



BSW RESPONDS: IN THE WAKE OF A HURRICANE

Insurance and Hurricane Business Loss

By Cullen J. Dupuy

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Many businesses have suffered losses as a result of Hurricane Gustav. It is important to immediately contact your insurance agent or your insurance company and make a claim. Once a claim is made, a claim number is assigned and an adjuster can begin to process the claim. Begin gathering documents in support of your claim and provide copies to your adjuster. Following a catastrophic event such as this, adjusters are dealing with thousands of claims and are interested in doing what is needed to close out documented insured claims. The more documentation you can provide in support of a claim, the more smoothly the process will go.

There are various types of coverage available under most commercial property policies. First, and most obviously, is property damage to a building. Other types of coverage that may be included are coverage for permanently installed fixtures, machinery and equipment, as well as equipment used to maintain the premises; business personal property and personal property of others in your care, custody or control; personal effects and personal property of employees on the premises; salesperson's samples; signs; outdoor landscaping; tools and equipment, including communication devices; money you are unable to collect due to the loss of accounts receivable records, and electronic data processing equipment, including telephone systems and software.

Some policies may include coverage for losses caused by off-premises power or water failure; spoilage caused to perishable stock; pollution cleanup and removal; debris removal; preservation of property; and loss of leasehold interest. Various policy endorsements may also exist which are specific to your particular type of business and which may cover other losses. Furthermore, business automobile coverage may provide property coverage for your business vehicles. If you are unsure about what your company's policies may cover and how best to document a claim, it is important to contact your attorney to answer these questions.

Business interruption coverage is also an important coverage contained in most commercial policies. This coverage may reimburse your business for lost income and for payroll expenses incurred during an interruption in business. It may also pay necessary extra expenses incurred in maintaining the business or re-opening the business in some capacity. There may also be business interruption coverage under the "civil authority" provisions of a policy. This coverage may exist, depending upon the wording of the policy, for losses incurred due to an inability to access your premises due to a governmental order. Some policies may also have specific provisions or endorsements providing coverage for business income losses caused by losing utilities, including water, power, or communications.

Business interruption losses are usually complex and sufficient documentation is critical to assist in having your claim processed. In an effort to do so, you should work with your accountant and the following documents should be gathered:

- ✂ profit and loss statements and other financial statements for the last 2 years;
- ✂ Documentation showing monthly net income data for the year to date;
- ✂ copies of contracts that are currently in place and being impacted;
- ✂ payroll expense records;
- ✂ invoices and receipts showing extra expenses incurred in re-opening the business or keeping it open; and
- ✂ any other documents peculiar to your business which will help document the actual loss of business income resulting from Gustav.

It must be kept in mind that insurance proceeds for a business interruption claim may be subject to federal and state income tax. Deductible expenses incurred may in effect offset the income. In addition, due to the uncertainty of coverage, business decisions should not be made with the expectation that all loss of business income during this time will be fully recovered through insurance. The survival of your business and the ability to thrive, and not business interruption insurance coverage, should be foremost in your decision making process.



Cullen J. Dupuy

Partner—Baton Rouge
Phone: 225.381.8021
Fax: 225.381.8029
cullen.dupuy@bswllp.com

Breazeale, Sachse & Wilson, LLP

Phone: (225) 387-4000
Toll Free: 1-866-832-4000
Fax: (225) 387-5397

Contact us: info@bswllp.com

WWW.BSWLLP.COM



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

Insurance for Construction-Related Losses by John Andrishok

In the wake of Hurricane Gustav, numerous construction projects sustained heavy water and wind damage which will undoubtedly require unanticipated repairs and water/mold remediation. Substantial delays are certain to follow. The construction contract will obviously govern who is ultimately responsible for the expenses and delays amongst the contractor and owner. However, now is the time to take advantage of any insurance which may assist in eliminating or reducing the costs to ensure that the project can be completed with minimal delays and, most importantly, without lingering payment disputes amongst the owner, general contractor, sub-contractors and suppliers. In connection with most construction projects, the general contractor or owner will secure builders' risk insurance to compensate the owner and contractor for any costs which may be incurred. Banks financing construction projects will typically require the coverage. Many broad form policies for specialty businesses, such as hospitals, have built in builders' risk provisions. Accordingly, it is important to check your policy or call your agent before moving forward with a remediation plan.

Builders' risk comes in many forms, but typically compensates the owner and general contractor for the materials and labor required to remediate the project. Coverage typically extends to more than the building or structure under construction. Coverage may also extend to temporary buildings on site, scaffolding, construction forms and property in transit which was to be incorporated into the project. Property typically not covered unless specifically endorsed include landscaping, sidewalks, paving, fences, machinery and existing structures.

Policies will pay either the replacement cost or actual cash value. The following may be recoverable and should be claimed:

- ✂✂ Increased equipment and materials costs;
- ✂✂ Additional labor and overtime costs for work affecting the critical path;
- ✂✂ Express freight and transportation;
- ✂✂ General Conditions, such as temporary utilities, structures, enclosures and equipment rental;
- ✂✂ Equipment and labor relocation expenses;
- ✂✂ Mold/water remediation costs;
- ✂✂ Testing costs;
- ✂✂ Engineering and architectural fees.

As a general rule, delays to the owner (including liquidated damages) and general contractor (home office and on-site overhead) are not included within the scope of the builder's risk coverage. Nevertheless, certain policies do provide coverage for delays and it is important to review your specific policy to determine whether coverage exists.

