PURSUING SUBROGATION AFTER THE CATASTROPHIC LOSS: IS MOTHER NATURE INSURED?

GERARD P. HARNEY
MANAGING PARTNER
COZEN AND O'CONNOR
501 W. Broadway, Suite 1610
San Diego, Ca 92101
(619) 234-1700
gharney@cozen.com

BIOGRAPHICAL SKETCH

GERARD P. HARNEY, ESQUIRE

GERARD P. HARNEY is the Managing Partner of the Regional office of Cozen and O'Connor in San Diego, California. He is a member of the bars of California, Pennsylvania, and New Jersey. He graduated from the University of Pennsylvania in 1968 and Villanova University School of Law in 1973.

Mr. Harney concentrates his practice in the fields of subrogation and insurance coverage. He, along with other members of the firm of Cozen and O'Connor, have been involved in the investigation and pursuit of subrogation in a number of catastrophes, including the Pepcon explosion in Henderson, Nevada, in 1988, the Santa Barbara fires in 1990, and the Oakland/Berkeley fire in 1991. He is presently engaged in the investigation and analysis of subrogation potential arising from the Malibu/Laguna Hills fires and the Northridge earthquake. Mr. Harney successfully recovered $34,000,000 for the insurers of Universal Studios and Walt Disney Company in connection with the fire at Universal Studios "Back Lot" in November of 1990. His coverage work has included issues relating to the Mt. St. Helens volcanic explosion, the San Diego/Pt. Loma marine sewer pipe failure in 1992 and losses arising from the Northridge earthquake.

I. INTRODUCTION

The last few years have not been kind to the insurance industry. The Northridge earthquake has devastated large portions of the San Fernando Valley, Hurricanes Andrew and Inika left behind thousands of destroyed homes in their unpredictable paths. Flooding in the Mid-West this past summer caused unprecedented damage to crops and farm property. The recent Malibu and Laguna Hills fires in Southern California imitated the destruction of the Oakland/Berkeley Hills fire in 1991. The response of the insurance industry to these catastrophes has not been without criticism, despite the tireless efforts of the members of the rapidly assembled CAT teams responding to these disasters. The high public visibility involved in the handling of these losses, however, has, in many circumstances, resulted in insurers disregarding some of their own economic interests and potential policy defenses in an effort to foster public confidence in the insurance process.

One important right which has been sacrificed in this area is that of subrogation. Whether due to the magnitude or nature of the event as not lending itself to third-party recovery efforts or the fear of public misconception of being viewed as too "greedy", it has been our experience that insurers have tended to place questions of recovery on the back burner with the hope that these issues can be revisited once the dust settles. This paper is not intended as a discussion of the merits of this decision by some insurers . In many cases, it is simply not practical to invest heavily in a subrogation effort where there is little chance of recovery given the fact that human intervention was only remotely involved in the loss or the damages are of such a magnitude that the resources of the responsible party appear insignificant in relation to the losses incurred. These "natural" disasters or catastrophes do, however, in the appropriate case present a

reasonable prospect of recovery which can be effectively pursued. This paper discusses such cases and the differing investigative techniques and theories available in those situations.

II. INVESTIGATION OF THE CATASTROPHIC LOSS

How does the natural disaster or catastrophic loss differ from the ordinary loss in terms of subrogation handling and investigation? The difference is largely one of size. All too often, the members of the CAT team are overwhelmed by the extent of destruction from the event and a feeling of. futility in pursuing subrogation in circumstances many consider to be an "Act of God". As a result, steps taken in the investigation of even the smallest loss are often ignored in the catastrophe and the file is not properly documented by the time someone begins to look at it for recovery purposes. If subrogation is to be effectively analyzed, however, there must be an early investigation of not only the cause of the event but the cause of damage. The participants in this investigation are members of the CAT team, public officials, private cause and origin experts, engineers and other technical consultants, and legal counsel.

A. Role of Members of the CAT Team.

The first thing which must be done is to identify for the CAT team members the potential theories of recovery. All too often, an inexperienced adjuster may simply view the event as an Act of God. The theories of liability will depend upon the nature of each event. There are, however, potential theories of recovery in any catastrophic loss and the first step to recovery is to provide the adjusters with a description of such possible theories as a means of directing the focus of their initial fact gathering. This should also include a description of potential defenses such as public entity immunity or the applicability of statutes of repose or limitation involving improvements to real property or product liability cases.

