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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **JULY 2009**

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on or removed from our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

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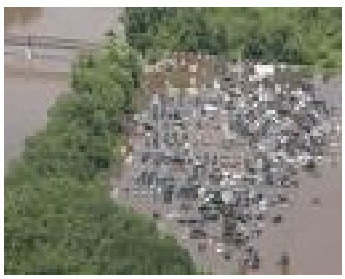
SPECIAL EDITION: SUBROGATING FLOODS AND NATURAL DISASTERS

FLOODING IN IONIA, MICHIGAN PRESENTS SUBROGATION POTENTIAL

1,384 Flooded Vehicles

Subrogating flood losses continues to be a vastly overlooked area of third-party liability and subrogation. The reason is obvious - it is easy to defend subrogation claims involving flooding and heavy rainfall as an "Act of God." However, with today's technology, Doppler radar, advanced meteorological techniques and weather predicting abilities, blaming God is becoming less of an excuse than it was a generation ago.



Ionia, Michigan

Take for example the B-93.7 FM Birthday Bash at the Ionia County Fairgrounds in Ionia, Michigan by Clear Channel Communications, the parent company of WBCT (93.7 FM) on June 20, 2009. B-93 knew the vehicles were being parked in a known flood plain and were warned not to allow anyone to park in the south lot, but B-93 continued to park vehicles in that lot even as they had gravel trucks coming in to dump gravel in an effort to hold back the water. When rising waters from the Grand River made exits impassable, 1,384 cars became trapped and eventually were swallowed up by the raging waters as they sat in the parking lot where their owners had been directed to park them by B-93 and Clear Channel.

In many cases, the water was up to the cars' headlights. Individual car owners who didn't have insurance have also made plans to hire attorneys and pursue Clear Channel in Ionia County Circuit Court. Apparently, B-93's offer to refund the $15 parking fee wasn't enough.

Flooded Parking Lot Ionia County Fairgrounds

According to the Associated Press, vehicle owners say B-93's insurance company is refusing to pay claims because they say the radio station didn't cause the damage; it was an Act of God. Preliminary investigation indicates that B-93 should have known the water was coming and should have acted faster to get people out of the flood zone. As was the same situation in the Subaru case Matthiesen, Wickert & Lehrer, S.C. ("MWL") handled (see articles below regarding Subaru case), Clear Channel and B-93 instructed people to park in the south lot at the concert, which they knew or should have known was a floodplain - not a good idea. Clear Channel officials admitted they received a forecast of flooding shortly after the gates opened on Saturday, but they didn't believe the grounds were in imminent danger.

Subrogation always looks better when there are others pursuing the same parties for the same cause of action. In this case, the City of Ionia is going to pursue $40,703 from Clear Channel Communications as reimbursement for public service bills incurred beyond the normal police services and other costs of the regular two-day event. City and county officers provided around-the-clock protection of the area containing the flooded cars to prevent vandalism, looting and unauthorized access to the vehicles and other city workers prepared the area for car recovery and coordinated the process to get people to their vehicles.

In this case, as in every case, whether or not subrogation exists for insurers who have to pay property damage for the thousands of vehicles depends on two factors - early investigation and coordination. In situations like this where not all of the vehicles were owned or insured by one entity, coordination of subrogation investigation and litigation is paramount to handling these matters cost effectively. No carrier can subrogate under these facts for a dozen vehicles, due to the cost of potential investigation and litigation. However, MWL routinely pools the insurers involved in shared catastrophic losses such as this one, in order to take advantage of what we call the "mutual fund method of subrogation." There is strength in numbers and spreading cost across dozens of insurers means a cost-effective result for everyone.

If you have a subrogation concern arising out of the B-93 flooding incident, read the articles below on mass automobile flooding subrogation cases handled by MWL, and contact us if we can assist you in subrogating your property claim dollars. Investigation is ongoing and it is anybody's guess as to how strong a case exists against Clear Channel. But one thing is clear, if a company knows it's going to flood and instructs nearly 1,400 people to park their vehicles in a known flood plain, there's gonna be some 'splainin to do.