Coverage may also be available for lost revenues resulting from delays

in opening the business. Typical coverage includes:

- ✂✂ Loss of earnings;
- ✂✂ Loss of rents;
- ✂✂ General overhead;
- ✂✂ Operating expenses;
- ✂✂ Fixed operational and maintenance expenses;
- ✂✂ Interest expense and debt service;
- ✂✂ Marketing expenses;
- ✂✂ Insurance premiums.

As with any insurance claim it is important that you, immediately contact your insurance company to report the loss. The project should be secured to prevent further damage and all damages should be documented with photographs and accompanying descriptions. Claims should be supported with an estimate of the cost of materials and labor to remediate the damage. A professional adjuster may be helpful to support larger claims.

In addition to builders' risk coverage for damage to the project itself, general liability insurance may be available in certain circumstances. For example if flying debris from the construction project has caused damage to adjacent buildings, general liability insurance could be triggered. Any claims for damages resulting from the storm should be forwarded to all general liability, builders risk and excess policies to ensure that all notice requirements have been satisfied.

In short, there is often coverage available to compensate the owner and contractors for the extensive costs incurred as a result of hurricanes, tornados, storms, floods, fires and other acts of God. A thorough review of the available coverage and a carefully constructed claim can certainly assist in getting your construction project back on track with minimal losses.



John T. Andrishok

Partner—Baton Rouge
Phone: 225.381.8020
Fax: 225.387.5397
john.andrishok@bswllp.com



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

Concurrent Causation of Loss by Van R. Mayhall, III

Even before the devastation caused by Hurricanes Katrina and Rita, many homeowners insurance policies included a provision addressing “concurrent causation of loss.” While there are several different versions of concurrent causation provisions, all attempt to reduce or eliminate insurance coverage where two different perils, one covered by the policy and one excluded from coverage by the policy, act together, in concert or concurrently to cause damage or loss.

The term “peril” means an effect, action or force that causes damage or loss. The phrase “concurrent causation” generally refers to the combination or correlation of more than one peril that causes a specific damage or loss. Generally, if damage or loss is caused by a peril which is otherwise covered by the policy, as well as a peril that is not covered by the policy, then insurance coverage applies for the specific damage or loss. However, insurance policies often include provisions that attempt to modify that general rule.

Certain provisions state that insurance coverage is only applicable when the predominate or superior peril causing the damage is covered by the policy. Other provisions exclude all coverage when one of the two concurrent perils that cause loss or damage is not otherwise covered by the policy’s provisions.

An example to illustrate: Homeowners Insurance Policy A provides insurance coverage for damage to the insured property caused by wind, but excludes damage caused by flood.

Homeowners Insurance Policy A also includes a concurrent causation of loss provision stating that insurance is available under the policy only for loss caused by two or more different perils when the predominate peril producing loss is otherwise covered by the policy. Thus, if a home insured by Homeowners Insurance Policy A suffers major damage by wind concurrently with, or at the same time as, minor damage by flood, then the loss or damage would be covered by the policy. On the other hand, if the home suffers major damage by flood while only suffering minor damage by wind, then the entire loss would be excluded from coverage by the policy.

Another example: Homeowners Insurance Policy B provides coverage for damage caused by wind, but excludes damage caused by flood. Homeowners Insurance Policy B includes a concurrent causation of loss provision indicating that, when loss is caused by two or more different perils at the same time, if any peril causing damage is excluded under the policy, then the entire loss is excluded from coverage, even if the other perils would otherwise be covered by the policy. Thus, if a home insured by Homeowners Insurance Policy B suffers any damage by flood concurrently with any damage by wind, then the loss or damage would be excluded from coverage under the policy.

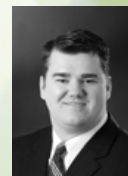
Named Storm Deductible by Van R. Mayhall, III

Homeowners filing claims for damage caused by Hurricane Gustav may be in for a surprise: the so-called “named storm deductible.” Recently authorized by the Louisiana Legislature, a new state law permits insurance companies to implement deductible of as much as four percent (4%) of the value of the insured property which is specifically applicable to damage caused by named storms such as tropical storms and hurricanes. While common in every other state, this is a new development in Louisiana insurance law.

A named storm deductible of, for example, four percent (4%) on a home with an insured value of \$150,000, would mean that, with respect to loss caused by Hurricane Gustav, a homeowner’s deductible would be \$6,000, rather than the standard \$500 or \$1,000 deductibles customarily applicable to other types of losses.

Similar named storm deductibles have been included in commercial and other property insurance policies for some time, and commercial named storm deductibles can rise as high as ten percent (10%) or fifteen percent (15%) of the insured property value.

Check with your insurance agent or insurance company to determine whether your homeowners or commercial policy has a named storm deductible. These types of changes are typically added to a policy at renewal, and you should have received written notification of this modification to your policy from your insurance company.



Van R. Mayhall, III

Partner—Baton Rouge
Phone: 225.381.3169
Fax: 225.387.5397
van.mayhall.iii@bswllp.com



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

What to Do When Employees Don't Show Up...

In the wake of hurricane Gustav, many employers are dealing with absent employees. In some cases, entire work-forces have gone missing. Sometimes employees have stayed in contact, and in some cases they have disappeared entirely. Many employers are asking if they must allow these employees time off of work because of the storm. The short answer to this question is no, absences from work due to damage caused by a hurricane, even when a state or federal state of emergency has been declared, are not protected leave under state or federal law. Generally, employers are free to treat absences from work due to natural disasters as they would any other type of unexcused and unprotected leave.

