorado, and has been admitted pro hac vice in Florida, Illinois, New Mexico and the



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