SYMPOSIUM

After the Tempest: How the Legal Community Recovers from Disasters

Introduction:
The Role of Lawyers in a Disaster-Prone World

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The Best Laid Plans: Force Majeure Clauses in Travel and Event Contracts

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Hurricane Katrina: A Deadly Warning Mandating Improvement to the National Response to Disasters

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SYMPOSIUM: AFTER THE TEMPEST: HOW THE LEGAL COMMUNITY RECOVERS FROM DISASTERS

INTRODUCTION: THE ROLE OF LAWYERS IN A DISASTER-PRONE WORLD

DANIEL A. FARBER*

The Symposium is a welcome opportunity for lawyers and legal academics to explore disaster issues in depth. In the past, disasters have rarely received more than passing attention in law reviews. Consequently, issues in disaster law have not received in-depth analysis of the kind they need. Nova Law Review is performing an important public service by providing a forum for analysis and debate about the challenges facing lawyers in a disaster-prone world.

This Symposium discusses the broader impact that natural disasters can have on the legal community and how it may affect lawyers’ offices, their work, their clients, and their perception by the community at large.1 Hurricane Katrina revealed how severe these impacts can be along a broad swath of the Gulf Coast, but most dramatically in New Orleans. Disasters directly affect lawyers, as they do others, by destroying homes and offices, ruining records, and causing serious business interruptions. But in the long run, the most important question is how lawyers relate to the broader social and legal issues posed by disasters.

For anyone who doubts the seriousness of these issues, a good lesson can be learned with a tour of New Orleans today. Block after block of ruined houses stretch out, representing hundreds of thousands of dislocated lives. Boarded-up and gutted homes go on for miles, in neighborhoods where only sporadic signs can be seen of current human occupation. Some of the devastation on the Gulf Coast was even more dramatic, though fortunately fewer people were directly impacted. The legal profession cannot afford to ignore a social problem of this magnitude, and it is foolhardy to wait until after the fact to begin thinking through the issues.

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One of the key roles that lawyers can play is to help clarify and reform disaster law, a generally neglected subject. This field of law is ripe for re-examination. Disaster law sometimes seems like an unrelated collection of legal rules of various kinds that happen to come into play when communities have suffered severe physical damage. But at a deeper level, disaster law is about assembling the best portfolio of legal rules to deal with catastrophic risks, a portfolio that includes strategies for prevention, emergency response, compensation and insurance, and rebuilding. Our current strategies for each of these tasks are, at best, passable. Moreover, the individual strategies often fail to mesh effectively. The reality is that the issues addressed by these legal strategies are interrelated.

To determine how much to invest in prevention, we need to consider the extent to which a strong emergency response can limit damages. We also need to be sure that precautions like higher levees do not backfire by causing more people to move into high-risk areas—the extent to which this happens will be influenced by land use policies and insurance availability. Poor land use policies and subsidized insurance can actually be counterproductive, encouraging people to move into areas that are vulnerable. In turn, preventive measures help shape plans for emergency response. To plan the emergency response we need to take into the forecast which areas are vulnerable, and where precautions may fail. We also need to design the emergency response so as to set the stage for rebuilding, rather than responding in ways that will make reconstruction more difficult. And rebuilding, of course, begins a new round of the cycle; for what we rebuild will itself be subject to disaster risks. If we do not rebuild better than what we had, we are likely to find ourselves in precisely the same vulnerable position, with another disaster being only a matter of time.

Because it involves these interlinked issues, disaster law calls upon the skills of a wide range of lawyers. Land use lawyers help determine what will be built—or rebuilt—and where, and hence, what will be at risk. Torts lawyers may bring actions for compensation; insurance lawyers help determine the extent to which victims are able to receive compensation in order to re-

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2. It is notable that the first law school text on the subject was not published until 2006. See generally Daniel A. Farber & Jim Chen, Disasters and the Law: Katrina and Beyond (2006).

3. For example, land use lawyers must grapple with claims that restrictions on building in vulnerable areas constitute unconstitutional takings under Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1032 (1992). In Lucas, the United States Supreme Court held that a complete ban on the use of beachfront property was a per se taking, unless use of the property was a common law nuisance or fell within some other “background” restriction of state law. Id. at 1030–32.
build. Practitioners of administrative law can provide needed guidance to
disaster planning efforts. After the disaster takes place, family law practi-
tioners must deal with families divided by the disaster; bankruptcy lawyers
must assist the financially devastated; criminal lawyers must try to function
in what may be the wreckage of the criminal justice system, and so forth.
Every field of law is, somehow or another, involved at some stage of the
process, from disaster preparation to emergency response to reconstruction.

Lawyers may make a particular contribution in terms of victim compen-
sation. Our current system of laws is poorly designed to compensate disaster
victims. America is, among other things, the "promised land" for trial law-
yers. Tort recovery, however, is faced with some serious obstacles, even if it
can be shown that the government or private contractors were at fault in
causation of the damage. The federal government is almost completely immune
from suit for flood damage. Private firms, such as the contractors who build
levees, may lack deep pockets. Even apart from these barriers, given the
complex dynamics of major disasters, problems of causation may be severe,
for it may be hard to show that a particular harm was caused by an absence
of due care by a defendant. In the case of levee failure, for example, the
plaintiff would have to show that his injury was caused by that specific fail-
ure and would not have occurred anyway due to other breaches, overtopping,
wind, or other causes.

For these reasons, recovery under the current tort system looks like a
long shot. Other possible routes to compensation do exist. The Federal
Emergency Management Agency (FEMA) provides grants and loans to dis-
aster victims to help with recovery—assistance that may be slow to arrive
but does provide a route to rebuilding. Moreover, many victims have insur-
ance of one kind or another. But private insurance is often limited to wind
damage as opposed to flood damage. After a major hurricane there may be
thousands, if not hundreds of thousands, of disputes on the wind versus flood
issue, as well as other insurance issues such as coverage and valuation.
Moreover, after floods, FEMA typically requires localities to upgrade their

4. On the need for reform in this area, see FARBER & CHEN, supra note 2, at 93–108.
5. The Litigation Section of the American Bar Association is currently embarking on a
project to reassess disaster compensation rules. This project was prompted by an awareness of
the need to reconsider existing legal rules in this area. See Kim J. Askew, The Rule of Law:
litigation/journal/opening_statements/06summer_openingstatement.pdf.
rol Act broadly to eliminate federal liability). In some states such as California, however, the
state government may be liable for inadequate design or maintenance of levees. See Paterno
v. State, 6 Cal. Rptr. 3d 854, 879–80 (Ct. App. 2003) (applying reasonableness test to assess
government liability).
building codes for rebuilding—but the added expenses are not covered by the typical insurance policy, even if the policy covers “replacement cost.” An additional problem is that insurance companies tend to withdraw from the market after catastrophes—so people may be very vulnerable if another big hurricane hits in the next few years. Federal flood insurance picks up some of the slack, but is not purchased universally and has other problems of its own.\(^7\)

None of these alternatives to the tort system provides compensation for those who die or are injured due to disasters. Some families may benefit from life insurance or social security survivors' payments. But for many, these forms of compensation will prove inadequate. The 9/11 Victim Compensation Fund is one model of an alternative to conventional tort recovery.\(^8\) So far, however, even though the federal government clearly has the moral responsibility for hundreds of deaths after Hurricane Katrina, it has not seen fit to offer any form of recompense.

Lawyers play a crucial role in resolving disputed claims for private insurance and public compensation such as flood insurance. Rebuilding also requires major contributions by lawyers. Rebuilding is not just a matter of mortar and bricks. It also involves restoring critical social infrastructure, such as the criminal justice system, family structures, and business relationships. Lawyers need to restore their own organizations, whether they are private law firms or public sector institutions. They need to resolve the custody issues of disrupted families. When changes in land use or infrastructure are needed, lawyers are inevitably involved. Business arrangements that were ruptured by disaster need to be resolved. In short, when winds die down and flood waters recede, lawyers become key players in restoring the community.

Environmental lawyers also have a particularly important role to play. First, disaster decisions involve assessing and managing a special kind of risk—small probabilities of very serious harm. This kind of problem is familiar to environmental lawyers because of their work on the regulation of toxic substances. Thus, they are intimately aware of the analytical methods and controversies surrounding such decision-making. Second, one of the lessons of Hurricane Katrina is that wetlands and other buffer zones can be critical in mitigating the harmful effects of disasters. Protecting these wetlands is a core focus of environmental law. Third, disaster prevention can involve complex decisions about infrastructure and land use planning. Major

\(^7\) For discussion of these and other insurance issues, see FARBER & CHEN, supra note 2, at 178–200.

infrastructure investments will require in-depth environmental assessments. Fourth, disaster can also cause environmental harm such as toxic substance releases, and again, environmental lawyers are on the forefront. It is not surprising that one of the first comprehensive reports on Katrina was issued by a group of environmental law professors.

It might seem initially surprising that lawyers should play such an important part in disaster issues. On further reflection, however, the issues are especially well-fitted for the legal profession. In planning transactions, lawyers are used to envisioning future contingencies and planning against even unlikely events; as litigators, they are all too familiar with how carelessness and organizational failures can lead to major harm. If first-year torts students learn nothing else from their classes, they should learn that accidents can always happen and that it pays to wear a seatbelt. Much of lawyering is either about getting clients to “wear their seatbelts”—at least metaphorically—or sorting out liability when they have failed to do so.

Lawyers are also in the business of solving problems—often unexpected ones—and disasters trigger an avalanche of personal, family, institutional, and economic problems. Individuals are injured or lose their jobs or homes; custodial parents are separated from their children; courts close down or lose their records; and companies suffer crippling business interruptions and loss of inventory. If lawyers are to perform their roles effectively under the heightened pressure of disaster conditions, they need to be educated about disaster law in law school courses, and later through continuing legal education. At all levels of the profession—law students, law professors, practitioners, judges—we need to work now to devise solutions for future disasters, which assuredly will come someday.

Indeed, the role of lawyers in disasters is likely to grow even more important in the future for the simple, if unfortunate, reason that the disasters themselves are likely to become more frequent and more severe. There seems to be no end to the flow of people into vulnerable coastal areas, drawn there by scenery and good weather. Thus, many more people and properties become subject to hurricane and flooding risks.

There are also good reasons to fear that hurricanes like Katrina may be growing in likelihood. There has been a dramatic rise in powerful tropical storms during the past three decades. It is plausible to connect this increase with global warming. Tropical storms feed off of warm ocean waters, and global warming is expected to increase ocean temperatures. Some experts

think there is a link between increased storm intensity and global warming. However, we do not have very good historical records about storms, and the records we do have suggest there may be a natural, decades-long cycle. That cycle could be the cause of the recent increase, not global warming. Whether the cause is climate change or a natural cycle, however, the implication is still that we are likely to see many more mega-storms in the near future than we saw in the past few decades.¹⁰

It is time to take counsel about the enormous problems arising from Hurricanes Katrina, Rita, and Wilma across the Gulf Coast region. And it is time to start making plans so that next time the legal system will be better prepared. This Symposium reflects a healthy awakening of interest in these issues by academics, judges, and lawyers. Hopefully, we can begin assembling the intellectual capital now that we will need to weather future storms.

¹⁰ For discussion of the potential linkage between hurricanes and climate change, see John McQuaid & Mark Schleifstein, Path of Destruction: The Devastation of New Orleans and the Coming Age of Superstorms 347–56 (2006).
THE BEST LAID PLANS: FORCE MAJEURE CLAUSES IN TRAVEL AND EVENT CONTRACTS

SUZEN M. GRIESHOP CORRADA

I. INTRODUCTION

Once an optional addition to a contract, force majeure clauses are becoming a staple in travel and event planning. A contract with a force majeure clause can excuse nonperformance when circumstances occur that exceed the control of the parties and precludes performance. These clauses can be found in travel and event contracts worldwide, in companies both large and small, as a proactive measure to protect both the hospitality provider and the client. With the ominous threat of hurricanes, tornados, earth-
quakes, snowstorms, and typhoons, as well as terrorism and disease-related conditions, a contract is not safe without a well-written force majeure clause.

II. FORCE MAJEURE CLAUSES IN THE AIRLINE INDUSTRY

The Federal Aviation Administration (FAA) Aerospace Forecast for the Fiscal Years of 2007–2020 predicts that 768 million passengers will be flying during the 2007 fiscal year, over 1 billion passengers by 2015, and 1.2 billion by 2020. This forecast also predicts that there will be approximately 62.5 million take-offs and landings in the larger airports of the United States. Simultaneously, consumer complaints skyrocketed with the Department of Transportation as passengers voiced their unhappiness regarding their airline travel experience. An overwhelming majority of travel delays were caused by a combination of inclement weather and air traffic control systems that are antiquated and ill-equipped to handle the volume of modern transportation. In the future, the situation will become worse unless a system is implemented that can meet the needs of the traveling public while anticipating the unexpected conditions of a force majeure.
The airline industry has utilized force majeure clauses for years; however, with the changes in our world and the influx of issues beyond an airline’s control, gone are the days of free hotel rooms and vouchers as compensation for travel delays.9 “An airline reservation is a legal contract”10 and the force majeure clauses in these contracts are becoming “watertight.”11 In the event of a force majeure, an airline passenger’s rights are detailed in the airline’s “contract of carriage.”12 The contract of carriage is usually posted on the airline’s website and available, upon request, at the airport.13 Buried in the fine print and legalese is a force majeure clause which generally includes a multitude of items that are beyond the control of the airline.14 Items listed begin with inclement weather, but also include: labor disputes, fuel shortages, labor shortages, government regulations, civil unrest, wars, political unrest, embargos, unsettled international conditions, riots, air traffic control issues, and any other occurrence not reasonably anticipated, foreseen or predicted by the airline.15

“[A]irlines do not guarantee their schedules, and they are not required to assist or compensate passengers for flights delayed or canceled by bad weather or other causes [deemed] beyond their control, collectively known as
The only time that a passenger can expect compensation is for a flight delay resulting from the airline's action and not from the actions of others or an act of God. In the event of a force majeure, the airline's only obligation is to book the passenger on the next available flight or refund the airfare for the unused portion of the ticket. Since there are no federal requirements regarding how an airline handles passenger delays, the passenger is left to the mercy of the airline and can only wait for an elevation in the delay, or seek other options.

When booking travel for an event or conference, most airlines will allow the contractor to negotiate a lower group-rated airfare; however, the terms of the force majeure clause are generally nonnegotiable. Additionally, in a force majeure situation, the airline is not under an obligation to refund to the client the cost of a hardship incurred if the delay affects the remainder of the travel itinerary. Absent an insurance policy which covers

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17. Bear, supra note 16. "The term 'act of God' has been widely defined as: Any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected could have been prevented." James E. Mercante, That Sinking Feeling—A Boat Owner's Liability in the Aftermath of a Hurricane, 17 NOVA L. REV. 1053, 1055 (1993) (citing 1A C.J.S. Act of God § 757 (1985)). An act of God is also defined as, "[a] disturbance... of such unanticipated force and severity as would fairly preclude charging a [defendant] with responsibility for damage occasioned by [the defendant's] failure to guard against it in the protection of property committed to its custody." Id. (quoting Compania de Vapores INSCO S.A. v. Missouri Pac. R.R., Co., 232 F.2d 657, 660 (5th Cir. 1956)).


19. Dunham-Potter, What Are My Rights, supra note 7. Rule 240 is a written outline detailing the passenger's rights and it is issued by individual airlines. See id. Specifically, it details airline procedure if an incident occurs, for example a scheduling or booking conflict that is within the airlines control. Id. Rule 240 does not cover force majeures. Id. If a passenger chooses to accept a refund for the portion of the flight that was delayed and seek alternative transportation, they are urged to verify that their return trip itinerary or the remaining portion of their booking is not accidentally canceled during the refund process. Stellin, supra note 13.

20. See Davis, supra note 15, at 42.

the airfare, the passenger or group is left with little or no recourse if a force majeure situation occurs. 2

III. FORCE MAJEURE CLAUSES AND EVENT PLANNING

Although the allure of idyllic weather and a picturesque location may influence many to contract events in different locales, with the introduction of stricter force majeure clauses in air travel, it may be safer and more reliable to plan the event closer to home. Unlike the one-sided force majeure clauses offered in an airline’s contract of carriage, 23 a hotel or convention facility will generally negotiate the terms of the contract with the client or event sponsor. 24 Absent the unpredictability of transporting a large group via airlines, an event planned closer to home may prove to be profitable in goodwill while saving the planner the stress of a multi-tasked itinerary.

A. Negotiating the Event Contract

Whether the event is scheduled at home or away, a multitude of details such as attrition, cancellation, force majeure, and dispute resolution should be accounted for in the contract. 25 It is necessary for the individual or corporate attorney to negotiate the specifics of the contract and ensure that the clearly defined requisites of the event have been addressed. 26 “A poorly negotiated contract can cost a corporation thousands of dollars in unnecessary expenses, while a well-staged event can engender incalculable levels of goodwill” for the event sponsor. 27

23. Susan Carey, Fliers Assail “Imprisonment” on Grounded Planes Thousands Stranded on Runways up to 11 Hours, PALM BEACH POST, Jan. 19, 1999, at 1A. While each airline forms their specific rate plan, generally they will issue special offers to clients for group travel or large blocks of tickets purchased for a special event at a pre-determined destination. See Davis, supra note 15, at 43. These offers may include percentage rate discounts, special fares, additional frequent flyer miles, free freight, upgrades, and free bonus tickets or productivity tickets to the client or sponsor of the event. Id.
24. Id. at 43–44.
25. Id. at 44. The details of an event contract should also include: dates and times, contact names and information, function space specifics, food and beverage, liability and insurance, presence of other groups or events, ADA compliance, equipment requests and inventory, labor charges, parking, and if applicable, accommodations and guest specifics. Id.
26. See Davis, supra note 15, at 44.
27. Id. at 39.
Prepare ahead of time by researching the facility that the client wishes to contract with.\textsuperscript{28} Find out what other facilities offer, then weigh these as viable alternatives to add clarity to the property that is being considered.\textsuperscript{29} “During the site selection and negotiation process, ask to see a facility’s standard contract, especially the fine print on [the] deposit, payment, attrition and termination and cancellation policies.”\textsuperscript{30} Clarify any ambiguities in the facilities standard contract and utilize this contract as a base for negotiations and discussions.\textsuperscript{31} If the facility offers acceptable provisions, “save your negotiating currency for something that isn’t covered elsewhere.”\textsuperscript{32} Reiterate the specific goals of the client’s event, what is expected of the facility, the transaction that will be occurring, and the law that will apply thereto.\textsuperscript{33} Negotiate a final agreement that incorporates the facility’s standard language, the client’s specific language, and the best interests of both parties into the negotiated contract.\textsuperscript{34} All discussions and agreements should be solidified and included in this contractual writing.\textsuperscript{35} The writing should detail all of the relevant and important technical issues, in addition to the mundane, in an effort to avoid confusion and misunderstandings.\textsuperscript{36} Once the contract is reduced to writing, it should be reviewed for content as well as scrivener’s errors and other seemingly harmless but potentially litigious errors.\textsuperscript{37}

\textsuperscript{28} J. Kent Newsome, \textit{Ten Rules for Ethical and Effective Negotiating}, 531 P.L.I. REAL EST. L. 1117 (2006). Advanced preparation and knowledge of the market rates can enable the client to assess the event facilities’ price-to-value ratio, thereby resulting in a balanced and cost-effective outcome. \textit{See} Davis, \textit{supra} note 15, at 42. This advanced research is far more advantageous to the client than expert negotiation skills. \textit{Id.}

\textsuperscript{29} Newsome, \textit{supra} note 28, at 1119.

\textsuperscript{30} Davis, \textit{supra} note 15, at 44.

\textsuperscript{31} \textit{See id.} at 43–44. It is important to know the contract that you are negotiating. \textit{See} Newsome, \textit{supra} note 28, at 1119–21.

\textsuperscript{32} Newsome, \textit{supra} note 28, at 1120.

\textsuperscript{33} \textit{See id.} at 1120–21. The event contract should cement what is expected of the client and the facility, thereby incorporating the purpose for the gathering, the client’s goals for the event and, if applicable, the meeting’s content. \textit{See} Davis, \textit{supra} note 15, at 44.

\textsuperscript{34} \textit{See Davis, supra} note 15, at 44.

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{See id.;} Andrea M. Teichman, \textit{Drafting and Negotiating Contracts}, 3 MASS. BASIC PRAC. MANUAL ch. 12 (2007).

\textsuperscript{37} \textit{See Davis, supra} note 15, at 44. When reviewing and evaluating the contract, ensure that the products and services offered by the facility have been accurately described and the expectations of the client have been clearly delineated. \textit{See} Teichman, \textit{supra} note 36.
B. The Force Majeure or “Eyeore” Clause

The traditional law of contracts provides that, if there is no wording in the contract stating otherwise, one or both parties to the contract may terminate the contractual performance if the party’s performance is made impracticable, impossible, or is frustrated by supervening events which would render the significance of the performance valueless to that party. This fundamental legal principal is a default provision which is effectuated when a supervening act or occurrence has an effect on the event, and the parties did not assign the risk and consequences in the contractual agreement. If the parties to the contract do not want the peril of unintended consequences from future acts that transpire beyond their control, then the contractual agreement should thoroughly “address what [principles] will apply and what the consequences will be.”

Successful event planning begins with the contractual language between the facility and client. One of the most important provisions that should be included in the event contract is the force majeure clause. Force majeure clauses, also referred to as “Acts of God and War" or “Vis Major," are applicable when the execution of an event is prevented due to forces beyond the control of the facility or group, such as inclement weather, large-scale disasters, labor disputes, or civil unrest. In a standard force majeure clause, no penalties are assessed to either party when the event must be terminated; however, “these clauses are susceptible to very different interpretations” based upon the specific language or the ambiguity of the writing.

40. Id.
41. Id.
42. Id.
43. Davis, supra note 15, at 44.
44. Robbins, supra note 38. “Vis major means a greater or superior force.”
45. Davis, supra note 15, at 44.
46. Id.
"Force Majeure clauses are not just boilerplate anymore." 47 In the wake of recent events and catastrophes that have occurred worldwide, it has become evident that some clauses are better constructed than others. 48 A true force majeure can cause a materially adverse ripple effect, particularly in the travel and hospitality industry. 49 Contingency planning is now a reality that clients and facilities must consider when scheduling an event. 50 Therefore, a fully contemplated force majeure clause has become a necessity in all viable event contracts. 51

In a world where timing is everything, when a catastrophe occurs and an unevaluated force majeure clause comes into effect, litigation can and will ensue. Ambiguity is a common cause for litigating a force majeure clause. 52 When "a written instrument lends itself to more than one reasonable interpretation, it is ambiguous." 53 In many cases an extensive list of potential force majeure events is a party's best defense against a claim of ambiguity. 54 A well structured clause should specifically include the conditions that will inhibit or prevent a party's performance. 55 This detailed clause will force the


51. Foster, supra note 39; see generally N. Ins. Co. of N.Y. v. Pelican Point Harbor, Inc., 19 Fla. L. Weekly Fed. D722 (N.D. Fla. 2006) (holding that summary judgment is denied because disputed issues of material facts existed regarding the force majeure clause); Tire Kingdom, Inc. v. Waterbed City, Inc., 654 So. 2d 1005, 1006 (Fla. 3d Dist. Ct. App. 1995) ("[T]he trial court in the case sub judice may rightly interpret the [force m]ajeure clause at issue here as a matter of law.").

52. See Cartan Tours, Inc. v. ESA Servs., Inc., 833 So. 2d 873, 874–75 (Fla. 4th Dist. Ct. App. 2003) (finding the phrase "affecting the ability of the Olympic Games to be held" was ambiguous because it could have more then one meaning).


parties to recognize and contemplate the potential of a force majeure, while preventing the clause from appearing vague and standardized. The more negotiated the terms in this provision appear, rather than "boilerplate," the more a court will accept the clause as unambiguous and controlling.

One of the most critical issues for the parties is determining what time interval between the scheduled event and the potential force majeure occurrence will justify the termination of a contract. The decision to not perform in a contract under the protection of a force majeure clause must be approached carefully. The mere threat of a force majeure will not relieve a party of its contractual obligations. This is because "'fear doesn't amount to force majeure.'" If the parties choose to make a provision for a threat of a force majeure, they must state in the contract that based upon a specific viable threat, such as a warning from the Department of Homeland Security, either party has the ability to terminate the contract.

Contractual wording becomes paramount when addressing the repercussions of a force majeure on an event. For example, unless the contractual agreement states otherwise, parties are still under an obligation to perform despite a lack of attendance or interest in the event. Equally, if adverse economic conditions are a derivative result of a force majeure, payment would not be excused simply because it became economically impractical or inadvisable. "In fact, 'the unforeseen cost increase that would excuse performance must be more than merely onerous or expensive. It must be posi-

clause specifically includes the event that actually prevents a party's performance.'" Id. (quoting Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987)).

56. See St. Joe Paper Co., 371 So. 2d at 180–81.

57. Teichman, supra note 36.


59. See id.


61. See Foster, supra note 39.

62. See id.

63. Id.; Christopher Elliott, Practical Traveler: With Threat of Avian Flu, Go or Stay Home? N.Y. TIMES, Oct. 30, 2005, at 5.6. An outbreak of a virus is considered a force majeure event and is beyond the control of the travel or event planner; however, if the trip or event is still scheduled and can be executed, then the planner is under no obligation to offer you a refund. Id.

tively unjust to hold the parties bound.” 65 Neither a shift in the market nor financial inability as a result of a force majeure will discharge the contract unless the contractual language states otherwise. 66 If parties seek to protect themselves in the event of a force majeure, their intentions must be clearly stated in the clause and not implied. 67 Relying upon common law doctrines as a default is equally discouraged. 68

“The party who relies on a force majeure clause to excuse performance bears the burden of proving that the event was beyond the party's control and without its fault or negligence.” 69 Proof or even general knowledge of the force majeure event does not absolve this burden. 70 Rather, sufficient evidence must be presented to show that the circumstances pertaining to the force majeure rendered the performance of the contract so unreasonable and extreme that it is necessary to excuse the performance and the parties under the agreement. 71

It is important to note that once the contractual agreement is terminated due to a force majeure, the parties' obligations to each other are also terminated. 72 This termination applies even if the force majeure resolves itself, disappears, or comes to an end. 73 Once the termination has occurred neither party is under any obligation to “undo” the termination or enter into new contract for the event. 74

C. Attrition and Event Insurance

After a force majeure, an event planner may decide to persist with the event despite a contractual clause making it possible to cancel without a penalty; however, deciding that “the show must go on” does not necessarily

66. OWBR LLC, 266 F. Supp. 2d at 1222 (citing RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981)).
67. See Foster, supra note 39.
68. See Butler, 354 P.2d at 244–45.
69. OWBR LLC, 266 F. Supp. 2d at 1222 (citing Stand Energy Corp. v. Cinergy Servs., 760 N.E.2d 453, 457 (Ohio Ct. App. 2001)).
70. Id. at 1224.
71. Id. at 1225.
73. Id.
74. Id.
mean that people will choose to attend the event.75 Many event contracts impose fees on the client if a predetermined percentage of people fail to attend.76 Thus, clients who choose not to cancel the event are faced with substantial attrition fees.77 Although some event facilities have more relaxed attrition and cancellation policies than others, it is never a good business decision to wait until a force majeure to discover the details of a facility’s policy.78

Event “contracts should be written with language that links attrition and force majeure events, and automatically voids (or substantially modifies) the attrition provision if a force majeure event occurs.”79 With this type of clause, the client can make an informed business decision to proceed with the event absent an attrition fee, or at a minimum, a fee that is substantially modified.80 This agreement would allow clients the freedom to hold the event without an attrition penalty for an act that was beyond their control.81 Facilities would also receive the benefit of continued revenue where absent this modified attrition policy they would face terminations and a loss in profits.82 Additionally, a combined attrition and force majeure provision can exemplify a facility’s contractual goodwill and showcase itself as an additional advantage to clients when they are comparing and selecting event locations.

Event cancellation insurance is a growing trend in the wake of recent global force majeures. This type of insurance coverage “responds to the financial consequences of a force majeure event (beyond the control of the business) as defined in the insurance contract, which has an impact on the

75. See Mandel, A New Appreciation, supra note 48. “Additionally, meeting sponsors are required by law not to subject their attendees to unreasonable risks of harm.” Foster, supra note 39.
76. Mandel, A New Appreciation, supra note 48.
77. Id. Attraction is often referred to as “slippage” in the food and beverage industry. Davis, supra note 15, at 44.
78. See Mandel, A New Appreciation, supra note 48. In the aftermath of September 11, 2001, Hilton Hotels issued a statement that cancellation fees or penalties would not be imposed upon events between September 11, and October 31, 2001. Dunham-Potter, How Travel Companies Handle Events, supra note 18. The hotel chain stated that it is committed to flexibility and working cooperatively with its customers and guests during this tenuous period of time. Id.
80. Id.
81. See id.
corporate bottom line." Event insurance is available to both clients and event facilities. The insurance coverage can prove to be quite costly, but if the bulk of a client’s or facility’s annual income is linked to an event or a trade show, insurance becomes a crucial necessity. In the aftermath of a force majeure, the expense of the insurance will prove to be money well spent.

IV. CONSTRUCTING A FORCE MAJEURE CLAUSE

Successful event planning begins with the contract language in the client and facility agreement. While each contract may be as different as the events that they pertain to, a well-structured force majeure clause should be a standard that both parties strive for.

The facility’s standard event contract will determine what additional terms will need to be added to the force majeure clause. The agreement should specify the type of event, dates, times, event attendance, and the possibility of a force majeure. Caution should be taken not to state that the facility’s booking is contingent upon the occurrence of a larger event such as the Olympic Games or the World Cup. If the large scale event takes place, despite the force majeure, the client may find itself locked into the contract with no recourse or relief.

The contract should contain a clear, specific, and inclusive force majeure clause designed to cover known and unknown occurrences that could affect either party’s performance. Clear intentions in a contract will supersede and are considered controlling. Acts that are foreseeable, such as

84. Foster, supra note 39.
85. See Mandel, A New Appreciation, supra note 48.
86. "[F]orce majeure insurance is insurance gauged to cover us from the unimaginable, rather than the imaginable catastrophes." Robbins, supra note 38.
87. Foster, supra note 39.
88. Id. After Hurricane Katrina hit New Orleans, groups with event insurance were able to collect on their policies; however, many groups did not purchase insurance because of the post September 11, 2001, rate increases. David Jonas et al., Katrina Roils Industry, BUS. TRAVEL NEWS, Sept. 5, 2005, at 1.
89. See Cartan Tours, Inc. v. ESA Servs., 833 So. 2d 873, 874–75 (Fla. 4th Dist. Ct. App. 2003).
90. See id.
91. Foster, supra note 39.
92. Id.
power outages, must be listed in the force majeure clause in order for a party to terminate the contract without penalty. On occasion, some jurisdictions have held that failure to provide for a foreseeable event in the contract means the parties accepted the risk from such event and waived the right to use the occurrence of that event as a valid reason to terminate their performance. Lists of potentially adverse acts or occurrences should be listed with the preface “including but not limited to.” The clause should be written with a broad scope allowing for total or partial termination of the contract based upon a viable threat or the actual occurrence of a force majeure. Additionally, the contract should connect attrition with the force majeure event and modify or void the provision if this occurs. Parties should define vague or ambiguous words such as “inadvisable” in the contract, as well as terms or words that could have multiple meanings. In the event of a dispute over part, or all of the force majeure clause, the parties should agree and document whether they will submit the dispute to arbitration or costly litigation. The application of these criteria should yield an effective force majeure clause that is comprehensive and fair to both parties.

V. CONCLUSION

In the realm of contract law, contemplating the unforeseen is worthy of careful planning. Proper contract drafting will assist both parties in avoiding disputes and supports a healthy business relationship. The force majeure clause should be a permanent part of this process particularly in travel and event contracts. The time taken to carefully draft this clause will promote a positive experience for both parties knowing that all contingencies have been considered and planned for, and will prove to be invaluable in the aftermath of unforeseen circumstances.

93. See id.
94. Id.
95. Id.
96. Foster, supra note 39.
HURRICANE KATRINA: A DEADLY WARNING MANDATING IMPROVEMENT TO THE NATIONAL RESPONSE TO DISASTERS

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Dr. Aileen Marty is an internationally recognized expert in emergency preparedness, infectious disease, pathology, and the science, medicine, and policy of chemical, biological, and radiation counterterrorism. She is a frequent lecturer on disaster preparedness throughout the world. Dr. Marty is currently on Special Assignment with the Battelle Office of Homeland Security serving as Liaison and Relationship Manager for Office of Health Affairs of the Department of Homeland Security. She also serves as an Interagency Coordinator for the Department of Health and Human Services, United States Department of Agriculture, National Laboratories of the Department of Energy, and the Department of Defense. She teaches “Scientific, Domestic, and International Policy Challenges of Weapons of Mass Destruction and Terror” at the National Defense University. The editors of the Law Review solicited Dr. Marty’s contribution to this symposium on disasters, in part because of her expertise in the subject, but also because we wanted to highlight the need for a multidisciplinary approach to disaster preparedness in the hopes of stimulating further collaboration among the professions in this vital area. In this article, Dr. Marty, a medical doctor, puts into context the Federal Response to catastrophes and disasters, explores some of the lessons learned from Hurricane Katrina focusing primarily on the health issues, and then explains some of the remaining policy challenges that continue to face the nation regarding disasters. — Law Review Eds.

* Any opinions, findings, and conclusions or recommendations expressed in this material are those of the author and do not necessarily reflect the views of Battelle Memorial Institute, the Department of Homeland Security, or the Department of Health and Human Services.
+ The author wishes to express her sincere appreciation for the careful review and advice provided by Elena Marty-Nelson, Richard Danzig, Lundi McCarthy, Matthew Moore, and Michelle Jaffe.
I. INTRODUCTION

The federal government’s role in disaster management has evolved from simply providing tax relief to that of an active participant in prevention, response, and recovery. Experience with massive catastrophes that cause

1. See infra Table 1.
multiple casualties in the United States is limited; only ten large disasters are recorded in which there were over 1000 fatalities. Prior to the 2006 Hurricane Season, experts agreed that there would be more category four and five hurricanes. In addition, the risk from large-scale deliberate disasters is increasing; particularly as acquiring nuclear weapons is considered a potent political, military, and social tool. Since the 9/11 attacks, the federal government has recognized the urgent need for an improved, integrated National Plan for Preparedness, Response, and Recovery. The response to the 2005 hurricanes demonstrated the need for even more changes. This article first examines the changes initiated by 9/11. The article then reveals the mandated improvements, such as further integration between federal, state/tribal, and local government and the private sector capabilities that were made obvious by the lessons learned from Hurricanes Katrina and Rita, focusing particularly on some of the health care issues that arose. Finally, the article raises some very significant issues that continue to require multi-disciplinary and creative solutions and that must be addressed in disaster preparedness.

In February 2003, the White House produced Homeland Security Presidential Directive-5 (HSPD-5) on the Management of Domestic Incidents,

2. The term “casualty” is often ill-defined. In some texts, the term casualty means death, whereas in others it implies a patient with a treatable injury or illness. See BLACK’S LAW DICTIONARY 231 (8th ed. 2004). In this article, the term “casualty” is used to encompass both those with potentially treatable conditions and the dead. The absolute number of patients needed to define an event as producing “mass casualties” is less important than the functional impact to the existing support system. An incident that overwhelms the resources of a given system at a specific point in time is considered a mass casualty event. High impact events may or may not cause large numbers of directly impacted persons, but may nonetheless cause a large impact on the support system, because of the numbers of persons who fear that they may have been impacted. Thus, if one considers the “psychological casualties” and the fact that the effects of major natural catastrophes or of a terrorist event can be far-reaching, then even events with limited numbers of directly impacted persons can be “mass casualties” events.

3. See infra Table 2.


and in December 2003, the White House issued Homeland Security Presidential Directive-8 (HSPD–8) on National Preparedness. ⑦

HSPD–5 called for a transition from a Federal Response Plan (FRP) to a National Response Plan (NRP) ⑧ coupled with a National Incident Management System (NIMS). ⑨ The hope was that the NIMS would provide a consistent nationwide approach for federal, state, tribal, and local governments to work together effectively and efficiently to prepare, respond, and recover from domestic incidents, regardless of cause, size, or complexity. The backbone of the NIMS is the Incident Command System (ICS), ⑩ expanded so that NIMS would provide for interoperability and compatibility among federal, state, tribal, and local capabilities. The NIMS included a core set of concepts, principles, terminology, and technologies covering the incident command system, multi-agency coordination systems, unified command, training, identification and management of resources, qualifications and certification, as well as the collection, tracking, and reporting of incident information and incident resources.

HSPD–8 had the goal of establishing policies to strengthen the preparedness of the United States to prevent and respond to emergencies under a national, domestic, all-hazards preparedness goal. The NRP, modeled on the FRP, ⑪ incorporated the Robert T. Stafford Disaster Assistance and Emergency Relief Act, ⑫ and presented an all-hazards approach. The NRP, using the NIMS, was designed to provide the structure and mechanisms for national level policy and operational direction for federal support to state and local incident managers and for exercising direct federal authorities and re-


⑩ The ICS was developed in the early 1970s to deal with differences among agencies and unspecified incident objectives in certain disasters. Occupational Safety & Health Admin., U.S. Dep’t of Labor, Incident Command System: What is an Incident Command System? http://www.osha.gov/SLTC/etools/ics/what_is_ics.html (last visited June 21, 2007). ICS is “a standardized on-scene incident management concept designed specifically to allow responders to adopt an integrated organizational structure equal to the complexity and demands of any single incident or multiple incidents without being hindered by jurisdictional boundaries.” Id.


Published by NSUWorks, 2007

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The NRP attempted to capture protocols for operating under different threats or threat levels and it incorporated, as much as possible, the existing federal emergency and incident management plans, along with rigorous requirements for continuous improvements from testing, exercising, and experience. The hope was that the NRP would provide a consistent approach to reporting incidents, providing assessments, and making recommendations to the President, the Secretary of Homeland Security, and the Homeland Security Council. HSPD-8 also called for a National Preparedness Goal that established measurable priorities, targets, and a common approach to developing needed capabilities. This National Preparedness Goal uses a Capabilities-Based Planning approach to determine how prepared we are, how prepared we should be, and how to prioritize our efforts to close the gaps. It required the development of a target capabilities list that identified the capabilities of federal, state, local, and tribal entities.

Hurricane Katrina revealed many gaps and issues with the National Preparedness Goal and its target capabilities list, as well as issues with the NRP and the NIMS. The lessons learned have led to major revisions in all of these documents and to the development of an NRP/NIMS review process.

13. See infra Figure 1.
II. HURRICANE KATRINA

Hurricane Katrina collided with South Florida, picked up strength, and slammed into the Gulf Coast ravaging Mississippi, Louisiana, and Alabama in late August 2005.17

On August 29, 2005, at approximately 6:10 a.m. CDT (7:10 a.m. EST), Hurricane Katrina’s eye made landfall at Buras, on the Louisiana coast, between Grand Isle and the mouth of the Mississippi River. An hour and a half before the storm made landfall, the levees near the CSX railroad and Industrial canal were breached and the flooding of residential areas in greater New Orleans began. The storm surge overtopped the levees on the east bank of the river, “crossed” the river, overtopped the levees on the west bank, and sent additional water into neighborhoods in Plaquemines Parish. The center of Hurricane Katrina moved ashore into southeast Louisiana just east of Grand Isle. Catastrophic flooding manifested in New Orleans from massive overtopping of levees in east Orleans and St. Bernard Parish, overtopping and breaking of the Industrial Canal levees, and breaks in the 17th Street and London Avenue Canal flood walls. Though the flooding was first reported locally at 8:21 a.m. CDT (9:21 a.m. EST) on Monday, the Homeland Security Operations Center (HSOC) merely reported a “levee issue” at 9:50 a.m. CDT (10:50 a.m. EST) on Monday. Sadly, by Monday morning the disaster zone encompassed an area of 93,000 square miles, and thirteen states were in

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a "state of emergency." The storm had caused repeated surges of water many reaching twenty-seven feet above normal in the Biloxi Mississippi area, and damaged 169 miles of levees in Louisiana. It was not until Tuesday, August 30, at 6:00 a.m. EST that the HSOC finally provided a confirmed report of a breach. Inexplicably, Secretary of Homeland Security Michael Chertoff held off declaring Hurricane Katrina an "Incident of National Significance" until Tuesday evening, August 30, at 7:30 p.m. EST.19

The impact from these events were felt not only by the thousands of people caught in the path of the storms, but also by the entire nation as we struggled to provide shelter, food, medical resources, and law enforcement to those in and from the affected communities, and to deal with the economic consequences of the damaged infrastructure caused by these storms. The hurricanes, coupled with the subsequent flooding, caused the same sort of devastation to many local health care facilities, research centers, waste facilities, chemical facilities, and cemeteries, as it did to other types of buildings in the region, compounding the medical threats to the community. It damaged jails and law offices, compounding the security and law enforcement issues as well.

Countless foreign nations, from the poorest to the wealthiest, offered cash and in-kind donations, including foreign military donations to the United States. In-kind donations included food, clothing, medical supplies, and equipment. FEMA and other government agencies, however, did not have plans, policies, or procedures to ensure the proper acceptance and distribution of either cash or in-kind assistance donated by foreign countries and militaries. FEMA and other agencies established ad hoc procedures, but no agency tracked and confirmed that the assistance arrived at their destinations.

18. National Response Plan, supra note 8, at 4. The response to the hurricanes of 2005 was based on the NRP of December 2004. In the NRP of December 2004, an "Incident of National Significance" was defined as being based on criteria established in paragraph 4 of HSPD–5, and was considered an actual or potential high-impact event that required a "coordinated and effective response by an appropriate combination of federal, state, local, tribal, nongovernmental, and/or private-sector entities in order to save lives, minimize damage, and provided the basis for long-term community recovery and mitigation activities." Id. at 3. Paragraph 4 of HSPD–5 states:

The Secretary shall coordinate the Federal Government's resources utilized in response to or recovery from terrorist attacks, major disasters, or other emergencies if and when any one of the following four conditions applies: (1) a Federal department or agency acting under its own authority has requested the assistance of the Secretary; (2) the resources of State and local authorities are overwhelmed and Federal assistance has been requested by the appropriate State and local authorities; (3) more than one Federal department or agency has become substantially involved in responding to the incident; or (4) the Secretary has been directed to assume responsibility for managing the domestic incident by the President.

HSPD–5, supra note 6, at 230.

19. See supra note 17 and accompanying text.

https://nsuworks.nova.edu/nlr/vol31/iss3/1
Lack of procedures, inadequate data about the donations, and poor coordination resulted in the United States government agreeing to receive food and medical items that could not be used in the United States and led to storage costs of about $80,000.20

III. KEY FACTORS THAT LED TO FAILURES

(1) Long-term warnings went unheeded and government officials neglected their duties to prepare for a forewarned catastrophe.21

(2) Government officials took insufficient actions or made poor decisions in the days immediately before and after landfall.22

(3) Some important definitions and triggers in the NRP were not clearly defined.

(4) The Catastrophic Incident Annex could not be activated without the declaration of an Incident of National Significance or the specific request of the affected state.

(4) There were inconsistencies between the NRP and NIMS.

(5) There was ignorance concerning the NRP, NIMS, and the lessons learned from the Hurricane Pam exercise by key persons at all levels of response.

(6) Funding was cut to the Hurricane Pam exercise before it was completed, thus while problems were identified, key planning decisions for managing the problems were not yet made (plans for medical care for victims were not finalized, communication issues were not addressed, and key transportation decisions were left “to be determined”).

(7) The systems which officials relied on to support their response efforts failed.

(8) Government officials at all levels failed to provide effective leadership and were confused regarding their relative responsibilities.23

(9) There were problems with communication and situational awareness.

(10) Our plan failed to recognize that local police, fire, and medical personnel might be incapacitated.

22. Id.
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(11) There was a need but no plan in effect that utilized a modern, flexible, transparent logistic system between federal, state, local, and industry agencies.

(12) Confusion arose regarding the roles of the Principle Federal Official and the Federal Coordinating Officer.

(13) We were unprepared to manage and accept the unprecedented tide of foreign assistance on this scale.\(^{24}\)

(14) Issues arose between the roles of the Military and the National Guard, and their deployment was delayed.

(15) There was confusion between the roles of the HSOC, Interagency Incident Management Group (IIMG), and other operation centers and delays in activating the IIMG.

IV. ADJUSTMENTS TO NRP, NIMS, AND THE NATIONAL PREPAREDNESS GOAL AND ITS TARGET CAPABILITIES

A. Adjustments to National Response Plan

The NRP applies to all incidents requiring a coordinated federal response and is an all-hazards plan built on the template of the NIMS, which provides the structure and mechanism for national-level policy and operational direction for managing a domestic incident. Its flexibility is intended to enable effective interaction among various federal, state, local, tribal, private-sector, and other nongovernmental entities. The specific changes to the NRP following Hurricanes Katrina and Rita are:

(1) The NRP is always in effect.\(^{25}\)

(2) When incidents impact the entire nation, multiple states, or localities, multiple Joint Field Offices (JFO)\(^{26}\) may be established regionally.

(3) The Secretary will consider the four criteria set forth in HSPD-5 when making the determination to declare an Incident of National Signifi-


\(^{25}\) In the December 2004 NRP, which was not always in effect, the NRP could be partially or fully implemented in the context of a threat, anticipation of a significant event, or in response to a significant event. Selective implementation through the activation of one or more of the system’s components was supposed to allow for maximum flexibility in meeting the unique operational and information-sharing requirements of the situation at hand and enabling effective interaction between various federal and non-federal entities.

\(^{26}\) A JFO is a temporary federal facility established locally to serve as a central point for federal, state, local, and tribal executives who have responsibility for incident oversight, direction, and/or assistance to effectively coordinate protection, prevention, preparedness, response, and recovery actions.
cance, but he is no longer bound to them; he is not limited to those thresholds, and he may base his decision on other applicable factors.

(4) The declaration of an Incident of National Significance is no longer critical to the decision to implement certain elements of the NRP.

(5) Catastrophic Incident Annex: While the basic premise still applies that incidents are generally handled at the lowest jurisdictional level possible, the revised NRP says the CI Annex is primarily designed to address no-notice or short-notice catastrophic incidents where the need for federal assistance is obvious and immediate. This allows the federal government to act in support of projected needs in anticipation of requests from state and local authorities.

(6) Department of Defense (DoD) provides Defense Support of Civil Authorities (DSCA) in response to requests for assistance during domestic incidents. The supported DoD combatant commander may use a Joint Task Force (JTF) to command federal Title X military activities in support of the incident. Command and Control of the JTF is collocated with the Principal Federal Official (PFO)\(^{27}\) at the JFO to ensure coordination and unity of efforts.

(7) The Secretary of Homeland Security is now permitted to combine the roles of the PFO and that of the Federal Coordinating Officer (FCO)\(^{28}\) in a single individual for any disaster that is not an incident resulting from terrorism.

(8) To ensure coordination of effort, whenever possible, from operational entities such as DoD JTF; headquarters will collocate at the Joint Field Office.

(9) To better coordinate the NIMS with the NRP elements of Emergency Support Functions (ESF), they now organizationally fall within the Operations, Planning, and Logistics and Finance/Administration sections of the Joint Field Office, and other sections as required.

(10) The Domestic Readiness Group, which serves as a permanent standing interagency planning/operations staff housed within the National Operations Center, was created.

(11) The HSOC was replaced with the National Operations Center.

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27. The PFO is the federal official designated by the Secretary of Homeland Security to act as his or her local representative to oversee, coordinate, and execute the Secretary's incident management responsibilities under HSPD–5 for Incidents of National Significance.

28. The FCO is someone appointed to manage federal resource support activities related to Stafford Act disasters and emergencies. The FCO is responsible for coordinating timely delivery of federal disaster assistance resources and programs to the affected state and local governments, individual victims, and the private sector.
The Interagency Incident Management Group was replaced with an incident advisory group and adjudication body for the Secretary of Homeland Security.

B. Adjustments to National Incident Management System

The NIMS provides a structural framework for incident management at all jurisdictional levels regardless of the cause, size, or complexity of an event. The basic components of NIMS are now Preparedness, Communications and Information Management, Resource Management, and the Command and Management component—headed by the Incident Commander. These four NIMS components work together as a system to provide the national framework for incident management. Each organization—e.g., fire, police, emergency medical services, hospitals, etc.—needs some type of an Incident Management System (IMS) with an Incident Command System (ICS). The Command and Management oversees four sections—Operations, Planning, Logistics, and Finance. When more than one entity works together, a “joint command” is used. The Command is responsible for overall operations and liaisons with other agencies. The Operations Section houses the “doers”; the Planning Section looks ahead and addresses the “what if” scenarios; the Logistics Section gets “stuff” to keep operations going; and the Finance Section tracks and authorizes expenses and personnel. The ICS provides a flexible infrastructure that can expand and contract as time evolves, depending on the size and complexity of the event. All personnel need to have clearly defined roles and responsibilities, based on previously described functions rather than on specific individuals.

As of March 26, 2007, the NIMS working group has produced a draft NIMS Upgrade V2. The working group continues to study, obtain, and review comments and revise NIMS accordingly to include: improving the guidance to clarify roles and responsibilities within the NIMS framework; the incorporation of concept preparedness into NIMS; and making NIMS easier for stakeholders to use. The revised NIMS will provide clearer identification of the relationships between the NIMS, HSPD–8, the NRP, and other federal response efforts. In addition, the revised NIMS will emphasize

29. Memorandum from Al Fluman, supra note 15.
30. See Figure 2.
32. Id.
NIMS training for emergency management, response personnel, disaster workers, private sector, and nongovernmental agencies.

C. Adjustments to National Preparedness Goal and Its Target Capabilities

The impact of the 2005 hurricanes required changes to our National Preparedness Goal (NPG). 33 A new national priority was added: “Strengthen Emergency operations planning and citizen protection capabilities.” This new priority is now a capability-specific priority to the NPG. Emergency planning is now a “National Security Priority.”

The NPG is now more strongly viewed as one with an “All-Hazard” approach and less of a counter-terrorism approach. The specific capabilities in environmental health, fatality management, citizen protection (evacuation or in-place protection), public safety and security response, on-site incident management and emergency operations center management (such that government officials are better prepared to handle their role in managing a major event), and urban search and rescue (to emphasize search of evacuated areas in addition to structural collapse extrication) have been modified or rewritten. There are also plans to rewrite or modify mass care, short-term recovery, critical resource logistics and distribution, citizen preparedness and participation, and water rescue.

V. PUBLIC HEALTH ASPECTS

A. Lessons Learned from Katrina Regarding Public Health in a Catastrophe

1) Shelter in place: Hospitals had to support thousands of extra people—evacuees, families of staff and patients, policemen, firefighters, National Guardsmen, and United States Marshals. Extra beds, toiletries, and food needed to be found and distributed at the same time that patient care was being provided.

2) Loss of access to drugs and vaccines.

3) Separating acute treatment needs from pre-existing conditions.

4) Impact on Hospital staff: Many lost their homes, some lost medical practices by loss of patients.

5) Need to improvise and disregard certain rules during event.

6) Reorienting medical specialists toward providing primary care.

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(7) Location of generators—loss of power on health care (e.g. dialysis equipment, ventilators, etc.).

(8) Coordination between FEMA & DHHS.

(9) Evacuating/accepting patients: Transportation issues.
   (a) Need for better planning and coordination of transportation of patients to/from hospitals, because following Katrina the nearest centers got most patients and were overwhelmed.
   (b) Need for better plans for the evacuation of handicapped/elderly.

(10) Heat, hygiene, and waste disposal.

(11) Immunizing workers who clean up debris.

(12) Complications caused by mold, allergies, petrochemicals, and infectious agents.

(13) Security forces need to coordinate with health experts as per the ICS.

(14) Hospitals in New Orleans failed to anticipate communication failures, and such failures lasted nearly twenty-one hours.

(15) The transfer of the National Disaster Medical System (NDMS) to the Department of Homeland Security in 2003 had undermined NDMS effectiveness. When Hurricane Katrina struck the Gulf Coast, NDMS was unprepared to properly respond, also there was confusion between HHS and DHS about deploying NDMS personnel and assets.

B. Public Health Aspects of Multi-Disciplinary Coordination and Communications

Disasters require non-traditional partnerships, and the partners must be notified and must participate in coordination of the event. These include: 1) local law enforcement and potentially the Federal Bureau of Investigation (FBI); 2) public health—populations of patients rather than simply individuals are involved; 3) the EMS agency; 4) city/county/state or tribal/federal administration; 5) the Laboratory Response Network; 6) the media; 7) mortuary affairs; and 8) faith-based leaders. Clear procedures must be in place to maintain the “chain of evidence” and proper authorities must be notified, such as public health and the FBI, when collecting samples. A 24/7 reporting system must be implemented so notifications can be readily made at all hours during the emergency. Potential damage to physical communications infrastructure necessitates appropriate redundancy planning and must con-
sider alternate forms of communications and notification systems. In past
disasters, communications networks have been crippled significantly by mas-
sive simultaneous utilization by the affected population. The numbers of
persons attempting to access various telecommunication systems simultane-
ously affects the communication networks in such a way that no calls can get
through, even though the system remains physically intact.

C. Surge Capacity and Alternate Sites of Care

A strategy to improve system capacity—surge capacity—is critical to
optimize preparation and management of mass casualties. Even with an op-
timal IMS, if the health care system lacks the capacity to provide patient care
to large numbers of casualties, people will die. Our current health care sys-
tem has virtually no excess capacity. This is very cost-efficient under ordi-
nary circumstances, but problematic following any type of disaster or public
health emergency that produces large numbers of casualties. Even a small
increase in the number of patients stresses the current health care system.
Compounding the problem is the issue that hospital disaster plans cannot
count on a staff level that equals or exceeds their normal staffing. Some staff
members will go home—or not come in—so they can take care of their own
families, while others may be isolated because of road conditions or other
physical problems. Additionally, loss of power, phones, and cellphones can
make it difficult or impossible to respond. Hospitals need plans that are ca-
pable of functioning at scaled levels, based on the scope of the emergency
and the availability of the staff. An expert has proposed a model for improv-
ing surge capacity for hospitals that contains of three components: “Staff,”
“Stuff,” and “Structure,” with “Structure” consisting of both the management
infrastructure as well as the physical buildings required to provide patient

Using this model; personnel, supplies, equipment, physical space,
and a management infrastructure, consistent with the needs of the event,
would be identified and provided.

Traditionally, hospitals have been thought of as the major or the only
places for medical care; but, hospital resources can easily be exceeded or the
hospital could become non-functional because of flooding, power-issues, or
contamination. One strategy for dealing with mass casualties is to use alternate sites of care, referred to as “surge hospitals,” such as veterinary hospitals, shuttered retail stores, athletic arenas, airport hangers, and other facilities. Another strategy is to “surge” within existing hospitals by, for example, adding additional beds, opening unused wards, and adding personnel. The capability to emergently expand patient care capacity is required by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) standards. Thus, all hospital facilities must either designate appropriate alternate sites of care or have an internal surge capacity. The Medical Disaster Response concept is one example of such an approach. The local administrative jurisdiction (EMS or public health) should also be involved in community and regional planning for alternate care sites.

Expanded hospitals and surge hospitals require additional staff. The recruitment of properly licensed and credentialed health care volunteers presents significant challenges for public and private health entities. The existing methods for the deployment of voluntary health personnel in emergencies are limited by issues with recruitment of qualified volunteers, effective use of volunteers during emergencies, and verification of the identity and qualifications of the volunteers by those seeking their assistance. To adequately staff this expanded capacity, decision-makers should consider innovative concepts to provide emergency credentialing of personnel. One technique is to temporarily grant privileges to providers by honoring the credentialing process of neighboring institutions. Another technique is to employ the concept of a National Medical License for Disasters (NMLD). There would be strict criteria for obtaining and maintaining the license, including passing the United States Medical Licensing Exam (USMLE) and yearly Continuing Medical Education (CME) credits, as well as yearly assessment of the individual’s role and responsibility in an incident. Such a license would not be active until a disaster or catastrophe is declared. When it is the

activated practitioner, it is automatically "federalized" and thus, the practitioner is insured as a federal practitioner. It replaces a registration system and is more cost effective for the federal government and for the regions in need of health care providers. It could allow for qualified foreign personnel to assist in a domestic emergency if the foreign physicians can pass our tests and maintain their national medical license for disaster.

D. Health Risk Communications During Disasters

Health care providers and the public may lack a basic understanding of the true risks associated with certain types of disasters. This lack of knowledge can reduce the effectiveness of mitigation measures which would otherwise limit morbidity and mortality.