SUBROGATING AGAINST GOD:
Natural Disasters and the Recovery Opportunities They Present

A big nemesis of most insurance carriers - second perhaps only to trial lawyers - is the natural disaster. When God sends a hurricane, tornado, flood or a naturally occurring fire, the resulting claims can be enough to put many carriers out of business. With no clear third parties or subrogation potential, and the Almighty being beyond the reach of subpoenas or service, these claim payments often seem like money down the proverbial drain - no pun intended. Floods, hurricanes, tornados, wind storms, hail, and other natural disasters are admittedly difficult to subrogate, because they epitomize the classic "Act of God" defense. But never say never. Quite

frequently, such natural disasters combined with man-made causes, conditions, and negligence do result in the damage for which you have paid a claim. Such subrogation potential is often quite difficult to detect without both investigation and a willingness to invest time and money in the possibility of making a big recovery on the back end.

1993 Mid-West Flood, Illinois

When faced with natural disaster claims, immediate efforts must be taken to recognize and take action on third-party liability. Documenting water levels, photographs of flood conditions, anecdotal witness testimony, and conditions at the time of the flooding are important components of recognizing and later proving third-party liability, so taking investigatory action as soon as is possible after such a loss is critical if subrogation is to be pursued successfully. The reason for this is that natural forces, such as flooding, can destroy tell-tale evidence and alter pre-existing conditions which might otherwise point to third parties responsible for exacerbating a perfectly natural disaster into damages which would not have occurred but for the negligence of somebody.

Such was the case with the Great Flood of 1993 in the Midwest and along the Mississippi River. This naturally occurring flood cost an estimated $21 billion, covered parts of nine states and lasted three months. As the flood waters rose, 1,369 brand-new Subaru automobiles, ready for distribution and valued at more than $17 million, were being stored by the Chicago & Northwestern Railroad (now Union Pacific) for Subaru of American, Inc. at an old American Motors outdoor storage facility in Kenosha, Wisconsin, which the railroad had leased for this purpose. Lloyds of London and its lead underwriter, Commercial Union Insurance Company, ultimately paid more than $11 million on this claim. The claim also resulted in Lloyds canceling Subaru's policy. Subrogation was looked into by the Lloyds Claims Office and quickly dismissed. It was, after all, the storm of the century. Who could one possibly blame for that?

As subrogation counsel for the Lloyds Claims Office, Gary Wickert had routinely performed quarterly subrogation reviews at the Lloyds office on Lime Street. During a routine file review, Gary came across the Subaru claim file in the closed file area. The words "No Subrogation" were stamped across the top of the file. Noticing that there had been a similar flood in this area earlier, Wickert convinced the lead underwriter to invest $50,000 to do a hydrological study and produce a HEC-2 computer simulation of the flood, which, together with a historical survey of the area, revealed that many of the vehicles might have been stored on a 100-year flood plain. That was enough to file suit on. Subaru and Lloyds sued Chicago Northwestern, Wackenhut Security and several other purported owners of the property.

Discovery was excruciating with some of the depositions taking more than three days. Ultimately, an old lease agreement between Chicago & Northwestern and Subaru was produced, which required CNW to maintain certain minimum standards, including drainage that would prevent more than two inches of water to accumulate. Wickert put an ad in a local paper seeking anecdotal stories about previous floods in the area and received favorable responses. Still, the defendants strenuously claimed the flood was an Act of God.

Faced with the hydrological evidence and the existence of a flood plain, however, they ultimately had to admit that parking $17 million worth of automobiles on a flood plain was not prudent. After several Motions for Summary Judgment, two trial settings and a three-day mediation, the defendants ultimately paid more than $7 million. It was $7 million Lloyds never thought they would see. After the recovery, Wickert set a meeting between Subaru and Lloyds, which resulted in Lloyds reissuing coverage to Subaru. A happy ending that proves the adage that when you have catastrophic losses - you have subrogation potential.