You will note that these types of leave are "generally" unprotected. There are circumstances under which leave during such a time of emergency could be protected. For example, if both the employer and the employee qualify under the FMLA, and if the employee's absence is caused by a serious health condition, whether or not it was caused by the storm, the leave could be protected.

Such a situation could arise like this: Hurricane Gustav strikes Baton Rouge on Monday. Most of your employees lose power and don't report to work for the next ten days. Jay, an average employee, falls from his roof on Thursday while removing a tree limb and breaks his leg. Jay's injury will require surgery, a hospital stay of three days and about two weeks off of work to recuperate. Your company decides to allow its employees until Friday to return to work or suffer the consequences.

While your company is entitled to take action against those employees who do not report to work, if you are aware of Jay's injury and need to be off of work to recuperate, you must allow him that time off under the FMLA. (This example assumes that Jay has not already used his 12 weeks of leave.) If, however, you are not aware of Jay's injury or need for medical leave, your company may treat Jay as it would any other employee who does not contact the company or report to work. If Jay informs your company of his injury after his employment has been terminated, the law does not necessarily require you to reinstate him.

...How Much to Pay Them...

Employees are either exempt or non-exempt. Non-exempt employees are usually paid by the hour. If a non-exempt employee does not show up for work, he is usually not entitled to be paid. Exempt employees, however, are paid a salary. If an exempt, salaried employee is unable to report to work due to temporary closure of the employer's business, the employee may be entitled to his usual salary for that work.. As a general rule, if a salaried employee performs any work for his employer during work week, he is still entitled to his full salary for that work week.

There are several exemptions to this general rule:

1. First and last week of employment
2. Sick days if the employer has a paid sick leave policy
3. Absence due to personal reasons unrelated to sickness

4. Penalty of violating safety rules of major significance
5. Suspension for violating rules of conduct; and
6. Absences covered under the "Family Medical Leave Act"

An employer may require an exempt, salaried employee to use his accrued paid leave (sick and vacation) for the days that he was absent. For example, if your business was closed Monday through Thursday of a particular week due to loss of power but re-opened on Friday, an employer will be required to pay that employee for a full work week, even if he worked on that Friday. However, if he has six days of accrued vacation, an employer could deduct four of those days to cover his pay from Monday through Thursday. Of course, if the employee does not have enough accrued paid time off, then the employer must pay the difference.

...and When to Pay Them? By Jerry S. Stovall

In the wake of hurricane Gustav, many employees have either quit or simply abandoned their jobs. Many of these employees have not contacted their employers and are unreachable. The fact that an employee may be missing does not relieve an employer of its obligation to timely pay the employee. Louisiana law requires an employer to pay an employee all amounts due within the lesser of the next regular payday or fifteen days following the date of the employee's separation from employment, regardless of whether the separation was voluntary or involuntary. This payment may be accomplished at the place and in the manner in which it was customary to pay the employee during her employment. For example, if it was customary to have a supervisor hand out checks on payday, giving the supervisor the missing employee's check to hold in case she comes in to pick it up should suffice. However, Louisiana

law also provides that an employer may pay an employee by placing the check in the United States mail to the employee with proper postage addressed to the employee's current address contained in the employer's records. (This is another reason that it is very important to require employees to notify you of any changes in their address.) The payment will be "made" when postmarked by the U.S. Postal Service. Employers should be extremely cautious if asked to give an employee's check to a friend or family member or to mail it to any address other than that contained in the its records.



Jerry L. Stovall, Jr.

Partner—Baton Rouge
Phone: 225.381.8042
Fax: 225.387.5397
jerry.stovall@bswllp.com



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

Governor Suspends Particular Unemployment Provisions

By Melissa M. Shirley

On September 5, 2008, Governor Jindal issued Executive Order BJ 2008-91, affecting employee rights and employer obligations with respect to unemployment compensation claims filed as a result of Hurricane Gustav. In doing so, Governor Jindal recognized the “serious challenges” presented by the evacuations, displacements, communication issues, inability to access files and the extraordinary volume of unemployment claims resulting from the disaster.

Generally speaking, while an employer is not charged directly for unemployment benefits paid to employees, the employer must contribute to the Unemployment Trust Fund at a predetermined rate based upon that employer’s “experience rating.” That experience rating is affected by the number of the employer’s employees who are awarded unemployment benefits within a particular period. To qualify for unemployment benefits, a claimant must register for work at and continue to report to an unemployment office. The claimant must also be able to work, available to work, and conducting an active search for work. A claimant may be disqualified from receiving unemployment compensation for misconduct or one of several other statutorily enumerated reasons. Executive Order BJ 2008-91 impacts these general concepts in the following respects:

- ✂ Benefits will not be charged against base period employers for purposes of the employer’s experience rating for disaster-related claims made during the effective period of the Order.
- ✂ Employees will not need to register and search for work. They will, however, be required to continue to report to an unemployment office in the manner prescribed by law. This includes reporting through either an automated telephone system or the internet. Employees must also continue to demonstrate that they are able to work and available for work.
- ✂ Particular disqualification provisions have been waived during the period of Order BJ 2008-91 for disaster related claims, including (a) an employee leaving employment without good cause attributed to a substantial change in employment by the employer; and (b) employee misconduct connected with employment.
- ✂ Offsets from unemployment benefits have been suspended for disaster related claims during the period of the Order. However, a claimant must still be “unemployed” within the meaning of the unemployment provisions. Persons who are paid by their employers, but perform no services for the week or weeks paid, are not unemployed and are therefore not eligible to receive benefits for any such week. Additionally, offsets for subsequent earnings are not affected by the Order.