Clear and concise messages—ideally prepared in advance of an event—delivered by a credible technical spokesperson can positively influence outcomes. One of the challenges is that the scientific knowledge necessary to support appropriate prevention and treatment recommendations may initially be absent.

Public information is readily available at several locations, particularly government websites such as:

http://www.ready.gov
http://www.bt.cdc.gov/planning/
http://www.fema.gov/hazard/index.shtm
http://www.cdc.gov/niosh/docs/2002-139/default.html#toc

These sites may be invaluable for the continued dissemination of information before and after a natural disaster or a deliberate attack. Additionally, by providing information about when and where to seek treatment, how to recognize symptoms of particular diseases, techniques for sheltering, and methods of mitigation, we can potentially decrease the "surge" burden to emergency response systems.

E. Delicate Legal Issues Regarding Public Health During Catastrophes

Certain laws and regulations can be problematic in the face of mass casualties. For example, in situations where there is exposure to a contagious agent, quarantine of exposed individuals and isolation of ill persons may be necessary. Quarantine authority varies by jurisdiction and has not been invoked for many years in the United States. It may become necessary to involuntarily isolate exposed victims until lack of contagion can be as-
HURRICANE KA TRINA: A DEADLY WARNING

sured. This will likely require close collaboration between hospital security, local law enforcement, and public health authorities. Thus, "[t]he balance between civil liberties and the protection of public health remains a challenge."\(^{40}\)

Complications can arise with application of the Consolidated Omnibus Budget Reconciliation Act/Emergency Medical Treatment and Active Labor Act (COBRA/EMTALA),\(^{41}\) which limits transfer of patients to specific pre-defined circumstances and requires facilities with the capability and capacity for a higher level of care to accept patients in transfer, and the Health Insurance Portability and Accountability Act (HIPAA)\(^{42}\) privacy regulations. There is an emergency exception in the HIPAA regulations,\(^{43}\) but case law is lacking to determine whether this would be sufficient to allow appropriate medical information to be transmitted in a mass casualty situation.

F. Triage

In the setting of mass casualties, the goal of triage shifts from doing the best for an individual to "doing the most good for the most patients." There are several systems available to manage a large influx of casualties. The most common system used in the United States for initial triage is START (Simple Triage and Rapid Treatment).\(^{44}\) Of note, patients who are contaminated or those who are exposed to contagious agents must be triaged in a manner that minimizes the possibility of transmitting the hazardous agent to others.\(^{45}\)

G. Securing Healthcare Facilities

During catastrophes a security plan must be in place that limits access to the hospital or appropriate ward(s) so only patients, authorized personnel

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43. See id.


45. David C. Cone & Kristi L. Koenig, Mass Casualty Triage in the Chemical, Biological, Radiological, or Nuclear Environment, 12 EUR. J. EMERG. MED. 287, 287 (2005).
and, if appropriate, patient visitors may enter. Logistical interventions, such as shutting down the ventilation systems, may be needed to prevent rapid spread if there is a contagious agent involved. "Reducing a building's vulnerability to an airborne chemical, biological, or radiological attack requires a comprehensive [plan]. Decisions concerning which protective measures to implement should be based on the threat profile and a security assessment of the building and its occupants. [P]hysical security is the first layer of defense." \(^{46}\) A building security assessment should be done to determine the necessity of additional measures. Codes must be developed such that new building systems adopt design features that are capable of incorporating the currently rapidly evolving technology which offers a greater level of protection.

H. Personal Protective Equipment for Health Care Providers

Standard precautions should be used for all patient encounters. In addition, if patients are exposed to agents that are spread person-to-person, appropriate respiratory personal protective equipment (PPE) may be needed to decrease the risk from exposure to respiratory droplets. There is some controversy regarding what types of masks would be protective if an agent is unknown. For agents transmitted by respiratory droplets, an N-95 mask would theoretically be adequate. In other situations, a HEPA filter mask might be more appropriate. This issue is currently unresolved.

I. Stockpiling

Strategic planning for mass casualties requires appropriate stockpiling of necessary medications, supplies, and equipment; especially since most hospitals have a "just-in-time" strategy for providing pharmaceuticals and equipment to their patients on a daily basis and lack the ability to rapidly expand resources to meet the needs of a large influx of casualties. Threat vulnerability analysis helps determine what should be in the stockpile by providing data regarding events that pose the greatest threat for a given place. Portable disposable ventilators and training staff in their use are advised. In addition, another sad lesson learned from Katrina is the need for additional persons, such as family members, to receive training on an ad-hoc basis on bag-valve-mask techniques to keep their relatives alive. If an event unfolds quickly, such as an earthquake, storage of stockpiles must be close by. Medications that arrive after six to twelve hours may have little impact.

\(^{46}\) CDC, NIOSH, GUIDANCE FOR PROTECTING BUILDING ENVIRONMENTS FROM AIRBORNE, CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL ATTACKS 22 (May 2002).
If, however, it takes several days for a disaster to fully develop, then there may be time to request additional medications and other equipment from a remote location. In general, a combination of local, regional, statewide, and federal caches is ideal. Careful administration will prevent multiple entities from being dependent on the same supplier. In between disasters, medications and other perishable items from the stockpile should be rotated into local or regional usage to minimize losses from expiration. One problem that arose during the medical management of victims of Katrina was the jurisdiction of the Strategic National Stockpile (SNS). Supplies from the SNS belong to the Federal Government until they are dispatched for use at which time ownership is transferred to the state. In at least one site, the SNS was delivered but not used, because all of the medical staff present at the scene were from a federal group and they were not permitted to use the supplies that were very much needed by the victims of the hurricane because of jurisdictional issues. This issue is still unresolved.

J. Psychological Aspects of Public Health Aspects of Catastrophes

A key component of any response is the psychological care for victims, involved emergency personnel, affected communities, and the country at large. Close integration with health risk communicators may help to mitigate some of the psychological trauma that is likely to follow an attack. Contrary to popular mythology, very few people, if any, panic during disasters. Nonetheless fear will cause an increase in persons presenting for care and the incremental effects of increased call volume, hazardous materials team responses, and concerned patients with unexplained medical symptoms visiting the emergency departments which can prove to be highly detrimental to public health and emergency response services.

47. E-mail from Raymond E. Swienton M.D., FACEP, Associate Professor of Emergency Medicine, Co-Director EMS, Disaster Medicine & Homeland Security Section, Division of Emergency Medicine, Southwestern Medical Center to author (May 22, 2006 11:00:10 PST) (on file with author).


50. See G. James Rubin et al., Psychological and Behavioural Reactions to the Bombings in London on 7 July 2005: Cross Sectional Survey of a Representative Sample of Londoners, BRITISH MED. J. (INT. ED.), Aug. 26, 2005, at 1, available at http://bmj.com/cgi/content/full/7517/606#BIBL.
K. *Health Care Providers Impacted by the Catastrophe*

A particular aspect of physical and psychological trauma is the impact of a catastrophe on the people participating in response and recovery activities. Whether particular response persons are injured or concerned about the effects on themselves and their families, the net effect is the same: loss of personnel. This decrease in personnel can affect the efficiency and success of the overall response effort—as was evident in the response to Hurricane Katrina.\(^{51}\) Providing information and solutions to people prior to and during the event helps—as does providing any needed personal protective equipment and post exposure medications or vaccines. Helping staff take care of their families and dependents is an essential effort to help secure the services of those persons who may otherwise need to care for their families. Stress debriefing and other psychological care services may help, but the efficacy of certain techniques is unclear and may actually be detrimental.

L. *Mortuary Affairs*

Planning at local and regional levels must take into consideration safe locations for the storage of possibly contagious or contaminated remains. Disaster Mortuary Operational Response Teams (DMORT),\(^{52}\) should be contacted, but local officials should prepare in case the DMORT is not immediately available to assist. The needs of criminal investigations and public health concerns, as well as the availability of mortuary services during a surge of mortality, may conflict with families’ wishes for rapid disposition of remains and religious concerns regarding timing and method of disposition. Confusion arose during Hurricane Katrina because the flood damaged some local cemeteries and uprooted trees which exposed some human remains.\(^{53}\) Inclusion of local religious leaders into ongoing planning/exercise events involving mortuary affairs may help mitigate some concerns. Religion-neutral, compassionately devised health risk communications may help alleviate public concern. Such measures will enhance the ability of law enforcement and public health agencies to carry out their duties while maintaining appropriate respect and dignity for the deceased.

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51. *See A FAILURE OF INITIATIVE, supra* note 17.
M. Special Populations

Specific populations are likely to be at higher risk of morbidity and mortality during disasters. These include geriatric, pediatric, immunocompromised, and pregnant persons, as well as those with limited communications abilities due to physical (deafness, blindness), cognitive (mental illness), or language barriers. As revealed in the response to Hurricane Katrina, persons who are homebound or who are reliant on home health nursing and materials, are also at higher risk, as are persons who are in high-density populations, such as shelters, nursing homes, and prisons. Education and surveillance in these populations is critical as are plans for early transportation or sheltering in place, quarantine/isolation, and treatment as needed.

VI. Public Health and Medical Support Changes Stimulated by the 2005 Hurricanes and Subsequent Threat Assessments

On December 19, 2006, the President signed into law the Pandemic and All-Hazards Preparedness Act. This law has:

(1) Transferred the National Disaster Medical System back from DHS to the Department of Health and Human Services (HHS);

(2) Created the office of Assistant Secretary for Preparedness and Response within the HHS to consolidate the responsibilities for federal public health and medical emergency preparedness and response activities;

(3) Required the Secretary of HHS to appoint an official to ensure that the Strategic National Stockpile (SNS) addresses the needs of at-risk populations, oversee development of curriculum for training programs on medical management of at-risk individuals, and disseminate best practices for outreach to and care for at-risk individuals before, during, and following public health emergencies;

(4) Beginning in 2009, HHS is required to prepare and submit the National Health Security Strategy for coordinated public health preparedness and response to Congress every four years. The strategy will evaluate and measure progress in federal, state, local, and tribal preparedness.

(5) Provided for cooperative agreements (i.e., grants) to state and selected local public health entities to improve health security, however, states or a consortium of states must agree to supplement this with non-federal funds. It also authorized grants to universities, laboratories, and hospitals for

tuition loans for persons willing to serve two years in local, state, or tribal health departments.

(6) Required the development of a nationwide, near real-time electronic public health situational awareness capability.

(7) Strengthened federal support and structure for the Medical Reserve Corps (MRC) program.

(8) Established the Biomedical Advanced Research and Development Authority (BARDA) and a Biodefense Medical Countermeasure Development Fund to allow BARDA to fund the development of products between NIH-funded basic research and end-stage procurement by the BioShield program.

(9) Established the National Biodefense Science Board.

(10) Set up limited anti-trust exemptions to help pharmaceutical companies collaborate with each other and with the government in the development of medical countermeasures and made other reforms to the Project BioShield Act of 2004 to facilitate drug development.

Unresolved issues include:

(1) Issues with medical licensing and malpractice risk for volunteer health workers from out of the affected region.

(2) Better coordination of logistics and transparencies to coordinate logistic actives between private and public entities.

(3) Improving interoperable communication systems, detection systems, and warning systems.

(4) Improving education, exercising, and training for private citizens.

(5) Preparing healthcare facilities and response agencies to triage for a large numbers of patients and assuring that they have ready access to current diagnostic and treatment information, while protecting the responding personnel from further harm is critical and complicated. This problem is compounded because 90% of the United States health care system is in private hands and these private entities struggle with the issue of unfunded mandates.

VII. CONCLUSION

The management of disasters requires a carefully orchestrated multi-disciplinary plan for federal, state, tribal, local, and private entities and requires an interdisciplinary understanding of the threats and issues. Thus, a

crucial necessity for preparation, mitigation, response to, and recovery from catastrophic events is the existence of pre-existing relationships between medical, public health, policy, and law enforcement agencies at all levels of government coupled with a coordinated national response plan operating under a national incident management system. Public and private entities at all levels have to drill, drill, and re-drill, while learning from those drills and improve plans, and drilling them again so that we don’t wait for another catastrophe to reveal weakness. Careful attention to education and training efforts and to health risk communications planning can help mitigate physical and psychological casualties, minimize attrition among response personnel, and decrease damage to infrastructure. The Federal Government in coordination with local, state, and private entities has made many efforts to improve our response since the hurricanes of 2005 and has set in motion a mechanism for continuous revision and improvement. We must be ever vigilant, however, to ensure that this momentum is not halted or derailed and that the ideas are tested and retested so that we will never again face the catastrophic human, economic, and social toll extracted by disasters with the magnitude of the hurricanes of 2005.
Table 1: Evolution of Federal and National Response to Disasters and Catastrophes

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1803</td>
<td>Congressional Act of 1803: Provided assistance by waiving duties &amp; tariffs for merchants following fires in Portsmouth, New Hampshire.</td>
</tr>
<tr>
<td>1900</td>
<td>Congress chartered American Red Cross as a charitable organization to provide disaster relief. This charter was dissolved for financial difficulties and a new charter was created in 1905.</td>
</tr>
<tr>
<td>1932</td>
<td>Hoover's Reconstruction Finance Corporation (RFC): Lent money to banks and institutions to stimulate economic activity &amp; dispense federal dollars after a disaster.</td>
</tr>
<tr>
<td>1934</td>
<td>Bureau of Public Roads given authority to finance reconstruction of highways and roads after a disaster.</td>
</tr>
<tr>
<td>1944</td>
<td>Flood Control Act: Gave U.S. Army Corps of Engineers authority over flood control and irrigation projects.</td>
</tr>
<tr>
<td>1950</td>
<td>Civil Defense Act: First comprehensive legislation on federal disaster relief.</td>
</tr>
<tr>
<td>1952</td>
<td>President Truman's Executive Order 10427: Established federal disaster assistance is a supplement.</td>
</tr>
<tr>
<td>1965</td>
<td>Establish HUD: Led to the establishment of the Federal Disaster Assistance Administration.</td>
</tr>
<tr>
<td>1973</td>
<td>President Nixon's Report: New approach to Federal Disaster, assistance is a supplement.</td>
</tr>
</tbody>
</table>

1974: Disaster Relief Act: Established process of presidential disaster declarations.


Also, FEMA charged to oversee the nation's Civil Defense (previously done by DoD's Defense Civil Preparedness Agency).

1988: Stafford Disaster Relief and Emergency Assistance Act.

1993: President Clinton elevated FEMA to a cabinet level position.

2000: Disaster Mitigation Act (Stafford Act with revisions). 57


2005: Hurricane Katrina and Rita.

2006: Notice of Change to the National Response Plan: Reorganized incident management, created the Domestic Readiness Group, established the National Operations center, changed and broadened the scope of the Catastrophic Incident annex, and clarified the meaning of an "Incident of National Significance". 59

2006: Department of Homeland Security Appropriations Act, 2006. 60


Table 2: Major U.S. Disasters (Deaths >1000) 62

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
<th>Deaths</th>
</tr>
</thead>
<tbody>
<tr>
<td>1865</td>
<td>Steamship explosion</td>
<td>1547</td>
</tr>
<tr>
<td>1875</td>
<td>Forest fire (Wisconsin)</td>
<td>1182</td>
</tr>
</tbody>
</table>

59. NOTICE OF CHANGE TO NATIONAL RESPONSE PLAN, supra note 15, at 9; NIMS Key Revision Issues – Background, supra note 15.
Figure 1: Organization of the NRP

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
<th>Casualties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1889</td>
<td>Flood (Pennsylvania)</td>
<td>&gt;2000</td>
</tr>
<tr>
<td>1900</td>
<td>Hurricane (Texas)</td>
<td>8000</td>
</tr>
<tr>
<td>1904</td>
<td>Steamship fire</td>
<td>1021</td>
</tr>
<tr>
<td>1906</td>
<td>San Francisco earthquake</td>
<td>&gt;3000</td>
</tr>
<tr>
<td>1928</td>
<td>Hurricane (Florida)</td>
<td>2000</td>
</tr>
<tr>
<td>1941</td>
<td>Pearl Harbor attack</td>
<td>2403</td>
</tr>
<tr>
<td>2001</td>
<td>September 11 attack</td>
<td>2819</td>
</tr>
<tr>
<td>2005</td>
<td>Hurricane (Gulf Coast)</td>
<td>1527</td>
</tr>
</tbody>
</table>

**Base Plan**
- Concept of Operations, Coordinating Structures, Roles and Responsibilities, Definitions, etc.

**Emergency Support Function Annexes**
- Groups capabilities & resources into functions potentially needed during an incident (e.g., Transportation, Communications, Emergency Management, Mass Care, Public Health, Search and Rescue, etc.)

**Support Annexes**
- Describes common processes and specific administrative requirements (e.g., Financial, International coordination, Logistics, Private Sector, Public Affairs, Worker Safety & Health, etc.)

**Incident Annexes**
- Outlines procedures, roles & responsibilities for specific contingencies (e.g. Catastrophic, Biological, Food & Ag., Rad./Nuc. Hazardous Materials, Law enforcement of terrorist incident)

**Appendices**
- Glossary, Acronyms, and Compendium of National Interagency Plans
Table 3: Emergency Support Functions in the NRP\textsuperscript{63}

<table>
<thead>
<tr>
<th>#</th>
<th>Function</th>
<th>Primary Department or Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>ESF 1</td>
<td>Transportation</td>
<td>DOT</td>
</tr>
<tr>
<td>ESF 2</td>
<td>Communication</td>
<td>DHS (IAIP/NCS)</td>
</tr>
<tr>
<td>ESF 3</td>
<td>Public Works &amp; Engineering</td>
<td>DoD (USACE), DHS (FEMA)</td>
</tr>
<tr>
<td>ESF 4</td>
<td>Firefighting</td>
<td>USDA (Forest Service)</td>
</tr>
<tr>
<td>ESF 5</td>
<td>Emergency Management</td>
<td>DHS (FEMA)</td>
</tr>
<tr>
<td>ESF 6</td>
<td>Mass Care, Housing, Human Services</td>
<td>DHS (FEMA), American Red Cross</td>
</tr>
<tr>
<td>ESF 7</td>
<td>Resources Support</td>
<td>GSA</td>
</tr>
<tr>
<td>ESF 8</td>
<td>Public Health &amp; Medical Support</td>
<td>HHS</td>
</tr>
<tr>
<td>ESF 9</td>
<td>Urban Search &amp; Rescue</td>
<td>DHS (FEMA)</td>
</tr>
<tr>
<td>ESF 10</td>
<td>Oil &amp; Hazardous Material Response</td>
<td>EPA, DHS (Coast Guard)</td>
</tr>
<tr>
<td>ESF 11</td>
<td>Agriculture &amp; Natural Resources</td>
<td>USDA, DOI</td>
</tr>
<tr>
<td>ESF 12</td>
<td>Energy</td>
<td>DOE</td>
</tr>
<tr>
<td>ESF 13</td>
<td>Public Safety &amp; Security</td>
<td>DOJ</td>
</tr>
<tr>
<td>ESF 14</td>
<td>Long Term Community Recovery &amp; Mitigation</td>
<td>USDA, DOC, DHS, HUD, Treasury, SBA</td>
</tr>
<tr>
<td>ESF 15</td>
<td>External Affairs</td>
<td>DHS (FEMA)</td>
</tr>
</tbody>
</table>

\textsuperscript{63} This table is a modified version of the December 2004 NRP modified to include the revisions specified in the Notice of Change to the National Response Plan dated May 25, 2006 version 5.0.
Figure 2: Post-Hurricane Katrina Integration of ICS with ESF's
Table 4: Hurricane Katrina Key Events and Response

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Federal</th>
<th>State &amp; Local</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thursday, August 25, 2005</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12:00 p.m.</td>
<td>FEMA conducts first video teleconference to help synchronize federal, state, and local responders and, as a means of defining and coordinating assistance and support needs, these calls were held each day at noon from August 25 until well after landfall.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3:30 p.m.</td>
<td>Tropical Storm Katrina becomes Hurricane Katrina (Category 1)</td>
<td>FEMA delivers 100 truckloads of ice, 35 truckloads of food, and 70 trucks of water to staging areas in Georgia, and over 400 truckloads of ice, over 500 truckloads of water, and nearly 200 truckloads of food at logistics centers in Alabama, Louisiana, Georgia, Texas, and South Carolina.</td>
<td></td>
</tr>
<tr>
<td>6:30 p.m.</td>
<td>Hurricane Katrina slams into South Florida at the Dade-Broward County line.</td>
<td>FEMA places Rapid Needs Assessment and Emergency Response Teams – Advance Elements (ERT-As) on alert.</td>
<td></td>
</tr>
</tbody>
</table>

64. See generally supra note 17 and accompanying text.

65. To emphasize the view from Washington, D.C., the time used here is Eastern Standard Time (Louisiana is on Central Time). The time also reflects the view of the Homeland Security Operations Center.
<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>1:00 a.m.</td>
<td>Eye passes over Miami, Florida.</td>
<td></td>
</tr>
<tr>
<td>5:00 a.m.</td>
<td>Katrina clears from South Florida.</td>
<td></td>
</tr>
<tr>
<td>11:30 a.m.</td>
<td>Katrina becomes a Category 2 hurricane and is predicted to make second landfall near Florida Panhandle as Category 3.</td>
<td></td>
</tr>
<tr>
<td>1:00 p.m.*</td>
<td>Louisiana Governor Kathleen Blanco declares a State of Emergency and activates the National Guard.</td>
<td></td>
</tr>
<tr>
<td>4:30 p.m.</td>
<td>Mississippi Governor Haley Barbour declares a State of Emergency and activates the National Guard.</td>
<td></td>
</tr>
<tr>
<td>5:00 p.m.</td>
<td>National Hurricane Center (NHC) changes prediction of second landfall from the Florida Panhandle to eastern Louisiana and Mississippi.</td>
<td></td>
</tr>
</tbody>
</table>

**Saturday, August 27, 2005**

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>5:00 a.m.</td>
<td>NHC issues forecast stating that Katrina is a Category 3 hurricane and predicts a direct...</td>
<td></td>
</tr>
<tr>
<td>Time</td>
<td>Event Description</td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>7:00 a.m.</td>
<td>FEMA NRCC activated at Level 1 (24 hour operation); FEMA NRCC ESFs 2, 6, 8, 9, 10, 11, 12, 13, 14, 15, and EMC activated.</td>
<td></td>
</tr>
<tr>
<td>8:30 a.m.</td>
<td>National Weather Service (NWS) informs Louisiana state and local officials that “probable path is right smack through metropolitan New Orleans.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Louisiana and Mississippi Emergency Operations Center activated, Governors of Louisiana and Mississippi declare State of Emergency.</td>
<td></td>
</tr>
<tr>
<td>10:00 a.m.</td>
<td>FEMA ERT-As activated, pre-staged at FEMA RRCC Region IV in Atlanta, Georgia and deployed to Alabama and Mississippi.</td>
<td></td>
</tr>
<tr>
<td>12:00 p.m.</td>
<td>FEMA Region IV at Level 1; all ESFs + Military Liaison Activated, Coast Guard Activated.</td>
<td></td>
</tr>
<tr>
<td>2:00 p.m.</td>
<td>Press Conference: New Orleans Mayor Ray Nagin and Governor Blanco announce issuance of Voluntary Evacuation Order &amp; Superdome will open at 8 a.m CDT on Sunday as “Special Needs Shelter”.</td>
<td></td>
</tr>
<tr>
<td>Time</td>
<td>Event Description</td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>5:00 p.m.</td>
<td>Contra Flow activated on Mississippi and Louisiana Interstate Highway.</td>
<td></td>
</tr>
<tr>
<td>7:44 – 8:00 p.m.</td>
<td>Emergency Declaration FEMA-3212-#M-LA for Louisiana; FCO- Lokey; NWS advises New Orleans levees could be overtopped.</td>
<td></td>
</tr>
<tr>
<td><strong>Sunday, August 28, 2005</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9:00 a.m.</td>
<td>Superdome opens as a Special Needs Shelter (8:00 a.m. CDT).</td>
<td></td>
</tr>
<tr>
<td>10:30 a.m.</td>
<td>Mayor Nagin orders a mandatory evacuation of Orleans Parish.</td>
<td></td>
</tr>
<tr>
<td>11:00 – 11:15 a.m.</td>
<td>Emergency Declaration FEMA-3212-#M-LA for Mississippi; FCO- William Lokey.</td>
<td></td>
</tr>
<tr>
<td>5:00 p.m.</td>
<td>FEMA has pre-positioned ice, trailers, and MRE’s in 16 regional centers.</td>
<td></td>
</tr>
<tr>
<td>6:30 p.m.</td>
<td>Emergency Declaration FEMA-3212-#M-LA for Alabama; FCO- Ron Sharman.</td>
<td></td>
</tr>
<tr>
<td><strong>Monday, August 29, 2005</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7:10 a.m.</td>
<td>Katrina makes landfall in southeastern Louisiana.</td>
<td></td>
</tr>
</tbody>
</table>
Hurricane Katrina: A Deadly Warning

<table>
<thead>
<tr>
<th>Time</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:21 a.m.</td>
<td>First report of levee breaches; Superdome begins to leak.</td>
</tr>
<tr>
<td>10:50 a.m.</td>
<td>HSOC reports &quot;possible&quot; levee &quot;issue&quot;.</td>
</tr>
<tr>
<td>2:00 p.m.</td>
<td>Communications used by first responders fail. Search and rescue efforts by U.S. Coast Guard begin. Search and rescue efforts by New Orleans Police and Fire Departments, Louisiana National Guard, and Louisiana Department of Wildlife and Fisheries.</td>
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<tr>
<td>9:00 p.m.</td>
<td>FEMA Director Brown promises Governor Blanco 500 buses.</td>
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<tr>
<td>11:30 p.m.</td>
<td>FEMA search and rescue teams arrive and begin operations.</td>
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Tuesday, August 30, 2005

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<tr>
<th>Time</th>
<th>Event Description</th>
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<tr>
<td>6:00 a.m.</td>
<td>HSOC issues report of levee breaches at Industrial Canal, 17th street, and Lake Ponchatrain.</td>
</tr>
<tr>
<td>11:30 a.m.</td>
<td>Acting Deputy Secretary of Defense orders NORTHCOM to move all needed assets to Gulf Coast, gives blanket authority for military assistance. Mayor Nagin opens New Orleans Convention Center as refuge for general population.</td>
</tr>
</tbody>
</table>
| 7:30 p.m.  | Secretary Chertoff declares Katrina an "Incident of National Significance" and designates Mike Brown as PFO. Governor Blanco directs Department of Social Services to find a shelter by 6 a.m. Wednesday for at
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<th>Time</th>
<th>Event</th>
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<tr>
<td>12:30 a.m.</td>
<td>Midnight order by FEMA assigns DOT to send buses to New Orleans.</td>
</tr>
<tr>
<td>Morning</td>
<td>Secretary Mike Leavitt (HHS) declares a public health emergency for Louisiana, Mississippi, Alabama, and Florida.</td>
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<tr>
<td></td>
<td>Governor Blanco issues an Executive Order (No. KBB 2005-31) to commandeer school buses; Calls Governor Perry of Texas to request use of Astrodome to house New Orleans evacuees.</td>
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DISASTER PLANNING AND RECOVERY

GARY A. POLIAKOFF*

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I. INTRODUCTION

Hurricane Andrew, which devastated South Miami-Dade on August 24, 1992,1 opened our eyes to the vulnerability of common interest ownership housing communities (i.e., condominiums, cooperatives, and deed restricted communities governed by a mandatory membership homeowners associa-

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tion) to catastrophic events. The lessons learned from Andrew’s 142 mile per hour winds were accentuated by Hurricane Opal, which struck the Florida Panhandle with twenty foot storm surges.² These lessons were reinforced by the events of 2004, when four major storm criss-crossed the state of Florida leaving devastation in their paths.³

In the aftermath of these storms, the importance of developing and implementing a disaster plan has become self-evident. This article is based upon first hand experience gained in assisting the victims of Hurricanes Andrew, Opal, Charley, Frances, Ivan, Jeanne, Katrina, and Wilma.

II. IDENTIFYING THE POTENTIAL CONSEQUENCES OF A DISASTER

Prior to September 11, 2001, the term “disaster” was generally associated with naturally occurring events such as fires, hurricanes, earthquakes, mudslides, or floods. Now, acts of terrorism need to be factored into the equation.

A. Dislocation Caused by the Total or Partial Destruction of the Premises

A properly prepared disaster plan will anticipate not only the possibility of a total casualty loss, but also the need to relocate, temporarily or permanently, due to the loss of both one’s residence and, potentially, one’s place of work. While many individuals were able to clean up their storm debris and return to their normal routines within a relatively short period of time, for tens of thousands of others, life remained in turmoil for years after being impacted by the devastation of recent storm events.

B. Economic Impact

The economic impact of a disaster is felt on many fronts. For example, many Florida Panhandle residents owned condominium units which were placed in rental pools and provided the respective owners a source of revenue. This source of revenue was temporarily disrupted as a result of Hurricane Opal.

Unit owners displaced from work may be unable to meet their financial obligations to the association. Uninsured, underinsured, or non-covered losses will necessitate special assessments, which could further stress the already overtaxed unit owners. The higher cost of goods and services resulting from shortages further compounds the problem.

². Id.
³. See id.
III. DEVELOPING A DISASTER PLAN

A. Designation of a Disaster Coordinator

The ability of the community association to minimize damages and speed up recovery, to a large extent, will be dependent upon the association's ability to react quickly and decisively when a disaster strikes. The ability to do so is dependent upon having a pre-designated person or committee in place prior to the disaster with full power and authority to implement the Disaster Plan.

B. Designation of an Information Facilitator

In times of crisis, people want to know—they need to know! A major hurdle to recovery is rumor and misinformation. Left unchecked, both can hamper the recovery efforts. This can be short-circuited through the use of an “Information Facilitator.” Today's computer technology provides the ideal vehicle for this purpose. Every association should have its own website. During normal times, it is the ideal resource for disseminating information and staying in touch with the unit owners. At times of a disaster, it is the vital link. The Information Facilitator should work in concert with the Disaster Coordinator as a type of “Press Secretary.”

IV. REMOVING THE BARRIERS TO RECOVERY

A. Reconstruction

State laws and document restrictions designed to insure owner access to information and input in the decision-making process often impede disaster recovery. For example, the use of reserve funds in an emergency is hampered by laws requiring prior approval by a majority of the voting interests present, in person or by proxy, at a meeting. If necessary, documents should be reviewed and amended to remove barriers to recovery and provide boards with emergency powers. Areas of concern include:


Generally found within the insurance section of the documents, these provisions require that the proceeds of insurance settlements be paid to a third party for disbursement at the instruction of the association's engineer. When such a provision exists, insurers will not pay proceeds to the association until a trustee is designated. This can critically delay the receipt of funds necessary for disaster response. It is preferable for the board to act as
a trustee with disbursements being authorized only when approved in advance by an independent engineer or construction manager employed by the association.

2. Access to Units

While the Condominium and Cooperative Acts grant associations an irrevocable right of access when necessary for the maintenance, repair, or replacement of the common elements or of any portion of a unit to be maintained by the association, or as necessary to prevent damage to the common elements or to a unit, a gray area exists in relation to the repair or reconstruction of portions of the units maintained by the unit owners. To avoid conflicts, all common interest ownership housing documents should be amended to provide:

- Right of access to the units to repair or replace any portion of the property insured by the association; and
- Association as agent: The association should be irrevocably appointed as agent for each unit owner, each owner of a mortgage or other lien upon a unit, and each owner of any other interest in the property, in order to adjust all claims arising under insurance policies purchased by the association and to execute and deliver releases upon the payment of claims.

It is of interest to note that in the aftermath of Hurricane Opal, Florida's Division of Florida Land Sales, Condominiums and Mobile Homes affirmed the right of an association to enter the unit to remove the carpet, cabinets, hot water heater, and other appliances damaged by the storm.\(^4\)

3. Powers of Board or Disaster Coordinator to Act in an Emergency

Members of the board (though less than a quorum) and/or a designated disaster coordinator, who act in good faith without pecuniary gain, should be indemnified from actions by members of the association and should have emergency powers, including, but not limited to, the power to contract for: 1) emergency services; 2) security from vandalism; 3) removal of debris; and 4) engineering and other professional services to assist in disaster recovery.

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4. See *In re* Petition for Arbitration Higdon v. Seaspray Condominium Ass’n, Inc., Case No. 96-0430.
B. Termination

1. Reconstruction vs. Termination

The unit owners at one South Miami-Dade County condominium destroyed by Hurricane Andrew were shocked to learn of a provision in their declaration of condominium which provided for automatic termination when damage exceeded fifty (50%) percent or more of the condominium, unless a majority of the total voting interests voted within sixty days to rebuild. Since the unit owners had scattered all across the country, the association had to seek court relief to prevent the activation of the provision. It is preferable for the documents to require a vote of the owners to terminate the condominium, not to rebuild it.

2. The “50% Rule”

Even if a condominium does not contain an “automatic termination” provision, a regulation of the National Flood Insurance Program, as adopted by most counties and cities, will significantly impact an association’s ability to reconstruct based upon the adequacy of insurance proceeds and other funds. The “50% Rule” provides that if the condominium/home is below the 100-year flood elevation, and if the condominium is “substantially damaged” or “substantially improved,” the condominium/home will be required to be rebuilt based upon current building codes, which might necessitate tearing it down, raising the elevation, and then reconstructing it.

V. Activating the Disaster Plan

A quick response in accordance with a preconceived plan will minimize damage and promote a speedy recovery. After the disaster, associations should take steps to:

- Account For Residents. Knowing the whereabouts of all residents greatly enhances emergency response time following a disaster. In a situation such as a hurricane where there is advance warning, a committee should ascertain which residents are remaining in the community and which are evacuating. A temporary destination address and phone number should be obtained from those who are evacuating.


• **Attend to the injured.** After disaster strikes, the board’s first action should be to direct emergency medical assistance to any residents in need.

• **Secure the community from acts of vandalism and looting.** In some cases, it may be necessary to hire security personnel to protect against vandalism, theft, and other criminal activities.

• **Remove storm debris.**

  • “Dry In”/“Shore Up” the building structures in order to mitigate against further damage. Depending upon the nature and extent of the damage, it may be necessary to evacuate the premises or shore-up the structure.

  • “Dry Out.” This is the removal, where necessary, of wet carpet, wall board, cabinets, etc. when necessary to prevent the growth of mold.

• **Survey the Property and Identify Areas Needing Priority Attention.** In the case of widespread disaster, unit owners will not be able to depend upon local law enforcement agencies whose attention might be diverted to higher priority matters. Arrangements for security, debris cleanup, and emergency repairs should be made as part of a disaster plan, not after the fact, when it will be difficult, if not impossible, to find help.

• **Activate the Plan.** Following a disaster, the disaster coordinator and information facilitator move into action. The information facilitator opens lines of communications with the unit owners. The disaster coordinator contacts emergency services and notifies the contractors and employees, advising them of their duties and needs. In some cases, it may be necessary to suspend or cancel ongoing contracts such as lawn and pool maintenance. Hopefully, a provision was made in the contract for such right of suspension without penalty in situations such as a disaster when the contracted services are no longer needed.

VI. **HASTE MAKES WASTE IN RECONSTRUCTION**

Within hours of any disaster, the affected community will be besieged by companies and individuals looking for work and/or offering disaster recovery services. This group will consist of qualified professionals, ranging from public adjusters to companies specializing in disaster recovery. The larger of these companies will arrive decked out in color-coordinated uniforms, with large debris removing equipment and even helicopters. Interspersed among the new arrivals will be the con men and profiteers who prey upon the misfortune of others. While it is very tempting to sign the first contract stuck in your face, when confronted with what initially will appear to be an insurmountable task of reconstruction, experience has shown that these
quick solutions are formulas for disasters of greater magnitude than those already suffered. No greater application exists for the old adage that “haste makes waste” than in these situations. The best advice is to “just say no” and stick to your disaster plan which, hopefully, will include a plan that anticipates the five phases of reconstruction: 1) Project planning/scheduling; 2) Construction bidding; 3) Contract negotiations; 4) Construction/rehabilitation; and 5) Project completion/close out.

There are intervening steps you should take which may require contracts of short duration and for specific purposes. Even these contracts should be reviewed to insure that proper precautions are taken.

A. Avoiding the Pitfalls of Disaster Recovery

The pitfalls of disaster include disputes between insurance carriers (flood, windstorm, hazard) and the association over the nature and extent of damage, cost of repair or replacement, and/or whether appropriate mitigation was effectuated. With regard to claims made by unit owners against their boards over the mismanagement of insurance proceeds, the association owes a duty to the owners and their mortgagees to exercise reasonable care in the management of the insurance proceeds and to hold the proceeds for the benefit of the owners and mortgagees.\(^7\) Claims of contractors, subcontractors, materialmen, and suppliers that were not paid by the general contractor will likely result in the association having to pay double because of the failure to comply with Florida’s Construction Lien Law.\(^8\) Suits against contractors and subcontractors over poor quality repairs are also common.

B. Restoration of the Property

Once conditions stabilize, the disaster recovery team will be in a position to meet with professionals trained in disaster recovery, such as:

- **Architect/Engineer:** These professionals are responsible for assessing the damage, preparing plans and specifications in accordance with new building codes, assisting in the selection of a construction manager, and defining other reconstruction requirements.

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8. *FLA. STAT. § 713.06 (2006); see, e.g., Adams v. McDonald, 356 So. 2d 864 (Fla. 1st Dist. Ct. App. 1978).*
• **Construction Manager:** The construction manager oversees the selection of a general contractor, competitive bidding, and administrators; directs and coordinates pay requisitions, change orders and all other activities of the parties; and resolves disputes.

• **General Contractor:** Under the direction of the construction manager, the general contractor employs and supervises laborers, supplies materials, and builds project in accordance with architect’s/engineer’s plans and specifications.

• **Attorney:** The attorney reviews construction contracts to insure adequate assurance of job performance and warranties, and compliance with applicable lien laws.

• **Public Adjuster:** In some instances, the assistance of an independent public adjuster may be beneficial when dealing with the nuisances of an ambiguous insurance policy. While most adjusters will work for a fee based upon a percentage of the insurance proceeds, when the scope of assistance required is limited to specific items, the fee should be adjusted accordingly.

Review your governing documents; particularly, the “repair after casualty” section of the insurance provision. It is common to find language such as the following:

• **Estimates of Costs.** Immediately after deciding to rebuild or repair damage to property for which the association is responsible, the association shall obtain reliable and detailed estimates of the cost to rebuild or repair.

• **Construction Fund.** The construction fund shall be disbursed in payment of such costs in the manner required by the board of directors of the association upon approval by an architect qualified to practice in Florida and employed by the association to supervise the work.

When the aforesaid provisions exist in your documents, contracting for reconstruction prior to obtaining a scope of work will be contrary to both the association’s best interest and the obligations set forth in the documents.

**VII. SETTLING THE INSURANCE CLAIMS**

In order to respond to an emergency, the association may need to obtain a short-term loan. Without a restriction in the documents, not-for-profit community associations can borrow. However, they generally cannot pledge the condominium property as security. Most banks with which the association does business will approve a commercial line of credit secured by the association’s accounts and/or assessment and lien rights. The association also
may obtain a small business administration loan that is available to victims of disaster, generally, at lower interest rates. Of course, reserve funds can also be utilized if approved by a majority of the total voting interests.

On television, within minutes of a disaster, an insurance adjuster appears on the scene with checkbook in hand. In the space of a thirty second commercial, all claims are resolved, and the victims shower praise on the company’s quick response and positive attitude. While this does occasionally happen, it is an unlikely scenario. In a major disaster, it is rare, if not impossible, to fully assess the damages within such a short timeframe. In fact, the association should not seriously entertain a settlement until the full scope of work is known and costs ascertained.

Immediately following the disaster, it will be necessary for the association to secure the property to mitigate against further damage and clean-up debris. Most insurers will offer advances for this purpose. As long as the association doesn’t sign any releases or settlements, there is nothing wrong with accepting such advances.

Insurance policies need to be examined to ensure that “proof of loss” forms are filed.

VIII. CONCLUSION

Disasters do not respect geographic location or economic status and can occur at any time. Their effects can last for years; however, pre-disaster readiness coupled with a well-orchestrated and executed disaster plan will minimize damages and promote a speedy recovery.
EVALUATING KATRINA: A SNAPSHOT OF RENTERS’ RIGHTS FOLLOWING DISASTERS

ELOISA C. RODRIGUEZ-DOD* AND OLYMPIA Duhart**

I. INTRODUCTION

Two years after Hurricane Katrina laid waste to the Gulf Region,¹ it is hard, if not impossible, for many people to return home. The powerful storm decimated parts of Mississippi, Alabama, and Louisiana.² It also displaced a record number of men, women, and children with some estimates as high as 800,000.³ Among those displaced, renters face additional difficulties. Renters, who comprise almost half of those displaced by Hurricane Katrina,⁴ are often last in line for government benefits and other assistance. Moreover, the hostility to renters’ rights that continues to pervade the community after Katrina created additional obstacles for low-income renters attempting to

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³. About 1.5 million people were directly affected by Hurricane Katrina, and more than 800,000 people were forced to live outside of their homes. Department of Homeland Security, Hurricane Katrina: What Government is Doing, http://www.dhs.gov/xpreppresp/programs/gc_1157649340100.shtm (last visited May 11, 2007) [hereinafter What Government is Doing].

⁴. In New Orleans, 55 percent of the housing units affected were rental units. National Low Income Housing Coalition, Preliminary Estimate 9-22-05, Hurricane Katrina’s Impact on Low Income Housing Units Estimated 302,000 Units Lost or Damaged, 71% Low Income, http://nlhch.org/doc/05-02.pdf (last visited May 11, 2007) [hereinafter National Low Housing Coalition]. Forty-seven percent of the housing units in the entire Katrina-affected area were rental units. Id. By some estimates, almost 84,000 rental units were destroyed or heavily damaged by Katrina and the ensuing flood. Susan Saulny & Gary Rivlin, Little Aid Coming to Displaced New Orleans Renters; Homeowners are Seeing Lion’s Share of Post-Katrina Help, N.Y. TIMES, Sept. 17, 2006, at 1.14; see also The Road Home Program, The Small Rental Property Program, http://www.road2la.org/rental/default.htm (last visited July 8, 2007) (stating that nearly 82,000 rental housing units received major damage or severe damage during Hurricanes Katrina and Rita).
resettle in the area. Further, even one-time homeowners have been forced to turn to rental housing as the long, slow recovery assistance process works its way through the region.

The difficulties facing renters in the New Orleans region after the storm are emblematic of the difficulties facing many "evacuees" who are forced to find temporary housing following a disaster. The staggering increase in disasters and catastrophes worldwide has led to a burgeoning transient population. "Hurricanes, tornados, forest fires, tsunamis, flooding, earthquakes and even terrorist attacks are destroying homes and livelihoods and displacing many families."

Among the obstacles for renters in the New Orleans region are the scarcity of land on the south shore of Lake Pontchartrain, increases in labor and material costs for repairs, higher insurance, infrastructure uncertainty, rental property inflation, uncertainty over flood protection, zoning restric-

5. See People's Hurricane Relief Fund and Oversight Coalition, Tenants Rights Working Group, www.peopleshurricane.org (last visited July 8, 2007). The group targets local and federal officials to meet a list of tenant demands to protect the rights of renters impacted by Hurricane Katrina. Id.

6. Eric Dash & David Leonhardt, Invasion of Reluctant Renters; So Many Evacuees and, Luckily, So Many Apartments in Cities of Refuge, N.Y. TIMES, Sept. 16, 2005, at C1. Immediately following the storm, federal officials estimated that between 400,000 to one million people from the Gulf Region scattered across the nation in search of housing, "perhaps the country's largest single migration since the Civil War." Id. In New Orleans, scores of homeowners were forced to find temporary housing within the state while they waited for their house to be repaired or for the flooding to abate. Id.

7. Warren Friedman, Denial of Housing to Renters Because of Criminal Background 1 (Nov. 8, 2006) (unpublished comment, on file with author).

8. Id.


10. The Road Home, supra note 9, at 11.


12. The Road Home, supra note 9, at 11.


14. The Road Home, supra note 9, at 11.
tions, and criminalization. Some of these problems can serve as a "snapshot" of sorts for the obstacles for renters who must find housing following a temporary, unforeseen displacement.

Part II of this article discusses legislation and attempted legislation impacting renters after Hurricane Katrina. Part III addresses the increase of rent after disasters and a suggested control. Part IV discusses the manner in which criminal backgrounds determine rental options following disasters. Lastly, Part V concludes with a call for the need to focus on reforms to address the housing crisis for renters during emergency situations.

II. RESTRICTIONS ON RENTERS: HITS AND MISSES

In the field of legislation concerning rental properties after Katrina, there have been some near hits and misses. Remarkably, some local lawmakers erected barriers, rather than relief, for the already embattled renters. One particularly egregious example of a legislative impediment to rental repatriation is St. Bernard Parish Code #670-09-06. Passed by the St. Bernard Parish Council in September 2006, the local ordinance placed a rental restriction on single family residences that prohibited landlords from renting to anyone other than blood relatives. The ordinance stated:

No person or entity shall rent, lease, loan, otherwise allow occupancy or use of any single family residence located in an R-1 zone by any person or group of persons, other than a family members(s) related by blood within the first, second or third direct ascending or descending generation(s), without

15. See discussion regarding Ordinance #670-09-06 infra section II and accompanying notes.
16. See discussion regarding the impact of criminal convictions on rental housing infra section IV and accompanying notes. Furthermore, the term "criminalization" in this paper is being used in a slightly different connotation than its dictionary meaning. It is being used expansively to refer to the criminal characterization of people who have either not gone through the justice system, or who are saddled with ancient, minor infractions.
17. This article includes in part material for a chapter originally written for REDEVELOPMENT AFTER A MAJOR DISASTER in the Law, Property, and Society book series of Ashgate Publishing (series editor, Robin Paul Malloy).
19. Id. The legislation did create an exception with Council approval. Id. In March 2006, the Parish originally approved an ordinance that placed a moratorium on single-family homes becoming rental properties "until such time as the post Katrina real estate market in St. Bernard Parish stabilizes." ST. BERNARD PARISH COUNCIL, LA. ORDINANCE #643-03-06 (2006). The ordinance under discussion here concerns an exception to the original moratorium.
first obtaining a Permissive Use Permit from the St. Bernard Parish Council.\textsuperscript{20}

The ordinance carried strict penalties. Violators were to be found guilty of a misdemeanor and subject to a fine "of not less than $50.00 and not more than $250.00 per day for each day of an un-permitted rental, lease, or occupancy of each property in violation" of the ordinance.\textsuperscript{21}

The parish of St. Bernard also reserved the right to pursue civil remedies in the District Court of the parish against any person who allowed use of any property in violation of the ordinance, or anyone who occupied or used any property in violation of the ordinance.\textsuperscript{22} The St. Bernard Parish Council asserted that the ordinance was needed to "maintain the integrity and stability of established neighborhoods as centers of family values and activities . . . ."\textsuperscript{23}


\textsuperscript{20} ST. BERNARD PARISH COUNCIL, LA. ORDINANCE #670-09-06 (2006).
\textsuperscript{21} Id. Each day of un-permitted occupancy of each property constituted a separate offense subject to a separate fine. Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id. The ordinance was adopted by vote on September 19, 2006. ST. BERNARD PARISH COUNCIL, LA. ORDINANCE #670-09-06 (2006). Five members of the council voted in favor of the ordinance; two members (including the chairman) voted against the ordinance. Id. Within one month, by its October 3, 2006 council meeting, the Parish was requesting a District Attorney opinion on the ordinance. See OFFICIAL PROCEEDINGS OF THE COUNCIL OF THE PARISH OF ST. BERNARD, STATE OF LOUISIANA, TAKEN AT A REGULAR MEETING HELD ON TUESDAY, OCTOBER 3, 2006 1 (2006) http://www.sbpg.net/10-3-06minutes.doc [hereinafter October Minutes].
\textsuperscript{24} See 42 U.S.C. § 3604(a) (2006). "The Fair Housing Act makes it unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, on the basis of race, color, religion, sex, familial status, national origin, or handicap." 15 AM. JUR. 2D Civil Rights § 392 (2007).
\textsuperscript{25} The Equal Protection Clause states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. CONST. amend. XIV, § 1 (emphasis added).
The basis for the civil rights complaint was rooted in the demographic composition of St. Bernard Parish, a community that sits a few miles east of downtown New Orleans. St. Bernard Parish is overwhelmingly white. Specifically, St. Bernard's population of 67,000 prior to Hurricane Katrina was nearly 90 percent white. Among homeowners in the parish, there is a greater gulf between the black and white residents. White residents own 93 percent of all owner-occupied units in the parish. Finally, minorities in the parish are disproportionately reliant on rental properties in the region: before the storm, nearly one in two black households in St. Bernard's and one in three Hispanic households in the parish were renters. By contrast, only one in four white households in St. Bernard were renters before the storm. The Orleans Fair Housing Action Center ("GNOFHAC") argued that the council's enactment of the ordinance constituted "a practice and policy of housing discrimination on the basis of race and national origin." It asserted that its injuries included interference with the organization's efforts to promote equal housing opportunity for its constituents, the depletion of resources needed to counter unlawful housing practices, and interference with the constituent's enjoyment of the benefit of living in an integrated community. The GNOFHAC argued that the Fair Housing Act is violated "even when seemingly neutral zoning policies have a discriminatory effect on a particular protected class and cause harm to a community through the perpetuation of segregation." See Greater New Orleans Fair Housing Action Center, News Release: Fair Housing Center Files Suit Against St. Bernard Parish; Announces News Conference Regarding Lawsuit, Oct. 3, 2006, www.gnofairhousing.org (last visited July 8, 2007).


29. According to pre-Katrina statistics from the U.S. Census Bureau, the 2000 Full-count Characteristics of St. Bernard Parish showed that the demographic break-down was 84.3 percent white, 7.6 percent black, and 5.1 percent Hispanic. GREATER NEW ORLEANS COMMUNITY DATA CENTER, ST. BERNARD PARISH: PEOPLE & HOUSEHOLD CHARACTERISTICS 2 (2006), http://www.gnocdc.org/st_bernard/people.html [hereinafter PEOPLE & HOUSEHOLD CHARACTERISTICS].


32. Id.
displacement caused by Hurricane Katrina in nearby New Orleans also boosted the minority population in need of rental housing.\(^{33}\)

In their suit, the challengers argued that the ordinances passed by the parish had the intent and effect of denying rental housing availability for minorities.\(^{34}\) The ordinance effectively restricted the bulk of the single-family home rentals in the Parish to whites.\(^{35}\) The challengers contended that the zoning restrictions operated to discriminate against minorities in the housing market.\(^{36}\) Interestingly, a member of the St. Bernard Parish Council who had voted against the ordinance also asserted in a local column that the restriction was intended to keep blacks from moving to the parish.\(^{37}\)

Courts have long recognized *de facto* racial discrimination of legislation by examining the discriminatory intent and impact of such laws.\(^{38}\) Disparate impact is measured by the discriminatory effect a challenged legislation will have on a protected class.\(^{39}\) Discriminatory intent examines the purpose for which the challenged legislation was enacted.\(^{40}\) Not only did the St. Bernard Parish ordinance disproportionately limit the rental access of minorities, but the stated reason for the ordinance was to preserve the “integrity” of the community, which was predominantly white.\(^{41}\)

Not surprisingly, the ordinance was met with a barrage of media criticism and community complaints from both civic and watchdog groups.\(^{42}\) Because Katrina had effectively decimated St. Bernard Parish, the need for

\(^{33}\) “African Americans were more likely to be flooded, more likely to be displaced, less likely to be able to return . . . .” Gary Younge, *New Orleans Forsaken*, *The Nation*, Sept. 18, 2006, http://www.thenation.com/doc/20060918/younge.


\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) A journalist characterized council member Lynn Dean as “eccentric, outspoken and white — like the rest of the members [of the council].” Sothern, *supra* note 28. Dean discussed the ignoble motives of the ordinance in his column in the *St. Bernard Parish Voice*. Id.

\(^{38}\) See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Yick Wo*, the United State Supreme Court reversed a Chinese challenger’s conviction under a facially neutral San Francisco ordinance as a violation of equal protection. Id.

\(^{39}\) See *Palmer v. Thompson*, 403 U.S. 217 (1971). The Court found no evidence in the record to show that the challenged state action affected “blacks differently from whites.” Id. at 225.


\(^{42}\) See, e.g., *Fair Housing Centers Files Suit*, *supra* note 26.
affordable housing in the area was paramount. In addition, critics say the ordinance was a thinly veiled pretext for discriminating against blacks.\footnote{This racist ordinance needs to be declared unconstitutional and the leaders closely monitored until they repent or resign.” Sothem, \emph{supra} note 28 (quoting Letter to the Editor, \emph{TIMES-PICAYUNE} (New Orleans).}

Council members from St. Bernard Parish defended the ordinance as an effort to maintain owner-occupied houses and keep out speculators.\footnote{St. Bernard Parish Government, Parish Council Proposing Major Changes to Rental Property Ordinance, Steve Cannizaro, http://www.sbpg.net/dec0506f.html (last visited July 8, 2007).} The council members said their concern was that speculators would buy low-cost damaged homes, make minimal repairs, and then rent them out, “which could depress home values in traditionally-owner-occupied homes.”\footnote{Id.}

In a subsequent incarnation, the legislation re-emerged as Ordinance \#697-12-06.\footnote{The St. Bernard Parish amended the ordinance at its Council Meeting on Dec. 19, 2006. \textbf{ST. BERNARD PARISH COUNCIL, LA. ORDINANCE \#697-12-06} (2006); see also \textit{OFFICIAL PROCEEDINGS OF THE COUNCIL OF THE PARISH OF ST. BERNARD, STATE OF LOUISIANA, TAKEN AT A REGULAR MEETING HELD ON TUESDAY, DECEMBER 19, 2006} \footnote{Id.} http://www.sbpg.net/12-19-06minutes.doc [hereinafter \textit{December Minutes}].} In its more diluted form, the new ordinance on the zoning restrictions regarding the rental of single-family residences removed the consanguinity restriction and instead imposed a Permissive Use Permit for anyone who wishes to rent, lease, loan, or otherwise allow occupancy of any single family residence in an identified zone.\footnote{ST. BERNARD PARISH COUNCIL, LA. ORDINANCE \#697-12-06 (2006). The Permissive Use Permit requirement also requires that landlords make a prior application to the St. Bernard Parish Planning Commission for “review, evaluation and recommendation concerning the matter.” \textit{Id.}}

The newer ordinance retains the criminal sanctions,\footnote{The violation of the ordinance constitutes a misdemeanor, and is subject to a fine of not less than $50 a day and not more than $250 for each day of un-permitted rental, lease, or occupancy. \textit{Id.}} as well as the civil penalties\footnote{Civil penalties for tenants and landlords who violated the ordinance are not less than $100 a day for each day of un-permitted occupancy, as well as administrative costs, court costs, and attorney fees for investigation and prosecution of the civil matter. \textit{Id.}} that could be imposed for violations. The ordinance also exempts single family residences that were rental properties before the enactment of the ordinance.\footnote{Id.}

Another prospective piece of legislation, which would have actually served the rights of renters trying to relocate after the storm, never got the
requisite support to transform into law. The Elimination of Barriers for Katrina Act, H.R. 4213, would have provided a mechanism for people with criminal backgrounds to avail themselves of government assistance. Generally, the blanket exclusion in place for people with criminal backgrounds effectively denied affordable housing access for those with a prior criminal record. While landlords are vested with inherent authority to deny tenancy to those with criminal backgrounds, the application of this practice to Katrina evacuees proved especially problematic.

First, the use of the criminal background records for Katrina evacuees are riddled with problems. Some evacuees have criminal records for ancient, minor infractions. Others have inaccurate records, which attach criminal records to the wrong renters. Further, the notorious time delays caused by Katrina have all but stalled the criminal justice system in New Orleans. The result is that many people charged with crimes were left in a criminal justice limbo that excluded them from rentals because of their arrests, but did not grant them a speedy resolution to the criminal charges. Unfortunately, the proposed legislation died for lack of support.

III. RENT CONTROL MEASURES

The destruction of rental housing in New Orleans brought with it not only a rental housing shortage but also an increase in rents. As with a typical supply and demand market, the reduced supply of affordable rental housing

51. Elimination of Barriers for Katrina Victims Act, H.R. 4213, 109th Cong. (2005-2006). The proposed legislation would have suspended temporarily the application of laws which would have denied federal benefits and entitlements to victims of Hurricane Katrina or Hurricane Rita who would have been rendered ineligible because of convictions for certain drug crimes. Id.