SUBROGATING GOVERNMENTAL ENTITIES FOR NATURAL DISASTER LOSSES

In the early morning hours of February 3, 1998, much of the San Francisco Bay area and Alameda County were struck by a strong storm system which had moved on shore the preceding afternoon. The storm had been preceded by several days of rain which resulted in wetter than usual ground conditions in most areas of the state. Nearly four inches of rain fell in a 24-hour period. It was argued that this was the equivalent of a 100-year flood in this area, although we later argued that it was only a 10-year storm. Needless to say, there was significant damage throughout the area, including flood waters which backed up through drains located on different portions of the 52-acre lot owned by Bay Cities Auto Auction, a Cox Enterprise entity. Thousands of cars were stored on the property, and more than 2,210 vehicles suffered severe water damage, resulting in more than $4 million being paid by Transportation Insurance Company and its excess carrier.

A claims supervisor for Transportation Insurance Company had attended a recent flood loss seminar we had given, during which I recounted a very similar flood loss involving thousands of new Subarus which had been damaged in Kenosha, Wisconsin during heavy flooding in 1993 in Wisconsin and throughout the Midwest. Because he recalled that our subrogation efforts had netted $7,275,000 in that case, he asked whether there was any use in trying to subrogate this natural disaster. As we consistently tell our clients, where there are large catastrophic losses, there is almost always subrogation potential. He referred us the file to conduct some initial investigation.

We immediately hired the nationally renowned hydrology and hydraulics experts, Daryl Simons and Charlie Baggs, out of Fort Collins, Colorado. They quickly went to the site of the loss and began taking site elevations in preparation for a HEC-II and HEC-LAS analysis of the flood. Bay Cities Auto Auctions is surrounded by the County's storm water drainage systems which are comprised of three lines - Line A, Line B, and Line D. These Lines drained in an area of approximately 15 square miles, culminating in a sharp right-hand turn into Line A, which runs along the Nimitz Freeway all the way to the Tidegate and San Francisco Bay. We obtained FEMA studies of the area, including a FEMA study which was in the process of being completed at the time of the flood, together with the Alameda County Flood Control District's Hydrology and Hydraulics Criteria Summary, dated August 1989, which dealt with design capacity of various categories of ditches and other channels in the system in order to accomplish their flood control objectives. The District's own criteria required facilities to be designed to carry the 100-year flood. It appeared that the District had never upgraded to the 100-year criteria, nor had they maintained the original system to handle its original capacity - the 15-year storm. Premised on this preliminary work, suit was filed against the Alameda County Flood Control and Water Conservation District, the State of California, and the City of Hayward, alleging causes of action in inverse condemnation, negligence, nuisance, waste, trespass, dangerous condition of public property, comparative equitable indemnity, comparative equitable contribution, and failure to warn. The litigation lasted nearly four years.

Much of the ongoing litigation centered around whether the subject flood was a 10-year storm, as we maintained, or a 100-year storm, as the defendant's maintained. The defendants noted that some rain gauges outside of the sub-basin measured a 100-200 year storm, while our use of the NOAA (National Oceanic and Atmospheric Administration) Atlases where their 24-hour system showed that this was less than a 10-year storm. The defendants claimed that Bay Cities Auto Auction was not historically subject to flooding, but that the defendants had unnecessarily concentrated extra water into Lines B and D around our insured's property over the years, and the State had erected a freeway which acted as a dam, except for a small aperture through which the waters of Lines B and D were to pass into what became Line A. We surveyed surrounding properties and businesses, noting flood marks on the sides of buildings in order to "nail down" with some accuracy the high flood levels during the storm. As plaintiffs, we also demonstrated and documented the urbanization which had increased

the black top and concrete surface area, which produced significantly more run off than in 1960, when the system was designed. Ultimately, we were able to show that the flood drain system which could handle a 15-year flood in 1960, was not able to do so in 1998. Urbanization had reduced the systems capacity from the 15-year flood to less than that of a 10-year flood. Desilting was shown to be necessary also because the channels had accumulated vegetation and silt which reduced the flow by approximately 50 percent.

While this case became hyper-technical in nature, and required expensive use of experts, whose fees exceeded $150,000, the issues were ultimately boiled down to the size of the storm and capacity of the channels. The experts in this case disagreed about almost everything, including the actual formula to be used to determine hydraulic resistance coefficients or "n values". Because we had hired the foremost experts in the industry early in the case, their strength carried the day. This is true even though months before trial, Charlie Baggs tragically died of a sudden illness, leaving us with a large "hole" in our expert arsenal.