A standard questionnaire or survey form can be provided to each member of the CAT team to assist them in differentiating damages due to the natural event as opposed to man-made

damages or losses. An example of such a survey is attached to this paper as Exhibit "A". It should include basic information questions, such as the age of the home or other structure, the nature of its construction (i.e., cedar shake roof versus tile roof in the case of a wildland fire); the nature of the damages sustained to the home (complete destruction, destruction of roof only, fire separation failures) and, perhaps most important, the nature of damage to adjacent structures. This differentiation of damage is critical to separating the damages due to an Act of God such as a hurricane from those due to shoddy construction of roofs and similar objects. In the case of an explosion, such as the Pepcon explosion in Henderson, Nevada, in 1988, cracks in stucco from the explosion could also have been the result of an earlier earthquake or soil subsidence. It was important in that case for the adjuster to be able to document that the cracking was fresh as opposed to old as evidenced by dirt or minor vegetation growing in the cracks.

It is also important for the adjuster or other member of the CAT team to follow a standard method of documentation of damages. This would include, of course, photographs of the damaged portions of the property as well as surrounding, similar structures. Whether the property is insured on a replacement cost or actual cash value basis, evidence relating to depreciation and fair market value must be developed or preserved. Additionally, it is also important to show that the possibility of salvage was considered as, except in the total loss, this will be an element of defense in any future subrogation action.

B. Interface with Public Officials.

Immediately after a catastrophe, there will be the requirement for public control of the area. Aside from considerations of public safety, there are concerns regarding the discovery of bodies in the wreckage and the necessity to avoid looting. There is also the concern in most large fire cases of whether or not the fire was intentionally set and the necessity to preserve the crime

scene. Because of these considerations, there is a necessity to "wait outside the yellow tape" until the police and fire departments and other investigative agencies have completed their examination of the loss scene. There is also a natural tendency to rely upon the competency and findings of such public investigations in terms of determining the cause or causes of the loss.

1. Gaining Access to the Loss Scene and Public Investigative Reports.

In many cases, however, public investigators are only concerned with determining whether or not a criminal act occurred and do not take the necessary steps to properly document the cause or contributing factors of an accidental loss or magnified damages resulting from poor construction or other acts of human intervention. It should also be recognized early on that in many cases public agencies simply do not have the resources to conduct technical aspects of these investigations. Therefore, an effort should be made to coordinate your subrogation investigation with these public officials and to assist such officials in a determination of the cause and conditions surrounding one of these losses. There may be occasions, however, where your investigators are excluded from the loss scene and you have a concern regarding the destruction or non-preservation of critical evidence. In such circumstances, a number of remedies may be available to you. These include the right to seek public records and information pursuant to "Freedom of Information Acts" such as the California Public Records Act.[1] CPRA reflects a general policy of disclosure of public records and information subject to certain statutory exemptions. Section 6254 of the California Government Code, Subdivision (f) , generally exempts from public disclosure law enforcement investigatory records and files. However, this

[1] Cal Code Sec. 6520, et seq. See also, Soehnel, Annotation, Propriety of State Court's Grant or Denial of Application for PreAction Production or Inspection of Documents, Persons or Other

section also recruires disclosure to an insurance carrier against whom a claim has or "might" be made for property damages due to fire and other casualties the following information:

1. Names and addresses of persons involved in, or witnesses to the incident, except confidential informants.

2. The description of any property involved.

3. The date, time and location of the incident.

4. All diagrams and statements of the parties involved in the incident.

5. Statements of all witnesses, other than confidential informants.

This information must be supplied to an insurance carrier unless this disclosure "would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or related investigation". In addition, the disclosure requirement does not encompass investigative files which contain the analysis or conclusions of the investigating officer.[2]

CPRA has been interpreted to place the burden of proof as to the privileged nature of such investigative material on the public agency resisting the disclosure.[3] Except in unusual circumstances, an agency must respond to a request for information or documentation within ten days.[4] If the agency resists disclosure, it must demonstrate that the public interest served by non-disclosure outweighs the public interest served by disclosure, unless a specific exception to

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Evidence, 12 A.L.R. 5th 577 (1993) which collects statutes and cases in a number of other jurisdictions on the issue.

[2] Cal.Govt.Code Sec. 6254 (b).

[3] Cal.Govt.Code Sec. 6255; see also, Times Mirror Co. v. Superior Court, 283 Cal.3d 1325, 813 P.2d 240 (1991).

