

SUBROGATING AGAINST GOD II

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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 rainy weather 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. (See "Subrogating Against God" in the Fall 2002 issue of the Subrogator.) 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 the 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 suddenly and 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 our local counsel in San Francisco, 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. 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 such as this one. Sometimes, it takes vision and hard work - which may ultimately pay dividends.