Thanks to the creativity and vision of a claim supervisor at Transportation Insurance Company, the hard work of subrogation counsel, and the tenaciousness and reputation of our experts, we were able to turn a natural occurring flood into a recovery of more than $2.5 million - recovered from three government entities (State of California, County of Alameda, and City of Hayward). Both this case and its predecessor in Wisconsin are testaments to the fact that third-party liability doesn't always jump out at you in the initial investigation of a catastrophic claim. Sometimes, it takes vision and hard work - which may ultimately pay dividends.

PERFECT STORM:
The Science Behind Subrogating Catastrophic Flood Losses

By Gary L. Wickert and Richard Van Bruggen, P.E., D.WRE,
Water Resources Consulting Services

Natural disasters, especially major flood losses, remain the nemesis of most insurance carriers. The damages can be astronomical and the chances of subrogation appear slim when everyone has suffered similar damage. However, when it seems that only God is responsible for sending devastation of such magnitude, it's time for subrogation professionals to roll up their sleeves and get to work. It's also time to hire an expert in hydrology or hydraulics. With the help of a hydrology expert, Matthiesen, Wickert & Lehrer, S.C. ("MWL") recovered over $7 million for Lloyds of London in the Great U.S.A. Flood of 1993. Five years later, with the help of expert, Rick Van Bruggen, MWL recovered over $2.5 million for Transportation Insurance Company after the Great California Flood. With perfect storms such as these, subrogation recovery almost always seems impossible. In reality, however, quite the contrary is true. Flood waters, just like pieces on a chess board, never lie. The subrogation professional's distinct advantage is that while God may send the rain, what happens to the flood waters once they reach Earth is almost always affected by man.

The behavior of water is predictable. It's affected by gravity, seeks its own level, and follows the contour of the Earth's surface – whether natural or man-made. As a result, with the use of a qualified hydrologist, subrogation counsel can accurately map, mimic, and image the exact behavior of the flood waters, before, during and after the flood event. This ability to prove what happened to the water means that we can accurately point to the effect that man-made objects, construction projects, barriers, and other obstacles had on the water, and show precisely how the specific flood damage being subrogated was affected or caused by these man-made conditions. It is, therefore, critical that the subrogation professional has a working knowledge of and understands the behavior of water and the science behind hydrology.

THE 100-YEAR FLOOD

1993 Mid-West Flood

The term “100-year flood” still seems to cause confusion among public lenders, professionals, and insurance companies. Many continue to believe it is a description of a flood that occurs only once every 100 years. In truth, the term “100-year flood” is an abbreviated way of describing the magnitude of a rainfall and subsequent flood event that has a 1% chance of occurring. It’s important to note that the same statistical chances apply for any storm at any time in any given year. The “return period” (or recurrence interval) of an annual maximum flood event has a return period of X years if its magnitude is equaled or exceeded once, on the average, every X years. A reciprocal of X (1/X) is the exceedance probability of the event, meaning the probability that the event is equaled or exceeded in any one year. For example, a 100-year return period (1/100) means there is a 1% probability of an occurrence in any year. A 10-year return period (1/10) means there is a 10% probability of an occurrence in any year. A 500-year return period (1/500) means there is a 0.2% probability of such an occurrence in any year. This is why many hydrologists have tried to change the terminology from “100-year flood” to a “1% flood”.

RAINFALL INTENSITY – DURATION - FREQUENCY CURVES

Rainfall data is still obtained from rain gage records, just like it was 100-years ago. (Gage can be spelled either gage or gauge. It seems, however, that modern hydrologists prefer the shorter of the two spellings). Any storm can have different plotted frequencies for different durations. A plot of rainfall intensities (in inches/hours) can occur over various periods of time (from minutes to days) and have correspondingly different return frequencies. For example, on January 9-10, 1995, a severe storm in Northern California produced the following results:

- 100-year, 1-hour rainfall depths recorded in Placer County;
- 200- to 500-year, 4- to 6-hour depths recorded in the Dry Creek watershed;
- 500- to 1,000-year, 24-hour rainfall depths occurred in Sacramento County; and
- 10,000-year rainfall plotted at Granite Bay (2-3 hour duration).