[4] Cal.Govt.Code Sec. 6256.

disclosure under CPRA is involved.[5] If you are unsatisfied with the agency's response, you may petition the Court for declaratory relief under CPRA to enforce your right of inspection.[6]

You may also seek to obtain and preserve evidence by way of pre-suit discovery proceedings.[7] If you expect to be a party in a civil action, you may obtain discovery of documents and other things within the scope of ordinarily permissible discovery under the civil procedure or discovery rules of your jurisdiction. The methods of discovery include oral and written depositions, inspection of documents and other things and places and physical and mental examination. These procedures may not be utilized, however, for the purpose of ascertaining the existence of a possible cause of action or in identifying those who might be parties to an action not yet filed. California Code of Civil Procedure, Section 2035 (a). If it is not being used for such purpose, pre-suit discovery may be obtained by way of filing a petition in Court setting forth the right and basis upon which evidence is sought to be preserved.

2. Use of the Spoliation of Evidence Rule.

If these formal methods of obtaining and preserving evidence are not available to you, you have the right to put the party holding such evidence on notice that you wish it preserved and the possibility of a spoliation of evidence claim in the event that it is not preserved.[8]

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[5] Cal. Govt. Code § 6255; See also, Williams v. Superior Court, (1993) 5 Cal. 4th 337, 19 Cal.Rptr. 882.

[6] Cal.Govt.Code Sec. 6259.

[7] See, Section 2035 of the California Code of Civil Procedure; Federal Rule of Civil Procedure 27; see also, 12 A.L.R. 5th 57 for procedures in other states.

[8] See, Hazen v. Anchorage, 718 P.2d 456 (Alaska, 1986) (tort of intentional spoliation recognized where police officers altered evidence that was favorable to defendant); See also, Miller v. Montgomery County, 164 Md.App.202, 494 A.2d 761 (Md.App., 1985); Petrik v. Monarch Printing Corp.- , 150 Ill.App.3d 248, 501 N.E. 2d 1312 (1986) ; Thomas Fischer, Annotation, Intentional Spoliation of Evidence, Interfering With Prospective Civil Action, As Actionable, 70 A.L.R. 4th 984 (1989).

The tort of spoliation of evidence has developed to define the circumstances under which an individual or agency in possession of evidence has a duty to preserve that evidence for the benefit of a third person if liability can be based on either negligent or intentional conduct.

Several courts have reviewed the circumstances under which an individual has been held liable for evidence that was destroyed or altered such as to interfere with person's prospective or actual civil action against either the individual destroying the evidence or a third person. The key issues in spoliation are determining (a) the circumstances under which an individual assumes a duty to preserve evidence, and (b) whether damages have been proximately caused by the alleged misconduct of the defendant.

In Smith v. Superior Court, 151 Cal.App.3d 491, .198 Cal.Rptr.829 (2d Dist.1984), the Court held that the plaintiff could maintain a cause of action for tortious interference with a prospective civil action for spoliation of evidence when an auto repair shop destroyed or lost evidence after agreeing to preserve it.[9] The Court noted that although the plaintiff was expected to prove the damages with a reasonable degree of accuracy, the protections of the law pertain to many interests which cannot be proved with certainty. In recognizing the tort of intentional spoliation for the first time, the Court concluded that a prospective civil action was a valuable "probable expectancy" which warranted protection.[10]

The tort of intentional spoliation has gained significant recognition such that courts may be willing to permit a person to maintain a cause of action against a public agency where it appears that the insurance carrier's rights have been compromised as the result of the denial of

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[9] See also, Reid v. State Farm Mutual Auto Ins. Co., 173 Cal.App.3d 557, 218 Cal.Rptr. 913 (1985) ; Barney v. Aetna Casualty & Surety Co., 185 Cal.App. 3d 966, 230 Cal. Rptr. 215 (1986)

[10] 151 Cal.App.3d at 502.

access by a public agency to a fire scene or the reports of an arson investigation. Therefore, if you find yourself in a situation where a public agency may destroy evidence which is critical to your potential subrogation claim, at a minimum, you should place the agency on notice in writing that the object is potential evidence in a civil action and that it will be held responsible for its destruction. While you may not get to see or examine the evidence immediately, by proceeding in this fashion you will ultimately have the opportunity to have such evidence examined and retained for use in your future case.

C. The Retention of Consultants: Cause and origin Investigators, Experts and Legal Counsel.

It is of critical importance to a proper subrogation investigation to assemble at the earliest stage possible a team of qualified experts and consultants. In a wildland fire such as those occurring recently in Southern California, this team would include a fire cause and origin expert and fire science experts experienced in analyzing the cause of the spread of such fires. Counsel should also be retained to protect the confidentiality of the work product of such experts which might otherwise be discoverable as constituting the "ordinary business" of the insurers in investigating potentially insurable losses.[11]

Hiring the right cause and origin expert is particularly important if you are to gain the cooperation of the public investigative entities. Usually, if this expert comes from the ranks of such agencies, the chances are greater for such cooperation. In some cases, it is possible to retain the former supervisor of the public investigators involved in the incident in question who will often seek the advice and assistance of your investigator.