52. See discussion infra section IV and accompanying notes.


54. Id. Those with outdated criminal backgrounds argue that the criminal backgrounds are unrepresentative of the lives they live today. Id. Further, the criminal background exclusion has a long reach, even impacting the family members of those convicted of crimes. Id. One mother of three from New Orleans reported that her entire family was unable to obtain housing in Texas because her husband had served time for possession of crack cocaine. Id.

55. The privatization of criminal background records has led many to question the veracity of backgrounds. Levingston, supra note 53, at 9.


57. Id.

has caused a demand for whatever units are available.59 This demand has been followed by a hike in the rent charged for those units.60

After Hurricane Katrina, the price of a rental unit soared by an average of about forty percent.61 For example, unfurnished condominium units that had been rented for $1,200 a month before the hurricane hit were being rented within a few months thereafter at $2,000 per month, a sixty-six percent rate hike.62 Some rentals even increased up to threefold the amount previously charged.

The skyrocketing rents have frustrated efforts to repopulate New Orleans and bring back the working class, especially minorities.63 "[M]any lower-income residents . . . say they are unable to return [because they] have been priced out."64

Landlords have defended the need to charge higher rents by pointing out the increase in costs to repair the damaged and destroyed rental units.65 The rising costs of insurance and labor have been passed off to tenants.66 Understandably, landlords must recover these costs in order to repair and operate their rental units. However, some people have questioned whether there also may exist some price gouging in that landlords are taking advantage of the shortage in rental housing.67 Whatever the case may be, the need and ability by landlords to increase rents have created a housing crisis for the poor and lower-income working classes.

Louisiana, like the majority of states, does not have a rent control statute in place.68 A landlord has a right to control and dispose of rental property "for valid consideration."69 This right cannot be abridged except by state law.70 However, without any controls in place, New Orleans is finding


60. See id; Greg Thomas, Local Rents Expected to Skyrocket, TIMES-PICAYUNE, Oct. 12, 2005, at C-12; Karen Brooks, Study: Katrina Hit Black Areas Hardest New Orleans Advised to Work on Ways to Bring Minorities Home, DALLAS MORNING NEWS, Jan. 27, 2006, at 3A.

61. Id.

62. See Thomas, supra note 60, at C-12.

63. Filosa & Hunter, supra note 59.

64. Brooks, supra note 60, at 3A

65. Id.

66. Filosa & Hunter, supra note 59; Thomas, supra note 60, at C-12.

67. Filosa & Hunter, supra note 59.

68. Id.


71. Id.
itself gripped by surging prices in the midst of the housing crisis. Thus, Louisiana should consider enacting a statute that would permit certain controls on rent increases when exigent circumstances exist.

Florida is one example of a natural disaster-prone state that has such a statute in place. Under Florida law, counties and municipalities may impose rent controls as “are necessary and proper to eliminate an existing housing emergency which is so grave as to constitute a serious menace to the general public.” Any such measure would expire within one year unless extended or renewed by adoption of a new measure. Had a similar statute been in place in Louisiana, the City of New Orleans could have effectively adopted an ordinance that would have curbed the soaring rents.

However, a review of the Florida statutes also reveals certain deficiencies in solving any exigent housing crisis. First, the damage and destruction that can occur from a natural disaster, such as Katrina, can render a city virtually paralyzed, requiring quick and immediate solutions. Although Florida law allows local governments to adopt and impose rent control measures upon finding that a grave housing emergency exists, any such local law will not be effective unless and until approved by the voters of the particular district. When an emergency exists due to a natural disaster, it may be difficult to quickly organize and operate polling places to permit the residents to vote. In addition, the local residents may be so scattered that they may not be able to effectively vote.

72. FLA. STAT. § 125.0103(2) (2006); FLA. STAT. § 166.043(2) (2006). In 1992, South Florida experienced the devastation of Hurricane Andrew, then the “most costly disaster in [U.S.] history.” Mike Williams, Hurricane Andrew: One Year Later, ATLANTA J. & CONST., Aug. 22, 1993, at A1. “More than 80,000 homes were destroyed or damaged.” John W. Mashek, Bush Seeks $7.6b for Storm Relief, BOSTON GLOBE, Sept. 9, 1992, at 1. The storm’s destruction created a housing shortage, making it difficult for displaced homeowners and tenants to find available housing. Howard W. French, After the Storm: “House for Rent” Becomes a Rarity, N.Y. TIMES, Sept. 6, 1992, at 34. The State Attorney General’s Office investigated thousand of complaints about price gouging, including high increases in rentals. Mashek, supra note 72, at 1. Despite the complaints, and despite the ability to adopt rent control measures during such a housing emergency, there is no evidence that Dade County or any affected city adopted any ordinance controlling rent.

73. § 125.0103(5); § 166.043(5).

74. See Damian Williams, Note, Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act Reform, 116 YALE L.J. 1116, 1119-20 (2007) (describing the electoral problems encountered in the aftermath of Hurricane Katrina); Jeff Crouere, Across State Lines: Louisiana, CAMPAIGNS & ELECTIONS, Feb. 2006, at 30 (noting that, due to the hurricane, the Louisiana Secretary of State postponed the February 2006 New Orleans’ mayoral election because it was logistically impossible to hold).
Second, the Florida statutes provide that no rent controls may be imposed on rentals "used or offered for residential purposes as a seasonal or tourist unit, as a second housing unit, or on rents for dwelling units located in luxury apartment buildings."\(^{76}\) Unfortunately for New Orleans, the majority of the damage and destruction occurred to areas of the city where the more affordable housing units were located.\(^{77}\) Residents have been forced to search for housing advertised as "luxury" apartments.\(^{78}\) Adopting the proviso in the Florida statutes excepting luxury apartments would possibly serve to continue the rental increase quandary. If "luxury" apartments are the only form of available housing, and if the landlords of these units could, under the statutes, easily increase rents to whatever rate the market will bear, then a bad situation is simply made worse. Therefore, any such statute should permit adoption of local rent control ordinances that could apply to all rental housing, including luxury apartments.

Consequently, disaster-prone states, such as Louisiana, should consider adopting statutes similar to those enacted in Florida. However, adopting the Florida statute \textit{in toto} may simply create a type of Gordian knot\(^{79}\)—although local governments will have certain power to adopt rent control measures, the voters may not approve the measures or the ordinance may not effectively control soaring rents. Thus, the state legislature should take heed and adopt a version that could immediately and effectively strike at the heart of the matter—give local governments greater power to control skyrocketing rents during exigent housing situations.

IV. **CRIME AND PUNISHMENT—A LANDLORD’S WAY**

Rental housing problems can exact a demanding toll on criminals and alleged criminals. Individuals with past arrest or conviction records, and particularly those who have served jail time, generally find it more difficult than others to integrate into society because they cannot readily secure jobs

\(^{76}\) § 125.0103(4); § 166.043(4). These statutes define “luxury apartment building” as a building “wherein on January 1, 1977, the aggregate rent due on a monthly basis from all dwelling units as stated in leases or rent lists existing on that date divided by the number of dwelling units exceeds $250.” § 125.0103(4); § 166.043(4).

\(^{77}\) See Williams, \textit{supra} note 75, at 1118; Filosa & Hunter, \textit{supra} note 59.

\(^{78}\) Filosa & Hunter, \textit{supra} note 59.

\(^{79}\) “The Gordian Knot is a legend associated with Alexander the Great. It is often used as a metaphor for an intractable problem, solved by a bold stroke (‘cutting the Gordian knot’).” Answers.com, Gordian Knot, http://www.answers.com/topic/gordian-knot (last visited July 9, 2007).
or affordable housing. This failure to obtain affordable housing generally leads to homelessness and may eventually lead to recidivism.

Although some convicts may be able to live with their families, others are not so fortunate. These individuals typically must resort to public housing. Under federal regulations currently in place, state public housing authorities may require criminal background checks of prospective and current tenants. Consequently, in a majority of states, the public housing authorities consider a person’s criminal background, including an arrest that did not lead to conviction, in making individualized determinations as to an applicant’s eligibility for public housing. In addition, three states immediately reject any applicant who has a criminal record. These federal regulations allow the public housing authority not only to deny housing to the alleged criminal but may also deny housing to the criminal’s family if he or she were to live with the family.

This problem regarding the lack of housing for persons with criminal records is of particular concern in New Orleans after Hurricane Katrina due to various factors. The crime rate in New Orleans was incredibly high prior to the hurricane; thus, a disproportionately large number of individuals could or would have been denied public housing. However, both public and private rental housing was already scarce before the hurricane, and obviously, 


81. See, e.g., Levingston, supra note 53, at 9; CAREY, supra note 80, at 16.

82. See CAREY, supra note 80, at 43. “[S]uccessful reentry into society is much more difficult for people who have been arrested or convicted of crimes.” SAMUELS & MUKAMAL, supra note 80, at 8.

83. CAREY, supra note 80, at 16.

84. Id.


86. See SAMUELS & MUKAMAL, supra note 80, at 8, 16.

87. Id. at 16.

88. CAREY, supra note 80, at 21 n.51.


worsened thereafter.91 In addition, after Hurricane Katrina, the criminal system radically disintegrated. There were increased incidents of arrests, many of which were for misdemeanors.92 Nonetheless, these arrests have created criminal records for those particular individuals. And to make matters worse, many pending criminal cases were brought to a standstill due to the hurricane’s physical destruction of court files and evidence.93 This great number of unresolved cases has added to the numbers of criminals and alleged criminals that cannot readily find public housing. As public housing is not feasible for these individuals, they must turn to more costly private rentals in an attempt to find a place to live.94

A private landlord is generally free to choose to whom he or she rents real property. The only limitations generally imposed are found under the Fair Housing Act (FHA).95 The FHA makes it unlawful for a landlord “[t]o refuse to . . . rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”96 Additionally, a landlord may not “discriminate in the . . . rental, or . . . otherwise make unavailable or deny, a dwelling to any . . . renter because of a handicap” of the renter or anyone who will reside with or is associated with the renter.97 Thus, as long as a private landlord does not discriminate against one of these protected classes, the landlord may, in his or her discretion, freely implement any selection criteria in renting to prospective tenants.

92. See Levingston, supra note 53, at 9.
94. This discussion will focus on the concerns associated with rentals by private landlords to those with arrest or conviction records, with a look at the crisis which has unfolded in New Orleans. For a more complete discussion of public housing issues, see generally James C. Smith, Disaster Planning and Public Housing: Lessons Learned from Katrina, to be published in RE-DEVELOPMENT AFTER A MAJOR DISASTER in the Law, Property, and Society book series of Ashgate Publishing (series editor, Robin Paul Malloy); see also CAREY, supra note 80.
95. 42 U.S.C. § 3604. This is the only limitation for landlords that do not participate in public housing programs, such as Section 8. As stated earlier in this article, some state and local governments have enacted more restrictive statutes and ordinances limiting a landlord’s right to freely rent to prospective tenants. Much of this legislation has been subject to challenge. Most recently, the City of Hazleton, Pennsylvania was sued in federal court over its enactment of an ordinance prohibiting private landlords from renting to illegal immigrants. Lozano v. City of Hazleton, No. 3:06-cv-1586 (M.D. Pa. 2007).
96. 42 U.S.C. § 3604(a).
97. § 3604(f).
No known law exists preventing a landlord from conducting a criminal background check before renting to a prospective tenant. Only one state requires a landlord to conduct criminal background checks, but only under limited circumstances.98 Private landlords in Arkansas may be ordered to perform a criminal background check of a prospective tenant if a municipality’s criminal nuisance abatement board declares the premises to be a public nuisance.99 Thus, the implementation of criminal background checks is mostly the prerogative of a private landlord. Given the shortage of housing after Hurricane Katrina’s destruction of New Orleans, and given that criminal background checks are already an impediment to securing public housing, a private landlord’s implementation of a criminal background check for prospective tenants in New Orleans compounds an already existing housing crisis for those with arrest records.100

These criminal background checks serve no purpose to private landlords other than permitting them to have some basis on which to exclude prospective tenants from renting the premises.101 Under the common law, landlords are generally not liable to tenants for crimes committed against them by other tenants.102 However, liability may attach if the landlord 1) had actual or constructive knowledge that would make the tenant’s conduct reasonably foreseeable and the landlord did not take reasonable precautions;103 2) had a special relationship with the perpetrator or victim;104 or 3) assumed an im-

99. Id.
100. As it is, many private landlords have been using consumer credit checks when screening prospective tenants. This too serves as a deterrent to criminals, particularly those who have served a sentence, in obtaining affordable rental housing as their crimes generally affect their credit status. See CAREY, supra note 80, at 32 n.104. Credit checks generally require an applicant’s consent. 15 U.S.C. § 1681b; see also FLA. STAT. § 501.005 (2006) (consumer may request a “security freeze” prohibiting release of consumer report information without consumer’s consent). However, in Florida, a consumer may not freeze information in the consumer report if it concerns and is used solely for tenant screening. § 501.005(12)(j).
101. See CAREY, supra note 80, at 19, 21. “Exclusions based on criminal records are usually justified in terms of promoting the safety of . . . tenants.” Id.
102. See 57A AM. JUR. 2D Negligence § 98 (2007).
103. See, e.g., T.W. v. Regal Trace, Ltd., 908 So. 2d 499, 506 (Fla. Dist. Ct. App. 2005) (landlord had duty to warn tenants of alleged sexual assault committed by one tenant on another minor tenant); Thompson v. Tuggle, 183 S.W.3d 611 (Mo. Ct. App. 2006) (landlord did not breach duty where it had no knowledge that tenant owned gun); Western Investments, Inc. v. Urena, 162 S.W.3d 547, 549 (Tex. 2005) (question of fact as to whether landlord’s knowledge of other crimes in the area rendered tenant’s assault by another tenant reasonably foreseeable by landlord); Johnson v. Slocum Realty Corp., 595 N.Y.S.2d 244, 245 (N.Y. App. Div. 1993) (landlord has duty to protect tenants from “foreseeable criminal intrusions”).
104. See, e.g., Foxworth v. Housing Auth. of Jefferson Parish, 590 So. 2d 1347, 1348-49 (La. Ct. App. 1991) (landlord has no duty to control actions of tenants unless some special
plied or express obligation to provide security to the tenant and breached that obligation. 105 The latter two reflect the state of the law in Louisiana. 106

In the Louisiana case of Smith v. Howard, a tenant shot and killed another tenant, whom she believed to be a burglar outside her window. 107 The victim’s estate sued both the tenant and the landlord. 108 The complaint alleged that the landlord caused the victim’s death by failing to

1) evict [the other tenant] after her neighbors reported to the [landlord] that she was a threat to their safety and to the safety of visitors; 2) maintain a proper screening program so as to avoid renting to tenants with a history of violent propensities; 3) maintain policies requiring tenants to state whether they have any dangerous weapons; 4) have a program for following up reports of violent conduct by tenants against other tenants or visitors; 5) insure the safety and security of guests; and 6) warn tenants and guests on the premises of the dangers posed by the tenant. 109

The appellate court affirmed the trial court’s dismissal of the complaint. 110 The court relied on the well settled law that, unless a special relationship exists, there is no duty to control the actions of a third person and prevent him from causing harm to someone else. 111 The court further noted that landlords do not have a special relationship with those who live on their premises, and, accordingly, owe no such duty to a tenant. 112 Therefore, because landlords will suffer no liability, criminal background checks create unnecessary impediments to some prospective tenants who are in dire need of affordable rental housing.

105. See, e.g., Foxworth, 590 So. 2d at 1348 (landlord has no duty to provide security unless landlord assumed the obligation); Holley v. Mt. Zion Terrace Apartments, Inc., 382 So. 2d 98 (Fla. Dist. Ct. App. 1980) (part of rent dedicated expressly for security creates question as to landlord’s contractual liability to provide such protection).


107. Howard, 489 So. 2d at 1038.

108. Id. at 1037–38.

109. Id. at 1038.

110. Id.

111. Id.

112. Howard, 489 So. 2d at 1038.
The majority of those with arrest records in the United States are people of color. In New Orleans, the rate of arrest of black men increased after the hurricane. Using arrest and conviction records as a basis to deny private rentals may lead to unjust and catastrophic results. Arrests have included offenses that range from small infractions to felonies. Minor infractions may include crimes such as “taking items from hardware stores and convenience stores and ‘disturbing the peace.’” Currently, a private landlord may readily investigate an applicant’s criminal background, and many are doing just that. Unlike consumer credit checks that require the person’s consent due to privacy concerns, a defendant’s consent is not required to obtain a copy of the defendant’s criminal record. In many instances, arrest and conviction records are easily available on the Internet; however, the results of such a search may be inaccurate or may lead to incorrect or misleading conclusions. Although a majority of states allow defendants to seal or expunge records of arrests that did not lead to conviction, thirty-three states prohibit the sealing or expungement of any conviction records and seventeen states allow only some conviction records, such as first-time offenses, to be sealed or expunged. Criminal records in twenty-eight states are available on the Internet, in addition to records available at the courthouse. In Louisiana, records of convictions, whether old or minor, are available for review. The state does, however, permit the sealing of some


115. See Levingston, supra note 53, at 9.


117. CAREY, supra note 80, at 19.

118. See supra note 100 and accompanying text.

119. SAMUELS & MUKAMAL, supra note 80, at 15.

120. Id.

121. Id.

122. Id.

123. Id.

124. SAMUELS & MUKAMAL, supra note 80, at 15; see also La. Dep’t of Public Safety and Corrections, Parole Board Dockets, http://www.corrections.state.la.us/Offices/paroleboard/paroledockets.htm (last visited July 9, 2007).
arrest records if the arrest did not lead to conviction and, at least, some arrest records are shielded from the public eye.\(^{125}\) Nonetheless, there is no prohibition on using these records as a basis for denial of rental housing. But what happened to "innocent until proven guilty"? Is a minor or old conviction really a credible and reasonable basis on which to deny housing? Something needs to be done to relieve this problem.

Louisiana should consider enacting a law, similar to a bill proposed in Illinois,\(^{126}\) that would limit a private landlord's ability to deny housing based on any arrest or conviction records. In January 2005, Illinois Rep. Chapin Rose introduced a house bill, amending its Landlord and Tenant Act, that would permit a private landlord to perform criminal backgrounds checks on prospective tenants; however, the original version of the bill noted that a "landlord may refuse to lease the property . . . if the criminal background check of the person contains any felony convictions or indicates that the person is a registered sex offender."\(^{127}\) Consequently, only those actually convicted of committing certain egregious crimes would be susceptible to being denied a private rental.

Some may argue that a reason for conducting a criminal background check is to circumvent the FHA and serve as a pretext to discrimination.\(^{128}\) The proposed Illinois bill, both in its original and amended versions, includes a proviso that "'[t]he landlord may not use the criminal background check to discriminate against a protected class.'"\(^{129}\) Thus, the bill recognized the dan-

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125. See La. Rev. Stat. § 44:9 (2006); see also Samuels & Mukamal, supra note 80, at 15.


127. Id. (emphasis added). The bill was later amended in February 2005 to permit the landlord to refuse to rent to a prospective tenant if:

(i) the individual's tenancy would constitute a direct threat to the health or safety of other individuals or the individual's tenancy would result in substantial physical damage to the property of others; or (ii) the individual has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in the federal Controlled Substances Act or the Illinois Controlled Substances Act.

Id. Unfortunately, this amendment would seemingly permit a landlord to interpret an arrest or conviction record and determine that renting to such individual could create a threat under subsection (i). This proposed bill is still pending, and the legislative session ended sine die. Id.


129. Illinois Bill, supra note 126.
gers concomitant with permitting a landlord to employ a criminal record as a basis for refusing to rent to a tenant.

V. CONCLUSION

Two years after Katrina left her mark on the Gulf Coast, renters are left with few options to resettle in their former communities. Funding programs set aside to benefit renters are few and far between. Landlords who own from one to four rental units can tap into $869 million in public funding, which pales in comparison to the $7.5 billion devoted to owners of damaged homes.

In January 2007, The Road Home launched a Small Rental Property program, which was designed to provide incentives to rebuild affordable rental housing. Even though there may be proposed tax incentives to lure developers back into the area, such solutions may address long-term needs but do little to fill the immediate need for affordable rental communities. Not only are renters priced out of communities, but minority renters are also faced with bias in the market.

Moreover, various attempts at enacting legislation have exacerbated the problem through limiting access to rentals. Other curative measures—such as the proposed legislation to eliminate barriers—have simply been abandoned. The tension created by the landlord’s ability to deny housing to renters with criminal backgrounds highlights competing policy concerns in the region. On one hand, there is the need to protect the safety of the residents...


131. Hammer, supra note 130, at 1.


of rental property by properly screening out criminals. On the other hand is the need to provide affordable housing access for those with a prior criminal record.

As the rebuilding process continues in the Gulf Region, the difficulties for renters presented by legislation and criminalization demonstrate that there is a need to focus the lens on these issues which impact renters. The obstacles that were presented by the hurricane, the flood, and the ensuing housing difficulties have a pronounced negative impact on the minority communities. The snapshot of the housing crisis for New Orleans serves as a powerful reminder for other communities suddenly forced to rebuild.

As one commentator noted, "The most important thing that needs to be saved (and rebuilt) is lower and middle income housing, shotguns, double shotguns, corner stores, Creole cottages and camelbacks all combining to make an urban fabric that does not exist in any other city."134

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I. INTRODUCTION

"With hurricanes, tornados, flooding, and severe thunderstorms tearing up the country from one end to another . . . are we sure this is a good time to take God out of the Pledge of Allegiance?"1

All kidding aside, the hurricanes of 2005 captured national attention and continue to cause many Americans to ask what they can do to better prepare for the next major disaster. There is cause for continued concern: according to the Insurance Information Institute,2 there are an average of twenty-five catastrophes each year causing at least $25 million in direct insured damages.3 In 2006, there were thirty-three events of this major magnitude.4 Like any other American, those in the legal community may find themselves victimized by disaster. Even firms who are not themselves the victims of disaster would benefit in knowing how to advise clients who have been victims.

This article examines the tax and insurance implications of disasters on law firms. Whether a large firm or a sole practitioner, it is prudent to anticipate and prepare for emergencies. Examining consequences along the full spectrum of contingencies will enable law offices to posture themselves to minimize their risk and to take advantage of opportunities to improve cash flow during recovery.

Tax relief available to all victims forms the baseline for discussion. Particular emphasis is placed on additional tax benefits from major disasters (i.e., those the president has declared as disaster areas under the Robert T.

2. Insurance Information Institute, About I.I., http://www.iii.org/media/about/ (last visited June 14, 2007). The Insurance Information Institute has tracked and provided insurance information to the government, media, universities, and the public for over forty years. Id.
4. Id.
Stafford Disaster Relief and Emergency Assistance Act—also called the Stafford Act). In addition, because costs of insurance are deductible as business expenses, so long as “ordinary and necessary,” the interface between taxes and insurance should be examined to maximize protection, minimize risk, and optimize tax treatment.

Hurricane Katrina was the most expensive disaster in United States history. Section II of this article puts this tragedy in perspective and discusses the risks of a repeat disaster of this magnitude. Section III discusses tax relief available to victims of disaster. It looks specifically at noteworthy disasters to give the reader an appreciation of the scope and flavor of tax relief that might be occasioned by future national disasters. Tax relief ranges from a minimum threshold available to all taxpayer victims up to the unprecedented tax relief to the victims of Hurricane Katrina.

The article next emphasizes precautionary measures firms should take to insulate themselves as much as possible from the significant financial costs of being struck by a hurricane or other disaster. Section IV exposes specific gaps in insurance coverage, often found in policy “exclusions,” which leave many holding the bag after a major disaster. Post-Katrina cases upholding flood damage exclusions are specifically discussed. Recent, proposed, and pending legislation, including proposed federal catastrophe insurance or reinsurance, is also evaluated.

Section IV also considers existing and proposed tax measures to allow both individuals and businesses to accelerate recovery. The prospects of tax-advantaged catastrophe savings accounts, small business administration relief, and other potential federal emergency tax relief are detailed.

II. BACKGROUND

A. Catastrophes in Context

The year 2005 was the most active and devastating hurricane season in United States history. In fact, the National Hurricane Center issued more hurricane forecasts in 2005 than in any previous year. Prior to these storms, Hurricane Ivan and Hurricane Charlie in 2004 had refreshed our memory about the widespread scope of damage and destruction a hurricane could produce. Indeed, these hurricanes should have served as a wake up call to Americans who may have forgotten about the horrors of Hurricane Andrew in 1992, a category 5 hurricane, and the most costly disaster in world history before Hurricane Katrina.

According to the Federal Emergency Management Agency (FEMA), "flooding, severe storms, and hurricanes are the most common and costly causes of disaster declarations in the United States; at least 10 such events since 1989 have each required FEMA relief expenditures in excess of a bil-


9. For a detailed examination of tropical storm prediction accuracy and methodology, see generally James L. Franklin, 2005 National Hurricane Center Forecast Verification Report, Nat'l Hurricane Ctr., May 21, 2006, at 1, http://www.nhc.noaa.gov/verification/pdfs/Verification_2005.pdf. "Not only were the 12-72 h[our] forecasts more accurate in 2005 than they had been over the previous decade, but the forecasts were also more skillful." Id. at 6.

10. At the time, Hurricanes Ivan and Charley were two of the top five most costly storms in world history. Catastrophes: Facts and Statistics, supra note 3.


TAX AND INSURANCE CONSEQUENCES OF MAJOR DISASTERS

Of course, any major disaster could leave a legal office in ruins, in addition to causing personal tragedy and loss for its victims.

Hurricanes are only one form of natural disaster. Tornados, earthquakes, wildfires, blizzards, volcanoes, landslides, mudslides, flooding, and hailstorms also wreak havoc. Other disasters, such as tsunamis, could potentially threaten the United States, though the threat, historically, has been comparatively minor.  

However, even a smaller tragedy, such as a lightning strike triggering a fire, could be devastating. Because fires are vastly more numerous, they continue to impact tens of thousands of taxpayers each year. For example, while the major hurricanes of 2005 captured all of the media’s attention, over the same timeframe, the American Red Cross responded to a record 72,883 disasters, most of them fire-related.

Based upon these statistics, it is prudent to understand the full range of tax relief and insurance options that might be available. The tragedy that disrupts your law practice may not be a hurricane or even a declared national disaster. If you fail to adequately prepare, a disaster may end your business. Even if a disaster is not financially fatal, appreciating the tax consequences is in every practitioner’s interest.

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14. Id. “[T]he frequency of damaging tsunamis in the United States has been low, compared with other natural hazards.” Id. at 10. According to the National Oceanic and Atmospheric Administration, the last significant tsunami struck Skagway, Alaska, in 1994, causing “one death and $25 million in damages.” Id. at 10–11.
15. On average, there have been over 1.5 million fires annually in the United States over the past ten years. See U.S. Fire Administration, http://www.usfa.dhs.gov/statistics/national/ (last visited June 14, 2007).
16. Id.
B. **Demographic and Weather Trends**

The United States should expect a major catastrophic hurricane, Category 3, 4, or 5, to make landfall every six to seven years.\(^{18}\) Even weaker storm systems can cause tremendous flood damage.\(^{19}\) For example, Category 2 hurricanes, while weaker than major catastrophic hurricanes, generally have higher moisture content and account for considerable flood damage.\(^{20}\)

Mitigation measures, predominantly improved building codes, have helped to "harden" vulnerable property.\(^{21}\) However, the lure of the coast continues to bring more people and property into the areas most likely to be affected by hurricanes.\(^{22}\) Over half of all Americans now live in coastal counties, which is an increase of thirty-three million people since 1980.\(^{23}\) Because of these predictable weather profiles and demonstrated demographic trends, the risks from hurricanes will always be present.\(^{24}\)

### III. TAX ADVICE FOR DISASTER VICTIMS

Presuming the survival and functionality of the firm or practitioner, the next question becomes how best to help both the business itself and any cli-

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20. *Id.*


22. For example, in the past twenty-five years, "communities along the . . . East Coast have dramatically increased development . . . despite the knowledge that a hurricane or large tropical storm could cause significant damage to property and life." H.R. Rep. No. 107-495 at 4; see also Insurance Information Institute, Hurricanes: Facts and Statistics: Leading States in Population Growth 1980–2003 (1), http://www.iii.org/media/facts/statsbyissue/hurricanes/ (last visited June 14, 2007) [hereinafter Hurricanes: Facts and Statistics].


ents who are disaster victims. For this reason, appreciating the tax consequences of the disaster is doubly important. First, it allows the firm itself to maximize its own tax relief, which is perhaps the key to survival for smaller or less capitalized firms. Second, those firms and practitioners that survive and rebound must be able to competently help their clients to do the same.

To address both facets, the discussion below examines individual as well as business tax issues. It emphasizes knowledge and preparation ahead of time to minimize and to help posture to mitigate the effects of the damage. This advice can also be funneled to clients proactively so that they may better plan, and then execute, their emergency plans.

A. Tax Relief for Victims of All Casualties

Fortunately, the federal government has historically afforded some relief to victims of all casualties.25 Section 165 of the Internal Revenue Code allows a tax deduction for “casualty losses.”26 A casualty loss is a loss due to “fire, storm, shipwreck or other casualty, or from theft.”27 The “other casualties” language has been construed by the courts to require a sudden and unexpected loss, as opposed to a loss derived from gradual deterioration.28 For example, flooding due to a hurricane would be a casualty, while flooding due to worn-out pipes would not.

Section 165 entitlement is independent of any nationally declared emergency.29 Therefore, any natural disaster, flood, or fire will be a casualty entitling the taxpayer to favorable treatment under the code.30 One disadvantage of section 165, for individuals, is that it is only available to taxpayers who itemize their deductions.31 For businesses, of course, all expenses are item-

27. Id. § 165(c)(3). For individuals, deductible losses must be “incurred in a trade or business,” derive from some other profit-seeking activity, or “arise from fire, storm, shipwreck, theft, or other casualty.” Id. § 165(c).
29. But see I.R.C. § 165(i) (timing advantage in declared emergency).
30. See generally id. § 165.
31. See generally id. §§ 161-199.
ized. Other limitations reducing section 165's efficacy in compensating individuals for personal loss are similarly not applicable to businesses.

A disadvantage for businesses is that uninsured "loss" is confined to the depreciated value of property that is damaged or destroyed. Because this "book value" often radically understates the costs of replacement property, the advantage to the taxpayer may not be nearly as generous as it would first appear.

A corollary would be that insurance proceeds, based on replacement cost, would lead to a casualty gain for the same reason. For instance, office furniture purchased in 2002 for $10,000 and depreciated to $5,000 may cost $15,000 to replace in 2007. If insured with replacement cost coverage, the taxpayer would have a casualty gain of $10,000, which would be a gain on the books only, because the $15,000 would be needed to replace the damaged items. One source of relief from this dilemma would be section 1033 of the Internal Revenue Code. This section allows a taxpayer to replace property that has been involuntarily converted without recognizing any gain, unless the taxpayer receives cash above the amount actually reinvested. In a declared emergency, the taxpayer has four years, versus the typical two years, to secure qualifying replacement property.

Despite the statutory presumption that, unless otherwise excluded, all accessions to wealth constitute income pursuant to section 61 of the code, the Internal Revenue Service (IRS) has long acknowledged that welfare payments need not be reported as income. Disaster relief is a type of welfare payment because it helps individuals and families who are put in need based on the emergency confronting them. "The assistance that a government grants its citizens who sustain personal injury and property damage as

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32. See id. § 162.
33. See id. § 165(h) (10 percent adjusted gross income reduction and $100 per casualty reduction in the amount allowed to be deducted by individuals, unless loss is to property held for trade, business, or investment).
34. See I.R.C. § 165(c). Damages to an individual's property used in a trade or business (such as a sole practitioner’s law practice) are not subject to these reductions. Compare id. § 165(c)(1), with id. § 165(c)(3).
35. Id. § 165(b). See generally id. §§ 1011, 1012, 1016.
36. Id. § 1033.
37. See id. § 1033(a)(1).
39. Id. § 1033(a)(2)(B)(i).
40. Id. § 1033(h)(1)(B).
41. Id. § 61(a).
the result of hurricanes, tornadoes, earth-quakes and other natural disasters is motivated by its obligation to assist in alleviating the suffering and damage caused by the disaster.”

However, while government public welfare payments to individuals are tax exempt, similar relief payments to businesses are not.

Because of the turmoil of the moment—safeguarding family members and trying to put lives back together—paying taxes may be the last thing on anyone’s mind. In addition, law firms and sole practitioners may be confronted with lost or destroyed records. Taxpayers, whose records are lost or who are otherwise unable to meet filing deadlines because of a natural disaster, may be granted an extension by the IRS based upon “reasonable cause.” The mere fact you were the victim of a disaster does not automatically qualify as reasonable cause; instead, the IRS evaluates all such requests on a case-by-case basis.

B. Advantages for Victims of Presidentially Declared Disasters

There is more flexibility in the Internal Revenue Code for victims of presidentially declared disasters than for victims of other casualties. The Secretary of the Treasury has discretionary authority in times of presidentially declared disasters to offer a blanket extension for up to one year for affected taxpayers to file and pay taxes. Compare this favorable treatment with sections 6081 and 6161 of the code, which allow the Secretary discretion to extend deadlines for “a reasonable time not to exceed six months” for disasters that do not result in a declared disaster area.

44. Id. at 18.
47. Id. For example, if a taxpayer arranged for a loan to pay taxes due on his business, but the bank scheduled to close on the loan where the business was not open due to severe damages, the IRS would consider abatement “using reasonable cause criteria.” Id.
49. Id. § 7508A(a).
The code also allows other advantages for victims of presidentially declared tragedies.\footnote{52} For example, section 7508A allows the Secretary discretion to disregard deadlines for filing and payment of taxes in declared disaster areas.\footnote{53} It states:

In the case of a taxpayer determined by the Secretary to be affected by a Presidentially declared disaster . . . the Secretary may specify a period of up to one year that may be disregarded in determining . . . [whether filing or payment of tax]\footnote{54} were performed within the time prescribed . . . the amount of any interest, penalty, additional amount, or addition to the tax . . . [and] the amount of any credit or refund.\footnote{55}

These extensions are then automatic for affected taxpayers in the declared disaster region.\footnote{56} In addition to the obvious advantage of additional time pursuant to this relief, the IRS has been empowered to forgive interest and penalties whenever such relief is granted.\footnote{57} For taxpayers who fail to qualify as "affected taxpayers" or who are outside declared disaster areas,
there is no authority to forgive interest, and the IRS will consider abatement of late payment penalties on a case-by-case basis.58

The authority to disregard time under section 7508A offers important additional procedural protections.59 Perhaps most critical for a tax practitioner, it extends the time to file a petition with the Tax Court and to file a claim for a refund or credit, or any other act required or permitted “under the internal revenue laws.”60

Section 165(i) allows another substantial advantage to victims of declared disasters—an “[e]lection to take the deduction” for casualty losses in the immediately preceding tax year.61 The benefit of this preference is twofold. Obviously, taking the election affords earlier tax relief for the loss. Additionally, allowing the taxpayer the option to choose the year to take the deduction allows the taxpayer the benefit of selecting the tax year that yields a better result. The preceding tax year may well reflect greater income due to the lack of catastrophic interruption; therefore, relief for the earlier period may well be from a higher marginal tax rate.

After the terrorist bombings of September 11, 2001, section 139 was promulgated to codify that recipients are not taxed on “qualified disaster relief payment[s].”62 However, this section only applies to relief payments made to individuals.63 Thus, any disaster relief granted to businesses would be includable as income.64

C. Additional Tax Relief Following Specific National Disasters

Congress and the IRS have acted on an ad hoc basis in the past in affording tax relief to victims of disaster. This section captures some of the more predictable responses (time extensions to file and pay taxes), as well as the more generous breaks that have accompanied some tragedies. It is not intended as an exhaustive discussion; rather, this section will provide insight

58. See id.; I.R.C. §§ 6081, 6161, 6601, 7508A.
59. See id. § 7508A(a).
60. Id.
61. Id. § 165(i)(1). The election is irrevocable after ninety days. 26 C.F.R. § 1.165-11(e) (2006).
62. I.R.C. § 139(a) (added by Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 111, 115 Stat. 2427, 2432 (2002)). Qualified disasters include presidentially declared disasters, disasters from terrorist or military activity, disasters resulting from accidents involving common carriers, or other events determined by the Secretary to be catastrophic. Id. § 139(c)(1)-(3). Amounts paid by federal, state, or local governments determined to warrant assistance are also not taxable. Id. § 139(c)(4).
63. Id. § 139(a).
into the spectrum of tax relief that has been afforded, at times in the past, and to suggest that tax relief has, at times, been more creative and substantial in the recent past.\textsuperscript{65}

As noted above, under section 6081, the Secretary may extend the deadline for filing a return for a reasonable amount of time.\textsuperscript{66} The deadline for payment of taxes due may similarly be extended “for a reasonable period not to exceed [six] months.”\textsuperscript{67} The IRS used this authority to grant automatic tax relief to victims of Hurricane Hugo,\textsuperscript{68} Hurricane Andrew,\textsuperscript{69} and Hurricane Iniki.\textsuperscript{70} To qualify for this blanket extension, taxpayers had to be affected by the disaster.\textsuperscript{71} Taxpayers alerted the IRS that they were affected by writing the name of the disaster on the top of their tax return.\textsuperscript{72} Taxpayers with an address within the disaster area were presumed to be affected; other taxpayers needed to submit a short statement of how the hurricanes “adversely affected their ability to meet their tax obligations.”\textsuperscript{73}

Although no tax relief was provided by Congress to the victims of Hurricane Hugo, Congress extended explicit tax relief to the victims of Hurricanes Andrew and Iniki.\textsuperscript{74} It also retroactively afforded tax relief to victims of all presidentially-declared disasters after September 1, 1991.\textsuperscript{75} The new law allowed victims of declared emergencies four years versus two years to replace their home and its scheduled contents without recognizing a taxable gain.\textsuperscript{76} Congress also created tax advantages for insured individuals to the

\begin{itemize}
\item \textsuperscript{65} For a more detailed discussion of the tax relief related to each of the disasters in this section, see generally Patrick E. Tolan, Jr., \textit{The Flurry of Tax Law Changes Following the 2005 Hurricanes: A Strategy for More Equitable Tax Treatment of Victims}, 72 \textit{Brook. L. Rev.} 799 (2007).
\item \textsuperscript{66} I.R.C. § 6081(a).
\item \textsuperscript{67} \textit{Id.} § 6161(a)(1). The limit may be longer for persons abroad and is twelve months for estate tax payments. \textit{Id.}
\item \textsuperscript{70} I.R.S. Notice 92-44, 1992-2 C.B. 373, 375.
\item \textsuperscript{71} \textit{See id.; supra notes 66–67 and accompanying text.}
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} \textit{See Omnibus Budget Reconciliation Act of 1993, I.R.C. § 1033(h)(1) (1996).}
\item \textsuperscript{75} \textit{Id.} § 1033(h)(2). This benefit included victims of Hurricane Andrew, Hurricane Iniki (the worst hurricane to strike the Hawaiian Islands in a century), any other declared disasters occurring in 1992, and all subsequent disasters. \textit{See Proclamation No. 6491, 57 Fed. Reg. 47, 553 (Oct. 14, 1992).}
\item \textsuperscript{76} I.R.C. § 1033(h)(1)(B).
extent their unscheduled contents were destroyed—involuntarily converted—as a result of a declared disaster.  

Changes granting identical treatment to businesses followed many years later. The Small Business Job Protection Act of 1996 extended the four-year replacement period in declared disaster areas to property held for a trade or business. Therefore, any business property—real or personal—is now subject to the same favorable tax treatment when the property destroyed is in a declared disaster area. This authority would allow a law firm to rebuild on the same site or to relocate its practice to another area within the four-year window without recognizing any gain on the involuntary conversion.

In addition to substantive tax relief following Hurricanes Andrew and Iniki, the IRS announced that it would expedite review of applications for tax exempt status by groups newly formed to aid the disaster victims. The IRS also indicated it would not raise issues concerning approved charitable organizations that might otherwise affect an organization’s qualification for tax exempt status—such as an organization rendering assistance in good faith to its own employees who were victims of the disasters. Finally, for designated counties and parishes impacted by Hurricane Andrew, the IRS provided relief from certain low income housing credit requirements.

After Hurricane Andrew, the Northridge Earthquake was the most costly U.S. natural disaster before Hurricane Katrina. On January 17, 1994, this earthquake, which measured 6.8 on the Richter scale, “jolted the San Fernando Valley, [just] 20 miles northwest of downtown Los Ange-

77. Id. § 1033(h)(1)(A). The IRS interpreted this provision generously for the taxpayer. See generally Rev. Rul. 95-22, 1995-1 C.B. 145, 145-46 (excluding from income all gain on nonscheduled personal property).
79. Id. at § 1119(b) (referring to I.R.C. §1033(h)(1)(B)).
80. Id. at § 1119(a).
81. See id.
84. I.R.S. Notice 92-43, 1992-2 C.B. 373 (authorizing relief from carryover allocations under I.R.C. § 42(h)(1)(E) and recapture under § 42(j)(4)(E)).
The Northridge Earthquake "caus[ed] more than 60 deaths [and] 12,000 injuries." 86 It destroyed 8,000 homes and damaged more than 114,000 buildings. 88 According to the Insurance Information Institute, it caused $15.3 billion in insured losses. 89

Congress provided no tax relief to the earthquake disaster victims. 90 Perhaps because such a low percentage of the buildings damaged were homes, Congress felt less sympathy for business and other property loss. 91 In any event, the IRS response was also less pronounced. 92 The quake relief was less extensive than the relief to the 1992 hurricane victims. 93 Like the 1992 relief, the IRS granted extensions of time to file and pay taxes, but instead of a six month extension, the extension was only for ten calendar days. 94 The IRS also suspended normal collection and examination actions for two weeks—versus thirty days for affected taxpayers in the 1992 hurricane disaster areas. 95 Finally, the IRS announced that it would expedite review of applications for tax exempt status by groups newly formed to aid the disaster victims, and it would "not raise certain issues" concerning charitable organizations that might affect an organization's tax exempt status. 96

Following Hurricane Andrew, Hurricane Iniki, and the Northridge Earthquake, the states of Florida, California, and Hawaii intervened to prevent a near total collapse of their respective insurance markets. 97 Perhaps these state bail-outs averted the need for serious discussion of federal tax

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87. Id.
88. Id.
89. Id.
90. See id.
91. See Catastrophes: Insurance Issues, supra note 86.
92. Id.
94. I.R.S. News Release IR-94-5 (Jan. 19, 1994) ("IRS Offices to Provide Disaster Tax Assistance"). Taxpayers were directed to mark the return: "LA EARTHQUAKE." Id.
97. See H.R. REP. No. 106-526, at 15 (2006). Other risk-prone states lacking state insurance programs saw "applications to state FAIR (Fair Access Insurance Requirements) plans and beach plans (so-called markets of last resort for homeowners' insurance which generally provide less coverage at a greater price) increased dramatically during the last half of the 1990s." Id. at 16.
relief. In any event, other than the limited relief discussed above, no tax relief was spawned by these major tragedies. 98

Compared with the limited tax relief to victims of earlier natural disasters, Congress was quick to authorize federal tax relief for the victims of the terrorist attacks of September 11, 2001. 99 The Victims of Terrorism Tax Relief Act of 2001 100 granted the victims of these atrocities substantial tax relief, including—among other things—relief from income taxes at a minimum of $10,000; 101 “exclusion of certain death benefits;” 102 “estate tax reduction;” 103 “exclusion of disaster relief payments;” 104 and, “exclusion of certain cancellations of indebtedness.” 105 It also allowed “payments by charitable organizations [to be] treated as exempt payments.” 106 Finally, the Act delegated authority to the IRS to postpone certain deadlines for up to one year in cases of natural disaster, military, or terrorist attack. 107

In addition to tax relief for individual victims, another Act also created a “New York Liberty Zone” with substantial tax advantages for Liberty Zone businesses. 108 These benefits included employment credits; 109 bonus and

98. See Catastrophes: Insurance Issues, supra note 86. Perhaps the most notable byproduct of Hurricane Andrew was the call for better building codes and better enforcement of existing codes. Id.
100. Id.
103. Id. § 103 (codified at I.R.C. § 2201).
104. Id. § 111 (codified at I.R.C. § 139). “[Section] 139(b)(4) codifies . . . [the] general welfare exclusion for qualified disaster relief payments to individuals.” I.R.S. Notice 2002-76, 2002-2 C.B. 917, 918. “Because of the extraordinary circumstances surrounding [such disasters], [the IRS] anticipate[s] that individuals will not be required to account for actual expenses” so long as the amount of relief is commensurate with the anticipated expenses incurred. Id. (internal quotations omitted).
107. Id. § 112, 115 Stat. at 2431 (codified at I.R.C. § 7508A) (increased from 120 days).
108. Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 301, 116 Stat. 21, 33 (codified at I.R.C. § 1400L). “‘New York Liberty Zone’ means the area located on or south of Canal Street, East Broadway (east of its intersection with Canal Street), or Grand Street (east of its intersection with East Broadway) in the Borough of Manhattan in the City of New York, New York.” I.R.C. § 1400L(h). Liberty Zone businesses are those employing no more than 200 employees which rebuilt in the footprint of the terrorist bombings of
accelerated depreciation and increased expensing for qualified Liberty Zone property; tax exempt bond advantages; and, an extension from two to five years for not recognizing gains for property involuntarily converted (where replacement property was in the Liberty Zone). Some of the tax advantages for individuals and businesses foreshadowed a similar Congressional response to the massive 2005 hurricane disasters.

After 9/11, Congress extended the IRS authority to “disregard” time under section 7508A from 120 days to one year. The IRS was also empowered to waive interest, as well as penalties, when disregarding time. These important provisions are now part of the statutory framework protecting disaster victims in declared emergencies.

Despite the high number of hurricanes in 2004—Charley, Ivan, Frances, and Jeanne—and the magnitude of the damages they caused, Congress afforded no tax relief to victims. The IRS, however, used its discretion to disregard time and extend time for filing and payment of taxes.

September 11, 2001 (commonly thought of as ground zero), as well as any businesses damaged or destroyed by the attacks that relocated anywhere else within New York City. See id. § 1400L(a)(2)(C).

109. See I.R.C. § 1400L(a)(2)(D); see also id. § 51.
110. See id. § 1400L(b)(2)(C); see also id. § 168(k).
111. See generally id. § 1400L(d)-(e).
112. See I.R.C. § 1400L(g).
118. While it was, at that time, the most expensive ever, the widespread loss in 2004 did not lead to any federal legislative tax relief. See Blake et al., supra note 18. There was a flurry of IRS activity. See, e.g., I.R.S. Notice 2004-76, 2004-2 C.B. 878, 878 (relief from certain requirements due to Hurricanes Charley, Frances, Ivan, and Jeanne); I.R.S. Notice 2004-62, 2004-2 C.B. 565, 565 (additional relief for areas affected by Tropical Storm Bonnie, and Hurricanes Charley and Frances); I.R.S. News Release IR-2004-115 (Sept. 10, 2004) (extending time to file and pay taxes for Hurricane Frances); I.R.S. News Release IR-2004-108 (Aug. 16, 2004) (extending time to file and pay taxes for areas affected by Tropical Storm Bonnie and Hurricane Charley). The IRS granted extensions of time to file and pay taxes; relief from deadlines involved in section 1031 like-kind exchange transactions; and, a suspension of the income limitations (ordinarily required for occupants of low-income housing) to
massive IRS activity was the norm again in 2005, this time Congress was awakened by the devastation and stepped in with the most comprehensive tax relief ever for victims of natural disasters.\textsuperscript{119} This flurry of activity is the subject of the next section.

D. The Post-Katrina High Water Mark for Tax Relief

The Katrina Emergency Tax Relief Act of 2005 (KETRA) was signed by President Bush and became law on September 23, 2005.\textsuperscript{120} KETRA contained important tax benefits both for individuals and for businesses.\textsuperscript{121} Title I crafted special rules for using retirement funds.\textsuperscript{122} Title II allowed employment relief.\textsuperscript{123} Title III contained incentives for charity and Title IV created miscellaneous additional benefits.\textsuperscript{124} These benefits are discussed in detail in the sections that follow. The cumulative benefit was significant, as KETRA was estimated to cost the federal government $6.1 billion in foregone tax revenue.\textsuperscript{125}

KETRA opened the door to wide-ranging tax relief for hurricane victims.\textsuperscript{126} Following the continued devastation wrought by Hurricanes Rita and Wilma over the ensuing weeks, Congress passed additional tax relief legislation.\textsuperscript{127} The Gulf Opportunity Zone Act of 2005 (GO Zone Act) was passed on December 15, 2005, and signed into law on December 21, 2005.\textsuperscript{128}
The tax relief for those affected by the later hurricanes was packaged with more far-reaching relief for those affected by Hurricane Katrina.

The core disaster area for Hurricane Katrina was renamed the “Gulf Opportunity Zone,” or “GO Zone,” and similar tax advantaged areas were established for the victims of Hurricanes Rita and Wilma—the “Rita GO Zone” and “Wilma GO Zone.” As with the initial KETRA relief, only those areas “determined by the President to warrant individual or individual and public assistance from the Federal Government” qualified for special GO Zone tax benefits.

This layered scheme of relief, with KETRA at times supplemented by and at times superseded by the GO Zone Act, is complex and confusing. It also created disparate tax treatment. Those within the “GO Zone” (Katrina victims) were afforded some benefits not shared by those in the “Rita GO Zone” or “Wilma GO Zone.” For example, Congress provided an enhanced education tax credit, for tax years 2005 and 2006, for students who attended educational institutions in the (Katrina) GO Zone. A variety of economic stimuli were also uniquely targeted to the victims of Katrina’s devastation. This article does not detail the disparities in treatment between the victims of the various 2005 disasters; rather, it looks at the range of tax remedies that Congress unleashed to try to deal with the aftermath of the disasters. The following sections summarize the significant tax relief remedies from the 2005 legislation.

1. Statutory Extensions to File and Pay Taxes

Congress required the Secretary of the Treasury to extend inter alia the period for filing and payment of taxes to all taxpayers in the three declared disaster areas, “for a period ending not earlier than February 28, 2006.” While the IRS could, and ultimately did, “disregard” a year under code sec-

130. Id. § 1400M(3).
131. Id. § 1400M(5).
132. Id. § 1400M(1), (3), (5).
133. Id.
134. Note, some of the victims of Hurricane Katrina were also victims of Hurricane Rita; if they qualify for individual or individual and public relief due to Katrina, these measures protect them. See I.R.C. § 1400M(1).
135. See id. § 14000.
136. See infra notes 155–77 and accompanying text.
137. For such an analysis, see Tolan, Jr., supra note 65.
tion 7508A, KETRA represented the first time Congress had usurped this discretionary authority. For the future, if a catastrophe is sufficiently tragic or widespread, Congress may again be prompted to act, because there is no reason to expect that loss of records and inability to timely prepare and file returns will not ensue.

2. Enhanced Retirement Account Access

Special rules for use of retirement funds first adopted in KETRA were extended to also include individuals who sustained economic loss from Hurricanes Rita and Wilma. Victims whose primary residences were located in the designated disaster areas were authorized to withdraw, without penalty, up to $100,000 from an eligible retirement plan.

Under this authority, individuals may prorate income over three years, repay within three years (and characterize the distribution as a rollover), or, if preferred, borrow up to $100,000 from their employer retirement savings plan and repay the sum within five years. Such flexibility allows people to borrow from themselves without penalty at a time when they are most desperate for funds. Despite pension reform and congressional efforts to relax some of the IRA rules in 2006, Congress did not make access to retirement accounts for disaster victims a permanent part of the code.

3. Improved Casualty Loss Deduction and Other Deductions

Those suffering casualty losses attributable to Hurricanes Katrina, Rita, or Wilma were allowed relief from the ten percent AGI and $100 reductions on casualty losses under code section 165. The dates of the losses necessarily needed to correspond to the periods after the respective hurricanes made landfall.

139. Id. § 7508A.
140. See id. § 1400Q.
141. Id. § 1400Q(a); Section 402(c)(8)(B) of the Internal Revenue Code defines an eligible retirement plan. Id. § 402(c)(8)(B).
142. I.R.C. § 1400Q(a)(5).
143. Id. § 1400Q(a)(3)(A).
144. Id. § 1400Q(c).
146. I.R.C. § 165(h)(1); see also id. § 1400S(b).
147. Id. § 1400S(b).
Special rules for determining earned income related to the Earned Income Credit and the refundable component of the Child Tax Credit were likewise afforded to "qualified individuals" in all three disaster areas.\textsuperscript{148} To qualify, the victims had to either be displaced from their principal place of abode by the hurricane, or had to qualify for individual or individual and public assistance from the federal government.\textsuperscript{149}

4. Improved Deductibility of Charitable Donations

As an incentive for charitable donations, Congress lifted the ceiling on charitable deductions.\textsuperscript{150} The ceiling is typically ten percent of a corporate taxpayer’s taxable income\textsuperscript{151} or one-half of an individual taxpayer’s adjusted gross income.\textsuperscript{152} KETRA and the GO Zone Act broadly enhanced charitable giving incentives.\textsuperscript{153} To enjoy relief from the limitations on charitable giving, corporate taxpayers were allowed to make contributions in 2005 to relief efforts supporting any of the three 2005 hurricanes.\textsuperscript{154} Individual taxpayers enjoyed tax relief, so long as cash donations were made after August 28, 2005, and before December 31, 2005, regardless of whether the donations were linked to hurricane relief.\textsuperscript{155}

Other changes beneficial to charity were also conceived. The mileage rate for charitable use of a vehicle in 2005 hurricane relief efforts was substantially increased.\textsuperscript{156} In the alternative, reimbursement for charitable use of a vehicle to provide Hurricane Katrina relief was excluded from income.\textsuperscript{157} Donors of books to public schools were given explicit relief from downward adjustments of the deduction (to offset capital gains, as required

\textsuperscript{148.} Id. § 1400S(d)(2)(B), (C), (D).
\textsuperscript{149.} Id.
\textsuperscript{150.} Katrina Emergency Tax Relief Act of 2005 (KETRA), Pub. L. No. 109-73, § 301, 119 Stat. 2016, 2022; see I.R.C. § 170(b)(1)(A) (limiting most charitable deductions to 50% of the taxpayer’s contribution base); id. § 170(b)(1)(B)(i) (limiting other charitable deductions to 30% of the taxpayer’s contribution base). Ordinarily, excess donations may be carried forward for the next five years. Id. § 170(b)(1)(B)(ii).
\textsuperscript{151.} I.R.C. § 170(b)(2)(A).
\textsuperscript{152.} See id. § 170(b)(1)(A), (B). The taxpayer’s contribution base is adjusted gross income computed without regard to any net operating loss carryback. Id. § 170(b)(1)(F); see also id. § 172. KETRA also excluded qualifying contributions from itemized deductions for purposes of the overall limitations in section 68 of the code. KETRA, § 301(c), 119 Stat. at 2023; see I.R.C. § 68.
\textsuperscript{153.} I.R.C. § 1400S(a).
\textsuperscript{154.} Id. § 1400S(a)(4)(A)(ii).
\textsuperscript{155.} Id. § 1400S(a)(4)(A)(i).
\textsuperscript{156.} Compare id. § 170(i) (fourteen cents per mile), with KETRA, § 303, 119 Stat. at 2024 (70% of standard business rate—yielding thirty-two cents per mile).
\textsuperscript{157.} KETRA, § 304, 119 Stat. at 2024.
by section 170(e) of the *Internal Revenue Code*).\(^{158}\) Finally, businesses were encouraged to donate food inventory before December 31, 2005.\(^ {159}\)

5. GO Zone Business Relief

While many of the GO Zone business tax incentives would not be helpful to rebuilding a law practice,\(^ {160}\) employee retention credits\(^ {161}\) and the other measures explained here may be significant. Of course, these benefits are all limited to the victims of the 2005 hurricanes. For future mega-disasters, however, Congress could allow similar relief.

Employee retention credits were created to motivate employers to retain employees in the disaster areas. These credits were extended to eligible employers in the Hurricane Katrina GO Zone,\(^ {162}\) the Hurricane Rita GO Zone,\(^ {163}\) and the Hurricane Wilma GO Zone.\(^ {164}\) The credit was made available to large and small businesses alike.\(^ {165}\)

For employers meeting the geographic requirements, the tax relief is very similar to the Work Opportunity Tax Credit in section 51 of the *Internal Revenue Code*.\(^ {166}\) The qualifying business can claim a 40% tax credit of the first $6,000 for each retained employee.\(^ {167}\) For a company retaining a large number of workers, the relief could be substantial. For example, a company retaining 100 workers could potentially claim a $240,000 credit.\(^ {168}\) Of course, a credit is much more valuable than a deduction since it directly off-

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158. *Id.* § 306, 119 Stat. at 2025. While undoubtedly prompted by the need to restock public school books following Katrina, tax relief was not limited to donations to those affected by Hurricane Katrina. *Id.* However, the December 31, 2005, termination eliminates its utility for future crisis situations. *Id.* § 306(a)(iv), 119 Stat. at 2026.