For purposes of Executive Order BJ 2008-91, the term “disaster-related claims” includes those claims for unemployment compensation filed by individuals whose unemployment is directly due to the effects of Hurricane Gustav or due to their inability to get to their job or worksite because they cannot travel through a disaster parish, as determined by the administrator of the state’s unemployment compensation program. The Order is effective for those parishes covered by the Major Disaster Presidential Declaration dated September 1, 2008 and to those parishes covered by any subsequent expansion of that Declaration. The Order applies to the period August 29, 2008 through September 21, 2008, unless subsequently modified by the Governor.



Melissa M. Shirley

Partner—Baton Rouge
Phone: 225.381.3173
Fax: 225.387.5397
melissa.shirley@bswllp.com



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

LDEQ Responds by John B. King and Micah A. Gautreaux

The Louisiana Department of Environmental Quality (“LDEQ”) has responded to Hurricane Gustav by issuing a Declaration of Emergency and Administrative Order, which was amended on September 6, 2008 (the “Order”) and will remain in place for at least sixty (60) calendar days. The Order AND A MORE DETAILED ARTICLE DISCUSSING ITS PROVISIONS may be found at WWW.BSWLLP.COM. The Order applies in any parish in which the local government and/or Governor Jindal declared or declares an emergency related to Hurricane Gustav. A variety of categories are covered by the Order, including: discharges from wastewater treatment systems, gray water and storm water discharges, management and disposal of hurricane-generated debris (including white goods, hazardous waste, yard waste and vegetative matter, waste tires, construction and demolition debris, and asbestos), open burning, and underground storage tanks. The Order deals only with LDEQ regulations and has no effect on local or federal requirements.

Persons and/or entities holding a permit issued by LDEQ should review it to see if it contains “upset provisions.” If so, consideration should be given as to whether activities covered by the permit have been impacted by Hurricane Gustav in a way that activation of the upset provisions is necessary. Wastewater treatment facilities, for example, are likely to be overwhelmed due to the increased influx of water from the hurricane. In that case, activation of the permit’s upset provisions may be appropriate if the influx of hurricane-related water makes it impossible for those facilities to meet their permit’s discharge limitations. However, upset provisions typically contain additional requirements, such as notification to LDEQ and documentation. They also do not allow violations related to operational error, lack of maintenance, or improper operation.

Large quantities of debris are normally associated with hurricanes. The Order stresses the importance of volume reduction, utilization of landfills for excess waste as a last resort, and the requirement that all waste be properly disposed of at a permitted facility. LDEQ, though, has established provisions for approving additional areas for processing and/or disposal of certain types of hurricane debris. Some limited changes to the normal rules have also been established for vegetative debris (i.e. tree limbs, leaves, branches, etc.), construction and demolition debris, white goods (i.e. refrigerators, freezers, large appliances, etc.), household hazardous waste (i.e. paint, solvents, varnishes, various chemicals, etc.), and other types of solid waste.

Blanket prohibitions on open burning by private individuals and companies, found in both LDEQ regulations and local ordinances, have not been waived by the Order. Open burning of vegetative debris and/or solid waste may only be conducted by local governments and then only after prior notice to and approval from LDEQ.

Underground Storage Tanks (“USTs”) which have been impacted in any way by Hurricane Gustav are also covered by the Order. Before placing any UST back into service, the Order’s startup protocols should be reviewed, as well as its requirements regarding recordkeeping and release detection.



John B. King

Partner—Baton Rouge
Phone: 225.381.8014
Fax: 225.387.5397
john.king@bswllp.com



Micah A. Gautreaux

Associate—Baton Rouge
Phone: 225.381.8033
Fax: 225.387.5397
micah.gautreaux@bswllp.com



BREAZEALE, SACHSE & WILSON, L.L.P.
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Natural Disasters Create a New Landscape for Business and Collection by Stephen F. Chiccarelli

Many of the issues businesses face in the wake of a disaster include the following:

- Companies no longer in business;
- Relocation of collateral;
- Relocation of guarantors;
- Suspensions of litigation and statutes of limitation;
- Relocation of witnesses;
- Destruction of branch locations, original documents, computer systems (with payment histories); and
- Different lending environment requiring re-evaluation of credit risks and accounts.

How should you protect yourself? First, I urge you to re-evaluate the thoroughness of information requested in your credit application. Do you request information so you have multiple ways to identify and locate key company personnel, including guarantors, on any account? Does your credit application or personal guaranty ask for:

- Social security numbers;
- Multiple phone numbers (cell, home, work);
- Third party references (bank, etc.);
- Business and home address;
- Insurance and bonding company information

Second, ensure the safety of your credit information. How do you store your credit applications? Are they simply in a file cabinet? Are they safe from flood, fire or other destruction? Many companies now digitally scan the originals so they are available online at all company locations and can be retrievable in that form at a later date.

Third, consider other ways to locate your account debtors. For example, since the 2005 hurricanes, the federal government has become a major and important source of funding for reconstruction. It has also become an important source of information about businesses competing for that reconstruction work. FEMA, the U.S. Corps of Engineers and other federal agencies have extensive web sites devoted to bidding for federal government contracts for reconstruction work. As part of any bid, a company must provide substantial information. Such information is available to the public. Thus, a company that may owe you substantial amounts pre-disaster, who has either relocated or may be difficult to find, may, as part of the post-disaster frenzy to obtain government funded work, supply vital financial and location information with their job bid.