The same comments apply with respect to technical experts. It is important to select an expert who has worked with state or local agencies in the past and in whom such agencies have confidence in terms of technical ability and ability to maintain confidential information. In many circumstances, the governmental agencies will be looking to the insurance carrier for technical resources that are beyond the financial capability of such agencies at this time. In selecting an expert, try to be cognizant of the recommendations of such public investigators and, conversely, try to avoid consultants who have a bad track record with the agency in question. This is another area where counsel and your cause and origin investigator familiar with such agencies can be of assistance.

D. Documenting the Loss Scene.

This seems fairly fundamental. You take photographs of the property involved in the loss. But, you do not stop at the insured property, but obtain panoramic photographs of the surrounding areas to show the manner in which the loss developed or how the fire or other calamity "spread" to the insured property in question. Retain experts who will also conduct surveys of critical elements of the loss scene. These will describe the nature and extent of damage and the likely cause of such damage. These photographs and surveys will later be used to establish what is referred to as "causation in fact". This is of critical importance in cases of this nature to establish that the damages or loss were not due solely to an Act of God such as a windstorm or flood but also the contribution of some human intervention. As long as such evidence establishes that the subrogable cause contributed in a substantial sense, you will be entitled to recover all resulting damages from the tortfeasor regardless of its percentage of

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[11] See, Wilson v. Superior Court, 226 Cal.2d 715, 38 Cal.Rptr. 255 (1964); Bank of the Orient v.

contributing fault in most comparative fault states. As tort responsibility for property damages in many states remains on a joint and several basis, the only limitations to your recovery will be the resources of the tortfeasor and the comparative fault of your insured.[12]

Besides photographs and a comprehensive damage survey, the evidence critical to establishing liability for a catastrophic loss largely depends upon the nature of such loss. In a hurricane loss where there is extensive damage to the roof of insured buildings unlike surrounding, similar properties, it is important to obtain and preserve representative samples of the elements of the roof believed to be defective in either design or construction. In a flood loss where diversion of natural water courses is suspected, an aerial photograph of the area depicting water flow or drainage patterns is important. Earlier aerial photographs can be obtained from survey companies in the area. In the case of a wildland fire, tapes of 911 and police and fire department communications should be obtained. The emergency or "white" frequency tapes should be requested. These should be obtained very quickly as they are routinely disposed of by these agencies. Your investigator should also interview the early responding fire companies to the event to see if a "company photographer" took any photographs or videotapes of the fire in its early or spreading stages. In many cases, videos are taken by fire companies for training purposes and these contain excellent early photographs of the fire. In addition to interviewing neighbors in terms of their observations, videotapes should also be sought from these neighbors given the prevalence of their use. Footage from local television stations should also be obtained, including not only the segments shown on the nightly news but the "outtakes. Once again, these

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Superior Court, 67 Cal-App-3d S88, 136 Cal.Rptr. 741 (1977).

tapes are maintained for only a limited time period and a request should be made early on in the investigation for a copy of the film. If the television station refuses to produce the film, as is often the case, a spoliation of evidence type letter should be sent to the television station so that the film is preserved. it is even possible nowadays to obtain NASA satellite photographs of an involved area for comparative purposes.

E. Obtaining Official Reports.

This is part of the routine investigation of any potentially insured loss. Insurance companies in California and other states are ordinarily entitled to such reports as long as their production does not jeopardize a criminal investigation. Besides obtaining police and fire reports, however, you should also be seeking, as soon as they are available, reports prepared by the National Fire Protection Association and federal agencies specializing in areas involved in a loss such as the National Transportation Safety Board and the Office of Pipeline Safety. These are available pursuant to the Federal Freedom of Information Act and similar statutes in most jurisdictions. In the case of a major fire such as the Oakland/Berkeley Hills blaze, copies of reports from an inter-agency study group such as the National Wildland/Urban Interface Fire Protection Initiative should be obtained. These contain both statistical and historical information as well summaries of the causative factors of the fire.[13]

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[12] e.g.,Cal.Civ.Code Secs. 1431, 1431.2 (Prop.51) ; Ill. Code of Civ. Pro. Sec. 2-1117; Tex. Civ. Practice and Remedies Sec. 33.013; Mich. Revised Judicature Act Sec. 600-2925 a, et seq.; N.Y. Civ. Pract. Law and Rules Sec. 1601.

[13] See, "The Oakland/Berkeley Hills Fire, National Wildlife/Urban Interface Fire Protection Initiative", October 20, 1991.

