

AUTHORS

Michael C. Davis
John F. Cooney
John M. Farenish
Dismas Locaria

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Crucial Legal Issues in the Recovery from Hurricane Sandy

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A massive effort is underway to repair the damage to public and private entities caused by the windstorm and water surge associated with Hurricane Sandy. Once the immediate emergency restoration stage has been completed, the long-term effort to rebuild infrastructure, communities, homes, and businesses will begin.

During this multi-year stage of the recovery process, state and local governments, private nonprofit organizations, and companies will face a broad variety of issues concerning the allocation of legal responsibility for harms they have suffered, obtaining the financial resources necessary to reconstruct facilities and restore operations to pre-disaster levels, and undertaking the necessary repair work, including obtaining necessary entitlements for certain repairs or infrastructure enhancements.

From our experience in prior disaster situations, we expect several important legal issues, including those listed below, will arise with some frequency.

Insurance

- Filing and documenting claims with insurers for property damage and business interruption claims.
- The allocation of responsibility among various insurers.
- Organizing record retention and management procedures and compiling required information to preserve and present documents and provide information necessary to support claims.
- Differentiating between the elements of property damage and business interruption claims, and assuring that the insured entity receives appropriate compensation for losses it experienced during the often extensive period necessary to restore operations to pre-disaster levels.
- Negotiating settlements with the entity's insurers to obtain appropriate compensation for losses suffered.
- Addressing insurance-related issues such as subrogation, advance payments from carriers, coverage for "betterments," repair v. replacement, and other issues.

Government Assistance

Many state and local government entities and private nonprofit organizations may be eligible to receive funds from the Public Assistance grant program administered by the Federal Emergency Management Agency for debris removal, emergency protective measures, and permanent restoration of infrastructure, by submitting a Request for Public Assistance through the state government.

In the aftermath of Hurricane Katrina, we have experience with a significant number of legal and practical issues that can arise during the FEMA process, including:

- Determining eligibility and filing applications for assistance that FEMA will deem acceptable.
- Ensuring that persons purporting to speak on behalf of FEMA and to authorize the grantee to undertake reconstruction efforts have actual authority to do so.
- Selecting the appropriate contract vehicle for restoration of infrastructure so that the entity does not enter into prohibited cost plus a percentage of costs-type agreements.
- Compliance with FEMA regulations and guidance to assure that the grantee received appropriate competitive bids before awarding reconstruction contracts.
- Compiling and submitting documents to FEMA to demonstrate that the costs incurred are eligible for federal reimbursement and that the amounts expended were reasonable.
- Understanding the operation of FEMA's statutory obligation to offset against its grants any amounts the grantee received from insurance recoveries or from restricted gifts for specific rebuilding purposes that were received from nonprofit foundations or individual donors.
- Organizing a system for differentiating between the costs of restoring property damage, which are eligible for FEMA reimbursement, and business interruption losses, which are not.

- Negotiating with FEMA the allocation of insurance proceeds between property damage and business interruption insurance.
- Appropriate organization of management systems and documents so that the grantee can work effectively with FEMA in reviewing Project Worksheets and determining the eligibility and reasonableness of amounts expended in reconstruction.
- Organizing the accounting and record-keeping process to facilitate the defense of a subsequent audit by the Inspector General of the Department of Homeland Security concerning the legality and reasonableness of expenditures by the grantee for which it seeks reimbursement under its FEMA grant.

Rebuilding

Many complex legal issues can arise in connection with assessing, repairing, and rebuilding in response to natural disasters, including:

- Making sure that the contractors retained have adequate experience, capabilities and contractual incentives to perform the work properly, legally, on time and on budget.
- Taking necessary steps to assess, prevent and abate, if necessary, any mold or other environmental impacts caused by water damage/flooding.
- Ensuring that the required permits, licenses and similar approvals are obtained in connection with any rebuilding effort. This can be especially difficult if the damaged building does not comply with current building codes.
- Determining whether other enhancements are necessary (e.g., better seawall protection) and, if so, obtaining the necessary approvals to implement them.
- Determining rights and responsibilities vis-à-vis tenants who may need to be evacuated permanently or temporarily.

Impact on Current Construction Projects

In addition to the rebuilding and insurance issues, the storm may have caused major delay impacts to existing construction contracts. Some of the impacts may include:

- Extensions of the contract time specified for performance – and the follow-on impact on other time-critical events or conditions.
- Analysis of the contract allocation of risks of delay costs (e.g., does the owner or the contractor bear the cost, or is the risk shared? – does insurance cover such delay costs and if so whose coverage?)
- Business failures of subcontractors or suppliers (and consequent impact on bonds or other security given for performance).
- Delays in delivery of key materials or components, which may require redesign or substitutions.
- Scarcity of labor now assigned to more critical matters, such as hospital restorations, etc.
- Triage by contractors who must devote attention to more critical matters and thus suspend work on less-critical projects.

Venable's construction and real estate lawyers have extensive experience in dealing with these categories of issues, whether on behalf of owners, contractors, architects, engineers, or other construction-related organizations.

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For more information contact the attorneys in Venable's **Government Contracts, Insurance, Real Estate** and **Regulatory** Practice Groups.