Amazingly enough, all of the above statistics came from the same storm event. As a result, simple rainfall and weather records are not, by themselves, accurate depictions of the event for which you are subrogating. Micro-bursts can cause downpours ten times the magnitude of the rainfall being experienced just a few hundred yards away.

100-YEAR STORM VERSUS 100-YEAR FLOOD

Great Flood of 1993
St. Louis, Missouri

Two sets of terminologies which are confused more than any other involve the 100-year storm with the 100-year flood. These are two distinct and different events. Floods are classified according to their frequency and depth. For example, there are 10-year, 25-year, 50-year, 100-year, and 500-year floods. A 100-year flood occurs less frequently than a 10-year flood, but because it has a larger volume and greater depth of water, it has far more destructive power, causes more damage, and is a more serious threat to human safety. We do not necessarily get a 100-year flood from a 100-year rainfall. This is where man comes into play. God may send a 10-year rainfall, but it is man that transforms it into the 100-year flood. Whether or not a 100-year rainfall causes a 100-year flood depends on the “time of concentration”, of the watershed, which, itself, depends on watershed size, runoff characteristics, and other geological conditions. The time of concentration is the time it takes for outflow from a certain watershed area to equal net inflow. For a constant rainfall rate, it is the time from the beginning of rainfall to the peak outflow from the watershed. For example, if a watershed contains primarily steep slopes, the time of concentration will be less. Steep slopes tend to result in shorter response time and

increased discharge while flat slopes tend to result in a longer response time and reduced discharge. Runoff characteristics include soil type, urbanization, channel slope, impervious cover, land use, etc.

THE SCIENCE OF HYDROLOGY

Hydrology is defined as “a science dealing with the properties, distribution and circulation of water on the surface of the land, in the soil, in underlying rocks, and in the atmosphere.” This is, in fact, a very broad definition encompassing many disciplines relating to water. When encountering a flood loss, it is critical to engage subrogation counsel and an expert hydrologist immediately. Piecing together the pieces of an unseen puzzle is quite complicated. It becomes somewhat simpler if you can combine the technical advances of hydrology and hydrologic computer models with anecdotal testimony of witnesses and physical evidence such as high water marks on buildings, automobiles, or other landmarks present at the time of the flood. Such “hard” evidence not only makes hydrologic models and simulations more reliable and accurate, but they also make them more believable.

HYDROLOGIC SIMULATIONS AND MODELING

Frequently, even a storm event of historic proportions might not have caused damage to your insured’s property had it not been for a specific existing condition, such as a levy in disrepair, clogged sewer drains, culverts in need of maintenance, malfunctioning flap valves, etc. While it is easy to show that a drain was not kept clean or that a culvert was left in a clogged condition, it is another thing entirely to prove to a jury that the condition actually caused the flood damage for which the insurance company has paid and you are now subrogating. A flood level of two feet may only require some cosmetic cleanup and minor repairs to a fleet of stored vehicles but with flood levels six inches higher, you could be looking at crushing all of the cars. This is where modeling becomes indispensable.

There are computer models that use rainfall depth-duration-frequency data and watershed characteristics, such as the Time of Concentration, to develop peak flows (Qs). It is usually the case that stream flow gage data is either of a short time record or unavailable, whereas rain gages are more plentiful and typically have longer periods of record. It is by way of a Hydrologic Analysis that we determine what the design flows are for storm drain systems, bridges and culverts. Examples of Hydrologic Simulation Models are:

- HEC-1 (Corps of Engineers – **H**ydrologic **E**ngineering **C**enter);
- HEC-HMS (Corps of Engineers – **H**ydrologic **M**odeling **S**ystem); and
- TR-55 (Soil Conservation Service - **T**echnical **R**elease No. 55).

These models can be plugged into a computer which can literally recreate with great precision the behavior of the water at various times during the storm event. This is critical in not only showing what caused the flood damage, but also to show that it could have been prevented and/or should have been noticed by a specific defendant, security guards, etc.