F. Retention of Evidence.

Spoliation of evidence continues to grow as a defense, particularly in the area of subrogation claims.[14] When you finally gain access to the necessary physical evidence, a decision must be made as to who is to maintain the evidence and the manner of its retention. The tendency at the time in most catastrophic losses will be to leave it with the public agency. While this may be temporarily satisfactory as long as a spoliation of evidence letter is provided to the agency, ultimately such agency will wish to dispose of such evidence and experience has shown that this will often be without regard to pending civil actions. Therefore, an agreement should be reached with the public agency and any potential defendants involved at the earliest stage for the preservation of all necessary evidence in one location. The evidence should be in a secure location with access through only one custodian. The custodian should be your expert or a joint custodian if defendants have already been identified and are involved in the investigation of the claim. An inventory of such evidence and photographs of the evidence in storage should be maintained. Access to the evidence should be controlled by the custodian so that a record is maintained reflecting each person examining the evidence, the date of such examination, and the condition of such evidence before and after the examination. An agreement should also be entered between all interested parties setting forth the protocol for any testing or destructive examination of the evidence pending or during the course of litigation.

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[14] See, Fire Ins. Exchange v. Zenith Radio, 103 Nev. 648, 747 P.2d 911 (Nev.1987); Unigard Security Ins. Co. v. Lakewood Engineering & Manufacturing Corp., 982 F.2d 363 (9th Cir. 1992).

III. IS THERE STILL AN "ACT OF GOD" DEFENSE?

The principal discouragement to subrogating in many catastrophe cases is that you cannot sue God. Lets face it. Nobody wants to slap a subpoena on God's desk. And then there's the question of jurisdiction. And enforcement of judgment . . .

Needless to say, where catastrophic losses occurred due to natural forces, a defense developed at common law shielding an otherwise potential defendant from liability. While most jurisdictions continue to recognize the Act of God doctrine as a viable defense, it is a narrow one in that it is restricted to those situations in which there is virtually no negligence found on the part of the defendant. An overview of the various jurisdictions which have considered the doctrine illustrates that, although varying in detail, practically all define an Act of God to require the entire exclusion of human agency from the cause of the loss or injury.

The majority of states appear to follow the law set out by the Supreme Court of South Carolina in Belue v. City of Greenville.[15] A five-inch rain fell within three hours. Due to the alleged improper installation of curbing and gutters, the plaintiff's property was flooded. The Court held that although the rainfall was extraordinary and unprecedented, it did not relieve the defendant of liability because it was not the sole cause of injury. The Court stated the test as follows:

> The principles embodied in all definitions is that the Act must be one occasioned exclusively by the violence of nature and all human agency must be excluded from creating or entering into the cause of mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and

[15] 226 S.C. 192, 84 S.E. 2d 631 (1954).

> removed from the operation of the rules applicable to the Acts of God.[16]

The neighboring state of North Carolina adopted the same analysis in Lea Co. v. North Carolina Board of Transportation.[17] The flooding on plaintiff's property came from an easement taken by the Board of Transportation. Although the flooding was statistically predicted to occur only once every 100 years, the Court found it was a reasonably foreseeable event. Citing Black's Law Dictionary, the Court defined an Act of God as:

> An Act occasioned exclusively by violence of nature without the interference of any human agency. It means a natural necessity proceeding from physical causes alone without the intervention of man. It is an act, event, happening or occurrence, due to natural causes an inevitable accident, or disaster; a natural and inevitable necessity which implies entire exclusion of all human agency which operates without interference or aid from man and which results from natural causes and is in no sense attributable to human agency.[18]

A similar analysis was applied by the Texas Supreme Court in Luther Transfer and Storage, Inc. v. Walton.[19] The Court acknowledged that while normally damages resulting from an Act of God are not ordinarily chargeable to anyone, an exception to this general rule exists when the negligence of another person has concurred with the Act of God.

The Pennsylvania Supreme Court was in accord, yet with a bit more style and flair.[20] Considering the liability of a telephone company when four poles snapped and fell on the roadway during a snowstorm injuring a motorist, the Court elegantly explained that:

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[16] Id. at 663, citing Mincey v. Dultmeier Manufacturing Co., 223 Iowa 252, 272 N.W. 430 (1937). See also, Atlantic Coast Line R. Co. v. HendrV, 112 Fla. 391, 150 So. 598 (Fla. 1933).
[17] 17 308 N.C. 603, 304 S.E.2d 164(1983).
[18] Id. at 172.
[19] 156 Tex. 492, 296 S.W. 2d 750 (1956).
[20] Bowman v. Columbia Telephone Co., 406 Pa. 455, 179 A-2d 197 (1962).