Stephen F. Chiccarelli

Partner—Baton Rouge
Phone: 225.381.8037
Fax: 225.376.5619
stephen.chiccarelli@bswllp.com



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

Immigration Issues...

In the wake of Gustav, many employers will be hiring new employees or independent contractors to satisfy the increased work demands emanating from the clean-up and rebuilding process. Be careful during this hiring process. Like it or not, employers have been burdened with the enforcement of immigration laws relating to their employees. The Immigration Reform and Control Act of 1986 (8 U.S.C. 1101, *et seq.* "IRCA") basically requires employers to verify the identity and employment eligibility of its employees. The intent of the IRCA was to end unauthorized employment by imposing penalties on employers who knowingly hire or continue to employ individuals who are not authorized to work in the United States.

The verification process is satisfied if the employer properly completes the Employment Eligibility Verification Form, which is more commonly known as the Form I-9. The Form I-9 is divided into three sections. The employee is obligated to complete Section 1 by the close of business on their first day of work. Section 2 requires the employee to provide identity and employment eligibility documentation from a list of acceptable documents (which are listed on the back of the Form I-9). The employer is required to review and verify the documents presented and then properly complete Section 2 within three business days of the employee's hire. Section 3 must be completed when it is necessary to update information or reverify documentation.

The employer is obligated to retain the Form I-9 for at least three years and to make it available for inspection if requested. There are severe sanctions for failure to properly complete or retain the Form I-9, including monetary penalties for each individual infraction.

Although there is no requirement to complete a Form I-9 for independent contractors, it is recommended that any contractual agreement contain a mandate requiring all subcontractors to adhere to the federal immigration laws -- and specifically requiring the subcontractors to complete and maintain Form I-9's for each of its employees that will be involved in the contractual relationship. The independent contractor agreement should also include an indemnity provision protecting your company in the event your subcontractor violates the IRCA.

...And Creative Pay Plans by A. Todd Caruso

Following Hurricane Katrina, employers were hard pressed to find skilled labor. A similar scenario will likely result from Hurricane Gustav. Due to this shortage of labor, employers may attempt to incent employees by providing additional sums of money in the form of bonuses, per diems, housing allowances, car allowances, etc. One of the pitfalls that may arise in this scenario involves the proper computation of overtime. Most of the additional forms of compensation described above would need to be added to the employee's regular rate of pay when calculating the overtime premium. Thus, be cognizant of the total compensation that the employee receives when determining the regular rate of pay from which the overtime premium will be calculated.

In an attempt to attract or maintain a competitive workforce, some employers are utilizing creative pay plans to compensate their "non-exempt" workers. However, such plans should be examined carefully in order to ensure that the provisions of the Fair Labor Standards Act are not violated. An employer's basic obligation is to pay non-exempt employees at least minimum wage for all hours worked (note that the minimum wage increased to \$6.55 per hour on July 24, 2008) and to pay an overtime premium of at least one-and-a-half times the "regular rate" for all time spent working in excess of 40 hours in a workweek.



A. Todd Caruso

Partner—Baton Rouge
Phone: 225.381.3176
Fax: 225.387.5297
todd.caruso@bswillp.com



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

Act of God: Do I Have to Perform? By W. Brett Mason

The common law concept of “act of God” has been defined as a providential occurrence or extraordinary manifestation of the forces of nature, which could not have been foreseen and the effect thereof avoided by the exercise of reasonable prudence, diligence, and care or by the use of those means, which the situation renders reasonable to employ. An act of God or fortuitous event is one that, at the time a contract is made, could not have been reasonably foreseen.

Was Hurricane Gustav an act of God? What effect will the storm have on business and personal obligations? These are important questions to consider. The Louisiana Civil Code provides that an obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible. However, contractual obligations are not automatically excused by an event like Hurricane Gustav. While the damage and effects of the storm may not have been expected and the damage may leave some obligations impossible to fulfill, not all contracts will be rendered dissolved unless required by law.

Although contractual performance in the wake of a hurricane may become more difficult economically or more burdensome than initially contemplated if its performance can be carried into effect, and is not rendered impossible, it is likely to be required by law. For example, Louisiana courts have enforced a pre-hurricane contract to purchase a membership interest in company owning historic real estate, a pre-hurricane contract to sell a home and a commercial lease despite claims of an act of God from a hurricane. Be mindful that unless performance is rendered impossible a contract may be enforced.

Whether contractual performance is required will also be determined by the terms and conditions of the contract. Lease agreements and some types of contracts may contain provisions which afford protection in the event performance is not possible due to an act of God or other unanticipated event, but the lease/contract is likely to contain a notice provision, requiring the party invoking the clause to put the other party on notice. In absence of such a provision one can consider requesting an extension, an accommodation, a forbearance, or other relief. Now is the time to review leases and contracts to check for these provisions because notice may be required.



W. Brett Mason

Partner—Baton Rouge
Phone: 225.381.3175
Fax: 225.381.8029
brett.mason@bswllp.com

Fallen Tree Liability by Scott N. Hensgens and Jennifer C. Dyess

In the wake of Hurricane Gustav, many businesses and homeowners have been confronted with the dilemma of fallen trees. Fallen trees invite many questions, including who is responsible for any damage caused by the fallen tree and who is responsible for the cost of removing the tree.

Under Louisiana law, a tree owner is not liable simply because his tree falls and damages another’s property. Rather, someone seeking recovery for such damage must prove that the tree’s owner knew or should have known that the tree was diseased or otherwise “defective.” A tree owner is not under a general duty to become a professional arborist in order to diagnose a non-apparent defective condition of an apparently health tree. He must, however, take appropriate steps to evaluate the tree’s condition and to prevent damage through ordinary maintenance.