159. *Id.* § 305(a)(iv), 119 Stat. at 2025. The limitation on contributions of food inventory is up to 10% of the business’ aggregate income. KETRA, § 305(a)(ii), 119 Stat. at 2025.

160. While $700 million in new market tax credits were created to redevelop the GO Zone, credits were available only to qualified community development agencies making qualified low-income community investments. Gulf Opportunity Zone Act of 2005, I.R.C. §§ 1400M-T. As a possible indirect benefit, Congress authorized nearly $8 billion in tax-exempt bonds for construction in the disaster of residential rental projects, nonresidential real property, or public utilities in the GO Zone. *Id.* § 1400N(a)-(b).

161. *Id.* § 1400R.

162. *Id.* §§ 1400M(2), 1400R(a).

163. *Id.* §§ 1400M(3), 1400R(b).


167. *Id.* § 1400R(a)(1), (b)(1), (c)(1).

168. \((40\% \times \$6,000 = \$2,400) \times 100 = \$240,000.\)
sets tax liability. In this example, the $240,000 credit would be equivalent to a deduction of $685,714 for a corporation in the 35% tax bracket.\textsuperscript{169}

The credit amount is, however, limited to "qualified wages" paid after the business became inoperable, but before the business resumed significant operations.\textsuperscript{170} Thus, if a business was only shut down for two days and payroll to each eligible employee was $100 per day, the credit would only be $8,000, versus the $240,000 potential credit described above.\textsuperscript{171} This additional restriction is sensible given the circumstances, because it prevents a business only incidentally impacted from receiving a windfall.

It is also interesting to note that the Work Opportunity Tax Credit, an incentive to employers to hire members of disadvantaged groups,\textsuperscript{172} was offered to those hiring Hurricane Katrina employees (including displaced employees), but was not extended to employers hiring those affected by the later hurricanes.\textsuperscript{173} This may reflect a concern that Katrina victims were more disadvantaged or more displaced than those of the later hurricanes or it may be that Congress later decided to restrict the advantage exclusively to employers within the relief areas.

Special depreciation allowances were established for GO Zone property placed into service from August 28, 2005, through the end of 2007 (2008 for nonresidential real property and residential rental property).\textsuperscript{174} Half of the adjusted basis of the property can be written off the first year, plus ordinary depreciation can then be taken on the remaining half.\textsuperscript{175} Code section 179 limits were also increased for the GO Zone by up to $100,000.\textsuperscript{176} Section 179 establishes a limit for the maximum cost of capital property (otherwise required to be depreciated over time) that can be deducted in the immediate tax year as a current expense.\textsuperscript{177}

In a similar vein, taxpayers in all three GO Zones may elect to take up to fifty percent of any GO Zone clean-up cost as a deduction for the taxable year in which the cost is incurred.\textsuperscript{178} They can also deduct one hundred per-

\textsuperscript{169} $240,000/.35 = $685,714.29. \\
\textsuperscript{170} I.R.C. § 1400R(a)(2)(C), (b)(2)(C), (c)(2)(C). \\
\textsuperscript{171} ($100 x 2 \text{ days})(100 \text{ employees}) = $20,000 x 40\% \text{ credit} = $8,000. \textsuperscript{172} I.R.C. § 51. \\
\textsuperscript{173} See Katrina Emergency Tax Relief Act of 2005 (KETRA), Pub. L. No. 109-73, § 201, 119 Stat. 2016, 2020. Katrina employees were identified as members of a targeted group under section 51 for purposes of this credit; the deadline for hiring displaced workers was December 31, 2005. \textit{Id.} § 201(b)(2), 119 Stat. at 2021. \\
\textsuperscript{175} Id. \\
\textsuperscript{176} \textit{Id.} § 1400N(e). \\
\textsuperscript{177} Id. \\
\textsuperscript{178} \textit{Id.} § 1400N(f).
cent of any environmental remediation costs, including remediation of hazardous substances as well as petroleum products, in the year clean-up costs are incurred. To qualify for either of these special provisions, the clean-up must be conducted before December 31, 2007.

Finally, instead of the typical two-year carryback period for net operating losses (pursuant to section 172(b)(1) of the Internal Revenue Code), the act allows a five-year carryback for any qualified GO Zone loss. This period is the same as the net operating losses carryback after 9/11, when Congress was trying to jumpstart the economy, and is two years more generous than the net operating losses carryback period allowed for casualty losses for individuals or for any size business under section 165 of the code. Like the preceding relief, the increased flexibility is also accompanied by substantive tax advantages. Here, the longer carryback period may enable a taxpayer to offset income in a tax year that would otherwise be unreachable.

6. Housing Credit for Displaced Individuals

Perhaps the most novel 2005 tax relief was the creation of a new exemption for housing displaced hurricane victims. A $500 exemption was created for tax years 2005 or 2006 for each Katrina victim taken in. The maximum reduction of income for any taxpayer is limited to $2000 (four displaced persons). Relief is restricted to situations where the taxpayer does not receive rent from the displaced individual—or any other amount from any source—in connection with providing the housing. Also, the displaced individual cannot be the spouse or dependent of the taxpayer.

GO Zone measures also included tax relief for situations involving employer-provided housing. Qualified employees were allowed to exclude

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179. I.R.C. § 1400N(g).
180. Id. § 1400N(f), (g).
181. Id. § 1400N(k).
182. Id. § 172(b)(1)(H).
183. Id. § 172(b)(1)(F). Note that the net operating loss carryback for small businesses in a declared disaster area is also three years (versus two) for any operating loss, not just those losses due to the casualty. I.R.C. § 172(b)(1)(F)(i)(II).
184. The entire net operating loss is carried to the earliest of the taxable years to which such loss may be carried. I.R.C. § 172(b)(1)(F)(i).
186. Id. § 302(b)(1).
187. Id. § 302(c)(3).
188. Id. § 302(c). There is no restriction on other relatives. Id.
189. See I.R.C. § 1400P(a), (b), (f) (2004 & Supp.).
from gross income up to $600 of the value of lodging provided by their employer from January 1, 2006, through July 1, 2006. Additionally, the employer was allowed a tax credit of “30 percent of any amount which is excludable from the gross income of a qualified employee.”

IV. IDENTIFYING AND ELIMINATING EXPOSURE TO DISASTER

A. Insurance Challenges

1. Coverage Inadequacies (Type and Amount)

Individuals and businesses have used insurance to protect against financial perils for hundreds of years. Standard insurance typically protects against fires, vandalism, burglary, theft, or storm activity. However, insurance against water damage from storms has been seriously limited. Most policies contain an express flood exclusion. However, catastrophic damage from hurricanes often results from flood damage due to the storm surge and heavy rains. Consequently, many do not have the right types of insurance coverage.

Unfortunately, many disaster victims find out too late that they lack the proper flood insurance. Historically, floods have been “one of the most destructive national hazards facing the people of the United States.” For

190. Id.
191. Id.
192. See, e.g., Ins. Co. v. Dunham, 78 U.S. (1 Wall.) 1, 30–33 (1870) (discussing evolution of maritime insurance over the past ten centuries).
194. Policies typically insure against some severe weather damage, such as wind and hail coverage, but exclude flood and storm surge damage. See, e.g., Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684, 695–96 (S.D. Miss. 2006) (policy precluded damage from flooding and storm surge during Hurricane Katrina, but covered damage caused by wind). The Insurance Information Issues indicates a typical homeowner’s policy contains a provision stating “[w]e do not pay for loss to the interior of a building or to personal property inside, caused by rain, snow, sleet, sand, or dust unless the wind or hail first damages the roof or walls and the wind forces rain, snow, sleet, sand, or dust through the opening.” HARTWIG, HURRICANE SEASON, supra note 85, at 145.
195. See id. at 146.
196. For example, Hurricane Katrina damages, due to storm surge and flooding, were estimated at $44 billion, compared to $38 billion for all other property damage. HARTWIG, HURRICANE SEASON, supra note 85, at 36, 48.
197. For a discussion regarding problems arising in litigation concerning the flood exclusion, see infra part IV.A.2.
decades, Congress has been "acutely aware of the national need for a reliable and comprehensive flood insurance program," because as many as "ninety percent of all natural disasters in [this country] involve flooding." 

The hurricane and flood devastation of 2005 was no exception. In Louisiana alone, Hurricane Katrina caused over $38 billion in flood and storm surge damage—most of it uninsured. In comparison, Louisiana was also the hardest hit with conventional insured losses due to Katrina of over $22.5 billion.

With the real property boom of the past few years, those who have not simultaneously increased their coverage may find themselves underinsured. Currently, fifty-nine percent of homeowners are uninsured or under-insured. While comparable data is not available for commercial property, with vacancy rates dropping, the commercial realty sector has likewise shown positive growth over the past two years.

199. Id.
201. See id. at 26 (excludes $1.47 billion in flood-damaged vehicles covered by comprehensive policies).
202. See id. at 26 (excludes $1.47 billion in flood-damaged vehicles covered by comprehensive policies).
204. See HARTWIG, LOUISIANA INSURANCE MARKET OVERVIEW, supra note 201, at 48 (although the numbers have improved in the past few years, most homes are still undervalued by 22%).
Flood insurance has not been commercially available through the private insurance industry "[b]ecause of the high risks and the lack of underwriting standards." Therefore, in 1968, Congress created a voluntary National Flood Insurance Program (NFIP) underwritten by the federal government. Over the years, the federal government assumed responsibility for providing relief and for partial indemnification for property losses resulting from floods.

One serious fault of the NFIP is that communities must decide to "opt in" to the plan—if the community does not opt in, flood insurance under the NFIP is not available within that community. This presents an obviously insurmountable obstacle for a firm seeking such insurance.

Other significant drawbacks derive from non-participation by communities in Special Flood Hazard Areas (SFHA) that fail to opt in. For example, SFHA that fail to opt in are ineligible for any form of federally-funded or supported financial assistance for acquisition or construction purposes. Furthermore, if flooding in a declared disaster area occurs in a non-participating SFHA community, no federal financial assistance can be provided for permanent repair or reconstruction of insurable buildings (although other disaster assistance is not cut off). However, if the community applies and is accepted into the NFIP within six months of a presidential disaster declaration, the limitations on federal disaster assistance are lifted.

This community option to retroactively opt in after a declared disaster created a free-rider problem. Without opening up its constituents to any liability for premiums, the community remained eligible for federal assistance for the first declared emergency (a "try it before you buy it" approach for the city), while at the same time such a community’s residents were prevented from obtaining any flood insurance. With such a dichotomy, it is no surprise that the NFIP was underutilized and undercapitalized.

208. See id.
211. See 42 U.S.C. § 5172(a).
212. See generally id.
In his 2006 testimony before Congress, the Comptroller General declared the NFIP program “essentially bankrupt.”\(^{214}\) To meet pressing needs from the 2005 flooding, produced by the hurricanes, Congress agreed to a $17 billion bail out.\(^{215}\) As demonstrated by system failure in 2005, Congress has yet to strike the right balance with the NFIP.\(^{216}\)

The NFIP is broken for a variety of reasons. Most who need flood insurance do not purchase it.\(^{217}\) Premiums are also “woefully inadequate given the technical bankruptcy of the NFIP.”\(^{218}\) Even for those who do insure, because of subsidies, they do not bear the true share of costs associated with their risks.\(^{219}\) In this regard, subsidies, like federal emergency relief itself, could actually stimulate overdevelopment of risky areas.\(^{220}\) Although a legislative fix to the NFIP was proposed in 2006, it failed to gather the necessary momentum for passage.\(^{221}\)

Regardless of whether the government or private industries offer insurance, tax relief measures should serve as incentives for people to carry adequate insurance. Indeed, one of the goals of the Stafford Act is “encouraging individuals, [s]tates, and local governments to protect themselves by obtaining insurance coverage to supplement or replace governmental assistance.”\(^{222}\)

\(^{214.}\) Id. at 38. “The magnitude and severity of the flood losses from Hurricanes Katrina and Rita overwhelmed the ability of the NFIP to absorb the costs of paying claims, providing an illustration of the extent to which the federal government is exposed to claims coverage in catastrophic loss years.” Id.


\(^{217.}\) “More than 11 million U.S. homes are in flood zones, . . . [b]ut [o]nly about one in four homeowners who live in areas vulnerable to floods purchase federal flood insurance.” Catastrophes: Insurance Issues, supra note 86.

\(^{218.}\) HARTWIG, HURRICANE SEASON, supra note 85, at 138.


\(^{220.}\) See generally Catastrophes: Facts and Statistics, supra note 3; see also HARTWIG, HURRICANE SEASON, supra note 85, at 15, 57. Insurers have stated that the cost of natural catastrophes leads to the overdevelopment in risky areas. See generally Catastrophes: Facts and Statistics, supra note 3.


2. Cases Expose Limitations and Systemic Inadequacies

Based on the scope of devastation in the wake of the hurricanes and flooding in 2005, it is not surprising so many lost so much. Given the insurance deficits identified above, it is also not surprising that so many found they were inadequately insured. Indeed, the delayed and rude awakening as to these inadequacies could also be expected. The case law confirms the necessity of securing separate flood insurance because of the flood exclusion in basic casualty policies.

For example, in Buente v. Allstate Property & Casualty Insurance Co.,223 the taxpayer challenged the insurance policy flood exclusion only to find that it prevented recovery for flood damages.224 Even though the flooding was undeniably a byproduct of the hurricane, the court held, consistently with many other cases,225 that the flood damage is not within the storm coverage because the language of the flood exclusion is unambiguous.226

Beyond this fundamental limitation, case law confirms that merely having two parallel systems leads to confusion—resulting in gaps in coverage and evidencing systemic flaws with the flood insurance scheme. The cases show potential for consumers to be unaware, ill-advised, and perhaps intentionally misled by their insurance agents. In addition, the cases show how the dual scheme can erode the insurer’s commitment to pay what is owed, and in some cases, motivate unsavory practices.

Many victims have alleged that their agents negligently failed to disclose the significance of the flood exclusion or mention that additional flood insurance was available at all.227 Others allege that their agents mistakenly

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224. Id. at *2.
told them that separate flood coverage was not necessary to cover losses from water damage due to a hurricane.228

Other litigation was spawned by claimants who alleged that their insurance agents lied to them about the scope of their coverage. In Denton v. Lamey,229 the Dentons alleged that Lamey agreed to provide both homeowner’s insurance and flood insurance and negligently failed to do so, even after accepting their premiums for both policies.230 The United States District Court determined there were triable issues of material fact that allowed plaintiffs to survive a motion for summary judgment.231

The case illustrates the mere fact that when two different policies are required for comprehensive protection, it can give rise to confusion—even where both are marketed and administered by the same company.232 That claimants might mistakenly believe they have purchased both policies is a flaw inherent in the system. Even more troublesome is the potential that the insurance policies could be provided by multiple providers who, by virtue of the system, must share liability for loss and determine how to allocate this loss. Conflicts and disputes between those with directly competing financial interests could be predicted in a hurricane scenario when there is water damage from both high winds and penetrating rain, as well as flooding.

Andry v. Audubon Insurance Co.,233 demonstrates how even those individuals who seek full insurance protection could be caught in the finger pointing between insurers and the necessary evil that ensues in sorting out liability. Gilbert and Alicia Andry were cautious and prudent homeowners who purchased three separate insurance policies to protect their new home in Pass Christian, Mississippi.234 They purchased their primary homeowner’s policy from Nationwide Property and Casualty Insurance Company, obtained a flood policy issued by the federal government through Nationwide, and bought a wind and hail policy through the Mississippi Windstorm Underwrit-

230. Id. at *2–3.
231. Id. at *4–6.
232. See 42 U.S.C. § 4081(a) (2000 & Supp.) (allows NFIP to select commercial insurance agents to interface administratively with NFIP clients concerning federal flood insurance coverage; the agent may or may not be the same carrier as the insured’s casualty policy carrier).
234. Id. at *2.
ing Association (MWUA).\textsuperscript{235} "It is undisputed that both the MWUA and the Nationwide homeowner's policies exclude[d] coverage for flood damage."\textsuperscript{236}

The dispute arose about whether damage resulted from the wind (allegedly blowing the home away) or from water damage due to flooding (allegedly washing the home away).\textsuperscript{237} The Nationwide policy specifically excluded flooding resulting from high tides or storm surge.\textsuperscript{238} Plaintiffs alleged Nationwide wrongly failed to pay for the wind damage covered under their policy.\textsuperscript{239} Curiously, Nationwide argued that the policy did not include wind damage either, despite the fact the policy "states the exact opposite."\textsuperscript{240}

The MWUA policy was administered by Audubon, who serviced plaintiffs' claim.\textsuperscript{241} Plaintiffs alleged that the Audubon adjuster wrongfully calculated the claim on their completely demolished home, by constructing a hypothetical waterline on the nonexistent wall and estimating damages only above the line (far less than their policy limits or the replacement cost of their home).\textsuperscript{242} Presumably, the imaginary line would be used to reduce liability by subtracting the flood damage that would have occurred below the line if the house and its contents had remained. Plaintiffs alleged that the claims adjuster from Audubon admitted upon inspection "that the policy limits [would have been] exhausted," but that he was required to adjust the claim based upon the imaginary waterline.\textsuperscript{243}

The case has not been addressed on the merits, as the United States District Court found that jurisdiction was proper in the state court.\textsuperscript{244} Despite Nationwide's claims that the scope of the flood insurance coverage was a federal issue, the court remanded the case for further proceedings.\textsuperscript{245}

\textsuperscript{235} Id. The MWUA was established in Mississippi in 1970 for coverage against wind-storms and hail along the Gulf Coast. MISS. CODE ANN. §§ 83-34-1 to 83-34-29 (1972); \textit{Andry}, 2006 WL 3904998, at *1 n.2.
\textsuperscript{236} \textit{Andry}, 2006 WL 3904998, at *9.
\textsuperscript{237} Id. at *1–2.
\textsuperscript{238} See id.
\textsuperscript{239} Id.
\textsuperscript{240} Id. at *9 n.11.
\textsuperscript{241} \textit{Andry}, 2006 WL 3904998, at *1. Audubon Insurance Company (a subsidiary of AIG-American International Group, Inc.) was acting as an agent of the MWUA servicing insurer. Id. at *5.
\textsuperscript{242} Id. at *7.
\textsuperscript{243} Id.
\textsuperscript{244} Id. at *9–11. Note that even though the case involved a Mississippi home and insurance policies in effect in Mississippi, the case was brought in Louisiana, as the plaintiffs were Louisiana citizens, and it was remanded to the Judicial District Court for the Parish of Plaquemines, State of Louisiana. \textit{Andry}, 2006 WL 3904998, at *11.
\textsuperscript{245} Id. at *10–11.
This multi-insurer tension is inevitable when one obtains policies from two separate insurance companies covering the same property. In any gray area, each insurer is financially motivated to assert that the other is more liable. Allowing insurers to duke it out in litigation or arbitration, at the expense of the insured—who suffers without compensation—is a travesty. Thus, the potential for multiple policies, where neither insurer accepts liability, is a serious flaw undermining the effectiveness of the flood insurance program.

While it is highly predictable that claimants would not be paid for flood damage when their policies contained a flood exclusion, and it is somewhat predictable that some insurers might squabble about the scope of their policy coverage, it is less predictable that insurers would be reluctant to pay for claims admittedly within the scope of coverage.

In *Broussard v. State Farm Fire & Casualty Co. (Broussard II)*, a case involving both wind damage (covered by the policy) as well as excluded flood damage, that is exactly what happened. The plaintiff in *Broussard* suffered both covered and excluded losses. The insurance company expert testified as to the existence of covered losses. Yet, the insurer failed to pay any of the damages, because it had not dispositively established the amount excluded as flood damage.

The court found the burden was on the insurer to prove how much water damage was excluded, after the plaintiff proved a prima facie case that the property sustained wind damage. State Farm failed to meet this burden and paid the price. In addition to relief for the policy limits, the jury awarded $2.5 million in punitive damages, which later was reduced to $1 million. The punitive damages awarded in *Broussard* against State Farm might motivate more cooperative claims processing and serve as a deterrent for other insurers refusing to pay at least what they acknowledge is due.

In summary, while those who are savvy about insurance probably appreciated that a flood insurance policy from the National Flood Insurance Program was required for flood protection, others were confused, ignorant, or perhaps even mislead by their insurance agents. Regardless of why, most

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247. Id. at *1–2.
248. See id.
249. Id. at *2.
250. Id.
252. Id.
were not adequately protected. The litigation that ensued, and continues, after the 2005 hurricanes reflects this unfortunate reality. However, even though the two separate halves—casualty insurance and flood insurance—are not as advantageous as one comprehensive whole, it is still better for individuals in participating communities to purchase both halves.

3. The Push for Insurance Reform

Due to insured losses hitting record proportions, Congress is considering federalizing reinsurance of the hurricane insurance market for homeowners.\(^{254}\) Despite the fact that many in the private insurance industry are opposed to such federalization—citing ability to withstand the highest loss years on record with sufficient policy reserves\(^{255}\)—there has been open debate in the insurance industry about the need for federal reinsurance.\(^{256}\)

As the debate over how to structure catastrophic insurance lingers, no one disputes the need for homeowners to have access to affordable insurance.\(^{257}\) Congress must take care, however, that any tax relief for victims of disaster encourages prudent decisions—such as motivating individuals to obtain sufficient insurance, including flood insurance for those at risk—versus exacerbating a false sense of security that a government bailout could promote.\(^{258}\)

Florida House Memorial 11A urges Congress to adopt a federal catastrophe insurance program, to participate in a federal/state issues summit, to

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254. See H.R. 91, 110th Cong. (1st Sess. 2007) (reinsurance available under this act “shall provide insurance coverage against residential property losses to homes (including dwellings owned under condominium and cooperative ownership arrangements) and the contents of apartment buildings”). For past failed efforts along these lines, see, e.g., H.R. 846, 109th Cong. (1st Sess. 2005) (federal auctions of catastrophe reinsurance contracts); H.R. 4366, 109th Cong. (1st Sess. 2005); H.R. 4507, 109th Cong. (1st Sess. 2005) (allowing States with catastrophe insurance programs to purchase federal reinsurance).


256. VALVERDE, JR., supra note 219, at 4–5; see also Is America’s Housing Market Prepared for the Next Natural Catastrophe? supra note 255, at 41–43 (statement of Alex Soto, President, InSource, Inc., on behalf of the Independent Insurance Agents and Brokers of America, Inc.).

257. “[U]sing history as a guide, natural catastrophes will inevitably place a tremendous strain on homeowners’ insurance markets in many areas, will raise costs for consumers, and will jeopardize the ability of many consumers to adequately insure their homes and possessions.” H.R. 4366, 109th Cong. (1st Sess. 2005).

provide specific federal tax legislation supporting disaster preparedness and relief (including tax deductions), and to engage in a national hurricane research initiative.\textsuperscript{259} The aspect concerning federal reinsurance is discussed here, while the ability of taxpayers and insurers to set aside funds on a tax-advantaged basis is discussed below in section B.2.

The federal government would be the ultimate reinsurer of super large losses associated with only the most severe "mega-catastrophes."\textsuperscript{260} A national catastrophe insurance program is necessary to promote personal responsibility among policyholders; support strong building codes, development plans, and other mitigation tools; maximize the risk-bearing capacity of the private markets; and provide quantifiable risk management through the Federal Government.\textsuperscript{261} Rather than relying exclusively on FEMA emergency relief and knee-jerk tax cuts and incentives, such a program would allow the promise of federal coverage to enhance insurability within vulnerable markets by making insurance affordable to those most likely to be affected by a hurricane.

Following the overwhelming demand on its Florida Hurricane Catastrophe Fund (FHCF) in 2004–2005, Florida has also been revamping its State Catastrophic Reinsurance Program.\textsuperscript{262} Florida House Bill 1A, which became law on January, 25, 2007, allows a temporary opportunity for insurers to increase their premiums for and coverage by the FHCF.\textsuperscript{263} The Florida Legislature intended “to create a temporary emergency program, applicable to the 2007, 2008, and 2009, hurricane seasons, to address these market disruptions and enable insurers, at their option, to procure additional coverage from the [FHCF].”\textsuperscript{264}

\textsuperscript{260} Id.
\textsuperscript{261} Id.
\textsuperscript{263} Id.
\textsuperscript{264} Id.
B. Posturing for the Storm

1. Existing Measures

Every taxpayer can take reasonable measures to prepare for a disaster: hardening buildings and facilities to hurricane and other storm threats, creating redundant records and storing them away from any high risk area (e.g., a fire safe box loaded with an emergency copy of electronic records and critical paper records—such as past tax returns, client records and contact information, etc.), and ensuring an up-to-date inventory of property. With modern technology, most urgent data can be carried on a thumb-drive or saved to other electronic media.

The challenge of creating and maintaining an up-to-date inventory of office items, equipment, furniture, plants, decorations, artwork, etc. can be much more onerous. It is the taxpayer’s burden to prove the amount of every claimed deduction, show receipts to establish the initial cost basis of property, and provide accounting documents to establish the depreciated value of items damaged or destroyed. Photo or video evidence of the condition of property before it is destroyed also goes far in encouraging insurance adjusters and the IRS to accept higher valuations. Certainly, any precious items should be periodically appraised.

How frequently to back up electronic data, conduct inventory, and appraise property depends upon how vulnerable the law practice is to known hazards. If a taxpayer is vulnerable to hurricanes or is located in a known floodplain, it would also be prudent to invest in measures to mitigate the effects of storm surge or rising water. The NFIP allows discounted premiums for communities who participate in a Community Rating System (CRS), because they have extensive floodplain management programs. The FEMA website discusses the CRS and other “FloodSmart” programs. Premiums may be reduced by up to forty-five percent for mitigation, planning, and preparedness. In addition, such measures help save lives and property.

267. Id.
268. Id.
2. Proposed Tax Measures Promoting Insurance

In Florida, after the devastating 2004 hurricane season, the notion of a hurricane savings account for individuals was first introduced.269 The hurricane savings account was forecasted “to cover an insurance deductible or other uninsured portion of the risks of loss from a hurricane, rising flood waters, or other catastrophic windstorm event.”270 Because the accounts would only safeguard homesteads, they would be beyond the reach of creditors.271

However, benefits of such an account are not realized unless or until the federal government creates such a tax-exempt or tax-deferred savings vehicle.272 While Florida unanimously petitioned Congress for such legislation in 2006,273 and Congress introduced a bill to create a Catastrophe Savings Account,274 the legislation was still not enacted in 2006.275

Florida renewed its efforts to stimulate such legislation in 2007.276 As proposed, the Florida House Memorial asks for the creation of tax exempt accounts for taxpayers to accumulate financial reserves on a tax-advantaged basis for the purpose of paying for mitigation enhancements and catastrophic losses.277 The proposal also requests changes to the tax code that will allow personal income tax deductions for insurance costs and mitigation expenses. “[T]he [Florida] [l]egislature urges Congress to provide a federal income tax deduction for residential property insurance premiums paid by consumers to offset the dramatic cost of property insurance.”278

271. See FLA. STAT. § 222.22 (2006). Section 222.22 of the Florida Statutes exempts hurricane savings accounts and other preferred savings programs from legal process. Id. However, this benefit attaches only when “the federal government provides tax-exempt or tax-deferred status to a hurricane savings account.” Id. § 222.22(4)(c).
272. Id. § 222.22. The federal government has not yet created such a favored tax position. See H.R. 4836, 109th Cong. (2d Sess. 2006).
276. See id.
277. See id.
278. Id. at 4.
The Florida legislature also asked Congress to “[c]reate tax-deferred insurance company catastrophe reserves to benefit policyholders.”\textsuperscript{279} “These tax-deferred reserves would build up over time and only be eligible to be used to pay for future catastrophic losses.”\textsuperscript{280} Congress is already considering the latter form of requested tax relief. The Policy Holders Protection Act is a bill “[t]o amend the \textit{Internal Revenue Code} of 1986 to provide for the creation of disaster protection funds by property and casualty insurance companies for the payment of policyholders’ claims arising from future catastrophic events.”\textsuperscript{281}

C. \textit{Recovery and Rebuilding}

No one knows whether those affected by the next disaster will enjoy the same tax relief as the victims of the 2005 hurricanes. Because congressional response has varied in the past, it is prudent to exploit current code provisions which afford relief to all casualty victims, while remaining alert for new legislation, and paying particular attention to IRS news releases, announcements, and notices likely to follow a major disaster.\textsuperscript{282} After Hurricane Katrina, for instance, there were twenty-nine IRS releases within thirty days of the storm.\textsuperscript{283}

1. \textit{Small Business, Heightened Vulnerabilities}

Immediate relief from tax filing deadlines and payment obligations in the wake of Hurricane Katrina was timely and essential, because many important books and records had been lost or destroyed due to the widespread devastation and massive flooding.\textsuperscript{284} In addition, where records miraculously survived, the evacuated often had no immediate access to them.\textsuperscript{285} Although it sounds obvious, such relief is especially necessary for small businesses that are barely making their payroll week to week.\textsuperscript{286} According

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{279.} \textit{Id.} at 3; \textit{see} H.R. 4836, 109th Cong. (2d Sess. 2006).
\item \textsuperscript{280.} Fla. H.M. 11A.
\item \textsuperscript{281.} \textit{See} H.R. 164, 110th Cong. (1st Sess. 2007) (modifying I.R.C. \textsection 832 (2004)).
\item \textsuperscript{282.} After Hurricane Katrina, for example, IRS Commissioner Mark Everson, announced deadline extensions within days of the storm. I.R.S. News Release IR-2005-84 (Aug. 30, 2005) ("IRS Grants Tax Relief for Hurricane Katrina Victims"), http://www.irs.gov/newsroom/article/ 0,,id=147055,00.html.
\item \textsuperscript{283.} Internal Revenue Service, News Releases for September 2005, http://www.irs.gov/newsroom/content0,,id=149346,00.html (last visited June 14, 2007).
\item \textsuperscript{285.} \textit{See id.} at 13.
\item \textsuperscript{286.} \textit{See id.}
\end{itemize}
\end{footnotesize}
to the Small Business Administration (SBA), twenty-five percent of small businesses may not survive a major disaster.  

Of course, tax relief or assistance from the tax system is but one small part of the relief available. Ultimately, the small firm or sole practitioner must have sufficient financial resources to rebuild and reopen. The SBA recognizes the special vulnerability of small businesses and makes loans available for victims of declared natural disasters. Although the loans are obviously available to small businesses, even large businesses and individuals may apply and qualify for these loans. Regrettably, in a major disaster, the SBA may be overwhelmed, making relief in the form of low or no interest loans slow.

2. Opportunity Zones

No one can depend on the government to establish an opportunity zone following a disaster. Nevertheless, it is important to realize the potential benefits of an opportunity zone if one is declared. Since history affords the Liberty Zone and the GO Zone as examples of substantial tax advantages for affected victims, it is prudent to stay alert to congressional actions to afford similar relief in the future, and to be postured to immediately take advantage of that relief.

288. See Lipman, supra note 25, at 955–61. In her article entitled Anatomy of a Disaster Under the Internal Revenue Code, Professor Francine J. Lipman provides an excellent examination of how tax consequences dovetail with other federal relief. Id.
291. See Walker Statement, supra note 213, at 42 (stating that the public expressed widespread dissatisfaction with the SBA and their backlog of about 103,300 hurricane-related loan applications, which averaged about 94 days).
In a nutshell, the procedural advantages of delayed filing and payment of taxes should benefit all taxpayers who otherwise would have taxes due. Forgiveness of interest and penalties should make this especially desirable in a declared emergency area.

The ability to amend past returns to claim net operating losses will afford an excellent opportunity to improve cash flow. Similarly, cash flow could be improved by accelerating any deductions into a previous period. By taking them earlier, there is possibly a twofold advantage. First, there may be more income to offset, perhaps allowing a taxpayer with a marginal rate of twenty-five percent to slip down into the fifteen percent bracket.292

Second, the ability to treat a business cost as an expense that is deductible this year, versus a capital asset—which depreciates over time—enhances cash flow by reducing tax liability now as opposed to spreading it out over future tax periods. Reduced liability translates into lower tax withholding right now as estimated payments are reduced to reflect increased expensing.293 In addition, if offered the opportunity, the taxpayer should take advantage of the immediate deduction for section 179 property instead of spreading these costs through depreciation.

V. CONCLUSION

Although promising changes are on the horizon, there is no reason for prudent taxpayers to wait for legal developments before getting their financial affairs in order. You will not be able to choose whether you will be a physical victim—that is why they are called acts of God—but you can influence, in important respects, whether you will be a financial victim.

Everyone should seek an appropriate mix of insurance. For businesses, these ordinary and necessary expenses are deductible in the year paid.294 A prudent business will be fully insured while carrying a substantial deductible, so that catastrophic events will amount to setbacks but not failure.

293. Estimated tax payments earlier in the tax year would have been based on expectations of greater income and fewer expenses. I.R.S. Pub'rn 505, Tax Withholding and Estimated Tax, at 7 (2007) available at http://www.irs.gov/publications/p505/ch02.html. Cash flow is improved by either reducing estimated payments immediately, due to changed circumstances based on the disaster and concomitant beneficial tax considerations; or, at worst, a bigger refund will be obtained at the end of the fiscal year if estimated payments are continued at pre-existing levels, resulting in overpayment. Id.
While an extension of time to file and pay taxes is likely, keeping a redundant set of records in a safe yet accessible location will jumpstart an ability to amend a previous return to take advantage of the three-year net operating loss carryback under code section 172(b)(1)(F), \(^{295}\) or the retroactive relief afforded under code section 165(i)\(^ {296}\) in a major disaster.

Finally, staying abreast of IRS releases and post-disaster relief legislation will allow firms and clients alike to maximize whatever compassionate tax relief is afforded. Together, these measures should help both lawyers and clients weather the storm.

\(^{295}\) I.R.C. § 172(b)(1)(F).

\(^{296}\) Id. § 165(i).
RESPONSIBILITY FOR THE RESTORATION OF THE HURRICANE INSURANCE INDUSTRY: BUSINESS PROPOSAL OR STATE SOLUTION?

SARA ELIZABETH GRADITOR*

I. INTRODUCTION

The concept of the free market has been honored throughout the history of the United States as advancing our economy by promoting competition.¹ While the free market is an integral part of American culture, difficulty develops when business practices overlap with public policy concerns.² Insurance companies that provide hurricane coverage are in business to make a

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2. See id.
profit for themselves while the product they sell is protection for the insureds' health and safety.\textsuperscript{3} Having a responsibility to look out for their insureds' best interests, as well as their owners' financial well-being, creates a conflict of interest.\textsuperscript{4} The issue that will be examined in this article is whether, and to what extent, the federal or state government should become involved in the hurricane insurance industry.

Part II discusses the current conditions of the insurance industry as a whole and the consequences of the suffering hurricane insurance market. Part III will explain the need for reinsurance and its effect on the insurance industry. Part IV will analyze the effect the suffering insurance and reinsurance industry has on residents of Florida. Part V will discuss how the state government once became involved by enacting Florida's Valued Policy Law, and why that law no longer provides the protection it once did. Part VI of this article will explore how the state intends to provide a solution to the hurricane insurance problem in Florida. Part VII will then discuss a proposal for the Florida Legislature to take action and provide hurricane insurance to Florida residents. Part VIII will conclude that state government involvement is necessary to stabilize the hurricane insurance market and to protect its citizens' health, safety, and welfare.

II. INSURANCE: THE BUSINESS THAT CANNOT AFFORD PROTECTION

A. The Industry

All Florida residents who have mortgages are required by law to obtain homeowners insurance.\textsuperscript{5} Homeowners insurance typically covers "everything except flooding caused by rising water."\textsuperscript{6} An increasing number of policies are excluding wind damage caused by hurricanes.\textsuperscript{7} Companies that choose to stay in the hurricane insurance market in Florida must increase rates to survive in the hurricane insurance industry.\textsuperscript{8} Consumers cannot af-

\textsuperscript{3} See FLA. STAT. § 215.555 (2006).
\textsuperscript{4} See id.
\textsuperscript{5} Id.; Interview with Walter Campbell, Sen., Fla. S., in Fort Lauderdale, Fla. (July 5, 2006) (audio on file with Nova Law Review).
\textsuperscript{7} \textsuperscript{7} Id.
ford to pay "'[t]hese skyrocketing insurance rates.'" Floridians are left with two options: spend an enormous amount of money protecting their homes from hurricanes, or not protect their homes from hurricanes at all. Many are not even afforded the luxury of having an option as insurers increasingly refuse to write policies for homeowners who live in areas at greater risk.

Hurricane Andrew’s economic impact in 1992 forced insurance companies to re-evaluate the hurricane insurance market in Florida. Ranked as one of the ten most expensive United States catastrophes, Hurricane Andrew ranks number two causing property insurers to pay $21.6 billion in property coverage to this date. Residents of Florida sought “property and casualty insurers to fund the long process of rebuilding.” As a result of Hurricane Andrew, “ten of the state’s insurers” went bankrupt. Prior to Hurricane Andrew, insurers capitalized on the construction boom in South Florida by insuring homes at rates that were “inadequate to cover potential hurricane losses.” “It is a gross understatement to say that the potential destruction resulting from a hurricane of Andrew’s magnitude was largely unanticipated both by the citizens of South Florida and their state and local governmental officials.”


10. See TASK FORCE 2006, supra note 8, at 14.

11. Jonathan Brennan Butler, Insurers Under Fire: Assessing the Constitutionality of Florida’s Residential Property Insurance Moratorium After Hurricane Andrew, 22 FLA. ST. U.L. REV. 731, 733–34 (1995). Florida’s extremely high reading on the “hurricane property risk scale” varies between 300 and 600. Fritz Yohn, Insurers Can Tame Hurricane Exposures, NAT’L UNDERWRITER, June 12, 2006, at 12. This scale is based on two factors including the “likelihood of a hurricane striking most any area within the state” and the magnitude of property located in “counties having the highest hurricane likelihood.” Id. Therefore, Florida “[h]omeowners are being denied insurance or face crippling premiums.” Janice Smith, Letter to the Editor, FPL Only Part of Hurricane Issues, SUN-SENTINEL, June 14, 2006, at 20A.

12. See Butler, supra note 11, at 732–34. “Andrew was a wake-up call and learning experience for the Florida market in 1992.” See also TASK FORCE 2006, supra note 8, at 14.

13. TASK FORCE 2006, supra note 8, at 13. Hurricane Katrina is the most costly catastrophe to date incurring over $38 billion in insured losses. Id.


15. Id. at 733.

16. Id.

17. Id. at 732.
The 2004 and 2005 hurricane seasons further reinforced the desire for insurance companies to abandon the hurricane insurance market in Florida.\(^{18}\) The 2004 season experienced four hurricanes “together creat[ing] 1.66 million claims resulting in $20.9 billion dollars of insured losses in the Florida market.”\(^{19}\) The 2005 season resulted in another four hurricanes causing insurance companies a great delay in “recovering, recapitalizing, and rebuilding” from the previous year.\(^{20}\) The mentality shifted from preparing for the return of another devastating Category Five hurricane, like Andrew, to preparing for multiple storms of less magnitude, but of equal, if not greater, economic impact.\(^{21}\)

Insurance companies used Andrew as a model in determining which insurance policies to renew or whether to renew them at all.\(^{22}\) In response, insurers concluded that policies must be withdrawn in the coastal regions of Florida.\(^{23}\) This conclusion remains as insurance companies increasingly reduce their risk of catastrophic loss by cutting back their level of exposure.\(^{24}\) Decisions by insurance companies to cancel policies after being with an insured for “years and years without filing a claim” are the insurers’ reaction to “not making money in the Florida homeowners’ insurance market.”\(^{25}\)

B. Florida’s Response

The state has used its police powers to provide disaster relief by “taking responsibility for the worst or highest risks” in the hurricane insurance market.\(^{26}\) After Hurricane Andrew, the Florida Residential Property Casualty Joint Underwriting Association was established.\(^{27}\) This association was to “provide a public/private response to the deterioration of insurance availabili-
ity in the private market." In addition, the Florida Windstorm Underwriting Association was created by law to make secure windstorm coverage for residential policyholders unable to obtain it in the voluntary market. Together, the associations covered approximately 1.35 million policies with an "exposure of almost $86.5 billion."30

Citizens Property Insurance Corporation (Citizens) was created in 2002 to encompass both entities.31 Citizens' rates are required by law to be higher than the rates of private insurers.32 As a result, Citizens has a rate structure that is not meant to compete with the private market.33 In fact, it is "[d]esigned to offer insurance only where the private market will not provide coverage" making it the "provider of last resort."34

The 2006 hurricane season presented some obstacles for Citizens.35 Poe Financial Group (Poe), one of South Florida's largest property insurers, liquidated its Florida property insurance business.36 Citizens, being the state's insurer of last resort, then took over all of Poe's property and casualty policies.37 Not only did Citizens take over more than 300,000 policies from Poe, Citizens must also accommodate 50,000 new property and casualty applications it receives per month.38 The "explosive" growth of Citizens has forced it to increase rates and decrease coverage.39 Insurers insist that "[a] determination will have to be made on whether there is a public policy obligation to insure all structures in the state."40

In addition to "insuring too many high-risk properties," Citizens never fully recovered from the 2004 and 2005 hurricane seasons.41 During those seasons, "Citizens collected $1.2 billion in premiums, but paid out more than
$3.9 billion in claims" incurring a loss of approximately $2 billion. Florida decreased the loss to Citizens by paying a portion of the deficit with sales tax revenues. In exchange, the Florida State Legislature required Citizens to collect enough money from customers to provide for future damage. This leaves Citizens without any other option but to increase rates. The question is how much? "Insurance analysts say one of the determining factors as to if and how much premiums may rise depends on the hit reinsurers take."

III. THE IMPORTANCE OF REINSURANCE

A. Reinsurance

Basically, reinsurance is insurance for insurance companies. Insurance companies purchase insurance from reinsurance companies “to aid in covering larger-than-expected losses." As in any other business, a rate increase in the reinsurance industry results in a rate increase in the insurance industry. Consumers cannot escape “trickle-down economics” as the “investment outlook for the reinsurance industry is negative.”

The reinsurance industry continues to undergo legal problems in regards to “bid rigging and improper reinsurance contracts.” “[S]everal state attorneys general, . . . the SEC, and the Department of Justice” continue to conduct investigations on reports published in February 2006, indicating several “former executives at General Re Corp., a leading U.S. reinsurer,” committed fraud from a reinsurance deal in 2000. Stemming from those fraud

42. CATHERINE A. SEIFERT & JOE NIEDZIELSKI, STANDARD & POOR’S, INDUSTRY SURVEYS: INSURANCE: PROPERTY-CASUALTY 7 (July 13, 2006).
43. See TASK FORCE 2006, supra note 8, at 48; see Diamond, supra note 37.
44. Kathy Bushouse, Florida Legislature Leaves Much Unresolved on Insurance Issue, KNIGHT RIDDER TRIB. BUS. NEWS, May 9, 2006, at 1 [hereinafter Bushouse, Florida Legislature].
45. See id.
47. Id.
48. Id.
49. Id.
50. Id.
51. CATHERINE SEIFERT, STANDARD & POOR’S, SUB-INDUSTRY REVIEW: REINSURANCE (2006) [hereinafter SEIFERT 2006]. The most recent outlook for the reinsurance industry suggests it is neutral, but this is mostly due to the fact that many reinsurers were able to profit from the “mild hurricane season in 2006.” See CATHERINE SEIFERT, STANDARD & POOR’S, SUB-INDUSTRY REVIEW: REINSURANCE (2007).
52. SEIFERT & NIEDZIELSKI, supra note 42, at 6.
53. SEIFERT 2006, supra note 51.
charges, an ongoing investigation of many other reinsurers is taking place.54 "Some insurers now advocate for a federal regulator that would allow them to bypass the current system that regulates insurance on a state-by-state basis."55 This seems unlikely to happen as "the National Association of Insurance Commissioners (NAIC), the organization of state insurance commissioners, [argue] that industry standards across state lines can be developed under the current system."56 The consequences of these ongoing investigations create barriers to an already unattractive market, "dampen[ing] investor enthusiasm for many reinsurance stocks."57

Further, the insolvency of smaller reinsurers aid in further consolidation of the reinsurance market.58 As "larger, financially stronger" reinsurers take over the industry, there is a concern that competitive pricing will soon disappear.59 There is a strong indication that "reinsurers are reconsidering the risk/return relationships available when compared with other investment opportunities."60 The January 2006 market closed transactions at a slower rate than in the past, including 2005.61 "[W]hile overall rates appear not to have increased dramatically, wind reinsurance along the Gulf States is reported to have risen substantially."62

Legislators increasingly "face heightened public pressure" to provide solutions to the declining reinsurance market before it exacerbates any further.63 In response to the public, former Florida Governor Jeb Bush signed legislation in May 2006 offering loans to insurers, encouraging them to write policies in Florida.64 In addition, Citizens is required by law to "make its best efforts to procure catastrophe reinsurance at reasonable rates."65 However, "reasonable rates" are expected "to cover [a] projected 100-year probable maximum loss."66 The bottom line is "[i]nsurers are . . . buying more reinsurance protection and paying more for that coverage."67

54. See id.
55. SEIFERT & NIEDZIELSKI, supra note 42, at 5.
56. Id. at 5–6.
57. SEIFERT 2006, supra note 51.
58. SEIFERT & NIEDZIELSKI, supra note 42, at 1.
59. See id.
60. TASK FORCE 2006, supra note 8, at 13.
61. Id.
62. Id.
63. SEIFERT & NIEDZIELSKI, supra note 42, at 2.
64. Id.
66. TASK FORCE 2006, supra note 8, at 52 (quoting Fla. Stat. § 627.351(6)(c)(9)).
67. SEIFERT & NIEDZIELSKI, supra note 42, at 7.
B. The Florida Hurricane Catastrophe Fund

The problems with the residential property insurance market, caused by Hurricane Andrew, in effect created problems with the reinsurance market.68 As reinsurers became more and more hesitant to provide coverage for insurers in Florida, state action was deemed necessary to stabilize the market.69 Section 215.555 of the Florida Statutes created the Florida Hurricane Catastrophe Fund (FHCF) in an effort to protect the residents of Florida from another catastrophic hurricane loss.70 Acting as a state administered reinsurance program, the FHCF will partially reimburse those insurers who experience such a loss.71 Every property insurer who writes covered policies in Florida is required to purchase reinsurance from the FHCF.72 This provides insurance companies with security and encourages them to conduct business in Florida.73

However, the overpowering combination of the 2004 and 2005 hurricane seasons caused the cash resources of the FHCF to become strained.74 The four hurricanes in 2004 incurred insured losses of approximately $21 billion from 1.67 million claims.75 The FHCF valued their losses at $3.85 billion of that total amount.76 In 2005, Hurricane Wilma alone caused about $7.9 billion in insured losses from residential property.77 The FHCF expects to lose at least $2.6 billion of that total amount.78

Further, computer models used to predict future economic impact of hurricanes proved to be grossly inaccurate.79 Consumer demand surged as an inevitable consequence of the previous hurricane seasons.80 As a result, the FHCF incurred a loss for which it did not prepare.81 “With 10% adverse loss development,” FHCF must reserve $3.1 billion, the total amount of cash available, to be used for claims made from the 2005 losses.82 Since the

68. FLA. STAT. § 215.555(1)(b).
69. Id. § 215.555(1)(a).
70. See id. § 215.555.
71. Id. § 215.555(4)(a).
72. Id.
73. See generally FLA. STAT. § 215.555.
74. TASK FORCE 2006, supra note 8, at 47.
75. Id.
76. Id.
77. Id.
78. Id.
79. TASK FORCE 2006, supra note 8, at 47.
80. Id.
81. See id.
82. Id.
FHCF’s cash resources will be exhausted due to the 2005 claims, “there will not be any cash available to be carried forward for 2006 claims payments when the 2006 hurricane season begins.”83 Without the FHCF able to provide reimbursement, insurers will need to be issued revenue bonds to recuperate.84 Legislators issued $1.5 billion in bonds to help the FHCF recover from a $1.41 billion deficit resulting from the 2005 hurricane season.85 The FHCF borrowed an additional $2.8 billion in preparation for the 2006 hurricane season.86 Few future preventative measures exist for the FHCF.87 Expansion of the monetary fund for the FHCF is not an option because Florida policyholders, including “all property and casualty policyholders excluding workers compensation and medical malpractice,” would be placed in the position of funding the added coverage.88 Reduction of the fund would worsen the problem as cash reserves would diminish at a faster rate, increasing the need to issue bonds.89

The Florida Administrative Code allows insurance companies in Florida to raise rates as long as they are approved by state regulators.90 Among the few expense factors taken into consideration in each homeowner’s rate filing is the cost of reinsurance.91 In fact, reinsurance is broken down into specific expense factors which are taken into account when determining the cost of reinsurance in relation to the price of rates.92

State Farm Florida Insurance Co. (State Farm) “insures more than one million policyholders statewide.”93 The company submitted its rates early to state regulators in hope to secure and collect higher premiums.94 As Florida’s number two home insurer, a request was made “for the company’s largest-ever rate increase in the state.”95 However, this request was made prior to learning of the significant increase in cost for reinsurance.96 State Farm withdrew its initial request to reevaluate how high rates must be to make a

83. Id.
84. TASK FORCE 2006, supra note 8, at 47.
85. Stephanie Horvath & Dara Kam, State’s Disaster Fund Boosted, PALM BEACH POST, June 16, 2006, at 1D.
86. Id.
87. See TASK FORCE 2006, supra note 8, at 47.
88. Id.
89. Id.
91. Id. r. 69O-170.014(10)(f).
92. Id. r. 69O-170.014(11).
93. Kathy Bushouse, State Farm Aims Higher: Reinsurance Tab to Force Second Request for Even Steeper Rate Increases, SUN-SENTINEL, July 7, 2006, at 1D.
94. Id.
95. Id.
96. Id.
This presents the question as to whether the FHCF, by providing additional insurance capacity, continues to serve its purpose to improve the state’s economy and protect its citizens’ health, safety, and welfare.

IV. THE HARD TRUTH

Generally, the purpose for insurance is to provide security for its consumers. Insurance companies guarantee their ability to provide money to their policyholders in situations where the policyholder might undergo an unaffordable, unforeseeable loss. Thus, the reason why consumers purchase hurricane insurance is to gain some sense of assurance that they will be able to rebuild or reconstruct their home in the event of a catastrophic loss. Without this guarantee, there would be no need for insurance companies. Fear sets in when consumers are unable to afford to protect themselves with hurricane insurance. The situation becomes worse when the consumer is no longer in control and is refused coverage entirely.

As “no place in Florida is immune from hurricane risk,” the need to protect one’s home applies to every resident of Florida. People who live along the coast cannot find hurricane insurance because private insurance companies refuse to write them policies. This is because “practically all private insurers consider the [coast] too risky.” As a result, Citizens must provide them with the necessary insurance to protect them from potential hurricane damage. However, as noted above, Citizens’ rates must be significantly higher than those offered by private insurers. Many cannot “afford to live on either coast or nearby.” The attitude of some is: “If you cannot afford the cost or it is not available in your area, you should move.”

97. Id.
98. See TASK FORCE 2006, supra note 8, at 46.
100. Id.
101. Id.
102. Id.
104. Id.
105. TASK FORCE 2006, supra note 8, at 15.
106. Interview with Walter Campbell, supra note 5.
109. Id.
111. Id.
However, the hard truth is that "millions of coastal homeowners remain inadequately insured and unprepared for the [next hurricane] season."¹¹²

Even when Floridians are able to find residential hurricane insurance, it costs an enormous amount.¹¹³ Some believe Floridians need to gain an understanding that insurance companies are businesses that need to make a profit to survive.¹¹⁴ Since insurers are "working furiously" to secure a future profit, it is easy for them to forget the very purpose insurance companies were meant to serve.¹¹⁵ Thus, homeowners are unable to secure insurance rates at reasonable amounts.¹¹⁶ Moreover, Citizens simply cannot afford to cover every homeowner in Florida.¹¹⁷ "[T]he bottom line on homeowners insurance is harsh: Costs more. Covers less."¹¹⁸

Further, those who spend the money to be insured have significant difficulty collecting on their policy when a catastrophe actually does occur.¹¹⁹ A hurricane's impact on a community leads policyholders to make claims.¹²⁰ This causes insurance companies to incur a huge loss upon payment of every policy.¹²¹ Therefore, insurance claims and disputes over coverage are inevitable.¹²² Since many insurers "are not going to pay up," multiple lawsuits are filed against insurance companies.¹²³ In fact, lawsuits are still taking place from hurricanes that occurred in Florida about ten years ago.¹²⁴

The on-going need for a solution progresses as fewer options exist every day.¹²⁵ Florida State Senator Walter "Skip" Campbell explains:

> We are going to have a major crisis statewide with people that can[not] afford property insurance rates and that [is] going to create a crisis in multiple sectors of our economy. [P]eople will not be able to sell their houses because there won't be buyers because

¹¹³. Smith, supra note 11.
¹¹⁶. Id.
¹¹⁷. See TASK FORCE 2006, supra note 8, at 40-41.
¹¹⁸. Garcia, Check Your Coverage, supra note 115.
¹²⁰. See SEIFERT & NIEDZIELSKI, supra note 42, at 1-2.
¹²¹. Id.
¹²². See Ostrovsky, supra note 119.
¹²³. Id.
¹²⁴. Id.
¹²⁵. Interview with Walter Campbell, supra note 5.
buyers can[not] afford to pay the taxes and insurance. So, the banks are going to hurt, the mortgage companies are going to hurt, [the] real estate agents are going to hurt, and [the] general economy is going to start hurting because we will not have people who can, in fact, live in our communities to perform the jobs that we need; such as teaching, such as police officers . . . this is going to go one level even further down because we are seeing some of the commercial property owners . . . having the same problems as the residential community, which is they’re getting hit with increased property taxes and almost astronomical property insurance rates. So, what do they do? [They increase rent.] This is the beginning of the problem and it’s more far-reaching than anybody can ever think about.126

Awareness of the increasing insurance problems in Florida has caused many residents to voice their opinions as to what actions the state should take in response to this predicament.127 As “the continued availability of property insurance . . . is critical to the state’s economic survival,” the controversial topic of whether state action is necessary in response to hurricane insurance problems, once again, presents itself to the Florida Legislature.128

V. THE PREEMPTION OF A VERY OLD STATUTE

A. Florida’s Valued Policy Law

Problems with the insurance industry prompted the Florida Legislature to act as long ago as 1899 when its first valued policy law was put into action.129 “A valued policy is ‘one in which the value of the thing insured, and also the amount to be paid thereon in the event of loss, is settled by agreement between the parties and inserted in the policy.’”130 The “principal object and purpose” of Florida’s valued policy law is to determine the amount of money the insurer must pay the insured in the event of a total loss, prior to the occurrence of such an event.131 Moreover, it “requires the insurer to ascertain the insurable value at the time of writing the policy,” and to write it

126. Id.
127. See, e.g., Sims, supra note 114; Smith, supra note 11.
128. TASK FORCE 2006, supra note 8, at 10.
131. See Garaffa, supra note 129, at 8; see also FLA. STAT. § 627.702 (2006).
The statute plays a major role in insurance law as it “is part of every real property casualty insurance policy written on property in Florida.”

The statute serves to prevent future problems between insurers and policyholders by resolving the issue of how much the insurer must pay without the trouble of negotiation or litigation. It “operates like a liquidated damages clause rather than as an indemnity contract.” The statute states:

In the event of the total loss of any building, structure, mobile home... or manufactured building... located in this state and insured by any insurer as to a covered peril... the insurer’s liability under the policy for such total loss, if caused by a covered peril, shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.

The statute emphasizes that two requirements must be met to qualify under the valued policy law. First, an insurer must insure the property as a covered peril. Second, the damage incurred must amount to a total loss. However, “the statute does not define the term ‘total loss.’” For over a century, it has been left to the courts to determine and define what constitutes a total loss. Two tests evolved by case law including the identity test and the restoration test.