> Sometimes all the ingenuity and industry of man cannot avail against the turmoil and turbulence of the elements, but it is not enough to escape responsibility for the owner of the instrumentality which inflicts damage to assert that the instrumentality was propelled by the Supreme Being and that therefore he could shake the clinging snow of responsibility from off his hands.[21]

A little closer to home is the Arizona case of So. Pac. Co. v. Loden, which involved a late delivery of crops due to a heavy rain which washed away some of the railroad tracks.[22] The Bill of Lading excused the carrier for delay due to Acts of God. The Court found the defense inapplicable because it had been raining for approximately one week prior to the shipment and the 'carrier's employee had been out to inspect the tracks, and discovered the problem. Failing to take any precautions to avoid possible consequences of the rainfall, the Court found the defendant negligent and the defense inapplicable.[23]

California recently followed suit in Mancuso v. So. Ca. Edison Co.[24] The plaintiff brought an action against the electric company for destruction of his business by a fire caused by excessive current that was the result of a lightning strike on the company's facilities. After reciting the limitations on utilizing the defense, the Court acknowledged that if the lightning were "so unusual in its proportions that it could not be anticipated" by Edison, the defense would apply. However, if the lightning and the resulting damage could have been foreseen and steps taken to prevent it, Edison could be found liable.

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[21] Id. at 459.
[22] 19 Ariz. App. 460, 508 P.2d 347 (1973). 18
[23] See, also, Northwestern Mutual Insurance Co. v. Peterson, 280 Or. 773, 572 P.2d 1023 (1977) (explaining that even when the event meets the Act of God description, it still must be the sole, proximate cause of the injury).
[24] 232 Cal.App.3d 88, 283 Cal.Rptr. 300 (1991). 19

Were the Act of God a stronger defense, it would seriously impede subrogation claims following "natural" catastrophes. As demonstrated above, however, the courts have fashioned the doctrine so narrowly as to almost render it non-existent. The defendant must prove that the Act of God was so violent and unprecedented that no ordinary or reasonable amount of care would have prevented the damage. If negligence or other culpability is proved against a defendant, a contributing natural cause will not affect a recovery of those damages caused by the tortfeasor, and a subrogation claim based upon negligence, defective design or construction, or products liability may be effectively pursued.

IV. POTENTIAL RECOVERY THEORIES

Assuming that there is evidence that the damages for which payment is ultimately sought under your policy as part of a catastrophe is not due solely to "nature" or an Act of God, what theories of recovery are available to you? The main thing which must be done is to focus upon what caused or contributed to the damage. If some human or third-party intervention contributed in any substantial sense to such damages, you have a potentially viable subrogation action.

What are some of the innovative theories pursued in this context?

A. Suing the Arsonist

Many wildland fires are the result of arson. Remarkably, the individuals responsible for such fires are often identified and apprehended. These fires generally tend to be set by juveniles, individuals suffering some form of mental illness, or someone simply with a grudge. These individuals rarely have any assets worth pursuing. If they have insurance, the intentional nature of the act will usually preclude coverage. There are, however, limited circumstances under which coverage can be found. These involve juveniles living at home who are covered under their parents' homeowners', policy. In such circumstances, if it can be established that the juvenile did

not participate directly in the setting of the fire but, rather, was negligent in failing to prevent the fire from being set or reporting the fire at an earlier time, there could be coverage under the homeowners' policy for such negligence.[25] Additionally, if the insured - whether a juvenile or adult, was suffering at the time from a mental disease which prevented the formation of intent, there could be coverage.[26]

Even if the fire was intentionally set by someone without assets or insurance, this does not end the investigation one must look at what caused the damage being claimed by your insured or insureds in the particular case. This involves the "spread" case, and in the case of wildland fires, it usually involves failure to maintain weeds or other vegetation by surrounding property owners so that the loss was permitted to spread beyond the property where it began.[27] In these "vegetation" cases, research of local ordinances should be conducted to determine if they regulate the subject and, if so, whether any abatement proceedings had been commenced against the potential defendant.[28]

B. Downed Power Line Cases.

Aside from arson and lightning strikes, one of the leading causes of wildland fires is fallen utility lines. These usually go down during windstorms and one of the first things which

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[25] See, Annotation, Liability Insurance: Specific Exclusion of Liability for Injury Intentionally Caused by Insured, 2 A.L.R.3d 1238 (1965).
[26] See, Congregation of Rodef Shalom v. American Motorists Ins. Co., 91 Cal.App.3d 690, 154 Cal.Rptr. 348 (1979).
[27] See, Cal. Health &: Safety Code Sec. 13008.
[28] These were the essential facts of the Baldwin Hills fire in Los Angeles in the late 1980's. Suit was filed against Pepperdine University for failure to clear vacant land owned by the University below the Baldwin Hills development. Unknown arsonists threw one or more fire bombs onto this property and the fire was allegedly spread by the weeds and other vegetation growing on the hill leading up to the development. The case settled before trial for approximately twenty cents on the dollar.