A property owner is able to avoid liability for property damage by showing that the damage was caused solely by an act of God, such as a hurricane. This defense does not apply, though, to liability for the removal of the tree (as opposed to property damage caused by the fallen tree). Thus, a property owner does have a legal obligation to take steps to remove his tree off his neighbor’s property.



Scott N. Hensgens

Partner—Baton Rouge
Phone: 225.381.3171
Fax: 225.381.8029
scott.hensgens@bswllp.com



Jennifer C. Dyess

Associate—Baton Rouge
Phone: 225.381.8048
Fax: 225.381.8029
jennifer.dyess@bswllp.com



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

Emergency Healthcare Provisions by Whitney B. Little

What does an Emergency Declaration Mean for Healthcare Providers?

1. Federal Determination of a Public Health Emergency.

In response to Hurricane Gustav, Michael Leavitt, Secretary of the U.S. Department of Health and Human Services ("HHS"), made the determination that a public health emergency existed effective August 27, 2008. As a result, he waived and modified a number of requirements under the Social Security Act for those in the emergency area. The HHS waiver included the following:

- ✂ Certain conditions of participation, certification requirements, program participation or similar requirements, or pre-approval requirements.
- ✂ Requirements that physicians or other healthcare professionals hold licenses in the state in which they provide services if they have a license from another state.
- ✂ Sanctions under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), for the redirection of an individual to another location to receive a medical screening examination pursuant to a state emergency preparedness plan or transfer of an individual who has not been stabilized if the transfer arises out of hurricane-related emergency services.
- ✂ Sanctions under the Stark, anti-self referral laws, as CMS deems appropriate.
- ✂ Limitations on payments for health care services provided to Medicare Advantage patients by out-of-network health care providers.
- ✂ Sanctions and penalties under the HIPAA privacy regulations for hospitals in the designated geographic area for the emergency with disaster protocols in operation relating to (a) obtaining a patient's agreement to speak with family members or friends, (b) honoring a patient request to opt out of a facility directory, (c) notice of privacy practices, and (d) patients requests for privacy restrictions or confidential communications.
- ✂ Modification of certain deadlines and timetables for the performance of required activities to the extent necessary as determined by CMS.

The Center for Medicare & Medicaid Services ("CMS") is responsible for determining the extent of the waiver required to ensure (1) that sufficient health care services are available to meet the needs of federal healthcare program beneficiaries and (2) that health care providers who furnish services in good faith are reimbursed for the services and exempted from sanctions for non-compliance, if the providers are unable to comply with certain regulatory requirements as a result of Hurricane Gustav and as long as there is no determination of fraud or abuse.

2. State Determination of a Public Health Emergency.

When the Louisiana Governor declares a state of emergency, as Governor Bobby Jindal did on August 27, 2008 for Hurricane Gustav, the Louisiana Health Emergency Powers Act sets forth his powers and those of state entities.

Using these powers, Governor Jindal activated the state's emergency response and recovery program which allows for a suspension of regulatory procedures for conducting state business and the mandatory evacuation from any stricken or threatened area.

This type of heightened response necessitates a high level of coordination between the Governor's Office of Homeland Security and Emergency Preparedness and the Department of Health and Hospitals who are tasked with planning and executing a public health emergency assessment, mitigation, preparedness response and recovery for the state. Health care providers must also comply with emergency protocol which calls for specific procedures for evacuating facilities that are deemed to be a threat to public health.

In addition to issues that arise on a facility level, a state of emergency impacts the availability of health care professionals and support staff. To cope with this obstacle, any board or commission placed within the Department of Health and Hospitals may issue temporary registrations to health care providers licensed, certified or registered in another state. Further, during a state of public health emergency, health care providers will not be civilly liable for causing the death of, or injury to, any person except in the event of gross negligence or willful misconduct.



Whitney B. Little

Associate—Baton Rouge
Phone: 225.381.8027
Fax: 225.387.5397
whitney.little@bswllp.com



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

Is Your Contractor Properly Licensed? By Steven B. Loeb

Louisiana has fairly strict requirements and regulations concerning the licensing of contractors. Before you hire a contractor to perform work on your building, you might want to know if he has the proper license. The best source of information is the Louisiana Licensing Board for Contractors, 2525 Quail Drive, Baton Rouge, LA 70808, telephone (225) 765-2301, fax: (225) 765-2431; Complaints complaints@lsbc.louisiana.gov; or search for a contractor by name at http://www.lsbc.louisiana.gov/findcontractor_name.htm

HOME IMPROVEMENT: Unless first duly registered with the Licensing Board for Contractors, no person may perform reconstruction, renovation, repair, or removal or demolition work to any owner occupied building used as a residence or dwelling or to structures adjacent to such residence. Persons holding this certification are limited to work valued less than \$75,000. Higher amounts require a different license such as Residential Building Contractor..

The registration as a "Home Improvement Contractor" is not required if:

1. the work is performed gratuitously;
2. a homeowner physically performs the work on his own residence
3. the work is done by a licensed contractor or subcontractor; or
4. the work is only landscaping; interior painting or wall covering.

The law further requires that every agreement to perform home improvement work more than seventy-five hundred dollars (\$7,500) must be in writing. The contract must state all of the terms and conditions; the full name, address, and the registration number of the home improvement contractor; a detailed description of the work and the materials to be used; the total amount to be paid; an approximation of the cost expected if it is a cost-plus fee contract or a time-and-materials contract; and be signed by both parties. The home improvement contractor is required to give the owner a copy of the signed contract before starting any work.