HYDROLOGY VERSUS HYDRAULICS

While *hydrology* is the study of the rainfall-runoff process, including the determination of design frequency storms and floods, *hydraulics* is the study of how the water flows. In the case of flood flows, it could be the analysis of pipe and channel systems, culvert and bridge design, and the determination of river floodways and floodplains. The hydraulics part is essential to determine how much water fits in the pipe or channel or how far it spreads out on the floodplain. As with hydrologic simulations, hydraulic simulations can also be conducted. Frequently, hydrology and hydraulics are combined in order to connect with a coherent theory as to why a specific tortfeasor caused the flood damage, even though the rainfall

1995 Flood
Roseville, California

is considered to be an act of God. Sometimes a tortfeasor can be blamed for the flood damage simply because a channel or culvert system, while adequate to handle the storm, became inadequate over time because of sedimentation, overgrowth, or lack of maintenance of the system. Hydraulic simulations will explain whether or not that lack of maintenance actually caused the water to overflow the banks of the culvert or channel, or whether it would have overflown anyway. Examples of Hydraulic Simulation Models are:

- HEC-2 (Corps of Engineers – **H**ydrologic **E**ngineering **C**enter);
- HEC-RAS (Corps of Engineers – **R**iver **A**nalysis **S**ystem); and
- WSPRO (USGS/FHWA, **W**ater **S**urface **Pro**).

While hydrology and hydraulics are complex areas of science, the resulting models and computer graphics can explain to a jury in a simple manner exactly how and why the flood damage was caused. Subrogation professionals' time is no better spent when investigating flood losses than taking the time to interview a multitude of neighbors and eyewitnesses, to include anecdotal observations of water levels and water flow. Photographs of debris marks and high water level marks on buildings, pillars, street signs, etc., are indispensable in making the flood expert's finished product both more accurate and believable. The number of photographs taken should be proportional to the reserve amount or the estimated size of the claim.

FLOODPLAINS AND FLOODWAYS

2006 Flood Damage
Delaware County, NY

Federal flood insurance was first made available in 1968 through the enactment of the National Flood Insurance Act. 42 U.S.C. §§ 4001, *et seq*. Prior to this program, affordable private flood insurance was generally not available. Under the National Flood Insurance Program (NFIP), federally subsidized flood insurance is made available to owners of flood-prone property in participating communities. These participating communities are required to adopt certain minimum floodplain management standards and programs, including restrictions on new developments and designated floodways, a requirement that new structures in the 100-year flood zone be elevated to or above the 100-year flood level (known as the Base Flood Elevation or BFE), and that subdivisions are designed to minimize exposure to flood hazards. For high-hazard coastal zones, additional standards are imposed, sometimes including the requirement that buildings be elevated on pilings and that the Base Flood Elevation (BFE) include potential wave heights. The National Flood Insurance Act also required the identification of all floodplain areas and established flood risk zones. This is good news for subrogation professionals because it provides a warning to landowners and potential tortfeasors that flooding may occur and additional safeguards should be taken. Sometimes, constructive notice to a potential tortfeasor of the dangerous propensity of flooding in an area is as easy as indicating it in the property deed, legal description, or other documents relating to the property. In the earlier example involving the Subaru vehicles being flooded in Kenosha, Wisconsin, there was a great deal of disagreement as to whether or not the vehicles were actually parked on a "100-year floodplain". There was even disagreement as to exactly what that meant. City and state records were sketchy, and the entire area had been covered in crushed gravel, further complicating the question as to whether or not a floodplain had existed. Early land deeds were pulled and anecdotal testimony from farmers in the area was successfully solicited in order to show a pattern of flooding in the area where the vehicles were stored. One farmer had kept meticulous rainfall and flood records in an old notebook going back fifty years.

The National Flood Insurance Program (NFIP) adopted as a national standard a "100-year floodplain" to describe Special Flood Hazard Areas (SFHAs) that are depicted on the Flood Insurance Rate Maps (FIRMs) as "Zone A". Due to the confusion the term created, use of the term "100-year floodplain" has been replaced with a new designation of "base flood". Buildings located in a 100-year flood area (Zone A) are required to

have flood insurance to receive a federally backed mortgage loan or a home equity loan. In the 500-year flood area (Zone B) you *may* purchase flood insurance, but it is not required.