must be determined is the local wind speeds and other meteorological conditions. Depending upon the altitude of the service area and other factors, utilities recognize different wind speeds that the lines are required to withstand. These generally range between 50 and 80 miles per hour. This is also the subject of utility regulations such as Public order 95 in California, from which the minimum standards for design and maintenance of utility structures can be obtained. Negligence must generally be established against the utility in cases of this nature, however, the doctrine of *res ipsa loquitor* has been applied to prove such negligence.[29]

C. Liability of Public Entities.

1. Negligent firefighting.

As of last report, ten lawsuits have been filed against the City of Oakland in connection with the Oakland Hills fire of 1991.[30] Most Of these suits and earlier claims against the City of Oakland were on the basis of both negligent firefighting and the maintenance of public property in a dangerous condition. A municipality such as the City of Oakland is immune from negligent firefighting or failure to maintain adequate firefighting facility claims pursuant to Section 850.4 of the California Government Code. See also, Heieck and Moran v. City of Modesto.[31] Colorado and other jurisdictions, however, permit such claims.[32] The notice of claim provisions of governmental tort legislation must, in any case, be satisfied if a claim is to be pursued against a governmental entity.[33]

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[29] See, GiorcTi v. Pacific Gas & Elec. Co.,. 266 Cal.App.2d 355 (1968).
[30] See, "The Oakland Hills Fire of 1991: The City Reacts to Disaster, California Real Property Journal, Spring 1993.
[31] (1966) 64 Cal.2d 229, 441 P.2d 105.
[32] See, Sierra v. City and Cty. of Denver, 730 P.2d 902 (1986) (If negFi-igent when acting in capacity of firefighter, cause of action lies against city.)
[33] See, California Government Code Section 810, et seq.;

2. Inverse condemnation claims against governmental entities - The flood damage case.

An exception to the general rule of governmental immunity in the absence of a statute creating governmental liability arises under the doctrine of inverse condemnation. In California, a governmental entity may be liable for damages resulting from the exercise of governmental power while seeking to promote the general interest in its relation to any legitimate object of government.[34] As applied to the catastrophic loss, this principle usually arises in the context of damages caused by a flood. In such circumstances, if it can be established that a governmental agency erected dams or levies which unreasonably failed to control the flow of water upon your insured's land and such flow caused the damages complained of, liability may rest with such governmental entity. The issue in such cases is whether or not the flooding was such to overcome the reasonable design of the flood controls or other artificial devices installed by the municipal agency or its contractors to control or alter flooding.[35]

D. Negligence of Adiacent Property Owners - The Spread Case.

These cases essentially deal with fires or other losses which spread from their point of origin to your insured's property as a result of some negligence by an adjacent or intervening property owner. Among the viable theories are the following:

1. Failure to clear brush and other vegetation.

2. Dangerous use of private property.

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[34] See, Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 867 (1985).
[35] Belair v. Riverside County Flood Control District, 47 Cal. 3d 550, 253 Cal.Rptr. 693 (1988).

3. Failure to maintain property in a safe condition.[36]

In each of these cases, proof of liability does not require proof of culpability in the start of the fire. Either liability arises from failure to prevent such fire from spreading to your insured's property or properties or from magnifying in a substantial sense such fire from artificial conditions existing on the defendant's property.[37] Expert examination of the property and fire spread mechanics are required to establish this type of a theory, and it is often overlooked in the catastrophic loss.

E. Lightning Strikes.

Lightning is not ordinarily the cause of a catastrophic loss. It can be the cause of a forest fire or wildlands fire and, absent spread type theories, it would normally be considered a true Act of God. If lightning strikes a structure, however, an analysis should be performed to determine whether or not the structure was properly protected against lightning strikes. The Lightning Protection Code sets forth requirements for protection of many commercial buildings, and in some cases municipalities have incorporated the NFPA code into its fire ordinances.[38] Therefore, if you can establish that lightning struck a building which was not protected per the code and that such fire spread to your insured's property, recovery may be permitted.

F. Construction and Product Defect.

The emphasis in these cases is again upon what caused the damage as opposed to the initiating event. Although a fire or hurricane may have caused some damage to the home

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[36] See, Berry, Fire Litigation Handbook, Secs. 2.4.2-2-4.3 National Fire Protection Association, 1984. See also, Section 364 of the Restatement of Torts (2d) ; Annotation, Liability of Property Owner for Damages from Spread of Accidental Fire Originating on Property, 17 A.L.R. 5th 547 (1994).