First, the identity test will apply if the damage caused to the home “is so severe that it has lost its identity and character.” This test is satisfied even if the home is capable of being used for an alternative useful purpose. The identity test is also met in the event of a constructive total loss. A constructive total loss occurs when “an ordinance or regulation prevents repair”

132. Garaffa, supra note 129, at 8.
134. See Fla. Stat. § 627.702.
135. Richards, supra note 130, at 19.
137. See id. § 627.702(1)(b); Mierzwa, 877 So. 2d at 775.
138. § 627.702(1)(b); Mierzwa, 877 So. 2d at 775.
139. § 627.702(1)(b); Mierzwa, 877 So. 2d at 775.
140. See Fla. Stat. § 627.702; Garaffa, supra note 129, at 10.
142. Id.
143. Id.
144. Id.
145. Id. at 10–11.
of the damage caused by the hurricane. As a result, the identity is essentially lost. Second, the restoration test applies in situations where “a reasonably prudent owner” would not rebuild property to its pre-loss condition with the remains of the structure.

B. The State Controversy

The interpretation of the valued policy law in Florida has set forth controversy between insurers and policyholders since its inception. In Mierzwa v. Florida Windstorm Underwriting Assn in June 2004, the valued policy law was found to apply to different covered perils insured by multiple insurers. A homeowner’s wind insurance was provided by one carrier, while the flood insurance was provided by another carrier. The wind insurer’s “policy expressly excluded flood damage.” A local ordinance was applied by the court to determine whether the home was a total loss. It provided that damage caused to a structure requiring repairs amounting to more than fifty percent of its existing value must conform to the building code. A determination was made “that the total cost of repairs to the insured building would exceed half of its value.” Following this determination, the building had to be torn down and the site elevated. Thus, the court held that despite the separate policies covering separate perils, the combination of the damage caused by wind in addition to the damage caused by flood amounted to a total loss and resulted in the application of the valued policy law.

The court of appeals found no causation requirement in establishing a total loss because the valued policy law was “simple and straightforward.” According to the court, the valued policy law only requires the covered peril

146. Garaffa, supra note 129, at 11.
147. See id.
148. Id.
149. Hartford Fire Ins. Co. v. Redding, 37 So. 62, 65 (Fla. 1904) (holding the valued policy law is constitutional).
150. 877 So. 2d 774 (Fla. 4th Dist. Ct. App. 2004).
151. Id. at 776.
152. Id.
153. Id.
154. Id.
155. Mierzwa, 877 So. 2d at 776.
156. Id.
157. See id. at 776 n.3.
158. Id. at 775.
159. Id.; Garaffa, supra note 129, at 13.
“be a covered peril” and not “the covered peril causing the entire loss.”

Moreover, Mierzwa established that courts may find a total loss by combining policies and applying the valued policy law even in situations where an insurer expressly excludes certain types of coverage. Florida courts have for years upheld an insurer’s right to recover under two separate policies in the event of a total loss under the valued policy law. However, legislative intent continues to be questioned as to whether the valued policy law is meant to apply in these specific situations where perils are expressly excluded from coverage. The controversy exists precisely because the insurance carrier is liable for the face amount of the policy only when a total loss is established.

C. Federal Preemption

In a recent decision, the United States District Court of the Northern District of Florida held that Florida’s Valued Policy Law was preempted by federal law. In Greer v. Owners Insurance Co., two separate insurance policies provided separate types of coverage for one home. One insurance company only provided wind and fire insurance, expressly excluding flood insurance from the policy. The other insurance policy only covered damage caused by floods. The flood insurance policy was provided by the National Flood Insurance Program “established by Congress, through the National Flood Insurance Act.” The court placed emphasis solely on the fact that the director of the Federal Emergency Management Agency (FEMA) controls “the payment or disallowance of all flood insurance claims.” Those “[c]laims are paid out of a National Flood Insurance Fund in the United States Treasury.”

160. Mierzwa, 877 So. 2d at 776 (The court places strong emphasis on the distinction between “the” covered peril and “a” covered peril by using italics in the opinion).
161. See id. at 779.
162. Richards, supra note 130, at 18.
163. Garaffa, supra note 129, at 5.
164. See Mierzwa, 877 So. 2d at 775.
166. Id.
167. Id. at 1269–70.
168. Id. at 1270.
169. Id.
171. Greer, 434 F. Supp. 2d at 1274.
172. Id.
flood insurance policies are mandated and controlled by federal, not state, regulations.\textsuperscript{173}

It usually takes the combination of wind and flood damage for a building to lose its identity or appearance, thus making it a total loss for which the valued policy law would apply.\textsuperscript{174} Since the state cannot regulate the amount of compensation one might receive after incurring flood damage, the valued policy law will no longer apply in many situations.\textsuperscript{175} The state’s solution to help its residents receive reimbursement towards protecting and securing one’s home is now outdated and essentially useless.\textsuperscript{176}

The state has taken few steps toward providing a solution to Florida’s insurance problem since the first valued policy law was enacted in 1899.\textsuperscript{177} Florida’s legislature has placed little responsibility on property and casualty insurance companies to charge affordable rates.\textsuperscript{178} This includes whether hurricane insurance must be provided by insurers in addition to the more profitable lines already offered, or if an insurer is required to provide hurricane insurance at all.\textsuperscript{179} “Many people have a philosophical problem with the government[] being [involved] in the insurance business.”\textsuperscript{180} “There is now a widespread belief among economists, policy analysts, and policymakers that government should intervene in a market only when conditions for competition are not in place, and the market fails to be efficient.”\textsuperscript{181} There is no question that the hurricane insurance industry in Florida has lost its appeal to private insurers and the market continues to decline.\textsuperscript{182} “[T]he Florida legislature [must] get tough with the insurance industry,” the only question is how.\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{173} Id.
\item \textsuperscript{174} See generally Mierzwa v. Fla. Windstorm Underwriting Ass’n, 877 So. 2d 774 (Fla. 4th Dist. Ct. App. 2004).
\item \textsuperscript{175} See Greer, 434 F. Supp. 2d at 1275.
\item \textsuperscript{176} See generally id.
\item \textsuperscript{177} See generally Garaffa, supra note 129, at 8.
\item \textsuperscript{178} See Fla. Admin. Code Ann. r. § 69O-170.013 (2004). A negative inference can be drawn from the administrative code. Id. It provides certain procedural steps an insurer must take prior to changing rates, but does not provide a cap for which rates may not exceed. Id.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} NORCROSS, supra note 6, at 238 (emphasis added).
\item \textsuperscript{181} Swartz, supra note 1, at 90.
\item \textsuperscript{182} See Mark Hollis, Insurance Policy: Four Varied Views, SUN-SENTINEL, July 26, 2006, at 10B.
\item \textsuperscript{183} Smith, supra note 11.
\end{itemize}
VI. INTENTIONS, PLANS, PROPOSALS, & PROBLEMS

One option for the federal government is to shift the risk of very high cost coastal properties away from carriers by “tak[ing] on the role of reinsurer.”\(^\text{184}\) A memorial written by the Florida Legislature was presented to the United States Congress urging their support in establishing a National Catastrophe Insurance Program (Program).\(^\text{185}\) Included in the proposal, the Florida Legislature urged the United States Congress to:

1. Provid[e] consumers with a private market residential insurance program that provides all-perils protection.

2. Promot[e] personal responsibility through mitigation; promot[e] the retrofitting of existing housing stock; and provid[e] individuals with the ability to manage their own disaster savings accounts that, similar to health savings accounts, accumulate on a tax-advantaged basis for the purpose of paying for mitigation enhancements and catastrophic losses.

3. Creat[e] tax-deferred insurance company catastrophe reserves to benefit policyholders. These tax-deferred reserves would build up over time and [would] only be eligible to be used to pay for future catastrophic losses.

4. Enhanc[e] local and state government’s role in establishing and maintaining effective building codes, mitigation education, and land use management; promot[e] state emergency management, preparedness, and response; and creat[e] state or multistate regional catastrophic risk financing mechanisms such as the Florida Hurricane Catastrophe Fund.

5. Creat[e] a national catastrophe financing mechanism that would provide a quantifiable level of risk management and financing for mega-catastrophes; maximiz[e] the risk-bearing capacity of the private markets; and allow[] for aggregate risk pooling of natural disasters funded through sound risk-based premiums paid in correct proportion by all policyholders in the United States.\(^\text{186}\)

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\(^\text{184}\) Swartz, supra note 1, at 99. The government can shift high cost risk from carriers by either “provid[ing] financial coverage outright” or by providing reinsurance. \textit{Id.}


\(^\text{186}\) Fla. HM 541 (2006).
In sum, the Program would provide a uniform approach in responding to catastrophes.\textsuperscript{187} A catastrophe is defined by the Insurance Services Office as "an event that causes $25 million or more in insured property losses and affects a significant number of property/casualty policyholders and insurers."\textsuperscript{188} Therefore, natural disasters are not the only types of catastrophes.\textsuperscript{189}

In response to the memorial, three bills were introduced to the United States Congress.\textsuperscript{190} All three address at least one element of the national catastrophe fund proposal.\textsuperscript{191} One bill proposes to create a "Consumer Hurricane and Earthquake Protection Fund."\textsuperscript{192} This bill applies to all natural catastrophes, such as tornadoes, volcanic eruptions, and hurricanes.\textsuperscript{193} If enacted, it would provide reinsurance to insurance companies at lower rates than they can obtain on the private market.\textsuperscript{194} Similar to Florida's Hurricane Catastrophe Fund, the Consumer Hurricane and Earthquake Protection Fund "would be responsible for losses up to amounts determined on a state-to-state or regional basis."\textsuperscript{195} States that already have catastrophe funds, such as Florida, would pay losses up to their limits prior to receiving income from the national fund.\textsuperscript{196} In effect, "[t]he national fund would sell reinsurance to the state funds."\textsuperscript{197} As the Florida Hurricane Catastrophe Fund struggles to recapitalize, this proposed bill does not set forth future safeguards against an unexpected depletion of funds.\textsuperscript{198}

Another bill proposes to create the "Catastrophe Savings Account Act of 2006."\textsuperscript{199} Adding a chapter to the Internal Revenue Code of 1986, this Act would allow consumers "to manage a personal, tax-exempt Catastrophe Savings Account."\textsuperscript{200} The account, acting as a trust fund, would secure money to be set aside for the exclusive use of designated beneficiaries in

\textsuperscript{187} See id.
\textsuperscript{188} Fla. H.R. Comm. on NCIP, HM 541 (2006) Staff Analysis 3 (rev. Apr. 12, 2006) [hereinafter HM 541 Staff Analysis].
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 3-4.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 3.
\textsuperscript{193} HM 541 Staff Analysis, supra note 188, at 3-4.
\textsuperscript{194} Id. at 3.
\textsuperscript{195} Id. at 4.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} See HM 541 Staff Analysis, supra note 188, at 3-4.
\textsuperscript{199} Id. at 4.
\textsuperscript{200} Id.
their time of need.\textsuperscript{201} The bill would establish certain requirements to be met delineating which money would qualify under the Act.\textsuperscript{202}

The third bill presented to Congress proposes to create the "Policy-holder Disaster Protection Act of 2005."\textsuperscript{203} This bill suggests that Congress provide incentives to insurance companies to provide natural disaster insurance by revising the current tax laws.\textsuperscript{204} It recommends that insurance companies have the ability to defer their taxes on claims arising from natural disasters.\textsuperscript{205} The event must be a windstorm, earthquake, fire, flood, volcanic eruption, tsunami, winter catastrophe, or hail.\textsuperscript{206} Further, it must be designated a catastrophe by either the President of the United States, the Property Claim Services, "or by the chief executive official of a [s]tate or territory of the United States, or the District of Columbia."\textsuperscript{207}

While all three bills purport to move toward the goal of providing stability in the hurricane insurance industry, "[t]hey don’t deal with reality or solve problems, they just move money around."\textsuperscript{208} Since damage caused by hurricanes is unpredictable, it is difficult for insurance companies to calculate future projections.\textsuperscript{209} A national catastrophe fund, applying to all natural catastrophes, is said to help make future projections more predictable.\textsuperscript{210} In effect, this would allow insurance companies to "make a reasonable estimate of what their losses will be and what they have to charge."\textsuperscript{211} A national catastrophe fund conceptually would provide a solution for stabilizing the hurricane insurance market, while allowing consumers to have access to such funds.\textsuperscript{212} Since flood insurance policies are controlled by federal regulation,\textsuperscript{213} a conclusion may be drawn that natural catastrophe insurance policies should be controlled by federal regulation as well. However, similar plans have been presented to the United States Congress in the past and have failed simply because there was not a nationwide natural catastrophe insurance market.\textsuperscript{214}

\footnotesize{\begin{itemize}
  \item 201. \textit{Id.} One wonders if the tax benefit of having this trust account would ever amount to enough to compensate for a significant loss in the event of a natural disaster. \textit{Id.}
  \item 202. HM 541 Staff Analysis, \textit{supra} note 188, at 4.
  \item 203. \textit{Id.} at 4.
  \item 204. \textit{Id.}
  \item 205. \textit{Id.}
  \item 206. \textit{Id.}
  \item 207. HM 541 Staff Analysis, \textit{supra} note 188, at 4.
  \item 208. NORCROSS, \textit{supra} note 6, at 239.
  \item 209. \textit{Id.} at 237.
  \item 210. \textit{See id.}
  \item 211. \textit{Id.}
  \item 212. \textit{See id.} at 238.
  \item 214. Hollis, \textit{supra} note 182; see generally SEIFERT & NIEDZIELSKI, \textit{supra} note 42, at 5–20.
\end{itemize}}
On November 7, 2006, Florida elected Charlie Crist as its new governor. Throughout the race, all four candidates formulated ideas concerning hurricane insurance issues, as it was “one of the most talked-about items in the Florida governor’s race.” Since then, Florida residents increasingly “demand” government action. Governor Crist also recognizes that “the need to deliver Floridians relief from high insurance prices” must take priority. In response, the Florida Legislature called a special session specifically addressing the issue of hurricane insurance. While all of the proposals attempted to lessen the problem, none of them provided an actual solution to the problem. “In the last three decades, economists and, increasingly, politicians have argued that the free market advances economic growth and opportunity more effectively than government policies intended to achieve such goals.” However, the goal of supporting efficiency is based on the existence of an already competitive marketplace. Another factor to consider is that the property insurance industry “spends millions of dollars a year to influence public policy in Florida.” As such, the legislators are not likely to enforce or create any significant regulations on private insurance companies.

VII. FLORIDA STANDS ALONE

The business of hurricane insurance has a responsibility to provide protection for their clients, which results in a conflict of interest. The company’s desire to make a profit no longer accommodates the client’s desire for safety resulting in a lose-lose situation. In a high risk industry, such as Flor-

216. Hollis, supra note 182.
217. Off to a Stormy Start, SUN-SENTINEL, Jan. 17, 2007, at 1A.
220. See id. The proposals included an expansion of the FHCF, freezing Citizens’ rates at the 2006 levels, requiring private insurers who sell homeowners insurance in other states to also sell homeowners insurance in Florida, and allowing homeowners to buy property insurance without hurricane coverage. Id.
221. Swartz, supra note 1, at 89.
222. Id. at 89–90.
224. See generally id.
Florida's hurricane insurance industry, one option is for the insurance companies to charge higher rates making hurricane insurance unaffordable. Another option is for the government to require insurance companies to charge lower rates causing their businesses to suffer. A third option is for the federal government to provide more funds for reinsurance and hope that insurance companies will lower prices if they can attain lower reinsurance rates.

The first option has already taken place as premium rates for hurricane insurance coverage have increased, leaving many Floridians uninsured. The second option will help lower hurricane insurance rates, but companies will attempt to balance their loss by increasing rates in other types of insurance they offer. While the third option will help the coastal states and other states regularly prone to natural disasters, as already discussed, it is not necessary to every state's needs.

As certainty and stability in the natural catastrophe insurance market is not enough of an incentive for the federal government to establish a national solution, the alternative option is for the state government to "provide financial coverage outright." Florida's unique tropical atmosphere brings severe storms and hurricanes, causing significant damage to residents' homes every year. There is no discrepancy that "insurance companies are not in the insurance business when it comes to hurricanes." If the government acts to cover the costs of the worst risks, an inefficient market can become more efficient, and a non-functioning market can be stimulated to form.

In furtherance of protecting both the interests of the insurance company and the interests of the policyholder, the state should provide hurricane insurance to its residents. This type of "radical" state action is justified because hurricane insurance in Florida is now recognized as a necessity, not a privilege. Since the government has the ability to tax, the amount of money previously given to insurance companies to cover hurricane insurance

225. Seifert & Niedzielski, supra note 42, at 1–2.
226. See id. at 21.
227. See Swartz, supra note 1, at 99.
228. See, e.g., Stephanie Horvath, Premium Pressures Force Tough Choices: Homeowners Insurance Rate Hikes, Palm Beach Post, May 29, 2006, at 1F (explaining how one couple dropped their insurance coverage when the hurricane coverage increased 194%).
230. See Swartz, supra note 1, at 99.
231. See id.
232. See Norcross, supra note 6, at 195, 236.
233. Id. at 238.
234. Swartz, supra note 1, at 99.
235. See Price, supra note 25 (quoting Bill Newton, the executive director of the Florida Consumer Action Network).
should instead be invested and reserved by the state government for catastrophic situations. A condition precedent to being entitled to these funds would be the requirement that each Florida resident assess the value of their home qualifying them for a certain amount of insurance based on various factors. By completely removing hurricane insurance from Florida’s insurance market, insurers no longer have to concern themselves with raising prices or litigation following unpaid claims. The insurance industry will continue to remain profitable, as it will offer all other lines of insurance. Further, residents of Florida will effectively secure hurricane coverage with the guarantee that there will be enough funds to pay for their claims.

VIII. CONCLUSION

The catastrophic hurricanes which Florida has experienced over the past few years have caused many people to suffer. As a result, insurance companies reacted by decreasing their exposure to the market. In effect, most residents of Florida are left without any hurricane insurance at all. Others are left spending enormous amounts of money protecting their homes. The decline of the hurricane insurance industry in Florida is part of a chain reaction causing the state’s economy to suffer. People from other states are less likely to move to Florida. This prevents Florida residents from having the opportunity to sell their homes. Further, Florida residents who cannot afford to purchase hurricane insurance come to the realization that they will need to move to a state with lower risk exposure.

Florida’s few remedies offered, including Citizens and the Florida Hurricane Catastrophe Fund, are not adequately functioning to meet the many needs which they were intended to address. Both Citizens and the Florida Hurricane Catastrophe Fund are still trying to recapitalize after the previous two hurricane seasons. At the same time, an increasing number of hurricane insurance companies are evacuating the Florida market. Therefore, recapitalization for Citizens will be very difficult as it fulfills its duty as the insurer of last resort and assumes every policy that is unable to acquire protection.

236. See Interview with Walter Campbell, supra note 5.
237. Id.
238. Id.
239. Id.
240. See generally TASK FORCE 2006, supra note 8.
241. Id. at 40–42.
242. Id.
243. Id. at 40.
The need for the government, federal or state, to restore the natural catastrophe insurance market is ripe for review. Current proposals for government involvement do not provide an ultimate solution to stabilizing Florida's insurance market. The state urges Congress to aid in Florida's fight for survival from catastrophic events. At the same time, the federal government restrains from interfering with state policies against natural disasters. This is due to the belief that it would not be of concern to every state. State government involvement will provide stability in the hurricane insurance market, but will not address every problem hurricane insurance presents to insurers, policyholders, or the state itself. Therefore, the controversy remains as to how the state or federal government should react as government involvement with the insurance industry will infringe on traditional concepts of free trade. Still, recognition of government involvement is evolving allowing for future changes to be made to adapt to new problems that arise.

244. Id.
245. See Hollis, supra note 182.
246. Id.
247. See id.
IN THE WAKE OF THE STORM: NONPERFORMANCE OF CONTRACT OBLIGATIONS RESULTING FROM A NATURAL DISASTER

JENNIFER SNIFFEN*

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I. INTRODUCTION

Every year the United States is devastated by multiple natural disasters. Whether it is a hurricane ravaging the coastline with its winds exceeding 100 miles per hour, extreme flooding leaving thousands stranded and

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homeless, an earthquake on the west coast, a fire, or a terrorist attack threaten- ing the lives of many; natural disasters are not new and unfamiliar occurrences across the United States. In 2005, the Federal Emergency Management Agency declared sixty-eight natural disasters in the United States and its territories. Because natural disasters continuously occur, the impacts on contractual obligations become important to parties seeking relief from breach of contract claims that result from the inability to perform due to the occurrence of a disaster.

Typically, "[c]ontract liability is strict liability," and therefore, contracts are formed with the intention to be absolute. A party, as a result, may be liable for breach of contract even when the party is not at fault. A claim of force majeure can be asserted as an affirmative defense by a party in a suit arising out of nonperformance of contractual obligations. Force majeure is either used to describe an "event or occurrence, or [a] legal concept." "Force majeure" is a French term that is defined as a supervening force.

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5. See id.


7. See Restatement (Second) of Contracts ch. 11 introductory note (1981).

8. See id. § 261.


Although force majeure is not a new concept to the area of contract law, the presence of force majeure clauses in contracts are becoming more important after natural disasters such as Hurricane Katrina occur. However, “not all contracts [include] force majeure clauses,” and often, even if they do, the term is merely stated in the contract and is likely considered boilerplate because it is not bargained for.

After the 2005 hurricane season, merely including a force majeure clause in a contract is not enough. This could become a problem for parties faced with large penalties and damages for a breach of contract because typically a force majeure clause will excuse a party’s performance under a contract when there is an unavoidable “event beyond the party’s control,” making the party’s performance impossible. Additionally, considering that the occurrence of category four and five hurricanes, cyclones, and typhoons have significantly increased over the past thirty-five years, and many more regions of the United States may also be affected as a result, businesses and other parties are likely to depend on the ability to seek relief from performance of contractual obligations because of an event beyond its control. Furthermore, while there may not be many breach of contract lawsuits following disasters in 2005 that are currently published, they will continue to

13. Ned Bergin, Force Majeure Issues Relating to Katrina (Sept. 21, 2005), http://www.joneswalker.com/db30/cgi-bin/pubs/ForceMajeure.pdf. Hurricane Katrina affected many businesses and other parties to contracts and their “ability . . . to fulfill their contractual obligations.” Id.; see also Reynolds & Steffan, supra note 3. Following September 11, 2001, it is likely that contracts will be reexamined and the definition of force majeure will be expanded to include “acts of terrorism” that may be either actual or threatened. Reynolds & Steffan, supra note 3. By expanding the definition of force majeure, contracting parties will be given extra protection against nonperformance. Id.
15. See Seely, supra note 11.
increase in the future. Like claims following the September 11 terrorist attacks, it could be a long time before claims resulting from Hurricane Katrina and other disasters "find their way through [our] court system." 

In the remaining sections of this article, other important concepts involving force majeure clauses will be discussed. Part II will give an overview of force majeure and why force majeure clauses are necessary in contracts. Part III will explain how a party to a contract seeking to have nonperformance of obligations excused is able to invoke a force majeure clause and the steps that need to be fulfilled in order for the force majeure clause to be a defense to breach of contract claims. Part IV will go into detail about the most common types of contracts affected by force majeure events. Part V will conclude the discussion and summarize all of the important concepts and issues that follow force majeure clauses.

II. A GENERAL OVERVIEW: THE FORCE MAJEURE CLAUSE DEFINED

Force majeure is considered "[a]n event or effect that can be neither anticipated nor controlled." As a result, not all conditions or events are situations that will excuse performance of contractual obligations, and therefore contractual obligations can only be excused under force majeure in extreme and unusual circumstances, such as a hurricane. Likewise, force majeure is used all over the world to excuse obligations under a contract where causes beyond a party's control create an inability for a party to perform. A party's inability to perform under a contract must be determined based on an objective standard, which shows that no one could perform the party's obligations under the contract. For example, "[e]xtraordinary circumstances may occur during the life of a contract and prevent a party from performing its obligations."

22. Id.
27. HURRICANE KATRINA HELPING HANDBOOK, supra note 17, at 17-9.
Because force majeure refers to a superior or irresistible force, it is often used interchangeably with an "act of God." An act of God excuses events beyond the control of mere human agency and occurs when there is an intervention of an "extraordinary, violent, and destructive agent, [which because of] its very nature raises a presumption that no human means could resist its effect." Furthermore, when the subject matter of a contract is destroyed because of an act of God and the party seeking to be excused is not at fault, the contract will be terminated relieving both parties of any further obligations. In many instances, specific weather conditions have been considered acts of God when the necessary prerequisites were met. For instance, a "severe weather [condition] must be atypical, unexpected, and . . . have an adverse impact" on the party's performance under the contract.

Although courts have found the two terms to be similar, they have also recognized that force majeure is a more expansive concept. A force majeure clause is placed in a contract so that the contracting parties know what types of events and circumstances will create an impossibility to perform as a result of an act of God. Additionally, a force majeure clause is included in a contract in order for the parties to expressly allocate risk and to provide notice to the parties that the occurrence of certain events may result in suspension of their performance, thereby excusing a party’s obligations without incurring any liability for damages. As a result, some parties may be wrongfully claiming force majeure as a defense when there is no express allocation of risk. Generally, if one party’s performance is excused, the

31. Louisville & N.R. Co. v. Finlay, 185 So. 904, 905 (Ala. 1939) (quoting Steele & Burgess v. Townsend, 37 Ala. 247, 256 (Ala. 1861)).
33. 1 AM. JUR. 2D Act of God § 4. Some weather conditions found to be acts of God are droughts, flooding, freezing temperatures, fog, high winds or a hurricane, ice storms, and lightning. Id.
35. 1 AM. JUR. 2D Act of God § 2.
other party’s performance is also excused.40 However, a party cannot invoke a force majeure clause if the event causing nonperformance involved human intervention.41 This is a common occurrence when a party is not directly affected by the force majeure event, such as the inability to obtain materials because the supplier cannot provide and deliver the materials needed.42 Therefore, a force majeure clause is not an all-inclusive fixed rule of law that regulates every force majeure clause inserted in a contract; it will usually explain the specific types of circumstances that will excuse nonperformance.43

Force majeure clauses do not apply in every situation where one party is unable to fulfill obligations under a contract.44 A party seeking excuse from performance as a result of a change in economic circumstances, greater expenses, fear of travel, or a threat of any type will not be granted relief from nonperformance.45 Consequently, when buyers of property in New York City executed an agreement and then defaulted because they feared traveling after the September 11 terrorist attacks,46 a court held that their obligations would not be excused.47 Furthermore, if fear and uncertainty were enough to constitute force majeure, thereby excusing performance, “contracting would no longer provide any stability and predictability.”48

III. THE PROCESS FOR INVOKING A FORCE MAJEURE CLAUSE

A force majeure clause can be invoked, excusing performance of obligations due to situations explained in the clause, when the situation provided in the contract does in fact occur49 and then prevents performance.50 Once an event that triggers a force majeure clause occurs, the party seeking relief

40. Bergin, supra note 13, at 1.
41. Fla. Power Corp. v. City of Tallahassee, 18 So. 2d 671, 675 (Fla. 1944). “[The event] must be the sole proximate cause of the nonperformance, without the participation of man, whether by active intervention or negligence or failure to act.” Id.
42. See Nestel, supra note 14, at 42.
43. Perlman v. Pioneer Ltd. P’ship, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990).
44. AM. HOTEL & LODGING ASS’N, supra note 25, at 7.
45. Id.
46. Uzan v. 845 UN Ltd. P’ship, 778 N.Y.S.2d 171, 172–73 (N.Y. App. Div. 2004); See also infra text accompanying note 211. If the parties in Uzan had not been able to get to the United States because flights were not operating, they may have had a force majeure excuse to nonperformance or delay of performance. See generally 1 AM. JUR. 2D Act of God § 4.
47. Uzan, 778 N.Y.S.2d at 178.
49. See Nestel, supra note 14, at 42.
50. Id. at 43.
must determine how it affects its obligations under the contract. For instance, if the force majeure event does not affect the parties' ability to fulfill any of their obligations and business can continue normally, the force majeure clause is not necessary and cannot be invoked as a defense to nonperformance. After a force majeure clause is officially invoked, "courts will enforce [the] clause unless it is 'manifestly unreasonable.'"

The party seeking excuse from nonperformance has the burden to prove that the force majeure clause should be invoked. Generally, in order for a force majeure clause to be invoked by a party seeking to excuse nonperformance, certain prerequisites must be met. First, the event has to be found to fall within the terms provided for in the clause. Second, the event must have reasonably been beyond that control of the party seeking to be excused from performance. Third, it must be determined what effect the force majeure event will have on the obligations of the party seeking to be excused. Finally, the party seeking relief must provide notice to the other party to the contract.

A. Examining the Language Present in the Clause

The language contained in a force majeure clause must be relied upon and analyzed in order to determine what constitutes a force majeure event, thus triggering the clause, and to figure out its effect on a party's contractual duties. Force majeure clauses should identify the effects of certain triggering events on each party's obligations. Often, the clause will provide that at the time a specific event or set of events occurs, each party's obligations are either suspended for the duration of the triggering event or may be ter-
minated along with the contract. "[T]he scope and application of a force majeure clause depend on the terms of the contract." For example, if the clause limits the events that trigger it to specific acts of God, then the event must be nonhuman and occur without any human intervention to become an excuse for nonperformance which the parties intended to be sufficient during contract formation. In *Perlman v. Pioneer Ltd. Partnership*, the court stated that when the language in the contract is unambiguous, it will trump the principals of force majeure because a court should not interject terms that the parties did not bargain for. Additionally, when a devastating force majeure event occurs, the language in the contract is important to the parties trying to escape liability because not all delays causing nonperformance will be excused and the clause will inform a party as to whether the performance of obligations under the contract are suspended, delayed, or terminated all together.

[M]any clauses are . . . limited to delays ‘in shipment’ of goods and [will] not cover shortages of supply [or] availability of [a] product. Thus, while the delays in shipments while export elevators re-open and catch up with back logs may be covered by most clauses, longer term shortages due . . . to the failure in the supply chain, crop failure, or lack of refining capacity may not.

1. Specificity of the Clause

Generally, a force majeure clause that is clearly drafted will be enforced according to the specific language provided, which will determine the interpretation a court will put on it. A clause’s wording can expand or limit the types of events that will be considered severe enough to warrant relief from

64. Zurich Am. Ins. Co. v. Hunt Petroleum, Inc., 157 S.W.3d 462, 466 (Tex. Ct. App. 2004). “Where a contract specifies that upon the occurrence of force majeure, the contractual obligations are suspended, it is clear that the parties intend that the present obligations to deliver and take gas are suspended through the duration of the force majeure.” Paulus & Meeuwig, supra note 51, at 311.
65. Nestel, supra note 14, at 42.
66. 918 F.2d 1244 (5th Cir. 1990).
67. Id. at 1248.
69. Id.
Whether the clause constructed in the contract is considered broad or narrow plays a big part in determining the types of events that will excuse contractual duties. Consequently, courts have held that the traditional definition of force majeure should not be relied upon when the parties indicate the effect, scope, and application of the term as applied to their contract. Furthermore, the precise language in the contract should be examined to provide evidence of the parties’ intent and to determine what events excuse performance under the force majeure clause.

When a clause is narrowly constructed, it will list specific events that prevent performance and include only a narrow catch-all phrase so that the contracting parties should not have any problem determining what events will qualify for excuse under the force majeure clause. If the force majeure clause specifically includes the event that actually prevents performance, then it will be excused. However, if the clause is constructed broadly, the wording will often create an ambiguity, and the events that are likely to be covered under the clause will be harder for parties to determine. This is because a broad force majeure clause only states a few events that will qualify as force majeure events and then provides a catch-all phrase like “or other events beyond its control” or “[other] unavoidable causes.” If this is the case, and the clause doesn’t specifically define “force majeure,” it will probably be considered a catch-all force majeure provision, resulting in the clause being construed against the drafter. Therefore, a broad force majeure clause will be narrowly interpreted, only encompassing the specific events or things stated in the contract, because “general words are not to be given expansive meaning; they are confined to [the] things of the same kind

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71. Id.
72. HURRICANE KATRINA HELPING HANDBOOK, supra note 17, at 17-10.
73. R & B Falcon Corp., 154 F. Supp. 2d at 973.
74. Id.
75. HURRICANE KATRINA HELPING HANDBOOK, supra note 17, at 17-10.
77. Paulus & Meeuwig, supra note 51, at 307.
78. Id.
79. Declercq, supra note 12, at 225.
or nature as the particular matters mentioned.” Courts have concluded that if a party at the time of contracting wishes to receive protection beyond the impracticability doctrine, the clause should be written with particularity and not general language. Furthermore, unless the clause provides that the events are “without limitation,” the events that are included in the contract as those that will excuse a party’s obligations may not excuse nonperformance after all.

2. Contracts Without Force Majeure Clauses

Fortunately, the absence of a force majeure clause in a contract will not always be detrimental to a party seeking to be excused. The clause does not necessarily have to be written in the contract because it can be oral; however, it may then be subject to the Statute of Frauds. Additionally, a force majeure clause may be found to be an implied-in-fact risk allocation by the parties, which is evidenced by their intentions. A majority of jurisdictions will still excuse a party that cannot fulfill obligations under a contract as a result of a force majeure event, even when no force majeure clause can be found in the contract. Only a minority of jurisdictions continue to hold that a party who does not perform will still be held liable for their nonperformance when a force majeure clause is not present in the contract. Some courts will not even automatically excuse a party to a contract when the inability to perform their obligations is due to a force majeure event that was provided for in the clause. A court will likely expect the party seeking


Neither party shall be liable in damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to acts of God, government restrictions, . . . wars, insurrections, and/or any other cause beyond the reasonable control of the party whose performance is affected.

Id.

85. Nestel, supra note 14, at 42.
86. Joan Teshima, Annotation, Gas and Oil Lease Force Majeure Provisions: Construction and Effect, 46 A.L.R.4TH 976, 981 (1986). At least “one treatise claims that it does not view the absence of a force majeure clause from an oil and gas lease as having special significance.” Id. at 983.
87. PERILLO, supra note 83, § 13.19.
88. Id.
89. Nestel, supra note 14, at 43.
90. Id.
91. Bund, supra note 38, at 400.
excuse to establish that it was actually prevented from performing its obligations and that the event causing nonperformance was not reasonably within its control.92

Likewise, without a force majeure clause in the contract, parties could be at the mercy of a court’s interpretation and application of legal principles to their contract.93 Sometimes, however, when there is not a force majeure clause in the contract, a party can look to applicable state statutes that address defenses to nonperformance of contract obligations.94 Parties affected by Hurricanes Katrina and Rita are able to consult the Louisiana Civil Code Articles to determine how they apply to nonperformance under their specific contract if the parties never addressed how a hurricane or other force majeure event would impact their obligations to each other.95 Similarly, parties to contracts faced with breach of contract claims in other states may also consult various state statutes for relief concerning force majeure issues.96

B. Reasonably Beyond the Control of the Breaching Party

In order for a breaching party to present a defense to the nonperformance of contractual obligations, the force majeure clause may be invoked if the event was beyond the control of the party seeking to be excused from performance.97 Under common law, the impossibility to perform, or events reasonably beyond a party’s control were essential to force majeure clauses.98 Events outside one’s control might include acts of God, sudden illness, fire, theft, natural disasters, or other situations where parties cannot take actions to protect themselves from risk.99 In proving that the event is beyond the breaching party’s control, this party must have performed in good faith and must show that no reasonable steps could have been taken to avoid the event.100 If an extraordinary event occurs, it will be characterized as a force majeure event if the party’s failure to perform—not the event itself—

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92. Id.
93. See Wilkinson, supra note 63, at 5.
95. Id.
96. Bergin, supra note 13, at 1.
97. Nestel, supra note 14, at 42.
98. Porter & Hedges LLP, supra note 16.
99. Seely, supra note 11.
100. Delclerq, supra note 12, at 238.
could not have reasonably been prevented.\textsuperscript{101} Merely claiming that the event could have been prevented is immaterial.\textsuperscript{102} In \textit{Atkinson Gas Co. v. Albrecht},\textsuperscript{103} the force majeure clause in a gas and oil lease was not triggered when the Railroad Commission required a well to be shut in because the company failed to comply with specific regulations that were within its reasonable control.\textsuperscript{104}

Another way a court can determine whether the nonperformance of the contract was reasonably beyond the control of the breaching party is to look at whether the parties contemplated the event at the time of contracting.\textsuperscript{105} Generally, the parties will be found to have either contemplated or not contemplated the supervening event.\textsuperscript{106} Although contemplation of the force majeure event is technically a subjective concept, it has been transformed into an objective concept through a reasonableness test.\textsuperscript{107} When a party's performance is objectively impossible, it literally cannot perform due to circumstances beyond its control.\textsuperscript{108} However, when a party's performance is only subjectively impossible, performance is technically possible, and a party may be responsible in some way for the nonperformance.\textsuperscript{109} In \textit{Perlman}, the party's nonperformance was not excused because the event creating nonperformance was reasonably within its control and was foreseeable at the time of contracting.\textsuperscript{110} Furthermore, Perlman's performance had not been rendered impossible or untenable—an important prerequisite needed to invoke a force majeure clause excusing nonperformance.\textsuperscript{111}

1. Foreseeability

Many force majeure clauses require an event to be unforeseeable at the time the contract is formed.\textsuperscript{112} This is because "under some circumstances, a party may have [actually] assumed the risk of an unforeseen force majeure

\begin{itemize}
  \item \textsuperscript{102} See Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236 (Tex. App. 1994).
  \item \textsuperscript{103} Id. at 236.
  \item \textsuperscript{104} Id. at 241.
  \item \textsuperscript{105} 2 BRUNER & O'CONNOR, BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 7.230.53 (2002).
  \item \textsuperscript{106} Id.
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 305 (2004).
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} 918 F.2d 1244, 1248–49 (5th Cir. 1990).
  \item \textsuperscript{111} Id. at 1248, 1250.
  \item \textsuperscript{112} Nestel, supra note 14, at 42–43.
\end{itemize}
NONPERFORMANCE OF CONTRACT OBLIGATIONS

event. The concept of foreseeability, when used to invoke a force majeure clause as an excuse to performance, can often be controversial, especially if the event that causes nonperformance was foreseeable at the time of contracting. Many cases have held that a party cannot use a force majeure defense when the contract failed to cover a foreseeable risk. As a result, if steps were not taken to protect against the breach and the parties did not discuss the impact of the event on the parties’ contractual obligations, relief will not be granted to the party seeking to be excused.

Because a force majeure event may be generally foreseeable, but not specifically, the foreseeability test is based on the parties’ hindsight and is often ambiguous in its application. This is likely to be an issue following Hurricane Katrina and other natural disasters where the event itself may have been foreseeable, but not the unexpected mass destruction that inadvertently results from it. The possibility of such catastrophic flooding that occurred as a result of a Category 4 hurricane hitting New Orleans on August 29, 2005, was incredibly slim, despite the foreseeability that a Category 4 or 5 hurricane could hit New Orleans straight on.

Consequently, courts have expressed greater “concern for the reasonableness of the parties’ foresight” regarding specific circumstances rather than the objective foreseeability of the actual event occurring. This may work in favor of a party who is seeking to excuse its nonperformance under a contract as a result of Hurricane Katrina because, from an objective perspective, “over a period of many years, scientists had predicted that a strong storm could breach the levees,” and even a relatively weak storm coming from the right direction would push a wall of water into the heart of New Orleans. However, it is also possible that the parties could have reasona-

113. Bergin, supra note 13, at 1.
114. 2 BRUNER & O’CONNOR, supra note 105, § 7.230.53.
116. Id.
117. Id.
118. Bergin, supra note 13, at 1.
120. Bergin, supra note 13, at 1; see also Farnsworth v. Sewerage & Water Bd. of New Orleans, 139 So. 638, 641 (La. 1932) (holding that the contractor assumed the risk of the excessive rainfall, but not the actual flooding that was caused by the abnormal rain and created a delay for timely performance).
121. Bergin, supra note 13, at 2.
123. Id.
bly foreseen the event occurring and just decided that it was not important enough to address it under the clause in the contract. 124 Likewise, the fact that natural disasters may not be entirely predictable cannot be held as "an excuse for careless [contract]" formation. 125 The "common thread running through [the doctrine of foreseeability] is that contractual nonperformance will be excused . . . due to unforeseen circumstances or events that are materially different from the basic assumptions of the parties when the contract was formed." 126

2. Fortuitous Event

"A fortuitous event is one that could not have been reasonably foreseen at the time the contract was made"127 because it is an event that "occurs only by chance."128 Fortuitous events will only relieve a party of its obligations under a contract when performance of those obligations is actually impossible.129 Therefore, if the fortuitous event only makes performance more burdensome, nonperformance will not be excused under the force majeure clause.130

In coastal regions of the United States that may be susceptible to being hit by hurricanes, it is important to note that there is authority which provides that "hurricanes are ipso facto131 fortuitous events," and as a result, not reasonably foreseeable by parties at the time of contracting.132 However, if the contracting parties indicate in their agreement "that they foresaw the risk of a hurricane or flooding," then a hurricane that hits and causes flooding will not be held to be a fortuitous event.133 This is because, in some cases, a seemingly fortuitous event, such as a flood, will not excuse delays caused by the event if the flooding was was foreseeable.134 Because of the nature of a hurricane, disputes are likely to arise regarding whether the catastrophic flood-

126. 6 BRUNER & O'CONNOR, supra note 26, § 21:6.
127. Lockridge & Cazenave, supra note 94.
129. See id. Some state statutes may provide that a party is not liable to perform when nonperformance of obligations "is caused by a fortuitous event that makes performance impossible." L.A. CIV. CODE ANN. art. 1873 (1987).
130. Lockridge & Cazenave, supra note 94.
131. BLACKS LAW DICTIONARY 847 (8th ed. 2004). Ipso facto means "[b]y the very nature of the situation." Id.
132. Lockridge & Cazenave, supra note 94.
133. Id.
134. Gregory & Harris, supra note 34.
ing and damage that resulted from the hurricanes in 2005 were reasonably foreseeable at the time of contracting.\textsuperscript{135} Furthermore, like insurance companies following a natural disaster such as a hurricane, although the hurricane itself may not be reasonably foreseeable because it is an \textit{ipso facto} event, the flooding that resulted from it might have been considered foreseeable leaving parties with no relief when there is an impossibility to perform.\textsuperscript{136}

C. Effect of the Event on the Obligations Seeking to be Excused

"There is no ‘one size fits all’ force majeure clause that will protect all [parties]."\textsuperscript{137} Because courts often construe terms present in a force majeure clause narrowly, many times the impossibility of a party to perform under a contract is not excused unless the event causing nonperformance is included "within the meaning of the clause."\textsuperscript{138} One of the most important questions is how "the contract define[s] force majeure."\textsuperscript{139} As shown in \textit{Maralex Resources, Inc. v. Gilbreath},\textsuperscript{140} if specific types of force majeure events are provided in the contract, a party will not be excused from its obligations if one of those events does not occur.\textsuperscript{141} Performance of the contractual obligations was not excused because the lease provided that the force majeure clause would only pertain to "external forces beyond the control of [the lease], such as [a] natural disaster[]."\textsuperscript{142} The event allegedly causing nonperformance of obligations was a result of internal mechanical operations, which was not addressed in the contract and was within the party’s control.\textsuperscript{143}

Although many states rely on common law force majeure, others do not rely on common law concepts.\textsuperscript{144} In some states, force majeure depends upon what the contract defines it as, and therefore, parties affected by a natural disaster may be subject to whatever the contract provides if it is determined that another state law is applicable to the contract.\textsuperscript{145} For example, in

\textsuperscript{135}. \textit{See} Lockridge & Cazenave, \textit{supra} note 94.
\textsuperscript{136}. Hitch, \textit{supra} note 21, at 2.
\textsuperscript{137}. Porter & Hedges LLP, \textit{supra} note 16.
\textsuperscript{138}. \textit{Hillman}, \textit{supra} note 108, at 306.
\textsuperscript{140}. 76 P.3d 626 (N.M. 2003).
\textsuperscript{141}. \textit{Id.} at 636.
\textsuperscript{142}. \textit{Id.}
\textsuperscript{143}. \textit{Id.} at 636–37.
\textsuperscript{144}. Porter & Hedges LLP, \textit{supra} note 16.
\textsuperscript{145}. \textit{Id.}
Texas, if there is no force majeure clause in the contract, the party seeking excuse must still perform its obligations despite the fact that performance is impossible because of causes beyond the party's control. This may become important for victims of Hurricane Katrina because Texas is so close by, and contracts could have been formed by parties from Louisiana with parties in the State of Texas.

Even though an event itself may excuse a party's obligations under a contract because it falls within the language of the clause, if there was never a valid and enforceable contract at the time it occurred, the clause cannot be invoked. Furthermore, if an event does not directly affect a party's performance, the obligations under the contract will not be excused. The blockade and traffic slow-down in one situation did not relieve a party of its contractual obligation for timely performance because the traffic did not trigger the force majeure clause. Sometimes an event may excuse obligations under the contract when a force majeure clause provides that upon the occurrence of an event there might be an exception regarding part of a party's obligations. For example, although many leases extend the time for performance of the obligations when a force majeure event occurs, they often tend to carve out an exception for rent, by stating that the obligation will remain unaffected. This may affect people who cannot work to pay their rent because of the disaster occurring.

D. Notice to the Other Party to the Contract

Sometimes, when stated in a contract, in order to successfully invoke a force majeure clause, the party seeking to be excused from contract obligations must give notice to the other party to the contract that the force majeure clause is being used as a defense to its nonperformance. Likely, this is because parties to a contract want to ensure that they will have an opportu-

146. Id.
147. Id.
148. Goldstein v. Lindner, 648 N.W.2d 892, 899 (Wis. Ct. App. 2002). There was never a mining lease because the necessary permits were not obtained and therefore there was no performance that could have been prevented a party from occurring, thus allowing the party to invoke the force majeure clause under the contract. Id. at 899–900.
149. Paulus & Meeuwig, supra note 51, at 306.
150. Id.
151. Hitch, supra note 21, at 2.
152. Id.
153. FEDERAL RESPONSE TO HURRICANE KATRINA, supra note 2, at 9. Jobs have been scarce and the unemployment rate for evacuees of Hurricane Katrina was close to 28%. Id.
nity to cure or mitigate damages. Additionally, many clauses make notice a condition precedent to claiming force majeure or state that the failure to provide notice to the other party within the time given will waive a party's claim to force majeure. When it is stated in a force majeure clause that notice must be given, often there are express time limits provided in the clause within which the party seeking to be excused must inform the other party in order to avail itself of the defense.

The consequences that follow from a party not providing notice within the time limitations are often a matter of contention. Often when the downside of nonperformance is greater, more importance is attached to a force majeure clause and thus it is more important for notice to be given. If notice is not given, the party will forfeit its right to invoke the force majeure clause and the clause may be rendered defective. The requirement for a party to give notice to the other party to the contract depends on "the form of the . . . clause itself; the relation of the clause to the whole contract; and general considerations of law."

Furthermore, it is not enough that the entire world may be aware of the natural disaster that has occurred. If the contract specifies that notice must be given to the other party in the event one party wants to invoke the force majeure clause, then the party must be diligent in checking its contract because notice to the other party is what will trigger the force majeure protection. After Hurricane Katrina, in order for businesses to rely on force majeure as a defense to any breach of contract claims that might arise following the event, they were forced to post notices of force majeure on the internet to provide notice to everyone that either their performance would be delayed or that their offices would be closed.

155. Porter & Hedges LLP, supra note 16.
156. Id.
159. Porter & Hedges LLP, supra note 16.
160. Goldstein v. Lindner, 648 N.W.2d 892, 898 (Wis. Ct. App. 2002). In Goldstein, notice was never given to the other party, and therefore, even if the lease had been valid and enforceable, the lack of notice prevented the clause from being triggered. Id.
161. Godwin & Roughton, supra note 158. Many cases hold that the "[f]orce [m]ajeure clause [is] defective for being out of time." Id.
162. Id.
163. Richards Butler, supra note 68.
164. Id. "[J]ust because everyone knows about [Hurricane] Katrina, [doesn't mean] notice provisions can be disregarded." Bergin, supra note 13, at 1.
165. Wilkinson, supra note 63, at 6.
IV. FEELING THE EFFECTS: COMMON CONTRACTS AFFECTED

When a natural disaster occurs, contracts will inevitably be disrupted. In the minutes, hours, and days following a disaster, cities, streets, ports, and rail lines may be closed, thereby preventing access in or out of the area. This could lead to longer distances needing to be traveled, traffic congestion, and slower distribution. After a hurricane or other natural disaster, parties may claim force majeure based on an unavailability of labor or goods. Because “force majeure clauses are very common in construction and supply contracts,” a party will likely try to invoke the clause after a disaster results due to a loss of power, loss of surface transportation, and damage or loss to business structures and facilities.

A. The Shipping Industry

Following a disaster such as Hurricane Katrina, there was concern that ports would be affected by a shifting of sandbanks and shipping channels leading through the delta to the Mississippi as a result of the high winds during the storm. If this were to occur, 6000 vessels and rail hubs would be impacted by the inability for ships to reach their required destinations. Consequently, the weekend after Hurricane Katrina hit, over 100 vessels were waiting to enter the Mississippi, while others were trapped up the river. Force majeure clauses become important in such circumstances, which end up preventing timely performance either because carriers must wait until they can gain access to shipping routes, or they are forced to use alternate routes that will make delivery trips longer. When the Port of New Orleans—a port which is used for more than half of the nation’s grain exports—was closed, shippers were forced to try to use railways or trucks to

167. See generally id. at 5.
168. Id.
169. Porter & Hedges LLP, supra note 16.
170. Bund, supra note 38, at 412.
171. Savaglio & Freitag, supra note 166, at 9.
172. Richards Butler, supra note 59.
173. Id.
174. Id.
175. Lisa Girion, Businesses Seek a Legal Escape from Terrorism, L.A. TIMES, Oct. 14, 2001, at C1. Shippers were forced with having to make longer trips in order to satisfy their delivery obligations during the Suez Canal Crisis. Id.
transport goods. However, this provided more problems for suppliers when trying to meet their time schedules after Hurricane Katrina, because two of the biggest railroads in the eastern United States could not reach New Orleans and Alabama. This caused trains to be halted on 500 miles of track, which is typically used by fifty freight trains a day.

Fortunately, force majeure clauses allow distribution and shipping companies to “avoid [large] penalties for failing to deliver products [because of] circumstances beyond [their] control.”

If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller may allocate its available supply among itself and all of its customers, including those not under contract, in an equitable manner. Such deliveries so suspended shall be cancelled without liability, but the contract shall otherwise remain unaffected.

Likewise, businesses and suppliers that are parties to sales contracts, and that become affected by a natural disaster, may be shielded from “failing to deliver products in the event [that their] factory [or facility] is unusable after a storm.” For example, after Hurricane Rita hit the coastline, many businesses and communities were still feeling the devastation of Hurricane Katrina and therefore some manufacturers were forced to shut down their plants which substantially reduced the amount of product available for manufacturing other items.

B. Gas and Oil Production

Gas and oil disruptions and shortages can affect many areas of the United States. After Hurricanes Katrina, Rita, and Wilma hit the Gulf Coast in the Fall of 2005, pipelines transporting refined products either “had

177. Id.
178. Id.
182. Kaskey, *supra* note 179. A plant used to produce more than 55% of the material used to make plastic car parts and bottle caps was shut down because of Hurricane Rita. Id.
183. *Storm’s Wake: Hurricane Likely to Cause Harm Beyond Areas of Devastation*, THE PRESS DEMOCRAT, Sept. 4, 2005, at G2. “Katrina could have a wider impact on the nation than any other natural disaster in history.” Id.
service outages or through-put reductions." The disruption can be attributed to the destruction of 111 production platforms and 52 platforms being seriously damaged. Additionally, over a million barrels of oil per day were shut in as a result of the gulf hurricanes, amounting to 25% of the United States source for crude oil production and 20% of natural gas output being affected. This likely impacted many contracts because "[g]as production can [only recover] as fast as transport facilities return to service." In a gas and oil contract, a force majeure clause is used to relieve a lessee from the "harsh termination of the lease due to circumstances beyond its control [and which] would make performance untenable or impossible." However, a gas and oil lease could also specify through a provision in the contract, that the lease cannot be terminated by a force majeure event occurring. If there is a force majeure provision in the contract, a force majeure clause must be read "in light of the whole contract." When a contract involves a sale or supply of oil, coal or natural gas, a problem might arise when trying to invoke the clause because the contracts tend to include both a "take-or-pay" provision and a force majeure clause. Generally, a party’s performance under a gas and oil lease all depends on the degree to which the take-or-pay provision affects how the force majeure clause will be interpreted. In a take-or-pay provision, "a party can either . . . take the minimum purchase obligation of the oil, coal or natural gas, or . . . pay the minimum bill as determined by the contract." In addition to the impact of the take-or-pay provision on the force majeure clause, courts have held that it is not proper to inject terms into a gas and oil lease when the force majeure clause does not specify that the event excusing performance must "be unforeseeable or beyond the control of the lessee," which may help parties faced with the argument of whether the event was actually foreseeable.

Furthermore, a force majeure or similar clause may be included in an agreement to provide for a temporary cessation of production following expi-
ration of the primary term.195 If this is the case, "the lessee must exercise
diligence to overcome the conditions that result in a cessation of the produc-
tion, and resume production within a reasonable time."196 Ordinarily, a ces-
sation in production will only be considered temporary in order to avoid ter-
mination of the contract when it is caused by a sudden stoppage of the
well.197

C. Transportation

Transportation services, such as airlines, cruise ships, buses, and trains,
are often suspended or delayed for a period of time after a natural disaster
occurs because specific routes and departure-and-arrival stations may be
closed.198 After a hurricane, flights may be suspended until it is safe to fly
travelers into an affected area.199 Additionally, rail transportation may be
stopped for days, disrupting the normal schedule; also cruise ships may have
to cancel their trips due to closed ports, and subsequently be forced to oper-
ate out of new ports as a result of the disaster occurring.200

Generally, because travelers' reservations and tickets for airlines consti-
tute enforceable contracts,201 if an airline fails to perform under the contract
the ticket purchaser may be able to sue for breach of contract.202 However,
this option is only available to ticket holders when an airline's nonperform-
ance is due to something "within the airline's control"203 and not due to
weather related conditions or force majeure events.204 Even if a traveler is
entitled to compensation, if he decides to accept the compensation that the
airline immediately provides, then the right to seek additional compensation
in the future through a suit in small claims court will be waived.205

195. Id. § 239.
196. Id.
197. See id.
198. See generally UNIVERSITY OF MISSISSIPPI CIVIL LEGAL CLINIC ET AL., HURRICANE
      May 27, 2007) [hereinafter HURRICANE KATRINA: LEGAL ISSUES].
199. See Ted Jackovics, South Florida Air Traffic: Still Reeling from Wilma, TAMPA
      TRIB., Oct. 26, 2005, at 1. Air travel was suspended after hurricane Wilma because of power
      outages at the airports in the areas affected. Id.
200. HURRICANE KATRINA: LEGAL ISSUES, supra note 198, § 15.
201. Ed Perkins, Where the Little Guy Has a Fair Chance to Win, THE RECORD, Dec. 4,
      2005, at T3.
202. Id.
203. George Hobica & Kim Liang, Airline Rules for Contract of Carriage Have Changed,
204. Perkins, supra note 201.
205. Id.
When a force majeure event occurs and a person purchases a ticket prior to the event taking place, that passenger may or may not be able to reschedule their flight or get a complete refund without penalties. Even though most airlines accommodated rescheduling and refunds without penalties after Hurricane Katrina, they were subject to conditions and restrictions. Because travel policies for rescheduling and refunds are not federally regulated when travel suppliers put together refund and ticket policies for flights to affected areas after the hurricane and for the months ahead, the policies differed from one carrier to the next. Consequently, it may be easier for travelers to re-book their flights for a later date than to cancel altogether and get their money back. This was a common problem following the September 11 terrorist attacks because ticket holders were skittish about flying. However, travelers seeking a full refund as a result of the force majeure event were out of luck five months later because there was no longer an immediate terrorist threat to air travel.