In contrast to a "floodplain", "floodways" are determined within the floodplain. A floodway is defined as the channel plus any floodplain area that must be kept free of encroachment in order that the 100-year base flood is carried without increasing flood heights anywhere in the floodplain by more than one foot. Any encroachment or development on floodplains reduces the flood carrying capacity of a river, increasing flood heights in adjacent areas. In order to limit floodplain development within a central channel area of a river where most of the flood water conveyance occurs, floodways are established. Usually, there is no development allowed in the floodway. Flood damage which occurs in a floodway presents opportunities for subrogation. However, one example to the contrary is in Sonoma County, California, where development in the floodway can exist but must not have any net hydraulic effect on the conveyance of the river and homes must be on piers at a minimum level.

Cedar Rapids 2008 Great Iowa Flood

Most standard property policies and flood policies contain subrogation clauses which prohibit the insureds from giving up any rights to recover from any entities that may be responsible for a flood loss. Impairment of an insurer's subrogation rights, which should be looked for in contracts, leases, or other agreements which the insured entered into, discharge the insurer from any obligation to make a payment under the policy. This became a big issue with Hurricane Katrina. Owners and mortgagees should be careful not to sign releases that might impair the subrogation rights of their insurers.

SUBROGATION OF FLOOD LOSSES

It should be remembered that tortfeasors includes not only private individuals and companies, but also government entities. In the California flood loss (Bay Cities Auto Auction) described earlier in this article, MWL recovered more than $2.5 million from the State of California, the County of Alameda, and the City of Hayward. This was no small feat considering the dire economic situation the State of California and many of its political subdivisions were under at that time. Inverse condemnation is a legal remedy for a private landowner (or its subrogated carrier) whose interests or ownership in land has been interfered with, damaged, or outright taken away by a governmental action, such as routing drainage water for an entire watershed into a confluence area which results in the increased likelihood of flooding for one particular resident as opposed to the others. The fact that this one resident has an increased risk of damage to his property in order that all the residents in the watershed area can be somewhat free from flood loss, means that the government has taken away a property right of that single resident and damages may be recovered. While inverse condemnation is much more complex than this, the subrogation professional should simply be on the lookout for potential recovery from governmental entities as well as private concerns.

Subrogation with regard to Hurricane Katrina damage, while perhaps politically incorrect, may still be viable. There are numerous examples of decision making in the New Orleans area which illustrate a lack of local government concern about specific hazards to private residents. Local officials often resisted proposals to protect their communities from storms because they did not want to pay their share of federal projects. Levy districts opposed hurricane protection floodgates at the mouths of the city's drainage canals, leading to the construction of walls along the canals which failed in Hurricane Katrina. In the 1980s, the Federal Insurance Administration (FIA) launched a subrogation suit for more than $100 million against Jefferson, Orleans and St. Bernard Parishes, contending that these parishes caused the FIA to pay excessive flood insurance claims by failing to maintain levies and failing to enforce elevation requirements for new


New Orleans, Louisiana Hurricane Katrina Flooding September 2005

construction. This inaction on the part of the parishes led to buildings being flooded and their owners seeking compensation from the National Flood Insurance Program (NFIP). The courts ruled in the FIA's favor and ordered the parishes to improve their levy maintenance and enforcement practices. The City of New Orleans also did not update its 1970 comprehensive plan for almost 30 years. When it got around to this in 1999, its *New Century New Orleans Land Use Plan* made absolutely no mention of the extreme flood hazard facing the city, ways of mitigating the hazard through land use and building regulations or how the city might recover from an event such as Hurricane Katrina. Still local governments are willing to reduce natural hazards by managing development. It is not that they are opposed to land use measures, but, like individuals, they tend to prioritize things and view natural hazards as a minor problem that takes a back seat to more pressing issues such as unemployment, crime, housing, transportation and education.