RESIDENTIAL BUILDING CONTRACTOR: A "Residential Building Contractor" is a person or corporation who constructs a residence which is not more than three floors in height, when the cost of the undertaking exceeds seventy-five thousand dollars. "Residential building contractor" also means any person performing home improvement contracting when the cost of the undertaking exceeds seventy-five thousand dollars. The law does not require a license for owners for work on their personal residence.

MOLD REMEDIATION: Before you hire a contractor to rip out water soaked building materials, consider whether mold has started to grow. In south Louisiana, mold growth is based upon a very simple formula: moisture + organic material = mold. Mold is the most prevalent form of life in our natural environment so much so that it is present almost everywhere, all the time, just waiting for food and water to grow. The food is everything from normal house dust to sheet-rock. Just add water and the mold will grow. Most of us who experienced prolonged power outages without air conditioning, can expect some mold growth inside our buildings given the elevated interior humidity and condensation.

So what do we do about mold?

If water came inside by a roof leak or wind driven through windows, doors or other openings, or if condensation or humidity have made the interior damp to the touch, the first thing to do is either thoroughly dry out or remove all of the wet material. Assume mold has started to grow even if you can not see or smell it. Remember the formula. If you decide to dry only, then the affected material should be treated to kill the mold that started to grow. Excellent information on treatments can be found at:

U.S. Environmental Protection Agency "Mold Remediation in Schools and Commercial Buildings" Checklist for Mold Remediation: <http://www.epa.gov/iedmold1/checklist.html>

U.S. Environmental Protection Agency "Should You Have the Air Ducts in Your Home Cleaned?" <http://www.epa.gov/iaq/pubs/airduct.html>

Centers for Disease Control and Prevention "Checklist for Infection Control Concerns When Reopening Healthcare Facilities Closed Due to Extensive Water and Wind Damage" http://www.bt.cdc.gov/disasters/reopen_healthfacilities_checklist.asp

If you hire a contractor to remove or remediate the wet/moldy material, be aware that Louisiana law requires a license (LSA-R.S. 37:2185). The law simply states that no person shall "engage in or conduct, or advertise or hold himself out as engaging in or conducting . . . the removal, cleaning, sanitizing, demolition, or other treatment, including preventive activities, of mold or mold-contaminated matter" unless such person holds a mold remediation license.

The license requirement applies only to activities that affect indoor air quality and does not apply to residential property owners working on their own property or to apartment owners or tenants who perform mold remediation on their own property. A license is required if the residential mold remediation work includes the removal or treatment of more than twenty (20) square feet of material. All mold remediation in commercial facilities must be performed by a licensed mold remediation contractor.



Steven B. Loeb

Partner—Baton Rouge
Phone: 225.381.8050
Fax: 225.387.5397
steven.loeb@bswllp.com



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

IRS and LDR Grant Tax Extensions by Lance J. Kinchen

The Internal Revenue Service ("IRS") has issued IR-2008-100 providing relief to victims of Hurricane Gustav in affected areas of Louisiana. The IRS is postponing until January 5, 2009, deadlines for taxpayers who reside or have a business in the disaster area. The postponement applies to return filing, tax payment and other timed-sensitive acts otherwise due between September 1, 2008 and January 5, 2009, including the following:

- ✍ Individual estimated tax payments due September 15, 2008.
- ✍ Corporate extended 1120 tax returns due September 15, 2008.
- ✍ Individual extended 1040 tax returns due October 15, 2008.

In addition, the IRS will waive the failure to deposit penalties for employment and excise tax deposits due on or after September 1, 2008 and on or before September 16, 2008 as long as the deposits are made by September 16, 2008.

Taxpayers who reside in or have a business located in the following parishes will qualify for the above relief:

Acadia, Allen, Ascension, Assumption, Avoyelles, Beauregard, Cameron, East Baton Rouge, East Feliciana,

Evangeline, Iberia, Iberville, Jefferson, Jefferson Davis, Lafayette, Lafourche, Livingston, Orleans, Plaquemines, Pointe Coupee, Rapides, Sabine, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Landry, St. Martin, St. Mary, Terrebonne, Vermilion, Vernon, West Baton Rouge and West Feliciana.

Taxpayers not in the covered disaster area, but whose books, records, or tax professionals' offices are in the covered disaster area, are also entitled to relief.

In addition, the Louisiana Department of Revenue ("LDR") will recognize the January 5, 2009, extensions granted by the IRS for income-related taxes, which includes individual, corporation, declaration of estimates, and corporation franchise tax. The extensions are available on returns and payments due between September 1, 2008, and January 5, 2009. LDR will waive applicable penalties and abate interest that would otherwise apply on these returns.



Lance J. Kinchen

Partner—Baton Rouge
Phone: 225.381.8053
Fax: 225.387.5397
lance.kinchen@bswllp.com

Louisiana State Tax Relief by David Cassidy

The above-mentioned LDR extension also applies to the due dates for other returns such as sales and severance tax returns. Any interest or penalties that would ordinarily begin accruing on the usual due date will be waived. The new due date is January 5, 2009.

When filing a return that qualifies for an extension be sure to write, in black ink, on the top of the return "Hurricane Gustav."

A taxpayer may claim a deduction for a casualty loss sustained in Gustav on either the original or amended 2007 income tax return or the 2008 income tax return. Which return one takes it on could impact the amount of the deduction since the deduction for purposes of the Louisiana income tax for federal "excess itemized deductions" increases from 57.5% in 2007 to 65% in 2008 as part of the phase in of the repeal of the "Stelly Plan."