[37] See, Ford v. Jeffries, 379 A.2d 111 (Pa. 1977).

regardless of human fault or intervention, in many catastrophes the damages are substantially magnified by defects in the design or construction of the home.

In the Oakland Hills fire, the existence of cedar shake roofs and the effect of fire brands from these roofs igniting other properties is considered a substantial factor in the spread of the fire.[39] Some of the issues being considered in terms of pursuing subrogation in such case are whether cedar shakes constitute a defective "product" and whether the "market share" theory of liability may be advanced against the cedar shake roof industry or the marketers of such cedar shakes in the Oakland/Berkeley area. A direct action against the cedar shake industry has not been initiated to date, but may well come to fruition as the Oakland/Berkeley Hills fire litigation proceeds.

V. DO YOU REALLY WANT TO SUBROGATE THE CATASTROPHIC LOSS?

Although the "Act of God" defense no longer appears to be a formidable defense in the catastrophic loss context, there are a number of significant impediments to pursuing subrogation. The first involves a balancing of the negative publicity in subrogating, balanced against the cost of subrogating and the potential for recovery. In many instances, insurers have simply walked away from subrogation because the likelihood of recovery did not warrant the cost of investigating and prosecuting a subrogation action, particularly when one would reasonably assume that the identified tortfeasors would not have sufficient insurance coverage or assets. This is not, however, always the case. The explosion at the Pepcon plant in Henderson, Nevada, and the resulting litigation has shown that substantial recoveries may be made even though the

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(continued)

[38] NFPA 78.

[39] See, The Oakland/Berkeley Hills Fire, National Wildlands/Urban Interface Protection Initiative, supra.

initially identified tortfeasor has limited coverage. In that case, Pepcon had a policy limit of $1,000,000 and yet by the time the case was completed the subrogating insurers had recovered approximately 90% of paid losses of $90,000,000. Pepcon may not be a valid illustration of the point, however, as there was at least an identifiable tortfeasor and liability was relatively clear from the start. In the more frequently encountered "natutal" disaster, the feasibility of pursuing subrogation in terms of the resources of potential defendants is not as clear. Given the size of such losses, it is not unreasonable to expect recoveries, in the best case, of only pennies on the dollar.

To subrogate in these circumstances also raises difficult comparative fault questions. In the wildland fire case, does an insured who has chosen to live in a home with cedar shake shingles on a hillside with Eucalyptus trees and other flammable vegetation .overhanging the house assume the risk of fire damage? Does such assumption of risk also apply independently to the insurer, beyond the fact that it "stands in the shoes of its insured"? We have been confronted in cases of this nature with arguments by defendants that an insurer has assumed the risk of such losses by accepting premiums knowing the exact dangers involved. Although there are no decisions which recognize such defenses in the context of an insurer's knowledge and assumption of the risk, defendants in catastrophic loss litigation have joined other homeowners in the area as co-defendants or cross-defendants on the theory that their lack of maintenance of the property contributed to the fire spread or other damage. The purpose of such joinders is often to discourage insurers from pursuing such subrogation actions as it requires them to defend their insured's on such cross-complaints and thereby diminish the ultimate subrogation return to the company.

There is also the problem in cases of this nature of priority of recovery between the insured and insurance company. The majority rule throughout the country is that the insured recovers first in the event of limited funds until it is made whole.[40] California, somewhat surprisingly, has adopted the minority view.[41] It is questionable whether, even in states following the minority view, such result would be obtained with death claims and substantial uninsured claims arising out of the same catastrophe. It is probably for this reason that subrogation is not often pursued in catastrophic losses unless the potential defendant has essentially unlimited assets.

VI. CONCLUSION

In summary, the successful pursuit of subrogation in a catastrophic loss is relatively rare. Subrogation should not be ignored, however, as in the appropriate case it has and in the future will be a significant source of recovery for insurers. The focus in the early investigation of these cases should not be upon what caused the initial event, i.e. fire, flood or pestilence. Rather, the focus should be upon what caused the damage sustained by your insureds, particular property. If human intervention contributed in any substantial manner to the damages, the fact that the event is commonly thought of as an Act of God should not discourage further analysis of subrogation potential.

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[40] 16 Couch on Insurance 2d (Rev.ed.) Sec. 61:64.
[41] See, Travelers Indemnity Co. v. Ingebretsen, 38 Cal.App.3d 858, 11~C l.Rptr. 675 (1974).

EXHIBIT "A"

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