SUMMARY

Subrogating flood losses remains a complicated issue which requires the diligence of subrogation professionals and their interaction with subrogation counsel and hydrology experts. The five largest flood losses ever subrogated at MWL have all been closed files marked "no subrogation". This is quite telling. Recognition of subrogation potential remains the biggest obstacle in successful subrogation of flood losses. Potential subrogation usually cannot be recognized unless you understand and speak the language of hydrology, and are willing to invest the time and resources necessary to flush out third party liability. When in doubt, consult with an expert and subrogation counsel. God sends the rain, and the last time we checked he had absolute immunity. Therefore, subrogation professionals should focus on the actions of man which contribute to turning the naturally occurring perfect storm into the perfect disaster.

Co-author, Richard Van Bruggen is a professional engineer and hydrologist with Water Resources Consulting Services, Windsor, California, www.hydrologyexpert.com.

NATURAL DISASTERS REPRESENT SUBROGATION OPPORTUNITIES

Findlay, Ohio Flood
August 2007

Recently, *USA Today* reported on heavy rain causing flooding in parts of northwest Ohio, where rivers in some areas surged to more than eight feet above flood levels. Communities in Illinois, Indiana and Missouri also have experienced recent flooding. To make matters worse, communities in New York and Vermont are bracing for flood watches. Our industry knows that such news always translate into significant insurance claims. What we don't always realize, however, is that natural disaster claims can possess significant subrogation potential.

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It may not seem natural to begin heavy subrogation investigation after a natural disaster destroys property or causes a loss of life. The true cause of the loss seems obvious, but it is the less than obvious that must be uncovered in such situations. Rising water in hurricane and 100-year flood situations appear to devastate everybody in the affected area equally - buildings are destroyed, cars are flooded, and houses are washed away. Attempting to subrogate for property loss when thousands of others are affected similarly might raise some eyebrows initially. But the key is knowing that not all victims of flooding are affected equally. Man-made structures, ongoing construction, poorly-designed drainage, poor maintenance of storm water drains and culverts, and even failed pumps and storm water detention ponds can drastically affect some victims of flooding more than others. Flood waters which might have been six inches or less could cover entire inventories of automobiles because of human factors such as these.

Witnesses, neighbors, and property owners must immediately be contacted not only to determine the existence of abnormal or unusual contributing factors, but recording water lines on nearby buildings the day after a flood recedes can provide some of the most critical proof of the progression of the flood, allowing experts to build computer models recreating both the dynamics of the flood, but also illustrating how much worse the flood was because of the contributing human factors and negligence. Government entities are frequently involved and governmental notice must be given immediately to avoid the lapsing of notice requirements which can be as short as 30 days.

Experts must be retained immediately. Not just any expert, but an expert in hydrology or hydraulics, as the facts require. This area of expertise is highly specialized and there are a limited number of experts who are highly respected and recognized in the area. Finding them and getting them on the scene quickly is often critical to successful subrogation. Matthiesen, Wickert & Lehrer, S.C. can help you put the investigative and evidence preservation wheels in motion. If you are hit with a significant natural disaster claim, consider engaging Matthiesen, Wickert & Lehrer, S.C. to conduct subrogation investigation and evaluation on the loss. The smallest of investments could mean complete erasure of a significant loss for your insured, and a good year for your subrogation department.

UPCOMING EVENTS.....

August 11-12, 2009 - Chris Miller will be at the 5th Annual National Workers' Compensation Subrogation Strategies Insurance ExecuSummit, being held in Uncasville, Connecticut. Chris Miller will be presenting, *The Complete Guide To Taking A Future Credit In All 50 States*. For more information, please go to www.ExecuSummit.com.

November 1-4, 2009 - Gary Wickert and Ryan Woody will be at the 2009 NASP Annual Conference being held in Colorado Springs, Colorado. On November 2, Gary Wickert will be presenting *The Complete Guide To Taking A Future Credit In All 50 States* and, on November 3, Ryan Woody will be presenting *ERISA and The Wrongful Death Lawsuit.* MWL will also be exhibiting at this conference so if you plan on attending, please stop by our booth and see Gary Wickert, Ryan Woody and Jamie Breen. For more information, please go to www.subrogation.org.

May 11-14, 2010 - MWL will be exhibiting at the 5th Annual Claims Education Conference being held in New Orleans, Louisiana. Jamie Breen will be at our exhibit booth so stop by our booth if you plan on attending this conference. For more information, please go to http://www.claimseducationconference.com.