Similarly, it does not matter if the purpose of buying the ticket and traveling to the desired destination becomes pointless after the disaster occurs because in most situations, airlines will only refund the full ticket price if the scheduled flight did not operate. As a result, even though flights were providing service to New Orleans two months after Hurricane Katrina, if a person booked her ticket with the plan of having a wedding, she would likely only get an opportunity to reschedule, despite the fact that the purpose of her trip could not have taken place due to the catastrophic damage in the city. Additionally, even when some airlines revised their policies for passengers scheduled to travel into or out of New Orleans, rescheduling or a full refund was limited to a specified period. Some airlines stipulated that rescheduling and refunds were only applicable to flights scheduled from August 25, 2005 to September 30, 2005, and others provided that the refund or re-

207. Id.
208. Id.
210. See Girion, supra note 175.
211. Id.
213. Katrina Postponed Wedding, supra note 209.
214. See id.
216. Id.
scheduling had to occur within 180 days of when the original flight was scheduled, and that it only covered flights through 2005 and not after. 217

D. Power Companies

Storms and natural disasters can potentially devastate power infrastructures 218 and when this happens parties may wish to find out what can be done about their loss of electricity. After Hurricane Katrina, there were about two and a half million people without power 219 and a few months later, following Hurricane Wilma, there were over three million people without power. 220 However, despite the number of people without electricity, power companies are not insurers of continuous service if the interruption is beyond their control. 221

Generally speaking, an electric power company which contracts to supply current, although not an insurer of service, has an obligation to provide a patron with adequate and continuous service, arising either from express contract, regulatory enactments, or implied contract, and the supplier is, ordinarily at least, subject to a duty to exercise reasonable care to fulfill such an obligation. 222

Furthermore, when there is no force majeure provision in the contract defining the company’s liability, and a consumer is trying to prove that the power company is liable, the consumer must show that the power company was negligent in some way when unintended interruptions occurred. 223

Even if liability is based partly on the negligence of the power supplier or entirely on the contract, courts have typically held power companies not liable, and have relieved them from any penalties resulting from unintended interruptions “either as a matter of general principle or because of an express contractual or regulatory provision, where the interruptions resulted from an ‘act of God’ or from circumstances beyond the control of the supplier.” 224 In

217. See Katrina Postponed Wedding, supra note 206.
218. Federal Response to Hurricane Katrina, supra note 2, at 8.
219. Id.
223. Id.
224. Id.
Florida Power Corp. v. City of Tallahassee, the Supreme Court of Florida held that a hurricane hitting the city for a period of hours was considered an act of God, thereby relieving the company from the failure to deliver power. Because the power company’s failure to deliver power was directly traceable to the hurricane and one of the only justifiable reasons for an interruption, there was no breach of contract for which the power company could be held liable. Similarly, courts have not even definitively held a power company to be liable for an intentional interruption as a result of a maintenance test when there was a force majeure clause in the contract.

E. Construction Projects

Although unexpected events such as natural disasters may not have a direct effect on construction projects, the events could directly affect costs associated with a project. Hurricane Katrina dramatically increased the cost of materials for construction projects and the time needed to obtain the materials for those projects. Additionally, material shortages may cause project delays and increased costs for completion. Despite a contractor’s inability to control the weather, nonperformance under the contract will not be excused because they can plan for what happens when an uncommon or unforeseen event occurs.

In many construction contracts, a force majeure clause will not relieve a contractor of its obligation to perform, unless the event preventing performance was unforeseeable at the time the parties formed the contract. When there is no force majeure clause in the contract, the risk of loss for any unexpected or unforeseen events generally falls on the contractor who is providing materials and labor. This is because when performance could be jeopardized by a particular event, the omission of that event and its effects on the

225. 18 So. 2d 671 (Fla. 1944).
226. Id. at 675.
227. Id. at 674–75.
228. Id. at 675.
229. Liability of Electric Power, supra note 222, at 608.
231. See id.
233. See MCAI, supra note 230.
234. Dirik, supra note 139.
235. See MCAI, supra note 230.
parties’ contractual obligations may result in no relief being provided.\textsuperscript{236} However, many times even when there is a force majeure clause in the contract, a contractor’s remedies will be limited after the force majeure event occurs.\textsuperscript{237} For instance, a contractor could be allowed a time extension for delays created by the force majeure event, but he could also “be prohibited from recovering any costs” resulting from the delay.\textsuperscript{238}

V. CONCLUSION

“Even if protection from force majeure events exists, the clause may not be captioned ‘force majeure’ or include this term.”\textsuperscript{239} Therefore, it is important to know what they will look like so that force majeure and similar clauses can be reviewed periodically by parties.\textsuperscript{240} This will help make parties to contracts aware of what events are likely to be considered “force majeure” and whether notice must be given in order to invoke the clause if the event does fall within the terms of the clause.

Because of the magnitude of the 2005 hurricane season and other natural disasters across the United States, the increasing importance of placing force majeure clauses in contracts is becoming known.\textsuperscript{241} Additionally, because the language in the clauses plays such a huge part in a party’s relief, parties no longer have the ability to rely on any common law concepts to fill in the gaps.\textsuperscript{242}

\begin{itemize}
  \item \textsuperscript{236} See Bell, \textit{supra} note 232.
  \item \textsuperscript{237} See MCAI, \textit{supra} note 230.
  \item \textsuperscript{238} \textit{Id}.
  \item \textsuperscript{239} Nestel, \textit{supra} note 14, at 42.
  \item \textsuperscript{240} Godwin & Roughton, \textit{supra} note 158.
  \item \textsuperscript{241} Porter & Hedges LLP, \textit{supra} note 16.
  \item \textsuperscript{242} \textit{Id}.
\end{itemize}
I. INTRODUCTION

This survey focuses on juvenile delinquency and child welfare cases and to a lesser extent on adoption matters as they relate to child welfare cases. It discusses several Supreme Court of Florida cases in these topic areas which have clarified important issues as well as a high court opinion on the subject of juvenile curfews. The courts of appeal were active in interpreting a variety of statutory issues and, as they have done for years, held the trial courts strictly accountable for compliance with statutory obligations in both child welfare and dependency cases.

II. JUVENILE DELINQUENCY

A. Adjudicatory Issues

In 2003, in a very widely followed case, Tate v. State,1 which was the subject of a special issue of the Nova Law Review,2 the Fourth District Court of Appeal established the procedural approach to be used in evaluating the competency of young defendants in the juvenile and adult criminal courts.3

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1. 864 So. 2d 44 (Fla. 4th Dist. Ct. App. 2003).
3. Tate, 864 So. 2d at 51.
Since that time, a number of courts have ruled on a variety of procedural issues related to juvenile competency. 4

Section 985.223 of the Florida Statutes contains a number of provisions regarding how courts should handle competency in delinquency proceedings. 5 One of the major focuses of the law is the distinction between a child who is incompetent because of mental illness or retardation and a child who is incompetent because of age or immaturity or any reason other than mental illness or retardation. 6 In Department of Children & Families v. C.C. (C.C. II), 7 the issue was whether the trial court could commit a child to the Department of Children and Families (DCF) in the absence of evidence showing mental illness or retardation. 8 Ruling strictly as a matter of statutory interpretation, the court read the law to provide that a child who is determined to be mentally ill or retarded and who is adjudicated incompetent to proceed must be committed to DCF for treatment or training, whereas a child who is adjudicated incompetent because of age or immaturity may not be committed to either DCF or the Department of Juvenile Justice. 9 Because the child’s lack of competence derived from age and lack of maturity, the appellate court quashed the order placing the child with DCF. 10 In W.G. v. State, 11 the issue was whether a trial court may order competency restorative services for an incompetent child charged with a misdemeanor by placement of the child in a private facility. 12 The appellate court said that the trial court lacked the authority to do so under the law because the statute stated that trial courts may not order any restorative services for an incompetent juvenile who was charged with what would be a misdemeanor. 13 The court recognized that there might be some difficulty in understanding the logic underlying the statutory scheme but that the law was clear on its face. 14 Chapter 985 also provides that where it appears that a child may never become competent, the court may dismiss the proceeding. 15 In State v. J.L.M., III, 16 an eight-

5. See generally FLA. STAT. § 985.223 (2006).
6. Id. § 985.19(2).
8. Id. at 966.
9. Id.
10. Id.
12. Id. at 331.
13. Id.
14. Id. at 332.
year-old was declared incompetent. The evidence suggested that the child would not become competent in the next two years. The appeals court reversed the trial court dismissal because the evidence showed only that it was unlikely that the eight-year-old "could be trained to [become] [competent] within the next 4 [to] 6 years." The trial court did not find that the child would never become competent to proceed during the statutory period.

The appellate courts have also ruled on several issues related to technical compliance with the involuntary commitment statute. First, in M.H. v. State, the First District Court of Appeal held that when the trial court makes an order of involuntary commitment pursuant to chapter 985, it must make findings pursuant to three separate prongs of the state statute: 1) that the child is mentally ill or retarded; 2) that because of the mental illness or retardation the child is "manifestly incapable of surviving" or that "[t]here is a substantial likelihood that in the near future the child [would] inflict serious bodily harm on [him or her]self or others;" and 3) that "less restrictive alternatives" for treatment are inappropriate. Finally, in Department of Children & Families v. W.J.R., the appellate court held that prior to a commitment of a minor to DCF for competency restoration, DCF must be properly served and given notice and allowed to participate in a meaningful manner in the dispositional proceeding.

Issues relating to the waiver of the right to assistance of counsel in delinquency proceedings come up regularly throughout the country. The juvenile's right to counsel was established by the Supreme Court opinion in In re Gault in 1967, and cases interpreting the case are also heard by the Florida appellate courts each year. In K.E.N. v. State, the appellate court held, inter alia, that it had grave reservations concerning whether the specific guidelines established by the Florida Rules of Juvenile Procedure that govern the substantive right of the juvenile to counsel, can be complied with by a

17. Id. at 458.
18. Id. at 459.
19. Id. at 461.
20. Id.
21. 901 So. 2d 197 (Fla. 4th Dist. Ct. App. 2005).
22. Id. at 200 (quoting FLA. STAT. § 985.19(3) (2006)).
23. 915 So. 2d 245 (Fla. 5th Dist. Ct. App. 2005).
24. Id. at 246 (citing Dep't of Child. & Fam. v. J.F.C., 901 So. 2d 417 (Fla. 5th Dist. Ct. App. 2005)).
28. 892 So. 2d 1176 (Fla. 5th Dist. Ct. App. 2005).
“group rights advisory,” or an announcement of the rights the children possess made by the court to a group of youngsters appearing before it.29 The inquiry that the court must make includes a thorough analysis of each child’s comprehension of the offer of the right to counsel and each child’s capacity to make an intelligent and understandable choice to waive it.30 In C.K. v. State,31 “the trial court failed to make [the] thorough inquiry [necessary] . . . to obtain [a] waiver in writing,” have the mother verify that the decision was discussed, and find that the waiver “appeared to be knowing and voluntary.”32 The checklist the court must run through has been rearticulated by the appellate courts on a number of occasions and yet, inexplicably the trial courts seem to have trouble complying as the court found in C.V. v. State.33 In that case, at arraignment the trial court accepted an oral waiver of counsel and admission to the charges but failed to inform the child of his rights that would be relinquished.34 The court did not warn the child of the danger and disadvantages of representing himself, nor did the court make any inquiries about whether the child’s decision was voluntary and knowingly made.35 Again, the court failed to obtain a written waiver of counsel.36 On a more technical level, the Second District Court of Appeal reversed in T.H. v. State (T.H. II),37 where the child was not advised of his right to counsel at a hearing, and the error was not caught until six days after the dispositional hearing where the child refused counsel.38 The appeals court held that was fundamental error and reversed.39

In J.R.I. v. State,40 the child appealed from an order committing him to a residential facility on revocation of probation.41 Because the waiver of counsel in the original delinquency proceeding was not knowingly or intelligently made, the appellate court held that the trial court could not commit the child upon revocation of probation.42 Finally, in D.K. v. State,43 an appeal was taken in a case involving representation by a certified law student in-

29. Id. at 1179.
30. Id.
31. 909 So. 2d 602 (Fla. 2d Dist. Ct. App. 2005).
32. Id. at 604 (internal quotations omitted).
33. 915 So. 2d 664 (Fla. 2d Dist. Ct. App. 2005).
34. Id. at 665.
35. Id.
36. Id.
37. 899 So. 2d 504 (Fla. 2d Dist. Ct. App. 2005).
38. Id. at 505.
39. Id.
41. Id. at 1094.
42. Id.
43. 881 So. 2d 50 (Fla. 4th Dist. Ct. App. 2004).

https://nsuworks.nova.edu/nlr/vol31/iss3/1
The appeals court held that “because the name of the certified legal intern representing [the child was] not listed on the waiver form, it cannot be said that [the child] made a knowing and intelligent waiver of [the] right to legal representation.” Therefore, the court reversed.46

Issues relating to application of the United States Supreme Court ruling in Miranda v. Arizona47 continue to come before the Florida appellate courts.48 The cases deal both with issues of whether the individual is in custody and whether the confession given was voluntary under the totality of circumstances test set forth by the Supreme Court of Florida in Ramirez v. State.49 In J.G. v. State,50 the juvenile was adjudicated delinquent on a charge of sexual battery and appealed on grounds that he was in custody and the waiver of Miranda rights was not voluntarily, knowingly and intelligently made.51 The appellant was thirteen years old and a seventh-grader enrolled in an exceptional student educational school setting at the time of the interview.52 The youngster “was familiar with the juvenile justice system.”53 In addition to the failure to notify the appellant’s parents or custodian that the child was in custody as provided by Florida law,54 but which would not by itself dispose of the waiver issue, there was no evidence upon which the court could evaluate the voluntariness of the waiver.55 Nor did the trial court make any factual findings.56 The appellate court held that “[m]erely reading the Miranda rights form to a [thirteen]-year-old . . . or having [the child] read the rights form, by itself [did] not establish that [the child] understood and comprehended the rights he was giving up” as a consequence of the waiver.57 Furthermore, the court found that a family friend, whose interests lay closer to that of the victim, assisted in obtaining the confession by tricking the child through an explanation that there was a video

44. Id. at 51.
45. Id. at 52.
46. Id.
49. 739 So. 2d 568 (Fla. 1999).
51. Id. at 917–18.
52. Id. at 924.
53. Id.
55. J.G., 883 So. 2d at 924.
56. Id.
57. Id. at 925.
tape recording of the child "inappropriately touching the victim." 58 Under all these circumstances the appeals court reversed. 59

A juvenile was charged with committing the offense of poisoning food or water with intent to kill in *B.M.B. v. State*. 60 The interrogation of the child occurred on school grounds by a police officer who had been called to the school. 61 The appellate court reversed the trial court finding that the child had knowingly and voluntarily waived *Miranda* warnings and further found that the child was in custody at the time of the police interview. 62 In so doing, the court noted that whether the law would have been applied differently had the case been handled by a school resource officer and an assistant principal was not before the court. 63 The police officer turned off the tape recorder and, in testimony at trial, said that he orally administered the *Miranda* warnings at that point in time. 64 The appellate court held that there was no doubt that the child was in custody. 65 Applying the *Ramirez* test governing totality of the circumstances and recognizing that "there is no bright line rule that would render a confession by juvenile involuntarily," the court held that a number of factors would produce a finding that the waiver was not voluntary. 66 The court found that the tape recording was turned off and thus there was no first hand evidence. 67 There was nothing in the record to show that the child clearly understood her rights. 68 In particular, the child's "age, experience and background did not allow her to appreciate the gravity of the situation" (the student was in middle school) nor was there any "indication that [the child] understood that serious criminal charges could result" (a felony). 69 Further, the child was not provided with an opportunity to consult with a parent before being questioned. 70

Part of the test for the obligation to read a respondent *Miranda* warnings is that the person be in police custody for interrogation. 71

58.  Id.
59.  Id. at 927.
60.  927 So. 2d 219, 220 (Fla. 2d Dist. Ct. App. 2006).
61.  Id. at 221.
62.  Id. at 223.
63.  Id. at 221. A number of courts have held that if a police officer is acting as a school resource officer, the *New Jersey v. T.L.O.* test will be applied. See discussion of *New Jersey v. T.L.O.*, infra nn. 110–11; see also In re *W.R.*, 634 S.E.2d 923, 926–27 (N.C. Ct. App. 2006).
64.  *B.M.B.*, 927 So. 2d at 222.
65.  Id.
66.  Id.
67.  Id. at 223.
68.  Id.
69.  *B.M.B.*, 927 So. 2d at 223.
70.  Id.
State, a twelve-year-old was adjudicated to have committed an act of vandalism involving the windshield of an automobile. The trial court denied a motion to suppress, and after an adjudication and disposition, the child appealed. The sole witness in the case was a police officer who was called to the scene "in response to a report that someone had damaged [the victim's] car windshield by what appeared to be a BB gun shooting." The police officer interviewed the child and, after two other officers arrested the father in the child's presence, told the child to wait until the youngster's brother came to get him. During that period, the police officer fabricated a story that the victim had videotaped the event. The child, in response, implicated himself.

The appellate court held that the child was in custody when he made the admissions. Applying an objective test of whether a reasonable person in the suspect's position would have perceived the situation as such, the appellate court held that the child was detained, albeit for his own safety, and that the police officer was clearly interrogating the child. The appellate court therefore reversed.

An interesting jurisdictional issue was before the Fourth District Court of Appeal in State v. Jones. The issue was whether juveniles charged with traffic offenses, such as "driving without a valid license," should have their cases heard "in the traffic division of the county court" or "in the juvenile division of the circuit court . . . as delinquency matters." On a petition for a writ of prohibition after several cases had been dismissed and then transferred to the juvenile division of the circuit court, the appeals court held that the Florida statute specifically exempts traffic offenses from circuit court jurisdiction, and therefore, "the county court has original jurisdiction over offenses allegedly committed by the . . . [juveniles]." They are not statutorily viewed as acts of delinquency.

72. Id. at 573.
73. Id. at 575.
74. Id.
75. Id.
76. J.C.M., 891 So. 2d at 577.
77. Id.
78. Id.
79. Id.
80. Id.
81. J.C.M., 891 So. 2d at 578.
82. 899 So. 2d 1280 (Fla. 4th Dist. Ct. App. 2005).
83. See id. at 1280.
84. Id. at 1281.
85. Id. (citing Fla. Stat. § 26.012 (2003)).
The parents of a victim appealed from a trial court order denying a motion to set aside a pretrial intervention agreement in a delinquency case. In S.K. v. State, the respondent had been charged with "lewd and lascivious molestation" of a minor child. The amended petition "later filed chang[ed] the offense to a misdemeanor battery." The court entered a negotiated agreement known as a "PAY agreement," which "is an acronym used to refer to [a] prosecution alternative[...] youth agreement[.]" The victim's parents, who disagreed with the disposition, sought to challenge the agreement on several grounds. The appellate court held that "the decision to prosecute lies solely with the State [and] not with the victim of a crime," the juvenile rules of procedure do not provide "for the victim or the victim's parents to be involved in the submission of [the] treatment plan or in the decision to" hold or waive the hearing, and the victim's parents are not parties who will be "allowed to refuse consent to a waiver of a hearing." In delinquency cases involving child victims, issues of hearsay testimony by minors often come before the court. Such was the case in G.H. v. State. In a sexual abuse case, the child victim's mother testified that "the child told her . . . that someone with [the a]ppellant's first name [had] touched her, and the child was afraid to reveal [the] information because [of threats]." The trial court, when asked to rule on the child's hearsay statements, allowed the testimony finding "specifically that the statements [were] reliable and trustworthy." The appellate court held that the trial court was in error, because in all cases the court must make specific findings of fact on the record regarding the reliability of the statements. However, on the facts of the case, because there was direct testimony from the child upon which the court could rely for its adjudication, the error was deemed harmless. The question of whether a juvenile has the right, through counsel, to make a closing argument in a delinquency case was before the appellate

87. Id. at 1209.
88. Id. at 1210.
89. Id.
90. Id.
91. S.K., 881 So. 2d at 1210 n.1.
92. Id. at 1210–11.
93. Id. at 1212.
95. 896 So. 2d 833 (Fla. 1st Dist. Ct. App. 2005).
96. Id. at 834.
97. Id. at 835.
98. Id.
99. Id.
court in *J.M.S. v. State*. The child had been charged "with disorderly conduct ... and disruption of an educational institution." When the State rested, the child's "defense [counsel] moved for a dismissal arguing that yelling [and] cursing [was] not enough to prove disorderly conduct" and that "there was no incitement or encouragement." "The court denied the motion[] and found [the child] guilty of both counts," whereupon the "defense . . . asked for a closing argument." "[T]he court denied the request, citing the lateness of the hour and another pending case . . . [but] allowed [the] defense counsel to submit a memorandum" and also, at the dispositional hearing, some six weeks later, the right to make a renewed motion for judgment of acquittal and a closing argument. Citing earlier case law, the appellate court held that "it is an absolute violation of the Sixth Amendment for [a] court to deny . . . defendant[s] the right to make [a] closing argument." The appeals court held that the defense was denied the ability to "mak[e] an[] argument prior to the court's finding of guilt." "[M]ak[ing] a written closing argument and [an oral] argument at the disposition hearing after the" determination of guilt had already been made "[did] not cure the prejudice." The court reversed for a new adjudicatory hearing.

Issues involving searches in schools come up regularly in Florida delinquency cases in the Florida courts as they do elsewhere. Pursuant to the Supreme Court opinion in *New Jersey v. T.L.O.*, the test for search and seizure in schools is reasonable suspicion. The courts have also held that suspicion-less administrative searches of students are proper under certain circumstances. In *C.N.H. v. State*, a child "entered a plea of no contest"
in a delinquency case having been charged with "possession of a weapon on school property." The school in question was "an alternative middle school," which "ha[d] a policy of [carrying out] daily suspicionless pat-down searches of every student every morning before [the students were] permitted to go to . . . class[]." The appeals court held that in the context of "an administrative search, the warrant and probable cause showing is replaced by [a] requirement . . . [of] a neutral plan for execution; a compelling governmental need; the absence of less restrictive alternatives; and reduced privacy rights." Under the facts of the case, the appeals court held that the administrative searches were proper.

Florida courts have held that a school resource officer—a police officer assigned to a school—when conducting a search in a school, need only have reasonable suspicion to search. The court so held in State v. J.H. In J.H., "[a] police officer . . . at the school was told by another student [who had been] found with marijuana, that [the respondent] had possessed marijuana earlier [in the] day. The officer contacted the dean . . . [who] asked [the juvenile] to step out of class, and [when] the officer asked if [the youngster] had anything improper on him," the child offered up the marijuana. "[A]cknowledg[ing] that the standard is a reasonable suspicion," the child argued, nonetheless, that because he was in custody, *Miranda* warnings should have been given. The appeals court held that while it may be correct that in a "custodial interrogation by the officer" *Miranda* warnings were required, that issue was not dispositive "because the drugs would have been discovered inevitably without [the] interrogation." It therefore reversed the trial court order upholding the suppression.
B. Dispositional Issues

The Supreme Court of Florida has decided two significant cases involving dispositional issues during the most recent survey period. In *J.I.S. v. State*, the question was whether a juvenile who received "an indeterminate residential commitment to the Department of Juvenile Justice (DJJ) [is] entitled to credit for time served in secure detention before the commitment?" The Court held that in the case of "indeterminate commitment, which is a residential commitment [where the DJJ has] authority over the [defendant] until . . . [the youngster] reaches a statutorily prescribed age, . . . credit for time served in secure detention [pre-commitment] is not required by any court rule, statute, or constitutional provision." Therefore, the child is not entitled to credit for time served. However, the Court stated that "credit is required [in] a 'determinate' commitment" setting. That is, "for an offense such as a misdemeanor that . . . necessarily conclude[s] before the juvenile reaches the age at which [the authority of DJJ ends]," credit for time served does apply. The distinction between determinate and indeterminate sentences is as follows: "[C]ommitments circumscribed by the maximum adult punishment [are] 'determinate' and those limited only by the offender [obtaining] a certain age [are] 'indeterminate.'" As the Court noted, because "[t]he juvenile justice system [focuses on] rehabilitat[ing] youth," youngsters "are committed for indeterminate lengths of time" as a general proposition in the absence of a statute that states otherwise. Thus, it is "generally impossible to [set] a date from which to deduct time spent in secure detention."

The second Supreme Court of Florida case involving dispositions in delinquency cases is *N.C. v. Anderson*. The issue before the Court was

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125. 930 So. 2d 587 (Fla. 2006).
126. *Id.* at 589.
127. *Id.* at 590.
128. *Id.*
129. *Id.*
130. *J.I.S.*, 930 So. 2d at 590. For a discussion of the Supreme Court of Florida’s view of entitlement to jail credit on an adult sentence, see *Moore v. State*, 882 So. 2d 977 (Fla. 2004).
131. *J.I.S.*, 930 So. 2d at 592.
132. *Id.* at 593 (quoting *C.C. v. State (C.C. I)*, 841 So. 2d 657 (Fla. 4th Dist. Ct. App. 2003)).
133. *See id.* at 595.
134. *Id.* at 593 (quoting *C.C. I*, 841 So. 2d at 658).
135. 882 So. 2d 990 (Fla. 2004); *see also D.G. v. State*, 896 So. 2d 920, 921–22 (Fla. 4th Dist. Ct. App. 2005) (applying the *N.C.* holding to situations “where special conditions of probation [need] not [be] orally pronounced at [a] disposition hearing”).

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whether, in addition to being "entitled to a written order of disposition containing all the terms of disposition," a juvenile is entitled "to an oral pronouncement containing all of [those] terms?" 136 The Court held that as a matter of due process, there is no requirement "that the trial court issue an oral pronouncement of disposition," and that the relevant rule of juvenile procedure contains "adequate safeguard[s] for minors who wish to challenge their written dispositions." 137 The majority based its due process analysis on the flexibility in juvenile cases as distinguished from adult criminal cases. 138 The flexibility allows the State to act in its parens patriae role differently, and therefore, a balance is struck with respect to "informality" and "flexibility." 139 What is odd about this rationale is that flexibility is used by the Court as the predicate for providing less information to juveniles, 140 who it would seem, need more information.

Chief Justice Pariente concurred because of her desire to discuss a separate issue not before the Court, "but which nevertheless deserve[d] attention." 141 The issue was "the lack of adequate gender-specific programs and services for . . . delinquent girls" 142 "with a history of sexual abuse and depression, [who] acted out and committed a misdemeanor domestic battery." 143 The juvenile before the court in N.C., who did not receive the services she needed "in a lower level program or . . . intensive home services," and thus, was placed in a higher level program, demonstrated the need of the governmental branches to "cooperate to ensure that [the] juvenile justice system can fulfill its mandate of providing rehabilitation [services] to children . . . most at risk and most [at] need." 144

The issue of whether a fine can be part of a disposition, among other issues, was before the Fifth District Court of Appeal recently in A.M.P. v. State. 145 At disposition, the court held that "the fact that she went to trial cost the taxpayers in this community a greater amount. And [the court would] like to have fines [that] have some relationship to the impact on the community." 146 The appellate court held "that the trial court [had] no power to impose a fine on a juvenile in . . . delinquency proceeding[s] because [the]
imposition of a fine is not included within the powers of disposition given to the trial court in a delinquency proceeding.\(^{147}\)

In a second case involving the powers of the delinquency court, \textit{B.R. v. State},\(^{148}\) among the issues was the question of whether or not the trial court could, at disposition, refuse to allow the juvenile’s parent to speak.\(^{149}\) The appellate court reversed on the basis of a state statute which required the Florida court to give all parties the right to comment before determining and announcing its disposition.\(^{150}\) To make matters worse, as the appellate court explained, in addition to preventing the respondent’s mother from speaking at the dispositional hearing, the trial court made statements which discouraged the child’s right not to plead guilty in contravention of prior Florida case law.\(^{151}\) The appellate court reversed, ordering that a new dispositional hearing be held before a different judge.\(^{152}\)

An issue that comes up with some regularity is the question of the juvenile court’s ability to order the DCF to provide certain services to children before the delinquency court. One such issue is treatment for a juvenile detained under the Jimmy Ryce Act.\(^{153}\) Several courts have now held that the trial court exceeded its authority in ordering DCF to provide a specific treatment for such children including, most recently, the Fourth District Court of Appeal in \textit{Department of Children \& Families v. C.B.}\(^{154}\)

In \textit{R.D.W. v. State},\(^{155}\) a case involving an unusual factual scenario, a juvenile charged with possession of cannabis, who later entered a plea of no contest to the charge—and where the court withheld adjudication placing the youngster on probation—appealed from the dispositional order to the extent that it required him to remove a tattoo from his neck as a special condition of the probation.\(^{156}\) The appellate court reversed, finding no legal basis upon

\begin{enumerate}
\item 147. Id. at 100.
\item 148. 902 So. 2d 333 (Fla. 5th Dist. Ct. App. 2005).
\item 149. Id. at 334.
\item 150. Id. at 335 (citing FLA. STAT. § 985.23(1)(d) (2004)). The opinion was also based on prior Florida case law which “held that a trial court’s failure to allow a child’s parents to testify at a disposition hearing constitutes reversible error.” Id. (citing K.R. v. State, 584 So. 2d 1132 (Fla. 5th Dist. Ct. App. 1991) and T.H. v. State (T.H. I), 573 So. 2d 1090 (Fla. 5th Dist. Ct. App. 1991)).
\item 151. Id. (citing A.S. v. State, 667 So. 2d 994, 995–96 (Fla. 3d Dist. Ct. App. 1996)).
\item 152. B.R., 902 So. 2d at 336.
\item 154. 884 So. 2d 1035 (Fla. 4th Dist. Ct. App. 2004); see also Dep’t of Child. \& Fams. v. Harter, 861 So. 2d 1274 (Fla. 5th Dist. Ct. App. 2003); Dep’t of Child. \& Fam. Servs. v. I.C., 742 So. 2d 401 (Fla. 4th Dist. Ct. App. 1999).
\item 155. 927 So. 2d 195 (Fla. 5th Dist. Ct. App. 2006).
\item 156. Id. at 195–96.
\end{enumerate}
which the court could enter the order of tattoo removal. 157 The test for special conditions of probation is found in the Supreme Court of Florida opinion *Biller v. State*. 158 There was no evidence in the record in *R.D.W.* that the tattoo had anything to do with the condition of probation found in *Biller*, such as the "relationship to the crime which the defendant was convicted, . . . conduct that is in itself criminal, or . . . conduct which is reasonably related to the defendant's future criminality." 159 The State argued that state law provides that a minor may not be tattooed without written, notarized consent of the parent or guardian, and therefore it would violate the law for the juvenile to have a tattoo placed on his or her body unless parental permission is obtained. 160 The court rejected this argument, finding that it is "the person who tattooed the minor who breaks the law." 161 Judge Palmer dissented in the appellate court on the ground that having the tattoo was unlawful. 162

Restitution-related issues come up repeatedly before Florida's intermediate appellate courts. 163 In *C.T.H. v. State*, 164 a juvenile had been charged with trespass to a structure and resisting arrest. 165 The child pleaded no contest. 166 At a restitution hearing, the complaining witnesses testified that the juvenile had trespassed on his property several times, sprayed a fire extinguisher, ransacked the house and that property was taken. 167 The trial court ordered $1,279 in restitution. 168 Because the loss must be connected causally to the offense charged and cannot be ordered for an unconnected offense, and where, in the case at bar, it was unclear what damage related to the trespass, the court on appeal reversed and remanded for a new restitution hearing. 169 The same issue was before the court in *S.M. v. State*. 170 The child pleaded no contest to trespass in a conveyance (a vehicle). 171 At the restitution hearing, the owner of the automobile testified to $2647.71 in dam-

157. *Id.* at 195.
158. 618 So. 2d 734 (Fla. 1993).
159. *R.D.W.*, 927 So. 2d at 196 (citing *Biller*, 618 So. 2d at 734–35).
160. *Id.*
161. *Id.*
162. *Id.* at 197 (Palmer, J., dissenting).
163. See Dale, 2004 Survey, supra note 4, at 404–05.
164. 905 So. 2d 1031 (Fla. 5th Dist. Ct. App. 2005).
165. *Id.* at 1031.
166. *Id.* at 1032.
167. *Id.*
168. *Id.*
170. 881 So. 2d 78 (Fla. 5th Dist. Ct. App. 2004).
171. *Id.* at 79.
The appellate court reversed and remanded because there was no evidence showing the juvenile was responsible for the damage. It, too, was reversed and remanded for a new restitution hearing.

**III. DEPENDENCY**

One of the commonly litigated grounds for dependency in Florida is whether a child is at substantial risk of imminent abuse, abandonment, or neglect by a parent, legal custodian, or sibling. In *M.W. v. Department of Children and Family Services (M.W. II)*, a father appealed from a dependency finding as to three natural children based upon his sexual abuse of a step-sibling. Despite the fact that a psychologist testified that the chances of the subject children being abused was "below base rates but . . . not zero by any means," the appellate court affirmed. Because the nature of the harm was so great, the court ruled it was intolerable to allow even a low probability of abuse.

Under Florida law, a dependency petition does not have to be filed against both parties. However, parents who are not respondents are nonetheless parties and, as such, are entitled to be served with pleadings, orders, and papers. However, because they are not respondents, they have neither a statutory or constitutional right to counsel according to the court in *C.L.R. v. Department of Children & Families*.

Under Florida law, gay and lesbian couples may not marry. Florida does not recognize same sex marriages validly entered elsewhere. While

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172. Id.
173. Id. at 80.
174. Id.
176. 881 So. 2d 734 (Fla. 3d Dist. Ct. App. 2004).
177. Id. at 734.
178. Id. at 737 (emphasis omitted).
179. Id.
180. Id.
182. Id.
184. 913 So. 2d 764, 767 (Fla. 5th Dist. Ct. App. 2005).
186. Id.
Florida law does allow gay and lesbian couples to act as foster parents,187 they may not adopt.188 In D.E. v. R.D.B.,189 a mother’s former gay partner commenced a dependency proceeding alleging the child born through artificial insemination was abused and/or neglected because the biological mother cut off visitation with the former partner.190 Under Florida law, a non-parent cannot seek custody or visitation.191 The appeals court held that a parent’s decision to deny contact with someone who has no rights to custody or visitation with a “child is an inadequate ground upon which to base” dependency adjudication.192

DCF sometimes seeks to place dependent children in residential mental health treatment facilities.193 In 2000, the Supreme Court of Florida decided M.W. v. Davis (M.W. I)194 in which it held that an adjudicatory hearing, albeit one that did not comply with Florida’s civil commitment statute (known as the Baker Act), was required prior to such a placement.195 The question in In re J.W.196 was what should be the proper standard of proof in such a proceeding.197 Making reference to the child’s substantial liberty interest “in not being confined unnecessarily for medical treatment,” the Court in J.W. held that the standard was clear and convincing evidence.198

Florida law provides that a parent of sufficient means can be ordered to pay fees established by DCF for the care of a child who has been placed in shelter care as long as the parent is afforded notice and an opportunity to be heard about the amount of the assessment.199 In D.W. v. Department of Children & Families,200 a case indistinguishable from the opinions and involving the same judge, the Honorable Daniel Dawson, the appeals court reversed and remanded for a new hearing on notice to the parents because the support order had been entered without notice.201 The circumstances under which the

188. FLA. STAT. § 63.042.
189. 929 So. 2d 1164 (Fla. 5th Dist. Ct. App. 2006).
190. Id.
191. Id. (citing Wakeman v. Dixon, 921 So. 2d 669 (Fla. 1st Dist. Ct. App. 2006)).
192. Id. at 1165.
193. See M.W. v. Davis (M.W. I), 756 So. 2d 90 (Fla. 2000).
194. Id.
195. Id. at 109.
196. 890 So. 2d 337 (Fla. 2d Dist. Ct. App. 2004).
197. Id. at 339.
198. Id. at 340.
200. 882 So. 2d 491 (Fla. 5th Dist. Ct. App. 2004).
201. Id. at 493; see R.M. v. Dep’t of Child. & Fams., 877 So. 2d 797 (Fla. 5th Dist. Ct. App. 2004); L.O. v. Dep’t of Child. & Fams., 876 So. 2d 1292 (Fla. 5th Dist. Ct. App. 2004).
payment orders were made are remarkable. As a matter of administrative convenience, they were “entered under [a] separate case number in the domestic relations division, not in the dependency” division by Judge Dawson.\textsuperscript{202} As the appeals court noted, it is possible for the court to enter a support order other than through Chapter 39.\textsuperscript{203} But to do so, without notice to the parent, some seventy years after the seminal United States Supreme Court ruling in \textit{Mullane v. Central Hanover Bank & Trust Co.},\textsuperscript{204} which established the due process right to notice and an opportunity to be heard, where the government is involved in a taking of property, is inexplicable.\textsuperscript{205}

The question of whether non-respondent custodians are entitled to payment of attorneys fees in a dependency proceeding was before the Fifth District Court of Appeal in \textit{Department of Children & Families v. H.G.}.\textsuperscript{206} A child with multiple developmental and emotional problems was in the care of his uncle and aunt, his mother having died and his father having been incarcerated for most of the child’s life.\textsuperscript{207} When the aunt and uncle could no longer care for the boy and because he needed residential care, DCF commenced a dependency proceeding in which the custodians were notified but not named as respondents.\textsuperscript{208} The custodians hired a lawyer for whom they later sought payment.\textsuperscript{209} The appeals court overturned the trial court’s award of attorney’s fees.\textsuperscript{210} It held that the custodians were merely participants in the proceeding and not parties.\textsuperscript{211} Only parties are statutorily authorized to seek fees.\textsuperscript{212}

A question involving the application of the constitutional right to confrontation and cross-examination of one’s accuser in a dependency court was before the Third District Court of Appeal in \textit{A.B. v. Department of Children & Families Services}.\textsuperscript{213} The mother was charged with neglect for failure “to protect her [fifteen-year-old daughter] from the stepfather’s sexual and physical abuse.”\textsuperscript{214} The child testified by deposition.\textsuperscript{215} The appeals court

\begin{itemize}
\item \textsuperscript{202} \textit{D.W.}, 882 So. 2d at 493.
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} 339 U.S. 306 (1950).
\item \textsuperscript{205} \textit{Id.} at 320.
\item \textsuperscript{206} 922 So. 2d 1072 (Fla. 5th Dist. Ct. App. 2006).
\item \textsuperscript{207} \textit{Id.} at 1073.
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id.} at 1075.
\item \textsuperscript{211} \textit{H.G.}, 922 So. 2d at 1075.
\item \textsuperscript{212} \textit{Id.} (citing FLA. STAT. §§ 39.01(49), 57.105 (2006)).
\item \textsuperscript{213} 901 So. 2d 324 (Fla. 3d Dist. Ct. App. 2005).
\item \textsuperscript{214} \textit{Id.} at 325.
\end{itemize}
rejected the mother’s constitutional claim for two reasons.\textsuperscript{216} First, it held the dependency proceeding is a civil rather than criminal proceeding and, therefore, the Sixth Amendment right to confrontation did not apply.\textsuperscript{217} Second, “the [respondent’s] counsel was given [the] opportunity to cross-examine the child” at the deposition.\textsuperscript{218}

IV. PROSPECTIVE ABUSE AND NEGLECT

Florida courts continue to be faced with vexing issues related to the interpretation of the Supreme Court of Florida’s 1991 opinion in \textit{Padgett v. Department of Health \\ \\ & Rehabilitative Services},\textsuperscript{219} in which the Court held that a trial court may constitutionally terminate parental rights to a child who had not yet been abused or neglected based upon past abuse by the parent of another child.\textsuperscript{220} In \textit{K.A. v. Department of Children \\ & Family Services},\textsuperscript{221} the Second District Court of Appeal affirmed the termination of parental rights to a child who had been the subject of egregious abuse, but reversed as to two older siblings on grounds that there was no competent, substantial evidence that the parent posed a substantial risk of significant harm to those children.\textsuperscript{222} The court found “no nexus or predictive relationship between the past abuse of the infant . . . and prospective abuse of the older children,” under a test set forth in a number of earlier intermediate appellate court opinions.\textsuperscript{223} In so doing, however, the court recognized a conflict among the district courts of appeal involving the proper analytic framework for determining whether or not another child may become a victim of prospective abuse.\textsuperscript{224} It commented upon the difference between the Fifth District view that allows a presumption that past egregious abuse of one child is predictive of future abuse of another child\textsuperscript{225} and the Fourth District position that a pre-

\begin{thebibliography}{99}
\bibitem{215} \textit{Id.; see} FLA. R. JUV. P. 8.245(g)(3)(B)(ii) (providing that someone who is unavailable because he or she lives more than 100 miles from the place of hearing or is out of state may give testimonial evidence by deposition).
\bibitem{216} \textit{A.B.}, 901 So. 2d at 326–27.
\bibitem{217} \textit{Id.}
\bibitem{218} \textit{Id. at} 327.
\bibitem{219} 577 So. 2d 565 (Fla. 1991).
\bibitem{220} \textit{Id. at} 571.
\bibitem{221} 880 So. 2d 705 (Fla. 2d Dist. Ct. App. 2004).
\bibitem{222} \textit{Id. at} 710.
\bibitem{223} \textit{Id. at} 709 (citing \textit{A.D. (In re G.D.) v. Dep’t of Child. \\ & Fam. Servs.}, 870 So. 2d 235, 238 (Fla. 2d Dist. Ct. App. 2004)).
\bibitem{224} \textit{Id.}
\bibitem{225} \textit{Id.; see also} Dep’t of Child. \\ & Fam. Servs. v. B.B., 824 So. 2d 1000, 1007 (Fla. 5th Dist. Ct. App. 2002); \textit{A.B. v. Dep’t of Child. \\ & Fam. Servs.}, 816 So. 2d 684 (Fla. 5th Dist. Ct. App. 2002).
\end{thebibliography}
sumption is unconstitutional "because it relieves the state of its burden to
demonstrate that the reunification of [a] parent and child poses a substantial
risk of harm to that child."226 The court in K.A. did not reach this question,
because applying either test, it concluded, the State had not met its burden of
showing that the parent posed a substantial risk of significant harm to the two
older children, and thus far the trial court's position was not found to be er-
roneous.227

The issue referred to by the appellate court in K.A. on the question of
proof in a termination of parental rights case involving harm to one child
serving as the basis for a claim involving a second child finally reached the
Supreme Court of Florida in Florida Department of Children & Families v.
F.L. (F.L. II)228 The Court analyzed the statute, finding it constitutional, but
reversed the Fourth District opinion on the grounds that the State must prove,
in such a case, both prior involuntary termination to a sibling and "a substan-
tial risk of significant harm to the current child."229 The opinion, over a dis-
sent by Justice Weld with which Justice Cantero concurred, interpreted
Padgett in light of the 1998 amendment to Chapter 39 as remaining un-
changed in terms of its requirements.230 Thus, in addition to being obligated
to prove both a prior involuntary termination of the parental rights for a sib-
ling and a substantial risk of significant harm to the child before the court,
the State must also prove that termination of parental rights is the least re-
strictive methodology to protect the child from harm.231 The Court explained
that egregious abuse and neglect of another child tends to indicate a greater
risk of harm to the current child, while the amount of time that has passed
since the prior involuntary termination is also relevant.232 Evidence of
change of circumstances of the parent since the prior involuntary termination
was also viewed by the court as being significant as past conduct necessarily
has some predictive value regarding the parent's future conduct.233 Finally,
the court emphasized that the parent was "not required to show . . . changed
circumstances to avoid a termination of rights under section 39.806(1)(i)."234

226. K.A. (In re K.A.), 880 So. 2d at 709 n.1 (citing F.L. v. Dep't of Child. & Fams. (F.L.
I), 849 So. 2d 1114 (Fla. 4th Dist. Ct. App. 2003)).
227. Id. at 709.
228. 880 So. 2d 602 (Fla. 2004).
229. Id. at 611.
230. Id. at 609.
231. Id. at 610.
232. Id.
233. F.L. II, 880 So. 2d at 610.
234. Id.
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Incarceration is another ground for termination of parental rights in Florida. Interpretation of the termination statute in the context of the parent serving a prison sentence was before the Supreme Court of Florida in the fall of 2004. The certified conflict issue before the Court was whether the incarceration provision, requiring a parent to be incarcerated for a substantial portion of the period of time before the child obtains the age of eighteen, requires consideration of the entire period of incarceration or only the period to be served after the termination petition has been filed. In B.C. v. Department of Children & Families (B.C. II), the Supreme Court of Florida held that only the remaining period of incarceration is the appropriate standard. Applying principles of statutory construction, and over a dissent by Justice Wells, the Court applied a narrow interpretation of the statutory language and a constitutionally-required focus on future harm to the child.

The second case involving egregious conduct as grounds for termination of parental rights was D.A.D. (In re D.A.D. II) v. Department of Children & Family Services. In that case, the child’s father strangled a man to death in the family home while the mother and children were visiting relatives in another state. There was also evidence that “the [f]ather had shot his brother-in-law in an unsuccessful murder-for-hire plot,” although he was not charged with this attempt. This evidence was presented at the adjudicatory hearing as well as evidence of what was described by the court as the children’s “long [and] harrowing relationship with [their] [f]ather.” The children’s “[f]ather was an alcoholic and [a] cocaine-abuser with an extensive criminal record who was frequently jailed” and “never contributed money [to] the household expenses” as well as an individual who exhibited “jealous and controlling behavior toward the [m]other.” The appellate court held that the “[f]ather’s homicidal conduct was deplorable and outrageous.” However, there was inadequate evidence to establish a “sufficient

236. B.C. v. Dep’t of Child. & Fams. (B.C. II), 887 So. 2d 1046 (Fla. 2004).
237. Id. at 1051.
239. B.C. II, 887 So. 2d at 1055.
240. See id. at 1057.
241. Id. at 1034 (Fla. 2d Dist. Ct. App. 2005).
242. Id. at 1036.
243. Id.
244. Id.
245. Id. at 1038.
nexus between [that] conduct and the specific harm to the children” in support of an egregious conduct finding. Rather, the appellate court held the father’s conduct which amounted to “an unrelenting pattern of abuse,” neglect, and abandonment, did constitute egregious conduct. Therefore, the court affirmed the termination of parental rights.

As noted previously in a survey article in this law review, the parent’s failure to appear at a hearing in a termination of parental rights case can result in a default and a termination of parental rights. The issue arose again in Department of Children & Families v. A.S. In an opinion which conflicted with courts in other districts, the Fifth District held that the failure to appear by a parent does not constitute consent to termination under one provision of the Florida Statutes rendering proceedings involuntary. There are two separate provisions of the Florida Statutes—one governing involuntary termination and the other governing voluntary termination. The court engaged in a process of statutory construction and concluded that the legislature did not intend that consent under the one provision governing an involuntary proceeding be turned into one that is voluntary. For these reasons, it reversed noting its conflict with the Second District.

A second failure to appear case resulting in termination of parental rights is E.A. v. Department of Children & Families Services. In this case, the parent arrived at the termination hearing about twenty-two minutes after the testimony began, explaining that he had been “ensnarled in a traffic jam resulting from an automobile accident.” He further indicated that he had called the court and left a message relating to his tardiness. The trial court, nonetheless, determined that the respondent had been defaulted and would not be permitted to participate in the proceeding. Under Florida law, if the parent fails to appear at the appropriate time and place, both statute and the rules of juvenile procedure give the court the ability to consider the parent’s

247. Id. at 1039.
248. Id. at 1041.
250. 927 So. 2d 204 (Fla. 5th Dist. Ct. App. 2006).
251. Id. at 205.
254. Id. at 209 (citing In re A.D.C., 854 So. 2d 720 (Fla. 2d Dist. Ct. App. 2002); and In re T.S., 855 So. 2d 679 (Fla. 2d Dist. Ct. App. 2003)).
255. 894 So. 2d 1049 (Fla. 5th Dist Ct. App. 2005).
256. Id. at 1051.
257. Id.
258. Id.
absence to constitute consent to the termination of his or her parental rights. However, referring to prior case law, the appellate court in *E.A.* held that the purpose of the rule was "not to terminate parental rights on a 'gotcha' basis." Concluding that implied consent based upon a late arrival to a hearing should be disfavored, the appellate court reversed.

In the event a parent fails to appear and a termination is entered, a motion to vacate a default judgment terminating parental rights is appropriate, and if the parent has a meritorious defense, the motion should be granted. This matter arose in *E.S. v. Department of Children & Family Services.* Both the mother and her appointed counsel were absent at the final hearing on termination of her parental rights. The next day the mother moved to set aside the default on the grounds that she was unable to attend the hearing because she had medical justifications and that appointed counsel had advised the judge's chambers that he was in another hearing and was therefore unable to be in attendance at the present trial. Although the appellate court shared the trial court's skepticism about the sufficiency of the mother's medical excuse, the court held that the mother had acted with due diligence in filing the motion and given the fact that the mother had attended all of the previous hearings in the case, she should have been permitted to testify in opposition to the argument that her medical excuse was insufficient and she had no meritorious defense. For these reasons the appellate court reversed.

In *In re T.B. v. Department of Children & Family Services,* the trial court granted termination of parental rights and denied a parent's request for a continuance resulting in a failure to appear at the adjudicatory hearing. The appellate court concluded that the trial court abused its discretion in not granting the father's request for a continuance. The father had driven nine hours to this hearing, but could not attend on the next day, which was when

259. *Id.* (citing *B.H. v. Dep't of Child. & Fams.*, 882 So. 2d 1099, 1100 (Fla. 4th Dist. Ct. App. 2004)).
260. *E.A.*, 894 So. 2d at 1051.
261. *Id.* at 1051–52.
263. *Id.* at 493.
264. *Id.* at 494.
265. *Id.*
266. *Id.* at 496.
267. *E.S.*, 878 So. 2d at 497.
269. *Id.* at 171.
270. *Id.* at 174.
the case was rescheduled. 271 The court "ordered the father to appear the next
day before [a different judge], and the father [had] responded that he could
not." 272 The appellate court reversed on the grounds that the trial court
"placed more emphasis on judicial econom[ic] . . . convenience than on the
father's right to [care for] his child and . . . have his day in court," 273 which
constituted reversible error. 274

One of the basic grounds for termination of parental rights is abandon-
ment. 275 Another is failure to comply with the case plan. 276 Regardless of
the grounds for termination of parental rights, the Department of Children
and Family Services must plead the correct grounds and then offer proof. 277
In T.M v. Department of Children & Families (T.M II), 278 the Department
alleged that a father failed to comply with the case plan and his continued
involvement with the child threatened the child's life and safety. 279 The ap-
pellate court found that the Department had not proved either ground, and
thus a court finding of abandonment must be reversed because that was not
one of the grounds pleaded. 280

The right to counsel for parents in dependency and termination of pa-
rental rights proceedings in Florida is governed by statute. 281 The United
States Supreme Court has never held that there is an absolute right to counsel
for parents even in termination of parental rights cases. 282 Furthermore, the
Supreme Court of Florida has held that the state constitutional due process
clause does not create a right to appointed counsel in termination of parental
rights cases. 283 The Court has spoken about the effectiveness of counsel in a
dependency context. 284 That topic has been the subject of discussion in sur-
vey articles in this law review 285 and in an incisive student article. 286

References:

271. Id. at 171.
272. Id.
273. T.B., 920 So. 2d at 174.
274. Id. at 171.
276. Id. § 39.806(1)(c).
277. See T.M v. Dep't of Child. & Fams. (T.M II), 905 So. 2d 993, 998 (Fla. 4th Dist. Ct.
App. 2005).
278. Id. at 993.
279. Id. at 995.
280. Id. at 998–99.
283. In re D.B., 385 So. 2d 83, 87 (Fla. 1980).
286. Michele R. Forte, Making the Case for Effective Assistance of Counsel in Involuntary
question left unanswered by the Supreme Court of Florida was whether the statutory right to counsel for parents in TPR cases would generate a claim of ineffective assistance of counsel. That issue was before the Fourth District Court of Appeal in *E.T. v. State*.\(^{287}\) In a detailed opinion by Judge May with a partial dissent by Judge Stevenson, the court held as a technical matter that the parent, who filed a petition for a writ of habeas corpus had used the incorrect methodology and instead should have been taken on appeal.\(^{288}\) The court also certified the question of whether Florida recognizes a claim of ineffective assistance of counsel arising from a lawyer's representation of a parent in a termination of parental rights case and what procedures should be followed to pursue such a claim.\(^{289}\) Judge Stevenson dissented, writing that he would hold that Florida's due process clause does guarantee a right to meaningful and effective assistance of counsel in a TPR proceeding.\(^{290}\)

V. ADOPTION

The Supreme Court of Florida has recently spoken on the issue of the need of consent by the Department of Children and Family Services to adoption proceedings in *B.Y v. Department of Children & Families*,\(^{291}\) clearing up a conflict between the district courts of appeal.\(^{292}\) The Court reviewed the state statutes governing child welfare matters and analyzed the ongoing jurisdiction and obligations of the trial court.\(^{293}\) The Court reviewed the Florida Statutes governing consent to adoption, finding that a court may finalize an adoption without consent of the Department if such consent is unreasonably withheld.\(^{294}\) Thus, given the legislative mandates for the Court's continued jurisdiction to advance children's best interests, the Court has the authority to grant the adoption without the consent of the Department when such consent is unreasonably withheld.

The First District Court of Appeal recently held that there is a right to counsel for a parent in a Chapter 63 adoption case predicated upon the adverse parent's right to defend a petition to terminate parental rights pursuant to that chapter.\(^{295}\) In *G.C. v. W.J.*,\(^{296}\) the appellate court reversed the trial

\(^{287}\) 930 So. 2d 721 (Fla. 4th Dist. Ct. App. 2006).
\(^{288}\) *Id.* at 729.
\(^{289}\) *Id.* at 727 n.2, 729 (thirty-one states have addressed the issue); 1 MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT ¶ 4.06[1][c] (2006).
\(^{290}\) 887 So. 2d 1253 (Fla. 2004).
\(^{292}\) *Id.* at 1254.
\(^{293}\) *Id.* at 1255–56.
\(^{294}\) *Id.* at 1257.
court holding that while Chapter 63 does not speak to express appointment of counsel, the entitlement was inherent or fundamental where parental rights are subject to termination.\textsuperscript{297}

The issue of how courts hearing adoption cases and termination of parental rights cases relate to each other was before the appellate court in \textit{In re S.N.W.}\textsuperscript{298} The specific issue was whether the circuit court was required by statute to permit an adoption agency to intervene in a dependency proceeding.\textsuperscript{299} Under the facts of the case, a dependency proceeding was brought against the birth mother who thereafter, independently, and without notice to DCF, contacted an adoption agency and adoption proceedings commenced.\textsuperscript{300} “Prior to the adjudicatory hearing,” the adoption agency filed a petition to terminate parental rights, but the petition was not filed within the dependency case.\textsuperscript{301} While the TPR proceeding was pending, the agency “filed a request to intervene in the dependency action, . . . to dismiss [that] action, and [to] terminate the jurisdiction of the dependency court.”\textsuperscript{302} Although the issue was not strictly one of subject matter jurisdiction, the appellate court held that “[t]he court in which the adoption proceeding [was] pending and the court in which the dependency proceeding [was] pending are both circuit courts with jurisdiction to determine [the] issue[].”\textsuperscript{303} Neither statute nor court opinion mandates how the circuit court may administer the realignment of cases as long as the cases are within the jurisdiction of the circuit court.\textsuperscript{304} However, Chapter 39 does say that the “orders of [a] dependency court ‘shall take precedence over other custody and visitation orders’ entered” in any other circuit court.\textsuperscript{305} The appellate court concluded that the adoption agency was entitled to intervene in a dependency proceeding pursuant to the adoption law.\textsuperscript{306}

\textsuperscript{296} Id. at 998.
\textsuperscript{297} Id. For a more detailed explanation of the right to counsel for parents in termination of parental rights cases and dependency cases, see discussion \textit{supra} p. 23. \textit{See also} Michael J. Dale, \textit{Providing Counsel to Children in Dependency Cases in Florida}, 25 \textit{NOVA L. REV.} 769, 784 (2001).
\textsuperscript{298} Adoption Miracles, LLC (\textit{In re S.N.W.}) v. S.C.W., 912 So. 2d 368 (Fla. 2d Dist. Ct. App. 2005).
\textsuperscript{299} Id. at 373.
\textsuperscript{300} Id. at 370.
\textsuperscript{301} Id.
\textsuperscript{302} Id. at 371.
\textsuperscript{303} Adoption Miracles, LLC (\textit{In re S.N.W.}), 912 So. 2d at 373–74.
\textsuperscript{304} See \textit{id.} at 372.
\textsuperscript{305} Id. (quoting \textit{FLA. STAT.} § 39.013(4) (2005)).
\textsuperscript{306} Id. at 374.
Finally, in *J.I. v. Department of Children & Family Services*, the appellate court was faced with a procedural issue relating to whether DCF termination of parental rights permanency staffing meetings are subject to the Sunshine Law and whether failure to notify the public, the parents, and the attorneys of such a meeting violates the statute. The court held that the Sunshine Law does not apply to termination of parental rights meetings that are carried out by DCF for the purpose of determining whether to file a petition to terminate the parental rights. The court applied Florida case law, statutes, and the administrative code governing the Sunshine Law, concluding that nothing in the law provides that official action be taken at the staff meeting and further that Chapter 39 contains principles standing for the proposition that all information involving the child is to be confidential.