A refund of state sales taxes may be obtainable on certain personal property owned by an individual that was lost or destroyed as a result of "Gustav." In order for the sales taxes to be recoverable:

- ✍ the loss must not be covered by insurance;
- ✍ the property must have been owned by an individual and used on or about the person's home;
- ✍ the property must be items such as clothing, cars, boats and other titled assets, appliances or furniture; and
- ✍ sales tax must have been paid on the items.

This relief only applies to state sales taxes, and will not apply to the property acquired to replace items lost or destroyed.

A property owner may request the postponement of the collection of property taxes. To do so, a signed and sworn statement should be submitted to the officer charged with collecting such taxes (usually, but not always, the local sheriff) stating that the person's property has been destroyed or damaged and that the taxes would be oppressive and cannot be paid without a sacrifice of the property. (Copies of the statement must be filed with the state auditor and with the recorder of mortgages in the parish where the property is located.)

The property taxes may then be paid over ten years. If the installments are timely paid, no penalties or costs will apply. The unpaid taxes will, however, act as a lien on the property and will bear interest at the rate of 6% per year.



David R. Cassidy

Partner—Baton Rouge
Phone: 225.381.8018
Fax: 225.387.5397
david.cassidy@bswllp.com

Links to Helpful Information



BREAZEALE, SACHSE & WILSON, L.L.P.
ATTORNEYS AT LAW

[Office of the Governor](#)

<http://www.gov.louisiana.gov>

[Governor's Office of Homeland Security \(GOHSEP\)](#)

<http://www.ohsep.louisiana.gov>

[National Weather Service State of Louisiana](#)

<http://www.srh.noaa.gov/lix>

[Office of the Mayor-President](#)

<http://www.brgov.gov>

[FEMA U.S. Department of Homeland Security](#)

<http://www.fema.gov>

[American Red Cross](#)

<http://www.arcno.org>

[Small Business Administration](#)

<http://www.sba.gov>

[Central Contractor Registry](#)

<http://www.ccr.gov>

[Louisiana Motor Transport Association](#)

<http://www.louisianatrucking.com>

[Associated Builders and Contractors - Pelican Ch](#)

<http://www.abcpelican.org>

[Association of General Contractors](#)

<http://www.lagc.org>

[LUBA Workers' Comp](#)

<http://www.lubawc.com>

[Louisiana Assn of Self Insured Employers \(LASIE\)](#)

<http://www.lasie.org>

[Baton Rouge Area Foundation](#)

<http://www.braf.org>

[Louisiana Automobile Dealers Assn \(LADA\)](#)

<http://www.lada.org>

[Agriculture & Forestry](#)

<http://www.ldaf.state.la.us>

[Department of Corrections](#)

<http://www.doc.louisiana.gov>

[Economic Development](#)

<http://www.louisianaforward.com>

[Environmental Quality](#)

<http://www.deq.louisiana.gov>

[Louisiana National Guard](#)

<http://www.la.ngb.army.mil>

[Louisiana State Police](#)

<http://www.lsp.org>

[LSU – Health Services](#)

<http://www.lsuhs.org>

[Health & Hospitals](#)

<http://www.dhh.louisiana.gov>

[La. Workforce Commission](#)

<http://www.laworkforce.net>

[Natural Resources](#)

<http://www.dnr.louisiana.gov>

[Board of Regents \(Higher Ed\)](#)

<http://www.regents.state.la.us>

[Social Services](#)

<http://www.dss.louisiana.gov>

[Transportation & Development](#)

<http://www.dotd.louisiana.gov>

[Wildlife & Fisheries](#)

<http://www.wlf.louisiana.gov>

[Baton Rouge Area Chamber](#)

<http://www.brac.org>

[Capital Area United Way \(CAUW\)](#)

<http://www.cauw.org>



MANY THANKS TO THE BATON ROUGE AREA CHAMBER (BRAC) FOR THE FOLLOWING HELPFUL INFORMATION:

Small Business Association (SBA)

BRAC has been working with the SBA to help small business owners apply for business disaster loans. A temporary location has been set up at the Louisiana Technology Park (LTP) where business owners can use LTP computers and Internet access to apply for loans. Unlike other SBA sites around South LA, this location is only for business owners so you can avoid waiting for assistance while homeowners also apply for their homeowner SBA loans (although business owners will also be able to apply for home loans at the LTP). The SBA hotline is 1-800-621-3362, or if you have power and Internet access, you may apply online at www.disasterloan.sba.gov.

FEMA and the SBA have opened official Disaster Resource Centers around the parishes. The first locations are below. Businesses and homeowners can also apply for SBA assistance at these locations.

Ascension Parish

Dream Center East
810 Martin Luther King Drive
Donaldsonville, LA 70346
Opened 1:00 P.M. Monday 9-8-08

East Feliciana Parish

12024 Liberty Street
Clinton, LA 70722
Opened 1:00 P.M. Monday 9-8-08

Livingston Parish

Old State Police Camp
11845 Buddy Ellis Rd.
Denham Springs, LA 70726
Opened 1:00 P.M. Monday 9-8-08

Pointe Coupee Parish

Scott Civic Center
1200 Major Parkway
New Roads, LA 70760
Opened 1:00 P.M. Monday 9-8-08

West Baton Rouge Parish

Multi Purpose Facility
210 Turner Rd.
Port Allen, LA 70767
Opened 1:00 P.M. Monday 9-8-08