VI. CURFEW

The issue of juvenile curfews has been before a variety of courts in a variety of jurisdictions for a number of years now. The courts have generally upheld juvenile curfew ordinances where they are narrowly drawn and based upon documented evidence of the need for them to reduce crime. The subject recently reached the Supreme Court of Florida for the second time. The issue in *State v. J.P.* was first, what level of constitutional analysis should be applied to two local Florida ordinances, second, whether the ordinances implicated juveniles’ rights to free speech and assembly, and third, whether the ordinances were narrowly tailored to serve compelling governmental interests and therefore whether they violated the juveniles’ constitutional right to freedom of movement and privacy. First, the Court reaffirmed that strict scrutiny is applied in Florida. Recognizing that a child’s constitutional rights are not absolute, the Court held that the cities’ assertion of a compelling interest in preventing victimization of youngsters can outweigh privacy right for the youngsters during curfew hours if the ordinances are narrowly tailored to achieve that end, and further, that municipalities may have a compelling interest in protecting the juveniles and

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reducing juvenile crime, which would outweigh the juveniles’ right to travel freely during this time period, again, as long as the ordinances are narrowly tailored. 317 Oddly, while the data supporting the compelling governmental interest was challenged by the juveniles, the Court held that statistical data is not necessary, nor is scientific analysis, to show the wisdom of the legislature’s determination. 318 However, the Court concluded that the ordinances were not narrowly drawn because they imposed criminal sanctions for second and subsequent violations, and thus, did not meet strict scrutiny as they were antithetical to the municipalities’ stated interest in protecting the juveniles from victimization. 319 Judge Wells and Judge Cantero dissented at length as to the strict scrutiny standard and other constitutional rights. 320

VII. CONCLUSION

The Supreme Court of Florida has been quite active in dealing with several major issues involving the rights of children including curfews and standards for termination of parental rights, delinquency, and adoption. The intermediate appellate courts have also responded to important issues governing the rights of children. However, in addition, the intermediate appellate courts have continued their longstanding approach to juvenile justice and child welfare cases in which they hold the trial courts strictly accountable for compliance with both constitutional and state statutory obligations. On occasion, the appellate courts have been blunt in their response to errors of the trial courts that the appellate courts viewed as basic and obvious.

317. Id. at 1112–13.
318. J.P., 907 So. 2d at 1117.
319. Id.
320. Id. at 1120–38 (Wells, J. and Cantero, J., dissenting).
RANDOLPH v. GEORGIA: THE BEGINNING OF A NEW ERA IN THIRD-PARTY CONSENT CASES

JASON M. FERGUSON*

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In *Georgia v. Randolph (Randolph III)*, the United States Supreme Court held that law enforcement may not conduct a warrantless search of a premises shared by co-occupants where a physically present co-occupant expresses his or her refusal to consent to the search, even if law enforcement obtains the voluntary consent of another co-occupant of the premises. This article will introduce the historical context of the decision and provide an overview of the *Randolph III* opinion. The article also discusses cases that have addressed the impact of *Randolph III* on the future of third-party consent in the context of the Fourth Amendment of the United States Constitution. In conclusion, the author will offer his own observations regarding the opinion.

II. HISTORICAL BACKGROUND—A REFLECTION ON THE PAST

A. The Fourth Amendment Generally Prohibits Warrantless Searches

The Fourth Amendment of the United States Constitution provides that no person will be subjected to "unreasonable searches and seizures" of their "persons, houses, papers, and effects." Unlike most constitutional amendments, the Fourth Amendment further includes specific language regarding its application, stating, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Consequently, warrantless searches by law enforcement are generally deemed per se unreasonable. With the passage of time, however, courts have carefully loosened the warrant requirement of the Fourth Amendment by carving out a number of limited, well-defined exceptions. Although recognizing that factual circum-

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2. *Id.* at 1518–19.
3. U.S. CONST. amend. IV.
4. *Id.*
6. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (holding evidence of crime will not be suppressed where officers discover the evidence during a warrantless entry of a home in pursuit of a fleeing felon); United States v. Jeffers, 342 U.S. 48, 51 (1951) (explaining that police may enter a home without a warrant where an exceptional circumstance exists); Johnson v. United States, 333 U.S. 10, 14–15 (1948) (asserting that evidence will not...
stances, often of a time-sensitive nature, may justify these exceptions, the United States Supreme Court has been reluctant to infringe upon the protections of the Fourth Amendment that were so specifically outlined by the framers of the United States Constitution.\textsuperscript{7} Thus, the Court has observed, "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."\textsuperscript{8}

B. Valid Consent Is an Exception to the Warrant Requirement of the Fourth Amendment

Beginning in the early 1900s courts began to realize that a warrantless search by law enforcement with the voluntary consent of the property owner could not logically qualify as an "unreasonable" search.\textsuperscript{9} For example, in \textit{United States v. Williams},\textsuperscript{10} officers obtained the permission of a ranch owner to "look the premises over."\textsuperscript{11} While on the premises, the officers located what appeared to be evidence of a moonshine operation.\textsuperscript{12} In upholding the search, the United States District Court for the District of Montana stated, "[t]his search without warrant, but with [the owner's] consent, was not unreasonable."\textsuperscript{13} Armed with this realization, valid consent was later recognized as one of the limited, well-defined exceptions to the warrant requirement of the Fourth Amendment.\textsuperscript{14} Further development of this principle over time would soon reveal that valid consent, as an exception to the freedom from warrantless searches, would become a useful tool for law enforcement and expand to encompass a variety of factual scenarios.

\textsuperscript{7} See Amos v. United States, 255 U.S. 313, 315–16 (1921).
\textsuperscript{8} Johnson, 333 U.S. at 14.
\textsuperscript{10} 295 F. at 220.
\textsuperscript{11} \textit{Id.} at 219.
\textsuperscript{12} \textit{Id.}
\textsuperscript{13} \textit{Id.} at 220.
\textsuperscript{14} Davis v. United States, 328 U.S. 582, 593–94 (1946); Zap v. United States, 328 U.S. 624, 629 (1946), \textit{vacated}, 330 U.S. 800 (1947).
C. **Valid Consent Does Not Require a "Knowing and Intelligent" Waiver of Fourth Amendment Rights by a Defendant**

Given the overwhelming importance of constitutional rights to the American system of justice, the prosecution bears a heavy burden anytime it attempts to prove that an accused has waived one of those rights. 

Specifically, in most circumstances, the prosecution is required to prove that the person waiving a constitutional right knew of both the existence of the right as well as his or her right to refuse to waive the right. Commonly referred to as a "knowing and intelligent waiver," this burden has been applied to a variety of constitutional rights in criminal cases. Therefore, since consent to a warrantless search, at the most basic level, is nothing more than a waiver of a person’s Fourth Amendment rights, does law enforcement have to inform an accused of his or her right to refuse to consent to a search? The United States Supreme Court answered this question in the negative in *Schneckloth v. Bustamonte*.

In *Schneckloth*, evidence was obtained against the defendant during a consensual search of a vehicle. Although both California appellate courts affirmed the defendant's conviction, the defendant pursued a writ of habeas corpus in federal court. Setting aside the district court order denying habeas relief, the United States Court of Appeals for the Ninth Circuit held that the prosecution was required to prove that the person granting consent knew he or she had the right to refuse to waive his or her Fourth Amendment rights. The United States Supreme Court reversed, stating, "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent."

The primary significance of *Schneckloth* was that the Supreme Court distinguished the protections of the Fourth Amendment from other constitu-

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16. *Id.*
20. *Id.* at 220.
21. *Id.* at 221.
22. *Id.* at 221–22.
23. *Id.* at 227.
tional "trial rights," such as the right to counsel, which usually require a knowing and intelligent waiver. 24 However, the practical, common sense reasoning utilized by the Court in reaching this conclusion demonstrated the Court's willingness to expand, rather than further restrict, the principles surrounding consent searches except in cases involving coercion or threats. For example, the Court noted that the burden imposed on the prosecution by the Ninth Circuit decision would be unworkable in real world application, as the prosecution would seldom be capable of proving that an unprovoked, consenting defendant knew of his/her right to refuse consent. 25 In so reasoning, the Court stated, "[a]ny defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse consent." 26 Additionally, the Court observed that it would be completely "impractical" 27 to impose a requirement that law enforcement provide a defendant with a detailed warning in consent search cases. 28 Observing that consent searches often occur under the time pressures of active investigations and in such intimate places as the home, the Court stated, "[t]hese situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights." 29

D. Valid Consent May Be Effectively Obtained from a Variety of Persons Other than the Defendant

In the simplest of cases involving consent searches, a property owner has voluntarily acquiesced directly to law enforcement officers, in their presence, to a warrantless search and evidence unearthed during the search is used against the property owner. 30 In such cases, it should come as no surprise that evidence may be used against the property owner since it is precisely that property owner who has waived his/her very own Fourth Amendment rights by virtue of his/her very own consent. 31 However, the evolution of legal principles over time is seldom as elementary as the reasoning found in the simplest of cases, as varying factual nuances consistently challenge the

25. Id. at 230.
26. Id.
27. Id. at 231.
28. Id.
31. Id.
complacency of seemingly well-settled doctrines. The development of case law involving consent searches provides an excellent example of this constant dilemma.

As more cases involving consent searches began reaching appellate courts, it soon became clear that joint ownership or use of property by multiple persons would present unique questions regarding the effectiveness of consent by one person to the detriment of others. Specifically, courts were faced with the question of whether, via consent, an individual may waive the Fourth Amendment rights of another individual, based upon the fact that the individuals jointly share use and control of the property at issue. For example, in Stein v. United States, a wife discovered that her husband possessed and used opium in their home. The couple later separated with the husband moving to his mother’s home and the wife eventually moving into a friend’s home. The wife later returned to the marital home with federal narcotics agents and permitted the agents to search the home. The agents discovered drug-related evidence that was used against the husband in a prosecution for drug crimes. In rejecting the husband’s argument that the search was not permitted by the Fourth Amendment, the Ninth Circuit Court of Appeals held that the wife could unilaterally permit warrantless entry by law enforcement without the consent of her husband. The court relied heavily upon the fact that the husband and wife both had an equal right to possess the home, stating that “[t]he right of [the wife] to enter the house cannot be seriously questioned.”

As case law continued to evolve, the authority of persons having equal rights of possession and control of property to authorize a warrantless search to the detriment of other co-occupants or co-owners was further extended to encompass an assortment of factual scenarios. Some courts seemed to fo-

32. See, e.g., Cofer v. United States, 37 F.2d 677, 679 (5th Cir. 1930) (addressing whether a wife’s consent was binding on her husband where police coerced her consent).
34. 166 F.2d 851 (9th Cir. 1948).
35. Id. at 852.
36. Id. at 853.
37. Id.
38. Id.
39. Stein, 166 F.2d at 855.
40. Id.
41. See, e.g., Gurleski v. United States, 405 F.2d 253, 260–63 (5th Cir. 1968) (holding that consent of a joint user of an automobile is effective against other users); United States v. Eldridge, 302 F.2d 463, 465 (4th Cir. 1962) (holding that consent of a person who borrows an automobile temporarily, while the automobile is in that person’s possession, is effective against the actual owner); see Teasley v. United States, 292 F.2d 460, 464 (9th Cir. 1961) (holding that joint occupant of an apartment may consent to a warrantless search to the detri-
cus their reasoning on the fact that the person authorizing the warrantless search possessed the same right to authorize entry by law enforcement as the person against whom the evidence was being used.\textsuperscript{42} However, in 1969, the United States Supreme Court articulated an additional justification for permitting warrantless third-party consent searches, which focused on the actions of the person against whom evidence is being used in assuming the risk that other persons may consent to warrantless searches by police.\textsuperscript{43}

In \textit{Frazier v. Cupp},\textsuperscript{44} the defendant jointly used a duffel bag with his cousin.\textsuperscript{45} The cousin permitted a warrantless search of the bag by law enforcement and evidence was discovered linking the defendant to a murder.\textsuperscript{46} In a unanimous opinion written by Justice Thurgood Marshall, the United States Supreme Court "dismissed rather quickly,"\textsuperscript{47} the defendant's contention that the search was not authorized by finding that the defendant, as the person against whom the evidence was being used, maintained the duffel bag jointly with his cousin and left the bag in his cousin's home.\textsuperscript{48} Consequently, the Court stated that the defendant, "must be taken to have assumed the risk that [his cousin] would allow someone else to look inside."\textsuperscript{49} The Court's discussion in \textit{Frazier} regarding third-party consent consumed approximately one page of the published opinion of the Court and was by no means an exhaustive analysis.\textsuperscript{50} However, in 1974, the Court would take the liberty to create a more well-defined standard in third-party consent cases in \textit{United States v. Matlock}.\textsuperscript{51}

In \textit{Matlock}, the defendant was arrested in the yard of a residence he occupied with other persons for the crime of bank robbery.\textsuperscript{52} The arresting officers were aware that the defendant lived in the residence, however, the officers did not request consent from the defendant to search the residence.\textsuperscript{53} Instead, the officers approached an individual named Gayle Graff at the door.

\textsuperscript{42} See \textit{Eldridge}, 302 F.2d at 467–68; \textit{Sferas}, 210 F.2d at 74–75.
\textsuperscript{44} Id. at 731.
\textsuperscript{45} Id. at 740.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} \textit{Frazier}, 394 U.S. at 740.
\textsuperscript{49} Id.
\textsuperscript{50} See generally id.
\textsuperscript{51} 415 U.S. 164 (1974).
\textsuperscript{52} Id. at 166.
\textsuperscript{53} Id.
of the residence who ultimately permitted the officers to come inside.54 Once inside, Ms. Graff consented to a warrantless search of the home, including a bedroom that she shared jointly with the defendant.55 The officers obtained evidence against the defendant during the search that was used by the prosecution.56 The Court held that valid consent may be obtained from someone other than the defendant, “who possessed common authority over or other sufficient relationship to the premises.”57 Although the Court remanded the case for further findings consistent with the opinion,58 the Court specifically defined “common authority”59 as not being represented by the person’s interest in the premises searched in the context of property law but instead, the Court stated that such authority:

rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.60

As a result, the Court defined “common authority” to consent based upon two factors: first, based upon the inherent right of the co-occupant granting the consent to do so; and second, the actions or inactions of the defendant against whom evidence is being used in “assuming the risk” that his/her co-occupant will grant consent.61

The Matlock decision represents the first time that the United States Supreme Court established significant, guiding principles regarding when one person’s consent is valid to the detriment of another. Although questions would soon arise regarding the scope of one’s consent under Matlock,62 the opinion reached landmark status as its holding began to be recognized and

54. Id.
55. Id.
57. Id. at 171.
58. Id. at 178.
59. Id. at 171 n.7.
60. Id.
61. Matlock, 415 U.S. at 171 n.7.
applied throughout the federal system. However, the *Matlock* decision specifically reserved the question of whether a warrantless search is permissible when officers reasonably believe that they are obtaining consent from an individual with "common authority" over the premises but, in fact, the person does not have such authority. The Court would not address this issue until approximately sixteen years later in *Illinois v. Rodriguez*.

In *Rodriguez*, police in Chicago were called to the home of an individual named Dorothy Jackson. Upon arrival, the officers met Ms. Jackson's daughter, Gail Fischer, who appeared to be the victim of a physical attack. Fischer informed the officers that Rodriguez had beaten her up earlier in the day at his apartment, which was also located in Chicago, but on a different street. Fischer then traveled with the officers to the apartment in order to arrest Rodriguez; however, the officers did not obtain a search warrant or an arrest warrant. Upon arrival, Fischer entered the apartment using a key and permitted the officers to come inside.

Unknown to the officers at the time, Fischer had taken the key without Rodriguez's permission, and had moved out of the apartment with her children approximately one month prior to the incident. Fischer's name was not on the lease for the apartment, she paid none of the rent for the apartment, and she was not permitted to have guests in the apartment without Rodriguez's permission. However, Fischer referred to the apartment as "our[s]" while conversing with the officers, and indicated that she had clothing and furniture inside the apartment.

Once inside, the officers discovered evidence of drug-related activity in the living room and bedroom where Rodriguez was actually present and sleeping during the search. Rodriguez was arrested on drug related charges and subsequently moved to suppress the evidence found inside his apart-

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64. See *Matlock*, 415 U.S. at 171 n.7.
66. *Id.* at 179.
67. *Id.*
68. *Id.*
69. *Id.* at 180.
71. *Id.* at 181.
72. *Id.*
73. *Id.* at 179.
74. *Id.*
ment. Finding that Fischer was nothing more than an "infrequent visitor" incapable of granting consent to search the apartment, the trial court granted Rodriguez's motion. The Appellate Court of Illinois affirmed, concluding that the officers' belief, no matter how reasonable, that consent was valid is of no consequence to a Fourth Amendment analysis. The State of Illinois's petition for review by the Supreme Court of Illinois was denied and the case ended up before the United States Supreme Court.

The Court began its opinion by expressly stating that the State of Illinois had not met its burden of showing that Fischer possessed "common authority" over the apartment necessary to authorize her to grant consent to the detriment of Rodriguez since she was no longer a joint occupant.

Nevertheless, the Court held that valid consent may be obtained from a third-party where officers reasonably, though erroneously, believed that the consenting third party possesses common authority over the premises. In spite of the fact that Fischer was not a joint occupant of the apartment, the Court reasoned that all that is required in justifying a warrantless search based upon third-party consent is that the police officers make reasonable conclusions from the facts. In determining if police conduct is reasonable, the Court observed that the Fourth Amendment does not require that an officer's assessment always be factually accurate, but only that the officer's assessment of the facts at issue be objectively reasonable.

76. Id.
77. Id.
78. Id.
79. Id.
80. See Rodriguez, 497 U.S. at 188–89.
81. Id. at 180–81.
82. Id. at 181 (citing United States v. Matlock, 415 U.S. 164, 171 n.7 (1974)).
83. Id. at 186–88.
84. Id. at 186.
85. Rodriguez, 497 U.S. at 188.
E. Prior to Randolph, Valid Consent Could Be Effectively Obtained from Persons Other than the Defendant, Even If the Defendant Was Present at the Time of the Warrantless Search and Objected to the Search

Once legally identified as an exception to the Fourth Amendment warrant requirement, valid consent would expand to permit third parties having actual authority, as well as apparent authority, over property to permit law enforcement to conduct a warrantless search to the detriment of a criminal defendant. However, if such a third party consents to a warrantless search but the defendant, having equal authority over the property and present at the time of the search, objects to the search, may the police proceed without a warrant? Approximately thirty-two years after Matlock, and sixteen years after Rodriguez, the United States Supreme Court would answer this question decisively in the negative. Prior to Randolph III, however, every federal circuit to address this question consistently reached the opposite result with little debate.

In allowing warrantless searches under these circumstances, federal courts relied almost exclusively on the standard set forth in Matlock. Some federal courts addressed the issue fairly briefly with very little substantive analysis. Utilizing a more extensive analysis, however, other courts expanded the application of the Matlock standard to provide that a person with common authority over property may permit a warrantless search by law enforcement even if the defendant has equal authority over the property, is present at the time of the search, and specifically objects to the search. In so reasoning, some courts concluded that when a defendant assumes the risk

86. Davis v. United States, 328 U.S. 582, 593–94 (1946); Zap v. United States, 328 U.S. 624, 630 (1946).
87. Matlock, 415 U.S. at 171.
90. Id. at 1520–21.
91. See United States v. Rith, 164 F.3d 1323, 1328 (10th Cir. 1999); United States v. Morning, 64 F.3d 531, 536 (9th Cir. 1995); Lenz v. Winburn, 51 F.3d 1540, 1548 (11th Cir. 1995); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992); United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981) (per curiam); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979) (per curiam); United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977).
92. See Rith, 164 F.3d at 1328; Morning, 64 F.3d at 534–36; Lenz, 51 F.3d at 1548; Donlin, 982 F.2d at 33; Sumlin, 567 F.2d at 687–88.
93. See Lenz, 51 F.3d at 1548; Donlin, 982 F.2d at 33; Baldwin, 644 F.2d at 383.
94. See Rith, 164 F.3d at 1328; Morning, 64 F.3d at 534–36; Lenz, 51 F.3d at 1548; Donlin, 982 F.2d at 33; Sumlin, 567 F.2d 684, 687–88.
that others will consent to a warrantless search by cohabiting with other people, he or she essentially waives his or her expectation of privacy to a limited extent.\textsuperscript{95} By way of example, in United States v. Rith,\textsuperscript{96} the Tenth Circuit held that a son, who lived in his parent’s home, could not revoke the previously obtained consent of his parents to a warrantless search, even though the revocation was made contemporaneous to the search.\textsuperscript{97} The court stated,

Under Matlock and its interpretive progeny, [the son] had no expectation of privacy that negated his parents’ consent to a search of their home. To hold otherwise would undermine the gravamen of Matlock: “any of the co-habitants has the right to permit the inspection \textit{in his own right} and \ldots the others have assumed the risk that one of their number might permit the common area to be searched.”\textsuperscript{98}

The majority of state appellate courts addressing this issue concurred with the federal courts’ conclusion.\textsuperscript{99} However, a small minority of state appellate courts, including the Fourth District Court of Appeal of Florida reached a contrary result.\textsuperscript{100} Of the courts subscribing to this view, the Supreme Court of Washington provided the most thorough analysis.\textsuperscript{101} In State v. Leach,\textsuperscript{102} the defendant’s girlfriend consented to the search of an office that she and the defendant possessed equal control over.\textsuperscript{103} The defendant was present at the time of the search but the record in Leach did not indicate that he actually objected to the search.\textsuperscript{104} The court held that the girlfriend’s

\textsuperscript{95} Rith, 164 F.3d at 1328; Morning, 64 F.3d at 536; Sumlin, 567 F.2d at 688.
\textsuperscript{96} 164 F.3d at 1323.
\textsuperscript{97} Id. at 1328.
\textsuperscript{98} Id. (quoting United States v. Matlock, 415 U.S. 164, 171 n.7 (1974)); see also Morning, 64 F.3d at 536 (citing Matlock, 415 U.S. at 171 n.7) (stating that “a defendant cannot expect sole exclusionary authority unless he lives alone”); Sumlin, 567 F.2d at 688 (stating with regard to a joint occupants ability to object to a warrantless search consented to by a co-occupant that “[t]here is no reasonable expectation of privacy to be protected under such circumstances”).
\textsuperscript{101} See Leach, 782 P.2d at 1038–40.
\textsuperscript{102} Id. at 1085.
\textsuperscript{103} Id. at 1036.
\textsuperscript{104} Id. at 1036–37.
consent did not justify a warrantless search.\textsuperscript{105} The court distinguished \textit{Matlock}, stating that the \textit{Matlock} standard only applied to "absent, nonconsenting" defendants.\textsuperscript{106} Since the defendant in \textit{Leach} was present at the time of the search, the court found the warrantless entry by police to be unlawful in spite of the girlfriend's consent.\textsuperscript{107}

\section*{III. \textsc{Randolph v. Georgia}—The Present State of the Law}

In late May 2001, "Scott Randolph and his wife, Janet [Randolph], separated."\textsuperscript{108} Prior to this separation, the couple resided in a home located in Americus, Georgia that they rented from Scott Randolph's father, Edward Randolph.\textsuperscript{109} Both Mr. and Mrs. Randolph considered the home to be their marital residence.\textsuperscript{110} However, when the couple separated, Mrs. Randolph traveled to Canada to stay with her parents, taking the couple's child and some belongings with her.\textsuperscript{111} Mr. Randolph remained at the home in Americus, Georgia.\textsuperscript{112} For reasons unknown, Mrs. Randolph returned to the home in Americus, Georgia in early July 2001.\textsuperscript{113}

At approximately 9:00 a.m. on July 6, 2001,\textsuperscript{114} Mrs. Randolph requested that local police come to the home regarding a domestic dispute with Mr. Randolph.\textsuperscript{115} Upon arrival, Mrs. Randolph complained that Mr. Randolph had taken the couple's child to a neighbor's home following their dispute.\textsuperscript{116} Not long after the police arrived, Mr. Randolph returned to the home stating that he had taken the child to a neighbor's home fearing that Mrs. Randolph may attempt to flee to Canada with the child again.\textsuperscript{117} Accusations of misconduct soon erupted from both Mr. Randolph and Mrs.

\begin{footnotes}
\item[105] \textit{See id.} at 1040.
\item[106] \textit{Leach}, 782 P.2d at 1038 (quoting United States \textit{v. Matlock}, 415 U.S. 164, 170 (1974)).
\item[107] \textit{Id.} at 1040.
\item[110] Respondent's Response to Petition for Certiorari, \textit{supra} note 109, at 2.
\item[111] \textit{Randolph III}, 547 U.S. 103, 126 S. Ct. at 1519.
\item[113] \textit{Randolph III}, 547 U.S. 103, 126 S. Ct. at 1519.
\item[114] \textit{Randolph I}, 590 S.E.2d at 836.
\item[115] \textit{Randolph III}, 547 U.S. 103, 126 S. Ct. at 1519.
\item[116] \textit{Id.}
\item[117] \textit{Id.}
\end{footnotes}
Mrs. Randolph accused Mr. Randolph of using substantial quantities of cocaine, thus resulting in financial problems for the couple. Mr. Randolph denied the allegations and, in retaliation, alleged that it was Mrs. Randolph who abused both drugs and alcohol. In fact, at subsequent hearings in the case, Mr. Randolph would accuse Mrs. Randolph and an unknown male companion of consuming as many as thirty-six bottles of beer in the twenty-four hour period prior to the incident with police. He described her as being unsteady on her feet, smelling of alcohol, and experiencing dilated pupils at the time of the encounter with police. Although police denied witnessing Mrs. Randolph in a state of intoxication or incapacity, the police acknowledged that there was hostility and animosity between the couple at the time.

One of the officers, Sergeant Brett Murray, traveled with Mrs. Randolph to the neighbor’s home in order to retrieve the child. Upon returning to the home, Mrs. Randolph continued to complain about Mr. Randolph’s drug abuse and further stated that there was evidence of his drug-related activities inside the home. Sergeant Murray asked Mr. Randolph about his drug abuse and requested his consent to search the home. Mr. Randolph, an attorney, “unequivocally refused” to grant consent. Sergeant Murray then requested the consent of Mrs. Randolph which she “readily gave.” Mrs. Randolph then proceeded to take the officer inside the home to the couple’s upstairs bedroom. Inside the bedroom, Sergeant Murray discovered what appeared to be a straw with cocaine residue on it, consistent with an instrument used to ingest cocaine.

118. Id.; Randolph I, 590 S.E.2d at 836.
119. Randolph III, 547 U.S. 103, 126 S. Ct. at 1519; Randolph I, 590 S.E.2d at 836.
120. Randolph III, 547 U.S. 103, 126 S. Ct. at 1519.
121. Respondent's Response to Petition for Certiorari, supra note 109, at 3-4.
122. Id. at 4.
123. Brief for Petitioner, supra note 109, at 4.
126. Id.
129. Id.
130. Id.; Randolph I, 590 S.E.2d at 836.
132. Id.; Randolph I, 590 S.E.2d at 836.
Sergeant Murray left the home in order to obtain an evidence bag so that he could properly collect and store the evidence. He also contacted the local district attorney’s office and was instructed to stop the search and obtain a warrant. As Sergeant Murray approached the home in order to retrieve the straw, Mrs. Randolph withdrew her consent to the search. Sergeant Murray then took the straw, as well as the Randolphs, to the local police station and obtained a search warrant for the home. A subsequent search of the home pursuant to the warrant revealed numerous drug-related items.

Mr. Randolph was subsequently indicted for possession of cocaine. Mr. Randolph moved to suppress the evidence, contending that the search violated his Fourth Amendment rights. The trial court denied the motion, but the Court of Appeals of Georgia granted Mr. Randolph’s application for interlocutory appeal.

The Court of Appeals of Georgia reversed the trial court. In particular, the court favored a bright-line rule that police must always obtain a warrant before conducting a warrantless search where officers received competing responses to a request for consent to search from co-occupants having equal authority over the property at issue. The court reasoned that it is “inherently reasonable” in the context of the Fourth Amendment for police to always honor and respect the refusal of a co-occupant to grant consent. In so reasoning, the court observed that if “common authority” is the basis for one co-occupant’s right to consent, then “common authority” is likewise a basis for another co-occupant’s right to refuse to consent. Consequently, the court stated, “[i]nherent in the power to grant consent is the power to vitiate that consent.” Regarding cases involving a marital residence, the court further noted that such a holding would also protect the sanctity of marriage by not permitting a wife to overrule the objection of her husband.

133. Randolph III, 547 U.S. 103, 126 S. Ct. at 1519.
134. Id.
135. Id.
136. Id.
137. Id.
139. Id.
141. Randolph I, 590 S.E.2d at 840.
142. Id. at 836–37.
143. Id. at 837.
144. Id.
145. Id.
146. Randolph I, 590 S.E.2d at 837.
Rejecting a case-by-case analysis, the majority also concluded that a bright-line rule would provide more defined guidance to law enforcement when faced with similar circumstances to those presented in Randolph by simply instructing officers to obtain a warrant.\textsuperscript{147} Additionally, responding to the dissent, the majority distinguished Matlock based upon the fact that, unlike the defendant in Matlock, Mr. Randolph was present at the time of the search and unequivocally refused consent.\textsuperscript{148} More specifically, the court stated,

\textit{Matlock} and its progeny stand for the proposition that, in the absence of evidence to the contrary, there is a presumption that a co-occupant has waived his right of privacy as to other co-occupants. However, when police are confronted with an unequivocal assertion of that co-occupant's Fourth Amendment right, such presumption cannot stand.\textsuperscript{149}

Judge Ellington and Judge Phipps each wrote their own concurring opinions.\textsuperscript{150} Judge Ellington simply reiterated his belief that the conclusion of the majority effectively protected the privacy rights of citizens while simultaneously providing clear guidelines for law enforcement.\textsuperscript{151} Judge Phipps, however, wrote his own special concurrence in order to express his disagreement with the bright-line approach used by the majority in a number of respects.\textsuperscript{152} Relying upon Matlock and its progeny, Judge Phipps advocated a more case-by-case, fact intensive approach based upon a reasonableness standard.\textsuperscript{153} Judge Phipps ultimately agreed with the conclusion of the majority, however, because Sergeant Murray was faced with "bickering spouses" and possessed "no hard evidence" of a crime and, accordingly, did not act reasonably in conducting a warrantless search based upon Ms. Randolph's consent alone.\textsuperscript{154} Under those circumstances, Judge Phipps concluded that the officers should have obtained a warrant.\textsuperscript{155} Arguing that his approach would provide "reasonably clear guidance" to law enforcement, Judge Phips stated:

\textsuperscript{147} Id. at 838.
\textsuperscript{148} Id.; see United States v. Matlock, 415 U.S. 164 (1974).
\textsuperscript{149} Randolph I, 590 S.E.2d at 838.
\textsuperscript{150} Id. at 840-43.
\textsuperscript{151} Id. at 840 (Ellington, J., concurring).
\textsuperscript{152} Id. (Phipps, J., concurring).
\textsuperscript{153} Id. at 840-43.
\textsuperscript{154} Randolph I, 590 S.E.2d at 843.
\textsuperscript{155} Id.
If there is some objective verification that a crime has been committed, the police may search the common areas of a residence with the consent of one occupant or spouse even if another co-occupant or spouse objects. If one co-occupant or spouse simply summons the police to a residence and accuses his or her co-occupant or spouse of illegal conduct, the matter should be submitted to a neutral and detached magistrate if another co-occupant or spouse is present on the premises and objects. As always, in cases of doubt and in the absence of exigent circumstances, a warrant should be obtained.156

Judge Blackburn joined Judge Andrews in a dissenting opinion.157 Arguing that the majority misconstrued and misapplied the Fourth Amendment’s reasonableness standard, Judge Blackburn focused almost exclusively on Matlock and its progeny. With regard to the specific facts of Randolph, Judge Blackburn concluded:

Because the defendant shared dominion over the property with his wife at the time consent was given by her, the waiver of his expectation of privacy with regard to the premises remained in effect. With his expectation of privacy still waived with regard to his wife, the defendant had no right to trump her consent to search their home.158

The Supreme Court of Georgia granted the State of Georgia’s petition for writ of certiorari.159 However, in a remarkably brief opinion, the court affirmed the decision of the Court of Appeals of Georgia.160 The court began by recognizing that a co-occupant who possesses common authority over property may consent on behalf of all others, as set forth in Matlock.161 The court further acknowledged the reasoning of Matlock, which states that a co-occupant possesses “his own right” to consent and other co-occupants have “assumed the risk” that he or she will exercise that right in their absence.162 Nonetheless, the court distinguished Matlock based solely on the fact that Mr. Randolph, unlike the defendant in Matlock, was present at the time of the search and objected to it.163 Regarding the assumption of risk language

156. Id.
157. Id. at 843–52.
158. Id. at 845.
160. Id. at 837.
161. Id. at 836–37 (citing United States v. Matlock, 415 U.S. 164, 170 (1974)).
162. Id. at 837 (quoting Matlock, 415 U.S. at 171 n.7).
163. Id.
in *Matlock*, the court stated that "the risk 'is merely an inability to control access to the premises [in] one's absence." Consequently, the court chose to follow the lead of the Supreme Court of Washington in *Leach* and invalidated the search of Mr. Randolph's home. 165

Three justices joined in a dissenting opinion.166 The dissent began by pointing out that the weight of existing authority disfavored the majority's conclusion.167 The dissent, also relying upon *Matlock*, concluded that Mr. Randolph "assumed the risk" his wife would grant consent in her "own right" and, therefore, Mr. Randolph could not subsequently invalidate his wife's consent by way of his objection.168

The United States Supreme Court granted certiorari.169 In the end, however, the Court adopted the same bright-line approach as the Georgia appellate courts below.170 Specifically, the Court held, "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to police by another resident."171

The Court began its analysis by briefly exploring the history of third-party consent cases, beginning with the adoption of valid consent as an exception to the Fourth Amendment warrant requirement, and concluding with the holding in *Rodriguez*.172 The Court noted the standard set forth in *Matlock*, to the extent that a co-occupant with common authority over property, may permit a warrantless search to the detriment of other absent co-occupants.173 Nevertheless, the Court observed that none of the prior third-party consent cases from the United States Supreme Court dealt with the issue of whether police may rely on the consent of one co-occupant in conducting a warrantless search in the face of an expressed refusal to allow the search by another, present co-occupant.174 Thus, the Court concluded that

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164. *Randolph II*, 604 S.E.2d at 837 (quoting 3 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.3(d) (3d ed. 1996)).
165. *Id.* (referring to State v. Leach, 782 P.2d 1035, 1040 (Wash. 1989)).
166. *Id.* at 837.
167. *Id.* at 837–38 (Hunstein, J., dissenting).
168. *Id.* at 838.
171. *Id.* at 1526.
173. *Id.* at 1519 (citing *Matlock*, 415 U.S. at 170–71).
"[t]he significance of such a refusal turns on the underpinnings of the co-occupant consent rule, as recognized since Matlock."\textsuperscript{175}

The Court then provided insight into the meaning and significance of the "common authority" necessary under Matlock to justify a warrantless search.\textsuperscript{176} The Court pointed out that "great significance [is] given to widely shared social expectations" based, in part, on property law in determining the reasonableness of a Fourth Amendment search.\textsuperscript{177} As such, the Court stated that the objective reasonableness of a search under Matlock, "is in significant part a function of commonly held understanding[s] about the authority that co-inhabitants may exercise in ways that affect each other's interests."\textsuperscript{178}

After citing a number of cases in which no "common authority" could justify a warrantless search based on third-party consent,\textsuperscript{179} the Court turned to the question of whether one co-occupant's consent to a search may override an objection to the search by another, physically present co-occupant.\textsuperscript{180} In this regard, the Court observed by way of example that "no sensible person" would enter a home where one co-occupant invites him/her inside, and another co-occupant expressly refuses.\textsuperscript{181} The Court explained that such a result is necessary because no socially recognized understanding, or legally recognized doctrine of property law, exists as to the superior or inferior authority of one co-occupant over the other in these circumstances.\textsuperscript{182} Accordingly, the Court decided that "there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders."\textsuperscript{183} Armed with this conclusion, the Court further reasoned that a "police officer [has] no better claim to reasonableness" in conducting a warrantless search under these circumstances, as one occupant's consent bears no greater weight than another occupant's objection.\textsuperscript{184}

The Court next turned its attention to the potential impact that its decision may have on future investigations stating, "[y]es we recognize the con-
senting tenant’s interest as a citizen in bringing criminal activity to light.” Recognizing the competing interests of bringing new crimes to light, and, at the same time, protecting the Fourth Amendment rights of the citizens, the Court suggested a couple of ways that both interests may be preserved in future cases. Specifically, the Court explained that nothing in its decision prevents future co-occupants from delivering evidence of crime directly to law enforcement without a warrantless search, and law enforcement may still rely upon information obtained from the consenting co-occupant to obtain a search warrant from a magistrate, regardless of whether another co-occupant objects. Responding directly to Chief Justice Roberts’s dissent, the majority also asserted that the decision would have “no bearing on the capacity of the police to protect domestic victims” as police are still permitted to enter a home without a warrant any time there is good reason to believe that a threat of domestic violence exists. The Court, however, did acknowledge that, in close cases, the rule it adopted may prevent police from conducting a search for evidence where no exigency or other legally recognized exception authorizes warrantless entry. Nevertheless, the Court decided that such a risk was ultimately justified in order to adequately secure the Fourth Amendment rights of the citizens.

At the conclusion of the majority opinion, the Court attempted to address what it viewed as “two loose ends” created by its ruling. First, the Court addressed the language of Matlock, which states that a co-occupant of shared property mutually used by multiple occupants possesses “his own right” to consent to a search, and thus, reliance on the co-occupant’s consent by law enforcement is reasonable. With regard to this loose end, the Court observed that even though the co-occupant may possess “his own right” to authorize warrantless police entry, the right is not so superior or powerful that it may override the competing and equal right of the other co-occupants to refuse to consent. The second loose end the Court sought to clarify was the impact the decision would have on the standards set forth in Rodriguez

185. Id. at 1524 (citing Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971)).
186. Id. 1524–25.
187. Id.
188. Id. (citing United States v. Ventresca, 380 U.S. 102, 107 (1965)).
190. Id.
191. Id. at 1525–26.
192. See id. at 1526.
193. Id. at 1527.
195. Id.
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and Matlock. 96
' As noted by the Court, those cases rested upon similar facts
as to those at issue in Randolph 111.197 The defendants in those cases, like
Mr. Randolph, were physically nearby or actually present at the time of the
searches at issue. 198 In particular, the defendant in Matlock was in a police
car at the time of the search, and the defendant in Rodriguez was asleep in a
bedroom at the time of the search.' 99 Highlighting the formalistic character
of its decision, the Court stated:
If [Matlock and Rodriguez] are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential
defendant with self-interest in objecting is in fact at the door and
objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby
but not invited
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to take part in the threshold colloquy, loses out.
Accordingly, Randolph III imposes no obligation on law enforcement to
proactively seek the approval of any absent, or even nearby, co-occupant
prior to conducting a warrantless search based upon the consent of a present
co-occupant. 20'
Justice Stevens and Justice Breyer both wrote their own concurring
opinions.202 Justice Stevens argued that the Randolph III decision validates
his view that the Court cannot focus solely upon the original understanding
of constitutional amendments and ignore the "relevance of changes in our
society. 2 3 Justice Stevens pointed out that when the Fourth Amendment
was adopted, a husband would have superior authority over premises than
that of his wife; thus, his consent would be the only relevant inquiry. 2 4
Therefore, Justice Stevens noted that if the Court followed an original understanding of the Fourth Amendment, an arbitrary, if not blatantly discriminatory, result may prevail. 20 5 According to Justice Stevens, however, the present society recognizes that both husband and wife have equal constitutional
rights regarding property, and "[a]ssuming that both spouses are competent,

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197.
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Id. at 1527.
Id.
Id.
Randolph l11, 547 U.S. 103, 126 S. Ct. at 1527.
Id.
Id.at 1527.
Id. at 1528-29 (Stevens, J., concurring), 1529-31 (Breyer, J., concurring).
Id. at 1528 (Stevens, J., concurring).
Randolph 111, 547 U.S. 103, 126 S. Ct. at 1529.
Id.

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neither one is a master possessing the power to override the other’s constitutional rights to deny entry to their castle." 206

Justice Breyer, on the other hand, wrote his own separate, concurring opinion in order to express his agreement with the majority’s conclusion and articulate his own reasoning on how that conclusion should be reached. 207 Justice Breyer advocated a more fact-specific approach, based upon the totality of circumstances that, rather than imposing bright-line rules, focuses upon the reasonableness of the officer’s actions in conducting a warrantless search. 208 Finding Sergeant Murray’s search for evidence in the face of Mr. Randolph’s present objection to be unreasonable, Justice Breyer stated that were the circumstances to change significantly, so should the result. 209 Hinting as to how he may decide future cases, Justice Breyer noted that evidence of exigency, or an invitation to police by a potential abuse victim, may provide a “special reason” for an immediate entry by police, unlike the circumstances in Randolph III. 210

Chief Justice Roberts, joined by Justice Scalia, wrote a dissenting opinion. 211 Chief Justice Roberts began his opinion by summarizing his disagreement with the majority and stating his own opinion regarding what rule should have been applied. 212 Specifically, Chief Justice Roberts complained that the majority’s approach was too “random and happenstance” to adequately protect privacy. 213 Alternatively, Chief Justice Roberts argued the Court should have held that any time a person shares a place with another, he or she assumes the risk that person will permit law enforcement to enter, even if he or she objects. 214

Chief Justice Roberts then attacked the majority’s reliance on understandings regarding “social expectations” in formulating its holding. 215 Chief Justice Roberts observed that concepts of what constitutes socially acceptable conduct on the part of persons who share living arrangements jointly does not provide a solid foundation on which to rest constitutional, Fourth Amendment standards. 216 In direct contradiction to the majority’s observations regarding social expectations, Chief Justice Roberts pointed out

206. Id.
207. Id. at 1529–31 (Breyer, J., concurring).
208. Id.
210. Id. at 1530.
211. Id. at 1531–39 (Roberts, C.J., dissenting).
212. Id. at 1531.
213. Id.
215. Id.
216. Id. at 1531–32.
that different factual situations within a social setting may give rise to different social expectations. Through examples, Chief Justice Roberts noted that the relationship among the parties, the reason for the visit, or perhaps even the distance a visitor has traveled, may lead a visitor to enter a home at the invitation of one co-occupant, even over the objection of another co-occupant. Chief Justice Roberts further observed that with the exception of determining when a Fourth Amendment search has occurred, and when a person has standing to raise a Fourth Amendment challenge, the Court has not looked to concepts of social expectations in determining when a search is reasonable in previous cases. Instead, Chief Justice Roberts explained that the Court's Fourth Amendment precedents focus more on the protection of privacy than the impact on social expectations by looking to whether a person has a legitimate expectation of privacy in gauging the reasonableness of a search. As such, Chief Justice Roberts asserted:

A wide variety of often subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private, and those conventions go by of a variety of labels—courtesy, good manners, custom, protocol, even honor among thieves. The Constitution, however, protects not these but privacy, and once privacy has been shared, the shared information, documents, or places remain private only at the discretion of the confidant.

To support this assertion, Chief Justice Roberts highlighted a number of cases in which an individual was found to have waived his or her expectation of privacy in such things as oral conversations, personal property, and private information. Chief Justice Roberts observed further that the Matlock and Rodriguez decisions are consistent with this line of cases as both decisions share the "common thread" found in all third-party consent cases that one who shares control over property with others, assumes the risk

217. Id.
218. Id.
220. Id. (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).
221. Id. at 1533 (Roberts, C.J., dissenting).
222. Id. (citing United States v. White, 401 U.S. 745, 752 (1971)).
223. Id. (quoting Frazier v. Cupp, 394 U.S. 731, 740 (1969)).
that his or her co-occupants may consent to a warrantless search. Consequently, Chief Justice Roberts stated:

   The law acknowledges that although we might not expect our friends and family to admit the government into common areas, sharing space entails risk. A person assumes the risk that his co-occupants—just as they might report his illegal activity or deliver his contraband to the government—might consent to a search of areas over which they have access and control.

Chief Justice Roberts then shifted his focus to the practical consequences of the *Randolph III* decision. First, Chief Justice Roberts stated that the opinion is “so random in its application” that it cannot effectively protect one’s privacy. In particular, Chief Justice Roberts noted that the opinion will afford no protection of a person’s privacy right “if a co-owner happens to be absent when police arrive, in the backyard gardening, asleep in the next room, or listening to music through earphones so that only his co-occupant hears the knock on the door.” Next, Chief Justice Roberts pointed out that by not allowing police to search based on a co-occupant’s consent, simply because another co-occupant is present and objects, may lead to retaliation against the consenting co-occupant by the objecting co-occupant, or even destruction of evidence once the police leave the home. Moreover, with reference to domestic abuse case, Chief Justice Roberts explained that the exigency necessary to justify a warrantless search may not always exist in every case. Additionally, Chief Justice Roberts determined that the newly announced “‘consent plus a good reason’” rule in domestic abuse cases “spins out an entirely new framework for analyzing exigent circumstances.” Therefore, the rule seems contrary to the majority’s apparent disdain for a co-occupant’s consent since such consent is a key factor in determining whether police have a “‘good reason’” to enter the home.

Summarizing his perceived inconsistency in the majority opinion, Chief Justice Roberts stated:

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228. *Id.* at 1536.
229. *Id.*
230. *Id.*
231. *Id.*
233. *Id.*
234. *Id.* at 1538.
235. *Id.*
The majority reminds us, in high tones, that a man's home is his castle, but even under the majority's rule, it is not his castle if he happens to be absent, asleep in the keep, or otherwise engaged when the constable arrives at the gate. Then it is his co-owner's castle. And, of course, it is not his castle if he wants to consent to entry, but his co-owner objects.\textsuperscript{236}

As a result, Chief Justice Roberts concluded:

Rather than constitutionalize such an arbitrary rule, we should acknowledge that a decision to share a private place, like a decision to share a secret or a confidential document, necessarily entails the risk that those with whom we share in turn chose to share—for their own protection or other reasons—with the police.\textsuperscript{237}

An originalist no doubt, Justice Scalia apparently felt called out by Justice Stevens' concurrence and, thus, issued his own dissenting opinion.\textsuperscript{238} First, Justice Scalia explained that the fact that the Fourth Amendment, as part of an "unchanging [c]onstitution," often cross-references to the ever-changing area of property law presents no major hurdle in the path of an originalist.\textsuperscript{239} Additionally, Justice Scalia "express[ed] grave doubt that today's decision deserves Justice Stevens' celebration as part of the forward march of women's equality," given the possible negative impact the decision may have on law enforcement efforts to investigate domestic violence against women by men.\textsuperscript{240}

Justice Thomas issued his own dissenting opinion in which he concluded that \textit{Coolidge v. New Hampshire}\textsuperscript{241} squarely controlled the outcome in \textit{Randolph III}.\textsuperscript{242} In \textit{Coolidge}, while investigating a murder, police asked the wife whether her husband owned any guns.\textsuperscript{243} Thinking her cooperation would exonerate her husband, the wife obtained a number of her husband's guns from the couple's bedroom and gave them to police.\textsuperscript{244} The Court later rejected the husband's Fourth Amendment challenge on the grounds his wife

\begin{itemize}
\item \textsuperscript{236} \textit{Id.} at 1539 (citations omitted).
\item \textsuperscript{237} \textit{Randolph III}, 547 U.S. 103, 126 S. Ct. at 1539.
\item \textsuperscript{238} \textit{Id.} at 1539–1541 (Scalia, J., dissenting).
\item \textsuperscript{239} \textit{See id.} at 1540.
\item \textsuperscript{240} \textit{Id.} at 1540.
\item \textsuperscript{241} 403 U.S. 443 (1971).
\item \textsuperscript{242} \textit{Randolph III}, 547 U.S. 103, 126 S. Ct. at 1541–43 (Thomas, J., dissenting) (citing \textit{Coolidge}, 403 U.S. at 486–90).
\item \textsuperscript{243} \textit{Coolidge}, 403 U.S. at 486.
\item \textsuperscript{244} \textit{Id.}
\end{itemize}
searched his home as an "instrument" of law enforcement. The Court reasoned that the wife was not converted to a government agent simply by virtue of the fact that she made her own decision to cooperate with police. Therefore, based on Coolidge, Justice Thomas concluded that no Fourth Amendment search occurred in Randolph III since Ms. Randolph acted on her own accord in directing police to the drug-related area and was not acting as an agent of the government.

IV. SUBSEQUENT CASES—A GLIMPSE OF THE FUTURE

A. An Expressed Objection of a Co-occupant to a Warrantless Search May Override the Voluntary Consent of Another Co-occupant Even if the Objecting Co-occupant Is Not Physically Present at the Time of the Search.

The first Florida court to address significant issues related to Randolph III was the United States District Court for the Middle District of Florida. In United States v. Dominguez-Ramirez, agents with the Immigration and Customs Enforcement (ICE) agency intercepted a shipment of furniture crossing the Mexican border in El Paso, Texas that contained marijuana and was ultimately destined for Ocala, Florida. Law enforcement officers from various local and federal agencies across the country decided to conduct a controlled delivery of the narcotics to the address in Ocala, Florida in an attempt to further the investigation. The narcotics were delivered to a Florida address where the defendant, his brother, and one other individual were arrested. During a subsequent, late-night interview of the defendant, law enforcement officers asked for the defendant's consent to search his residence, located on a different street in Ocala, Florida. The defendant authorized the officers to search his home "in the morning" and not that night.

245. Id. at 487.
246. Id. at 487–88.
249. Id.
250. Id. at 2.
251. Id.
252. Id. at 3–4.
253. Dominguez-Ramirez, No. 5:06-cr-6-Oc-10GRJ, slip op. at 4.
because his wife was apparently taking insulin for a medical condition, and consequently, he "did not want her disturbed" that evening. 254

Law enforcement also interviewed the defendant's brother, who lived in a room inside the defendant's home. 255 The brother consented to a search of his room inside the home and was transported to the residence. 256 The defendant's wife came to the door of the residence and the officers informed her of her husband's arrest and her brother-in-law's consent to search his room. 257 The defendant's wife permitted the officers to come into the home and the officers began searching the defendant's brother's room. 258 The officers ultimately obtained consent from the defendant's wife to search the entire home. 259

In denying the defendant's motion to suppress, the court made two observations. 260 First, the court noted that the defendant never actually refused to grant consent. 261 Instead, the defendant gave a qualification that the officers could only search the home "[i]n the morning." 262 In this regard, the court stated, "[t]hus, in this case there was never a refusal to search by the co-owner husband sufficient to raise the issue of whether both tenants must consent before a search is conducted of jointly owned property." 263 Next, the court distinguished Randolph III based upon the fact that the defendant was not physically present at the time of the search. 264 Noting that the holding in Randolph III was limited to its facts and that Randolph III did not overrule the holding in Matlock, the court found this distinguishing characteristic significant enough that the consent of the wife justified the warrantless search. 265 In particular, the court stated, "[t]he Randolph [III] Court, however, left intact the rule that the consent of only one co-tenant is sufficient so long as the objector is not present and the police have not removed the objecting tenant from the entrance for the sake of avoiding a possible objection." 266

254. Id.
255. Id.
256. Id.
257. Id. at 5.
258. Dominguez-Ramirez, No. 5:06-cr-6-Oc-10GRJ, slip op. at 5.
259. Id. at 3.
260. Id. at 17.
261. Id.
262. Id.
263. Dominguez-Ramirez, No. 5:06-cr-6-Oc-10GRJ, slip op. at 17.
264. Id.
265. Id. at 17–18.
266. Id.
The holding in Dominguez-Ramirez seems to indicate that some courts may adopt a narrow, limited view of the holding in Randolph III. Under this view, even where police receive an objection from a co-occupant to a warrantless search, subsequent consent to the search by a different co-occupant may still justify the warrantless search so long as the objecting co-occupant is not physically present at the time of the search and there is no evidence that the officers purposefully removed the defendant from the location in order to stifle any objection. Indeed, given the United States Supreme Court’s own acknowledgement that its holding in Randolph III draws a “fine line,” such an application may seem legally sound. However, this approach is at odds with the result reached by the only federal circuit court of appeals to address substantial questions relating to the Randolph III decision as of the date of this writing.

In United States v. Hudspeth, law enforcement offices in Missouri obtained a search warrant for a business, Handi-Rak Service, Inc., in relation to sales of large quantities of pseudoephedrine-based products. The defendant was the Chief Executive Officer of the company and was present during the search. As part of the search, officers discovered a compact disc containing child pornography. The officers requested the defendant’s permission to search his personal residence, which he refused. The officers took the defendant to jail and then traveled to the defendant’s residence where they were greeted by the defendant’s wife. The defendant’s wife permitted the officers to enter the residence. The officers explained that they had found inappropriate material on her husband’s business computer, but did not inform her that he had already refused consent to search the cou-

267. See id.
269. Id. at 1527.
270. See United States v. Reed, No. 3:06-CR-75 RM, slip op. at 4, 9 (N.D. Ind. Aug. 3, 2006) (reaching the same conclusion as the court in Dominguez-Ramirez on similar facts and determining that applying the Randolph III standard to objecting co-occupants that are not physically present at the time of the search would require the court to redraw the “fine line” established by the United States Supreme Court).
271. See generally United States v. Hudspeth, 459 F.3d 922 (8th Cir. 2006).
272. Id. at 922.
273. Id. at 924.
274. Id.
275. Id. at 925.
276. Hudspeth, 459 F.3d at 925.
277. Id.
278. Id.
The wife informed the officers that the couple had two computers, one in their children’s room and one in the garage of their home; however, the wife refused to grant consent to conduct a search of the residence. One of the officers then requested that the officers be allowed to take the computers and some computer CDs with them. The wife ultimately acquiesced. A subsequent search of the computer revealed nude videos of the defendant’s step-daughter that were taken without her knowledge by a web camera. The defendant moved to suppress the evidence found on both the business computer and the home computer, which the district court denied. The defendant then entered a conditional guilty plea, reserving the right to appeal the suppression issue to the Eighth Circuit Court of Appeals. The Eighth Circuit upheld the search of the business computer, but reversed the decision with regard to the search of the home computer.

In its opinion, the court observed the distinguishing characteristics of both Matlock and Randolph. With regard to Matlock, the court noted that the case at bar did not involve a situation where the defendant was present but either did not object or was not invited to object. Additionally, in relation to Randolph, the court pointed out, “Georgia v. Randolph does not directly address the situation present in this case, in which a co-tenant is not physically present at the search but expressly denied consent to search prior to the police seeking permission from the consenting co-tenant who is present on the property.” Nevertheless, the court found Randolph to be the controlling case. In particular, the court stated that constitutional concerns identified in Randolph did not change simply because the objecting co-
occupant, who expressly objected to the search, was not physically present at the time of the search.292

The court then attempted to address the concerns outlined in both the majority and dissenting opinions in Randolph regarding the fear of retribution against a domestic abuse victim, who offers warrantless entry to law enforcement over the objection of his or her co-inhabitant.293 The court observed that since the objecting co-inhabitant is not actually present at the time of police entry in situations such as those presented in Hudspeth, these concerns would appear moot.294 Specifically, the court noted, “to some degree, the case for respecting the denial of consent by a non-present occupant is stronger than the refusal of the physically-present occupant.”295

Circuit Judge Riley wrote a partial dissenting opinion in which he reached a similar conclusion to that of the United States District Court for the Middle District of Florida in Dominguez-Ramirez.296 Accusing the majority of misreading Randolph III, Judge Riley pointed out that the Court in Randolph III adopted a very narrow and specific rule that only applies when the objecting co-occupant is physically present.297 Thus, Judge Riley stated,

If the [United States] Supreme Court desired to adopt the broader rule espoused by the majority here, the Court would not have continuously used the phrase “physically present,” and would have ruled [that] police entry without a warrant is unreasonable whenever the suspect refuses consent to search his residence, regardless of where the suspect may be located at the time of his express refusal.298

Judge Riley also observed that the majority opinion created policy issues in real world application.299 In short, Judge Riley characterized the majority opinion as promoting a “don’t ask” and “ignorance is bliss” policy by law enforcement,300 stating that, “the majority’s holding encourages law enforcement, in seeking consent, to bypass the suspect lest the suspect refuse [to] consent, and instead seek only the consent of an authorized co-occupant, thereby avoiding the knowledge bar.”301

292. Id.
293. Id. at 931.
294. Id.
295. Id.
296. Hudspeth, 459 F.3d at 933 (Riley, J., dissenting).
297. See id. at 932–33.
298. Id. at 933.
299. See id.
300. Id.
301. Hudspeth, 459 F.3d at 933–34 (Riley, J., dissenting).
B. The Objection of a Non-probationer, Co-occupant May Override the Prior Consent of His or Her Probationer Co-occupant Even if the Probationer Co-occupant Has Consented to Searches of His or Her Premises as a Condition of Probation

In the criminal justice system it is common for a defendant to be sentenced to a period of probation instead of incarceration. Upon being sentenced to probation, the probationer often accepts a waiver of his or her Fourth Amendment rights as a term of probation, whereby the probationer consents to a warrantless search of his or her premises by certain law enforcement officers. So what happens when the probationer shares common authority over premises with a non-probationer co-occupant and that co-occupant expressly objects to the search in spite of the probationer's limited waiver of his or her Fourth Amendment rights? Can a warrantless search continue in the face of such an expressed objection and, if so, can evidence of culpable conduct be used against the non-probationer? As of the date of this writing, these questions remain largely unresolved, especially at the federal level.

The United States District Court for the Northern District of New York, however, came close to addressing this issue in July of 2006. In Taylor v. Brontoli, officers attempted to search the home of a probationer pursuant to the terms of the probationer's waiver of her Fourth Amendment rights. The probationer's boyfriend, who was not on probation but shared common authority over the premises, expressly objected to the search. The officers searched the premises anyway and uncovered a firearm. The boyfriend was arrested in relation to the firearm. He subsequently filed a lawsuit against the officers pursuant to title 42, section 1983 of the United States Code claiming that his Fourth Amendment rights were violated by the warrantless search to which he expressly objected. On summary judgment the officers argued, inter alia, that the probationer's girlfriend had previously consented to the search through the terms of her probation. Denying all

302. See, e.g., FLA. STAT. § 948.01 (2006).
305. Id. at 1.
306. Id. at 4.
307. Id.
308. Id. at 5.
309. Taylor, No. 1:04-CV-0487, slip op. at 5.
310. Id. at 1, 6.
311. Id. at 9.
motions for summary judgment by all parties with leave to resubmit, the court invited the parties to address the impact of the recent decision in Randolph on the facts of the case. The court appropriately observed that, 

"[f]or the purposes of this case, the issue becomes whether a non-probationer can refuse consent to a search of a home where he may have a legitimate expectation of privacy, which is subject to searches by another occupant's probationary status."

At least one state appellate court has held that a non-probationer co-occupant may refuse consent to a warrantless search even if he/she resides with a probationer that has previously consented to warrantless searches as a condition of probation. A review of state cases at the time of this writing reveals no other state or federal cases addressing this issue. Consequently, the impact of the Randolph decision on cases involving facts similar to those presented in Taylor remains an open question.

V. CONCLUSION—TWO OBSERVATIONS

A. The Court in Randolph Seemed to Abandon the "Good Faith" Exception Established in Illinois v. Rodriguez

At the time of the search in Rodriguez, the officers did not factually have any legal basis whatsoever to conduct a warrantless search of the defendant’s apartment. The officers were not in pursuit of a felon, there was no imminent threat of an emergency or destruction of evidence, and the officers did not possess valid consent to conduct a warrantless search. In fact, the individual who permitted the search had no actual authority to permit entry by the police, or anyone else, since she was nothing more than an "infrequent visitor," who allowed the police to enter the apartment using a key that had been apparently stolen from Rodriguez. Therefore, using the strictest application of the Fourth Amendment warrant requirement, the stan-

312. Id.
313. Id. at 8.
319. See Rodriguez, 497 U.S. at 180.
320. Id.
321. Id. at 181.
standard set forth in *Matlock* was clearly breached and Rodriguez's rights were unquestionably violated. Nonetheless, the Court in *Rodriguez* seemed to establish a good faith exception to the warrant requirement in third-party consent cases. Specifically, the Court determined that even where the police are wholly incorrect as a factual matter in concluding that they have been given valid consent to search by an authorized third party, fruits of the warrantless search will not be suppressed if the officer’s conclusion was objectively reasonable.

The Court in *Randolph* concluded that Sergeant Murray did not have the authority to conduct a warrantless search of the Randolphs' home based upon the consent of Mrs. Randolph. As in *Rodriguez*, the prosecution in *Randolph III* ultimately failed to establish that Sergeant Murray had a legally sound justification for conducting a warrantless search under the *Matlock* standard. However, applying the exception set forth in *Rodriguez*, it would seem that the relevant question was not whether Mrs. Randolph's consent gave Sergeant Murray authority to conduct a warrantless search as purely a matter of fact but instead, the question is, "would the facts available to [Sergeant Murray] at the moment... 'warrant a man of reasonable caution in the belief' that [Ms. Randolph] had authority over the premises?"

Much like the officers in *Rodriguez*, the facts presented led Sergeant Murray to conclude that he had permission to conduct a warrantless search of the Randolphs' home from a person with both actual and apparent authority over the premises. Mrs. Randolph readily gave Sergeant Murray permission to search her marital residence. As a spouse having equal rights to the home, it was plausible for Sergeant Murray to conclude that Mrs. Randolph possessed her own right to permit Sergeant Murray, or anyone else, to enter the home, in spite of Mr. Randolph's objection to the search.

324. *Id.*
326. See *id.* at 1519-21; *Rodriguez*, 497 U.S. at 181; see also *Matlock*, 415 U.S. at 170, 171 n.7.
327. *Rodriguez*, 497 U.S. at 188.
328. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)) (internal quotations omitted).
329. See *id.* at 179-80.
331. *Id.*
332. See United States v. Matlock, 415 U.S. 164, 171 n.7 (1974). *But see Randolph III*, 547 U.S. 103, 126 S. Ct. at 1529-31 (Breyer, J., concurring) (arguing that Sergeant Murray’s decision to search was unreasonable).
This is especially true in light of the fact that Mrs. Randolph voluntarily led Sergeant Murray through the intimate areas of the home and into an area where drug-related material was discovered. Moreover, at the time of the search, the overwhelming weight of federal and state authority legally supported Sergeant Murray's decision to conduct the search, even in the face of Mr. Randolph's present objection. Thus, as with the officers in Rodriguez, at the very moment of the search, Sergeant Murray's conduct was entirely reasonable under an objective standard.

As specifically noted in Rodriguez, the Court has historically applied a good-faith, objective standard to police conduct in the context of Fourth Amendment searches, even where officer's conduct was based solely upon inaccurate conclusions. In short, prior to Randolph, the Court seemed consistently reluctant to engage in after-the-fact, Monday morning quarter-backing of decisions by police, made during the intensity of criminal investigations, to conduct a warrantless search so long as there was no evidence of coercion and the officer's conclusions were objectively reasonable. However, Randolph seems to alter, if not in part overrule, the holding of Rodriguez by applying a bright-line, all-inclusive approach that does not acknowledge the reasonableness of the officer's conduct.

B. Justice Breyer Is the Member of the Court Most Likely to Change His Position in Future Cases

Although Justice Breyer concurred with the decision of the majority in Randolph, his core reasoning was quite different. The majority created a bright-line, all-inclusive approach that will be applied in all future cases re-
Justice Breyer, however, advocated a more case-specific, fact-intensive approach which focuses primarily upon whether the circumstances of the case demonstrate that law enforcement officers acted reasonably in conducting a warrantless, consent search. Consequently, in future cases involving consent searches, Justice Breyer is the most likely member of the Court to permit the specific facts of the case to dictate the ultimate outcome, and possibly shift the voting ratio of the Court in favor of a more crime control oriented, pro-law enforcement result.

A review of the oral arguments in *Randolph* reveals that Justice Breyer feared that a bright-line approach to the question of reasonableness might have horrific results in future warrantless search cases with different facts than those presented in *Randolph*. Justice Breyer raised few questions throughout oral arguments until attorney Thomas C. Goldstein began his argument on behalf of Scott Randolph. Mr. Goldstein advocated a narrow, bright-line approach that all warrantless searches of a home are per se unreasonable whenever law enforcement receives an expressed objection to their search from a person having common authority over the premises. Justice Breyer interrupted Mr. Goldstein’s argument at one point stating, “[t]he two words that come into my mind are ‘spousal abuse.’” Justice Breyer then explained that he was troubled by the prospect that in ambiguous cases, where no exigency exists, a bright-line approach may result in law enforcement officers not being able to effectively investigate spousal abuse. Specifically, Justice Breyer provided an example wherein police receive an anonymous tip from a person that heard something “odd” at a neighbor’s home and, as a result, proceed to the home. When the police arrive, the wife, who is sitting at the kitchen table, looks “oddly” at the officer and tells the officer that she would like him to follow her upstairs to her bedroom. The husband is present and objects to the officer entering the home. Under the circumstances of the example, Justice Breyer expressed grave concern that police would not be able to enter the home in order to hear what the wife wanted to tell the police in her bedroom that she was too afraid to say in

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337. *See id.*
338. *See id.*
341. *Id.* at 31.
342. *Id.* at 37.
343. *Id.*
345. *Id.*
346. *Id.*
front of her husband.\textsuperscript{347} Indeed, Justice Breyer stated to Mr. Goldstein, 
"[a]nd I [a]m telling you, quite frankly, that's what bothers me a lot."\textsuperscript{348}

In spite of what seemed to be an aversion to Mr. Randolph's position 
during oral arguments, Justice Breyer ultimately agreed with the conclusion 
of the majority.\textsuperscript{349} Justice Breyer, however, made it very clear that he did not 
support a bright-line approach to the issue in \textit{Randolph}, by stating in the first 
sentence of his concurring opinion, "[i]f Fourth Amendment law forced us to 
choose between two bright-line rules, (1) a rule that always found one 
tenant's consent sufficient to justify a search without a warrant and (2) a rule 
that never did, I believe we should choose the first."\textsuperscript{350} Instead, Justice 
Breyer favored a more fact specific approach that focuses on the totality of 
the circumstances to determine whether the officers acted reasonably in 
conducting a warrantless search.\textsuperscript{351} Justice Breyer noted that the spirit of the 
Fourth Amendment recognizes that the circumstances of cases involving 
warrantless searches can be very different and, consequently, where certain 
facts may justify a warrantless search as being reasonable, others may not.\textsuperscript{352} 
Thus, Justice Breyer focused on four factual circumstances of the case in 
\textit{Randolph III} that supported his conclusion that Sergeant Brett Murray did 
not act reasonably in conducting a search of the Randolph's home, specifically that: 1) the search was only a search for evidence; 2) Randolph was 
present and expressly objected to the search; 3) there was no inference from 
the facts that destruction of evidence was a concern of the officers; and 4) the 
officers could have easily obtained a warrant prior to conducting the 
search.\textsuperscript{353} As during oral arguments, Justice Breyer also made it clear in his 
written concurring opinion that he was very concerned about domestic abuse 
cases and that he would be inclined to rule a different way if future facts 
demonstrate that a possible abuse victim were inviting the police into a 
home.\textsuperscript{354} In fact, Justice Breyer stated, "[i]n that context, an invitation (or 
consent) would provide a special reason for immediate, rather than later, 
police entry."\textsuperscript{355}

\begin{thebibliography}{9}
\bibitem{347} Id. at 39.
\bibitem{348} Id.
\bibitem{349} Georgia v. Randolph (\textit{Randolph III}), 547 U.S. 103, 126 S. Ct. 1515, 1530 (2006) 
(Breyer, J., concurring).
\bibitem{350} Id. at 1529.
\bibitem{351} Id.
\bibitem{352} Id.
\bibitem{353} Id.
\bibitem{354} \textit{Randolph III}, 547 U.S. 103, 126 S. Ct. at 1529–31 (Breyer, J., concurring); see Transcript 
\bibitem{355} \textit{Randolph III}, 547 U.S. 103, 126 S. Ct. at 1530–31 (Breyer, J., concurring).
\end{thebibliography}
A close reading of the dissent written by Chief Justice Roberts may lead one to speculate that Justice Breyer may have been initially inclined to support the conclusion of the dissenters or, perhaps, he was at the very least on the fence prior to the opinion being finalized. Since Justice Alito took no part in the decision, only eight members of the Court voted in the case. In addressing the perceived unsoundness of Justice Breyer’s concurring opinion, Chief Justice Roberts states that Justice Breyer, “joins what becomes the majority opinion,” which seems to indicate that Justice Breyer was the tie breaking vote in one respect or another. Nonetheless, the majority opinion of the Court certainly seems to reverse the trend of expanding the scope of consent in third-party consent cases. However, it would seem that Justice Breyer has left the door open for the government to possibly persuade him to side with the government in future cases.

One can further speculate, with reasonable certainty, that Justice Breyer will not strike down a warrantless search where there is solid evidence of possible spousal abuse. His questioning during oral arguments and his statements in the written, concurring opinion reveal that Justice Breyer is certainly opposed to placing overly restrictive barriers in the path of law enforcement efforts to thoroughly investigate such cases. This is even more likely where the potential victim indicates a desire to seek the aid of law enforcement. However, Justice Breyer’s willingness to review the facts of the case, instead of applying a bright-line approach, indicates that he may be persuaded to side with law enforcement in other, non-domestic abuse cases as well. For example, where officers are greeted by five residents of an apartment who consent to a search for evidence, and one resident objects, perhaps the totality of the circumstances would make a warrantless search reasonable. Or, as a further example, where police are searching a home for a possible kidneyng victim as opposed to a mere search for evidence, it seems likely that the officers’ conduct might be viewed as reasonable by Justice Breyer.

357. See id. at 1528 (majority opinion).
358. Id. at 1539 (Roberts, C.J., dissenting).
359. See generally id. at 1518–28 (majority opinion).
361. See id.
363. See Randolph III, 547 U.S. 103, 126 S. Ct. at 1530 (Breyer, J., concurring).
364. See id.
365. See id.
366. See id.

https://nsuworks.nova.edu/nlr/vol31/iss3/1
In addition, Justice Breyer has not been reluctant in past Fourth Amendment search cases to make decisions, crime control oriented or otherwise, based upon specific factual nuances of a case. This is especially true when addressing issues of reasonableness on the part of law enforcement in the context of Fourth Amendment searches of homes. By way of example, in *Minnesota v. Carter*, an officer observed narcotics-related activity occurring inside of a basement-level apartment by looking through a window of the apartment covered by venetian blinds. The officer was positioned approximately one to one and a half feet from the window in a publicly accessible area outside of the apartment and observed the activity through a space in the blinds. Relying upon this information, the officer obtained a search warrant for the home and a subsequent search revealed evidence of narcotics trafficking.

The majority opinion of the Court never reached the issue of whether the officer's conduct constituted an unreasonable search. Instead, the majority concluded that the petitioner in the case lacked standing to bring a constitutional challenge. However, as in *Randolph*, Justice Breyer wrote a separate concurring opinion in which he agreed with the ultimate outcome of the case, but for different reasons. While Justice Breyer concluded that the petitioner did have standing to challenge the unlawful search, he further observed that the actions of the officer in viewing the criminal activity from a publicly accessible area outside of the home in plain view of all passersby was not an unreasonable search. Focusing on the facts of the case, Justice Breyer specifically stated, "[o]ne who lives in a basement apartment that fronts a publicly traveled street, or similar space, ordinarily understands the need for care lest a member of the public simply direct his gaze downward."

On the other hand, a little more than one year later, Justice Breyer joined a rather unusual majority of Justices Scalia, Souter, Thomas, and Ginsburg in holding that conduct by police that was arguably similar to the conduct at issue in *Carter* constituted an unreasonable search under the

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368. *Id.* at 85, 103.
369. *Id.* at 103 (Breyer, J., concurring).
370. *Id.* at 85 (majority opinion).
371. See *id.* at 87–91.
373. See *id.* at 103–06 (Breyer, J., concurring); see also *Georgia v. Randolph* (*Randolph II*), 547 U.S. 103, 126 S. Ct. 1515, 1529–30 (2006) (Breyer, J., concurring).
374. See *Carter*, 525 U.S. at 103.
375. *Id.* at 104.
376. *Id.* at 105.
Fourth Amendment. In Kyllo v. United States, officers utilized a thermal imaging device from a public street to scan the exterior of a home in order to detect infrared radiation coming from the home as a result of high intensity heat lamps used to grow marijuana believed to be inside the home. The scan revealed an unusual amount of radiation coming from certain areas of the home and, relying on this and other information, officers obtained a search warrant. The majority reasoned that, by using this equipment, the officers were privy to more than what the naked eye could see from observing the exterior of the home from the street. Engaging in a fact-intensive analysis, the majority concluded, "where, as here, the Government uses a device that is not in general public use, to explore details of a home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."
THE REAL COSTS OF JUDICIAL MISCONDUCT: FLORIDA TAKING A STEP AHEAD IN THE REGULATION OF JUDICIAL SPEECH AND CONDUCT TO ENSURE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY

PHYLLIS WILLIAMS KOTEY*

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Published by NSUWorks, 2007 237
I. INTRODUCTION

“The public’s confidence in the judiciary hinges on the public’s perception of it, and that perception necessarily hinges on the media’s portrayal of the legal system.” —Justice Felix Frankfurter

An African proverb admonishes that: “Corn can’t expect justice from a court composed of chickens.” If the public’s perception of justice is formed by an opinion that judges are “insensitive, arbitrary, and aloof,” then it is understandable that the public would have no expectation of receiving justice. Like the corn, the public is consumed unceremoniously as a means to continuously feed a system that operates only to benefit itself. The speech and conduct of judges contribute to creating a public perception that judges are “incompetent, self-indulgent, abusive, or corrupt,” and, across the country, these judges are the subject of numerous complaints.

The challenge to this perception of justice is the reality that judges have an affirmative duty to “uphold the integrity and independence of the judiciary” through speech and conduct. Judges also have a duty to “avoid impropriety and the appearance of impropriety in all of the judge’s activities.” Additionally, a judge should execute judicial duties impartially and diligently, ensuring that extra-judicial duties are undertaken to minimize the risk

4. See id. at 35.
7. Id. Canon 2.
of conflict. Currently, the country grapples with maintaining an independent, honest, and impartial judiciary. However, Florida has taken the lead by amending its code to ensure that the independence, integrity, and impartiality of the judiciary are maintained. Like many other states, including the District of Columbia, Florida adopted the 1990 version of the Model Code of Judicial Conduct to regulate the speech and conduct of judges. In January of 2006, Florida adopted amendments to its code in response to the recent attacks on the independence of the judiciary. These changes are indicative of the importance in ensuring the independence, integrity, and impartiality of the judiciary.

II. THE CASE FOR INDEPENDENCE, INTEGRITY, AND IMPARTIALITY

Public confidence in the fairness of judicial decisions is a foundation of the judicial decision-making process and a byproduct of judicial independence. A judge must be free to act without fear of reprisal and without favor

8. Id. Canon 3, Canon 4A(3).
9. See Greene, supra note 3, at 37.
13. The Supreme Court of Florida requested that its Judicial Ethic Advisory Committee (JEAC) study the proposed revisions to the ABA Model of Judicial Conduct and recommend any appropriate amendments of its code. Amends. to Code of Jud. Conduct—ABA’s Model Code, 918 So. 2d at 949. The JEAC filed a report on January 31, 2005, recommending several amendments. Id. The amendments were published for comments and were adopted on January 5, 2006. Id.
toward an issue or individual. When a judge can speak and act without fear or favor, both integrity and independence are maintained. Further, when a judge adheres to the restraints placed on his or her speech and conduct, impartiality is maintained.

A. Perception of the Public

"'Perception is reality.' Each person has individualistic perceptions, different ways of looking at things, yet each person is able to change his or her perception, and, thus, change reality," The partition between the perception of justice and the reality of justice in our judicial system continues to grow. This is due to the disparity between the public's concept of what justice is and what justice should be. The discrepancy operates as a concept discrete and insular from what judges or lawyers believe about the judicial system. While repeated studies indicate that lawyers feel that they are being judged unfairly by society, the basis for these perceptions must be understood before they can change. Judges must be insulated from the external controls that operate to challenge their independence. However, judges cannot escape the overarching negative perception of the legal system that appears to engulf the judiciary.

B. Portrayal by the Media

The coverage of courtroom dramas in the media perpetuates perceptions that threaten to become a reality for the public. Historically, the proliferation of television legal dramas generated perceptions created by media cov-

17. See id.
19. HARVEY LEVINE, LEVINE ON TRIAL ADVOCACY § 6.
20. Id.
21. Id.
22. Sorenson, supra note 18, at 62.
23. Miller, supra note 5, at 431.
24. See id.
25. Greene, supra note 3, at 37. In Washington, D.C., at the 2005 Annual Meeting of the American Association for the Advancement of Science (AAAS), Monica Amarelo reported in a news release that they were "seeing crime victims and jurors who have TV-fueled misconceptions of what evidence needs to be tested and how real-life investigations ought to be conducted." Monica Amarelo, Pathologists Say TV Forensics Creates Unrealistic Expectations, AM. ASS'N ADVANCEMENT OF SCI. (Feb. 21, 2005), http://www.aaas.org/news/releases/2005/0221csi.shtml.
erage of real court cases that may contain relatively little or no truth at all. 26 In 2007 Florida was the venue of a poignant example of the impact on the media coverage on the perception of judges. 27 Circuit Court Judge Larry Seidlin made news across the country for his antics from the bench for his “witty” one liners and emotional and tearful delivery of his edicts. 28 Judge Seidlin was a presiding judge in some of the custody and legal proceedings that ensued after the death of Anna Nicole Smith. 29 His dramatic behavior led to perception that his speech and conduct were intended to attract offers for a courtroom television show. 30

Additionally, the new genre of television crime dramas use the latest scientific equipment that can detect, discover, diagnose, and dissect any piece of evidence with absolute certainty. 31 As a result, these dramas threaten to generate a standard of proof beyond all doubt with the use of such scientific equipment. 32 The Maricopa County Attorney conducted a study entitled The CSI Effect and Its Real-Life Impact on Justice. 33 The study concluded that television forensic crime dramas are having a significant impact on juries and their perception about the availability and necessity of evidence. 34 Consequently, the impact of the media is evident in television and real life court coverage.

26. See Greene, supra note 3, at 37. Leslie Abramson, a criminal defense attorney who represented the Menendez brothers, remarked that some media coverage has little regard for the truth. Leigh Buchanan Blenen, The Appearance of Justice: Juries, Judges and the Media Transcript, 86 J. CRIM. L. & CRIMINOLOGY 1096, 1098 (1996). She related a story about an individual who claimed on a television show that he goes to go the Los Angeles jail every three weeks to service Lyle Menendez’s hairpiece and that Menendez’s cell is right next door to O.J. Simpson’s cell. Id. The reality according to Abramson is that the hairpiece is not serviced at all and that Simpson was housed in an area secluded from all other prisoners. Id. at 1098–99.

27. This judge has since announced his retirement from the bench, effective July 31, 2007, to pursue a television career. Catherine Donaldson-Evans, Famed Judge to Step Down, SO. FLA. SUN-SENTINEL, June 20, 2007, at B1.

28. Id.

29. Id.


32. During a recent jury selection in a drug possession case, I noted with interest as prospective jurors questioned the prosecution and defense about scientific analysis. The prospective jurors inquired about the need and expectation of fingerprint and other forensic analysis that would allow definitive determination of the weight and sufficiency of the evidence.


34. Id. at 5–7.
Media coverage about the judicial system focuses on outrageous cases. The coverage of high-profile cases has also contributed to negative perceptions of the legal system and of judges. As a result, the public’s perception of what really happens in the courtroom is obscured by a lens that has little semblance of reality. These perceptions threaten to erode the integrity of the legal system. Unfortunately, the media’s focus on sensational trials and verdicts may play a role in some of the negative perceptions of justice. However, perceptions about the integrity of lawyers may play an even larger role.

C. Experiences of the Participants

The public’s perception about the impartiality of the judge may be shaped by the role of the individual in the legal system. For example, in the same trial, a victim, a juror, a plaintiff, a defendant, and a witness may each have different perceptions about partiality and the judicial system. Accordingly, each may have a different perception about the speech and conduct of the judge. This dichotomy becomes even more pronounced when the law-

35. LEVINE, supra note 19, § 6:25.14. Court TV brings the day to day reality of the courtroom to the general public. Every trial is not, however, carried out with the pomp and circumstance of the Scott Peterson, Robert Blake, or Michael Jackson trials. The snapshot of the media’s coverage of these trials may unfairly focus on judicial speech and conduct that creates a perception that may or may not be reality. For information on each of these trials, please refer to the Court TV website. Information about the Scott Peterson trial can be accessed from http://www.courtv.com/trials/peterson/ (last visited May 26, 2007). Information about the Robert Blake trial can be accessed from http://www.courtv.com/trials/blake/ (last visited May 26, 2007). Information about Michael Jackson’s various trials can be accessed from http://www.courtv.com/trials/jackson/ (last visited May 26, 2007).

36. Greene, supra note 3, at 35, 37. The O.J. Simpson trial reportedly supports the public belief that money can buy justice. Id.

37. Id. at 37.

38. Id.

39. Id.

40. Greene, supra note 3, at 36. A National Law Journal/West Publishing Company poll suggests that respect for the legal profession is declining. Randall Samborn, Anti-Lawyer Attitude Up, NAT’L L.J., Aug. 9, 1993, at 20. In a poll among a list of ten professions— including lawyers—only 2% of those polled said they had “the most respect for lawyers.” Id. This number was down from 5% in 1986. Id.

41. A victim who has been subjected to numerous interviews that require regurgitation of a disturbing and painful event may feel re-victimized. Therefore, the individual may perceive that justice is not served when a system seeks to ensure that a defendant’s constitutional rights are not compromised. If a juror is required to appear and to wait for a jury selection and trial that is riddled with delay and interruption, the juror may perceive that grave injustices exist within the judicial system.

42. Greene, supra note 3, at 35.
yers are added to the equation. The prosecutor and the defense attorney may have a different perception of justice that is dictated by the role they play. Each may view the speech and conduct of the judge differently in light of their roles as advocates and their beliefs about the independence, integrity, and impartiality of the judge. Likewise, in a civil action, the plaintiff’s lawyer and the defendant’s lawyer may each have different perceptions of justice. Each may view the speech and conduct of the judge differently, in light of their roles.

The negative perception of the public regarding the judicial system and some lawyers is supported by empirical evidence. By its very nature, the adversarial roles of lawyers can further distort the perception of justice. Admittedly, these diametrically opposed roles create the basic foundation for the fundamental challenge for the judge trying to positively affect public perception. Ultimately, one must concede that the perception and reality of integrity are cornerstones of an independent and impartial judiciary. Therefore, if left unrestrained, the speech and conduct of judges may erode the public’s confidence in the judicial system.

Studies have found that the public is more willing to accept an unpopular decision that is perceived as being fairly made. Therefore, the opportunity to be fully and fairly heard carries great weight. Moreover, a strong correlation exists between the public’s “[p]erception[] of fairness in the judicial system, . . . [and] its perception[] of . . . fairness in procedure[.].” “[B]ad judges terrorize courtrooms, impair the functioning of the legal system, and undermine public confidence in the law.” Judges, whose speech and conduct blatantly and repeatedly confront procedural fairness and create patterns of misconduct, run the risk of decreasing the public’s confidence to the detriment of the independence, integrity, and impartiality of the judicial system.

43. Id. at 36.
44. Id. at 35.
45. Id. at 36. Both are seeking to prevail. Id.
46. LEVINE, supra note 19, § 6:2. It is suggested that political rhetoric, ads, and commercials foster the perception of a “litigation crisis” severely tarnishing public perception. See Greene, supra note 3, at 37–38.
48. Id. at 451.
49. Id. at 451 n.6.
50. See id.
51. Id. at 452.
52. Miller, supra note 5, at 431 (quoting abstract).
53. See id.
The public will not and cannot be expected to adhere to the decisions of a court that lacks integrity and is not independent or impartial. Independence, integrity, and impartiality cannot be assumed or presumed from a court that does not adhere to high principles in its conduct and speech on and off the bench. Because the possibility exists for judicial speech and conduct to foster apprehension regarding the independence, integrity, and impartiality of the judiciary, a judge must accept some regulation. In reviewing judicial misconduct in this state, the Supreme Court of Florida has been critical of the penalties imposed in some cases and has rejected some of the recommendations of the Judicial Qualification Commission (JQC) as too lenient. The application of judicial discipline in Florida, a state which has adopted the America Bar Association (ABA) Model Code of 1990 and most recently adopted changes in its code in January 2006, will be used as a barometer for general application.

III. THE CODE OF JUDICIAL CONDUCT

A. The History of Judicial Discipline

The Code of Judicial Conduct is a standard of precepts by which judicial speech and conduct are measured and by which disciplinary proceedings are instituted against judges. Each state has developed a standard for regulating the speech and conduct of its judges which was generally, if not specifically, derived from ABA standards. Therefore, they provide an essential element to understanding the application of discipline against judges for speech and conduct that affects the independence, integrity, and impartiality of the judiciary.

Standards of ethical guidelines were first created by the ABA for the practicing bar in 1908. At the time that these guidelines were promulgated,
judges were not included in their application. Therefore, a tool for regulating judicial speech and conduct did not exist. This exclusion of ethical guidelines for judges was by no means an indication that the speech and conduct of judges did not warrant such regulation. Moreover, this lack of guidelines for judges did not prevent the conduct of judges from becoming a subject of concern about the independence, integrity, and impartiality of a judge.

Also, in 1922 a commission on judicial ethics was established by the ABA "to draft a code of judicial conduct." The appointment of then Chief Justice William Howard Taft to chair this commission accentuated the importance of the charge of the commission.

Finally, in 1924, the Canons of Judicial Ethics were promulgated and approved by the ABA. There were thirty-six canons instituted which operated as a guideline for states to adopt and were intended as a guide for ideal behavior. The intentional use of these canons only as a guide attracted critics who asserted that their oratory admonitions provided little guidance in determining a standard of proscribed conduct. This lack of a standard for proscribed conduct resulted in the discipline of judges being neither uni-

63. Id. The ABA, immediately after adopting the first canons of professional ethics for attorneys, sought to establish resolutions to include judicial discipline. Id. Resolutions were unsuccessfully presented in 1909, and in 1917. Id.

64. See id.

65. See ABA BACKGROUND PAPER, supra note 62, at 1.

66. See Major League Baseball, History of the Game: Kenesaw Mountain Landis, http://mlb.mlb.com/NASApp/mlb/mlb/history/mlb_history_people.jsp?story=com_bio_1 (last visited May 26, 2007); see also DAVID PIETRUSZA, JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS 191-93 (1998). In 1920, Judge Kennesaw Mountain Landis supplemented his federal district judge salary by serving as the first commissioner of baseball. Major League Baseball, History of the Game, supra. Judge Landis was brought in to lend his reputation to baseball after scandal threatened the integrity of baseball with the infamous White Sox scandal. Id. Players were alleged to have participated in a scheme to throw the 1919 World Series. Major League Baseball, Chicago White Sox Timeline: 1919-World Series, http://chicago.whitesox.mlb.com/cws/history/timeline01.jsp (last visited May 26, 2007). Although Landis banned eight players—even though they were acquitted at trial—he was criticized for his ethics in failing to ban owner Charles Comiskey. See Major League Baseball, History of the Game, supra. As a judge, Judge Landis earned $7,500 a year and supplemented this salary with a $42,500 a year salary as commissioner. Id. He continued to work as a federal judge while working as the first commissioner of baseball. Id.

67. ABA BACKGROUND PAPER, supra note 62, at 1.

68. Id.

69. Id.

70. Shaman, supra note 55, at 3.

71. Id.
formly nor universally undertaken. Consequently, the Canons remained virtually unchanged for almost fifty years.

B. The Creation of the Model Code of Judicial Conduct

In 1969, the ABA commenced a comprehensive review process to evaluate and update the Canons of Judicial Ethics. However, it was not until 1972 that these canons were modified to become the Model Code of Judicial Conduct. This Model Code reduced the number of canons from thirty-six to seven and incorporated language which eliminated the hortatory language of the previous Canons of Judicial Ethics. Hence, the 1972 Code indicated what a judge should do in an attempt to establish mandatory standards. This Model Code had no legal effect on the judges to whom it was intended to apply, and it would be necessary for each state to enact statutes or court rules that would make it mandatory and capable of enforcement. By 1990, “forty-seven states, the District of Columbia, and the Federal Judicial Conference” had adopted some form of the 1972 Model Code for regulation of judicial speech and conduct.

Also in 1990, a new version of the Model Code, adopted with five, not seven, canons emerged with significant changes from the 1972 Code. First, gender neutral language replaced the language in the 1972 Code, which had utilized masculine references only. Second, a terminology section was added to explain terms utilized in an attempt to ensure uniformity in understanding and application. Third, the language of the code was revised again to address the enforcement power of the Model Code. Therefore,

72. Id. at 6.
74. CODE OF JUD. CONDUCT Preface (1972).
75. ANN. MODEL CODE OF JUD. CONDUCT pmbl.
76. See CODE OF JUD. CONDUCT (1972); ABA BACKGROUND PAPER, supra note 62, at 1; JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS (3d ed. 2000).
77. See generally CODE OF JUD. CONDUCT (1972).
78. SHAMAN ET AL., supra note 76, at 3.
79. Id.
80. ABA BACKGROUND PAPER, supra note 62, at 1; see MODEL CODE OF JUD. CONDUCT (1990). Canons 4, 5, and 6 of the 1972 Code were combined into one canon dealing with conduct. ABA BACKGROUND PAPER, supra note 62, at 1.
83. ABA BACKGROUND PAPER, supra note 62, at 1; see also MODEL CODE OF JUD. CONDUCT (1990).
"should" was eliminated in favor of "shall" to emphasize the mandatory nature of the standards being established. 84 A note was added in the commentary to indicate clearly and unequivocally that mandatory enforcement and application was intended by the use of "shall" instead of "should." 85 Most notably, a preamble section was added, which explained: 1) how to apply the code; 2) when to apply the code; and 3) why to apply the code. 86 This explanation of the underlying principles of the code was an integral part of the code's effectiveness as a tool for regulation. 87

By 1990, forty-seven states had adopted the 1972 Code in some form. With the adoption of the 1990 Code, twenty of these forty-seven states, plus the District of Columbia, adopted the new Model Code of Judicial Conduct as their state's code. 88 Two of the three states that previously had no code of judicial conduct adopted the 1990 Code, bringing the total number of jurisdictions to twenty-three. 89 While some states have adopted a combination of the 1972 and 1990 Code, only Montana—with its own code—remains as the state that has adopted neither the 1972 nor 1990 Code. 90 Consequently, the Model Code operates as an excellent tool for application and analysis of judicial conduct.

C. The "New" Model Code of Judicial Conduct

In September of 2003, the ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct was formed to review the Code of Judicial Conduct and recommend changes. 91 In announcing the commission, then ABA President Dennis W. Archer, Jr. noted that it had been twelve years since the ABA had taken a close examination of the Code, and that in light of recent legal and political challenges and attacks on judges, some revisions may be warranted. 92 Public meetings were held across the country in conjunction with the ABA Annual Meeting. 93 The final draft report has been

85. Id.
86. See id.
87. MILFORD, supra note 73, at 9.
88. SHAMAN ET AL., supra note 76, at 3 n.19.
89. Id. at 4. Rhode Island and Wisconsin adopted codes based on the 1990 Model Code of Judicial Conduct. Id.
90. See MONT. CONST. art V, § 11.
91. ABA Joint Comm'n to Evaluate the Model Code of Jud. Conduct, About the Comm'n, http://www.abanet.org/judicialethics/about.html (last visited May 26, 2007) [hereinafter About the ABA Joint Comm'n].
93. About the ABA Joint Comm'n, supra note 91.
released and is awaiting comment from the judiciary, the bar, and the public.94

1. Format Changes

Both format and substantive changes to the Code are being proposed by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct.95 The format changes entail the reorganization of the information covered within the Canons and the numbering system.96 While Canons 4 and 5 address the same information they covered in the 1990 Code, most of the information previously provided in Canons 1, 2, and 3 has been placed in Canon 1.97 The judge’s professional duties are addressed solely in Canon 2.98 The personal conduct of the judge will now appear in Canon 3 instead of Canon 2.99 Second, the 1990 Code generally presents an overarching principle that is followed by subsections, which discursively provides the parameters for speech and conduct.100 Instead, the new code would more directly address permitted and prohibited speech and conduct.101 The numbering system will also be changed from lettered canons with subsections A,
B, or C to numbered canons with rules. A comment section will replace commentary throughout the code.

2. Substantive Changes

a. Canon 1—Conduct in General

"A judge shall . . . avoid impropriety and the appearance of impropriety in all of the judge’s activities,” so as to uphold “the independence, integrity, and impartiality of the judiciary.” The addition of the language after the comma is intended to emphasize the importance of avoiding impropriety and its appearance. It sets the tenor for judicial speech and conduct on and off the bench by stressing the importance of independence, integrity, and impartiality. Throughout the comment to this canon, the word independence is placed before both integrity and impartiality. Citing to over three decades of regulation of judicial conduct, the proposed changes place “the admonishment that judges avoid not only impropriety, but also its appearance in two places.” This language, regarding impropriety and its appearance, appears in the text of Canon 1 and in Rule 1.03 in the language “substantially as [it] appear[s] in the present Code.”

102. See Joint Comm. To Evaluate the Code of Judicial Conduct, ABA, Attachment B: Final Draft Report Redlined to Current ABA Model Code of Judicial Conduct (2005), available at http://www.abanet.org/judicialethics/redlinetocurrentcode.pdf [hereinafter Redline to Current Code]. For example, rules under Canon 1 would be designated: 1.01, 1.02, and 1.03. Id.
103. See id.
104. Id. Canon 1.
105. See id.
107. Redline to Current Code, supra note 102, Canon 1 cmts. 1–3.
108. Harrison et al., supra note 95, at 4. “The Commission . . . received numerous written communications on the question . . . of whether the 'appearance of impropriety' concept contained in the present Code should be retained.” Id. Some “urged that the concept be retained, [while] others, notably lawyers who represent judges and judicial candidates in disciplinary proceedings, voiced concerns that the concept is not clearly definable and does not provide judges and judicial candidates with adequate notice about what conduct might constitute a disciplinable offense.” Id.
109. Id.
b. Canon 2—Judicial Conduct

“A judge shall perform the duties of judicial office impartially . . . and diligently.” The redline copy of Canon 2 exemplifies the extensive revisions this Canon, which previously included only three subsections, has undergone. As the title to this Canon suggests, the admonition that “a judge shall perform the duties of judicial office impartially and diligently” is the subject and principal focus of Canon 2. The proposed changes would add seventeen additional provisions so that Canon 2 would contain twenty rules.

Each rule addresses speech and conduct that may occur while the judge is on the bench. Most of the speech and conduct addressed in this Canon was previously addressed in Canon 3 of the 1990 Model Code, using substantially the same language. The additional language of “[g]iving precedence to the duties of judicial office” further emphasizes the intent of this Canon. Impartiality and fairness are specifically addressed in a new Rule 2.06 that provides: “A judge shall uphold and apply the law, and decide all cases with impartiality and fairness.”

“Rule 2.08, ‘Demeanor and Decorum,’ contains a new Comment to accommodate” post-trial jury debriefing by delineating what must not be discussed. The Comment to Rule 2.09, “Ensuring the Right to be Heard,” adds a caution to judges to avoid coercion when “encouraging parties and their lawyers to settle disputes where possible.” In the proposal of Rule 2.10(B), judges are prohibited from “independently investigat[ing] facts in a case” and the importance of an independent judiciary is once again em-

110. REDLINE TO CURRENT CODE, supra note 102, Canon 2.
112. MODEL CODE OF JUD. CONDUCT Canon 2.
113. See REDLINE TO CURRENT CODE, supra note 102, Canon 2.
114. See id.
116. REDLINE TO CURRENT CODE, supra note 102, Canon 2.
117. Id. at Canon 2, R. 2.06.
118. HARRISON ET AL., supra note 95, at 4. This is a relatively new practice and procedure by some judges. See id.
119. Id. The proposal does not address the question of “[w]hether a judge who participates in facilitating settlement of a matter pending before him or her should be permitted to hear that matter if settlement efforts are unsuccessful [but this question] has been the subject of conflicting testimony.” Id.
120. Id. The Comment to the Rule specifically includes a prohibition against the “use of electronic research methods,” including Internet research. HARRISON ET AL., supra note 95, at 4–5. The Comment also notes the “developing practices in . . . ‘specialized courts,’ such as drug courts, domestic abuse courts, and others, [which] encourage or require judges to engage
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phasized. Rule 2.20 adds the duty of a judge to cooperate with judicial and lawyer disciplinary authorities.

c. Canon 3—Personal Conduct

"A judge shall conduct the judge's personal affairs to preserve the independence, integrity, and impartiality of the judiciary." The revision language for Canon 3 emphasizes the applicability of the code to speech and conduct that may occur during the personal life of a judge, including disclosure of information that may be deemed private. Many new commentaries have been added to this canon to provide clarity and clear guidance to the judiciary regarding personal conduct. For example, the revision comment provides that judges should write letters of recommendation based on "only knowledge obtained . . . in his or her official capacity." While the commentary is not new, it "addresses [a] long-standing debate about the appropriate use of judicial letterhead for references." While the

in communications with individuals and entities" and may violate ex parte provisions. See id. at 4–5. The addition to "[t]he Comment to Rule 2.12, 'Disqualification,' states that a judge 'should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification,'" which raised the question of "whether such an application of the disqualification rule is necessary or desirable, and specifically whether such an interpretation may work a hardship on one or both of the lawyers in a proceeding." Id. at 5.

121. REDLINE TO CURRENT CODE, supra note 102, Canon 2, R. 2.20.

122. HARRISON ET AL., supra note 95, at 5.

123. See id.

124. REDLINE TO CURRENT CODE, supra note 102, Canon 3.

125. See id.

126. See HARRISON ET AL., supra note 95, at 5–6; REDLINE TO CURRENT CODE, supra note 102, Canon 3.

127. HARRISON ET AL., supra note 95, at 5.


129. HARRISON ET AL., supra note 95, at 5. The issue of membership in the Boy Scouts of America was specifically addressed as a result of the United States Supreme Court's decision in Boy Scouts of America v. Dale, 530 U.S. 640 (2000). A Massachusetts Committee on Judicial Ethics found that the prohibition against discrimination based on sex did not refer to dis-
1990 Code presently contains a “prohibition against the manifestation of bias in the court.” The prohibition does “not appear with respect to organizational memberships held by a judge.”

Third, the caveat remains “that a judge may belong to ‘any organization dedicated to the preservation of religious, ethnic, or legitimate cultural values of common interest to its members’” without fear of violation of this canon.

Fourth, the comments note that attendance by the judge in violation of this canon is well established as a per se violation. Although, mere attendance of a judge at an event in a facility of a group that he or she could not join as a member does not violate the rule if attendance is an isolated event and could not be perceived as an endorsement of the organization.

Fifth, “a judge [must] immediately resign from an organization to which he or she belongs upon discovering that it engages in invidious discrimination . . . [but has] one year to withdraw from membership, unless he or she was successful in influencing the organization to abandon its discriminatory policies.”

d. Canon 4—Extrajudicial Conduct

“A judge shall conduct the judge’s extra-judicial activities . . . to minimize the risk of conflict with [judicial obligations].” “[T]he text of this Rule remains largely unchanged,” but the structure has changed, revising the description of gifts to exclude “several items that are not, in common parlance, thought of as gifts, including but not limited to: ordinary social hospitality; trivial tokens of appreciation; and loans, discounts, prizes, and scholarships that judges receive for reasons generally unrelated to their being judges.”

130. HARRISON ET AL., supra note 95, at 5.
131. Id.
132. Id. at 6.
133. See id. at 5–6.
134. Id. at 6.
135. REDLINE TO CURRENT CODE, supra note 102, Canon 4.
136. HARRISON ET AL., supra note 95, at 6.
"Rule 4.13(A)(7) remains substantially similar to the present Code, but includes several important changes." It provides that each jurisdiction should set a specific amount for the reporting of gifts instead of simply requiring that all gifts be reported. No gifts would be allowed for five years from persons who previously appeared before the court or who are likely to appear before the court in the foreseeable future.

First, Rule 4.14(A) would apply to waiver of charges as well as reimbursement of expenses. Second, permissible reimbursement is specifically limited to necessary travel and lodging. Third, [and the most important change is that] the condition precedent to accepting reimbursement or waiver of charges—that it not create an appearance of impropriety—has been amended to identify specifically the potential that the acceptance of gifts has for creating the perception that judicial integrity, impartiality, or independence may be compromised.

The Comment explicating this Rule is designed to provide judges with greater guidance when analyzing whether their reimbursement for attendance at a given event may be perceived as casting doubt on their integrity, impartiality, or independence. The sources of funding for an event, the reasonableness of the expenses paid, and the identity of the sponsor are all among factors that judges are urged to consider when deciding whether to attend expense-paid seminars.

e. Canon 5—Inappropriate Political Activity

"A judge or candidate for judicial office shall not engage in political . . . activity that is inconsistent with the independence, integrity, and impartiality of the judiciary." The redline copy of Canon 5 includes both substantial rule changes and significant comments to the canon. These changes appear to be a manifestation of the need to ensure the independence, integrity, and impartiality of the judiciary while recognizing "the political realities of judicial selection."

137. Id.
138. Id.
139. Id.
140. Id. at 7.
141. REDLINE TO CURRENT CODE, supra note 102, Canon 5. The former language is "[a] judge or judicial candidate shall refrain from inappropriate political activity." MODEL CODE OF JUD. CONDUCT Canon 5 (2004).
142. See REDLINE TO CURRENT CODE, supra note 102, Canon 5.
143. HARRISON ET AL., supra note 95, at 7.
The redline version adds the language: "activity that is not inconsistent with the independence, integrity, and impartiality of the judiciary." The language embodies these overriding principles while addressing the issues that may arise in the different methods of judicial selection. Rule 5.01 addresses the issue of speech and conduct that: 1) is false and made "with reckless disregard for the truth;" 2) might "reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending;" or 3) "make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of office." Rules 5.02, 5.03, 5.04, and 5.05 each address a different method of judicial selection.

Rule 5.02, "Permitted Political and Campaign Activities of Candidates for Judicial Office in Partisan Public Elections," contains specific language to indicate the speech and conduct permitted. This rule was contained in the previous code and generally adds language that clarifies the speech and conduct allowed. This rule specifically allows speech and conduct that would be prohibited by other rules.


Finally, Rule 5.05, "Permitted Political Activities of Candidates for Appointive Judicial Office," provides guidance for speech and conduct for those seeking appointment.
IV. THE SPEECH AND CONDUCT THAT THREATEN INDEPENDENCE, INTEGRITY, AND IMPARTIALITY

A. Categories of Judicial Speech and Conduct: The Florida Model

A recent article by Judge James R. Wolf explores the cost of judicial misconduct in Florida by conducting a comprehensive survey of judicial discipline.\(^\text{155}\) Judge Wolf identifies twenty categories of misconduct in his analysis of judicial discipline.\(^\text{156}\) The twenty categories are:

1) lacking judicial temperament; 2) failing to be impartial; 3) engaging in ex parte communications; 4) violating recusal and disclosure requirements; 5) improperly communicating with the press; 6) failing to follow the law while conducting judicial duties; 7) inappropriately using contempt power; 8) misusing office for personal gain; 9) misusing office for the [benefit] of others; 10) abusing substances; 11) improper receiving of gifts; 12) . . . improper sexual conduct; 13) . . . improper behavior while practicing law; 14) violating criminal laws; 15) . . . delay in ruling; 16) exhibiting a lack of candor during official proceedings; 17) failing to file required disclosure; 18) criticizing jurors and officials; 19) use of intimidation; and 20) . . . election misconduct.\(^\text{157}\)

Wolf’s article does not analyze the misconduct in the context of the most recent changes to the Florida Code of Judicial Conduct or the proposed changes in the Model Code of Judicial Conduct.\(^\text{158}\) The categories that he identifies are a comprehensive list of speech and conduct that frequently are the subject of judicial discipline.\(^\text{159}\) Narrowing the categories of misconduct identified by Judge Wolf provides a more useful mechanism for a broader

\(^{155}\) Wolf, supra note 57, at 350.

\(^{156}\) Id. at 352-53.

\(^{157}\) Id.

\(^{158}\) See id. at 351. According to Wolf:

While a study of the seven canons of the Florida Code of Judicial Conduct will certainly reveal what behavior constitutes judicial misconduct warranting the imposition of discipline, such a study cannot provide an adequate framework for determining the fairness or equality of the penalties actually received by judges for their misconduct.

Id.

\(^{159}\) See Wolf, supra note 57, at 352-53. In his analysis of judicial discipline while referring to categories one through ten of judicial misconduct, Wolf states: “While these behaviors are given many names, they essentially involve a judge being discourteous and not treating people the way he or she would want to be treated.” Id. at 367.
analysis of the speech and conduct. The twenty categories of misconduct can be reduced to three areas of misconduct: 1) on the bench speech and conduct; 2) off the bench speech; and 3) political speech and conduct.

These three categories provide a consolidated framework for comparison and evaluation of the judicial misconduct, and should serve as an effective and necessary tool for evaluating the regulation of judges in order to maintain public confidence and ensure the independence, integrity, and impartiality of the judiciary.

The examinations will necessarily include speech and conduct of judges during political activity to expose how the independence, integrity, and impartiality of the judiciary are affected.

B. Precepts for Regulation of Judicial Speech and Conduct

What a judge says can become as much the subject of discipline as what a judge does. The same speech may violate more than one provision, and each must be examined through those rules, commentaries, and cases that discuss the prohibited behavior. An adequate examination of judicial speech and conduct will necessarily overlap in depth and breadth of the analysis of the canons that govern such speech and behavior. While all of the canons may provide a constructive framework for analysis when looking at judicial speech or conduct, this examination of on the bench conduct will focus on, and begin with, an analysis of Canon 3, and then establish the implications of Canon 1 and Canon 2. The emphasis on Canon 3 reflects its overriding precepts of independence, integrity, and impartiality, and its emphasis on specific speech and conduct. The utility of Canon 4 as a tool for analysis is limited because of its framework, but it will be examined

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160. Id. at 352. With fewer categories, the opportunity for comparison and analysis is greater. See id. ("[I]t is beneficial for analytical purposes to identify narrow categories of conduct and to create a large number of categories to ensure that the comparison of penalties is truly for like conduct.").

161. See generally id at 352–53.

162. See Wolf, supra note 57, at 351 (raising many issues concerning discipline for judicial misconduct and implying why such issues are grounds for public concern).

163. See id. at 352.


165. See Wolf, supra note 57, at 352.

166. See id.


168. See id. Canon 1 ("A judge shall uphold the integrity and independence of the judiciary.").

169. See id. Canon 2 ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.").

170. See id. Canon 3.
for compliance. Finally, Canon 5 will be used to examine political speech and conduct.

"A judge shall uphold the integrity and independence of the judiciary." This canon invites desirable, not actual application, to judicial speech and conduct, but has been successfully applied to judicial speech and conduct, including political activity. The principal indictment against sole use of this canon as a disciplinary tool is that the "hortative and goal oriented" language fails to "set forth . . . the precise nature of the speech and conduct that may be subject to discipline." 

"A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." The overriding principle of this canon is the recognition of the need to prohibit irresponsible and improper speech and conduct through regulation. This regulation includes definitions of impropriety and the appearance of impropriety. It is impossible to list all speech and conduct that is prohibited by this canon, but the commentary provides that "improprieties under this standard include violations of law, court rules, or other specific provisions of this Code." The test for the appearance of impropriety of speech and conduct is objectively outlined as determining if "the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." This standard allows objective application of this canon to a variety of speech and conduct ranging from an ex-

171. See id. Canon 4.
172. MODEL CODE OF JUD. CONDUCT Canon 5.
173. Id. Canon 1.
174. E.g., In re Larsen, 616 A.2d 529, 612 (Pa. 1992). Numerous states have consistently noted the difficulty in applying this canon via case law. Id. Such cases involve examples of on the bench speech and conduct. See, e.g., In re Jacobi, 715 N.E.2d 873, 874-75 (Ind. 1999) (finding a violation of Canon 1 for extensive ex parte contact with a town's attorney and board president when granting its temporary restraining order); In re Waterman, 625 N.W.2d 748, 748-50 (Mich. 1999) (hearing cases of attorneys to whom he leased offices). For examples of off the bench speech and conduct see Miss. Comm'n on Jud. Performance v. Blakeney, 848 So. 2d 824, 826 (Miss. 2003) (initiating ex parte contact with deputy in attempt to obtain dismissal for defendant), and In re Esquiroz, 654 So. 2d 558, 558-59 (Fla. 1995) (charging a judge with a DUI in violation of Canon 1 and Canon 2). For examples of political speech and conduct see In re Koon, 580 S.E.2d 147, 148 (S.C. 2003) (illustrating an example of a case of inappropriate political activity), and In re Rodriguez, 829 So. 2d 857, 858-60 (Fla. 2002) (hearing a case on a campaign finance reporting irregularity).
177. Id
178. Id.
179. Id. Canon 2 cmt.
180. Id.
tramarital affair to failing to pay for income tax preparation, while awarding an income tax accountant fiduciary appointments.

“A judge [should] perform the duties of [a judge] impartially and diligently.” The all-encompassing nature of this canon provides the most comprehensive umbrella for analysis of judicial speech and conduct. This general applicability continues with the admonition that “judicial duties of a judge take precedence over all the judge’s other activities.” “The judge’s judicial duties include all the duties of the judge’s office prescribed by law.” In pronouncing the standards that would apply to this canon, the subsections identify the parameters as: 1) adjudicative duties; 2) administrative duties; 4) disciplinary duties; and 5) those duties relating to disqualification. Ultimately, an allegation of improper speech or conduct must generally include a violation of this canon, because it covers most aspects of how a judge should conduct judicial and extra-judicial activities.


184. See generally id.


186. Id.

187. Id. Canon 3B; see Wolf, supra note 57, at 359. Judge Wolf identifies these duties in terms of the need for the judge to “maintain[] competence, . . . order, and decorum” on the bench and judicially perform duties with dignity and courtesy free of bias and prejudice. Wolf, supra note 57, at 359. The administrative duties also require the judge to ensure “a party’s right to be heard” without improper ex parte communication or public comments. FLA. CODE JUD. CONDUCT Canon 3B.

188. FLA. CODE JUD. CONDUCT Canon 3C; see Wolf, supra note 57, at 359. Generally, these responsibilities include the adjudicative duties and the need to avoid favoritism and nepotism when making appointments. FLA. CODE JUD. CONDUCT Canon 3C.

189. FLA. CODE JUD. CONDUCT Canon 3D; see Wolf, supra note 57, at 359. This duty specifies the responsibility of a judge to report judicial and attorney misconduct. FLA. CODE JUD. CONDUCT Canon 3D.

190. FLA. CODE JUD. CONDUCT Canon 3E; see Wolf, supra note 57, at 359. This duty specifies the requirements of a judge for disclosure and recusal. FLA. CODE JUD. CONDUCT Canon 3E.

191. See MODEL CODE OF JUD. CONDUCT Canon 3 (2004) (“The judicial duties of a judge take precedence over all the judge’s other activities. The judge’s judicial duties include all the duties of the judge’s office prescribed by law. In the performance of these duties, the [standards of Canon 3] apply.”).
A judge should conduct "the judge’s extra-judicial activities [as] to minimize the risk of conflict with judicial obligations." This canon specifically applies to off the bench speech and conduct, and generally provides guidance to the judge when participating in these activities. Complete withdrawal by the judge from all extra-judicial activities is neither advisable nor required lest the judge becomes isolated from the community. However, this canon makes clear that the judge must accept speech and conduct limitations and expect to be the subject of scrutiny.

“A judge or judicial candidate shall refrain from inappropriate political activity.” In recent years, the legislative branch has become involved in attempts to encroach upon and politicize the issue of judicial independence. In 2002, the United States Supreme Court became the venue of vociferous attacks on judicial speech and conduct, especially during elections. In Republican Party of Minnesota v. White, the Court found unconstitutional a provision of the Minnesota Code of Judicial Conduct that prevented judicial candidates from announcing their views regarding disputed legal and political questions. In emphasizing the positive value of announcements on views regarding disputed legal and political questions, the

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192. Id. Canon 4.
193. Id.
194. Id. Canon 4 cmt.
195. Id.

Expressions of bias or prejudice by a judge, even outside the judge’s judicial activities, may cast reasonable doubt on the judge’s capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

196. Id. Canon 5.
199. Id. at 765.
200. Id. at 788.
Court stated that candidate platforms and positions are "what the elections are about." 201

C. Parameters of Judicial Speech and Conduct

The use of the canons for the examination of on the bench and off the bench speech and conduct must be preceded by determining what is meant by judicial duties. 202 This canon provides guidance stating that judicial duties are "all [of] the duties of the judge’s office prescribed by law." 203 Since by law a judge is capable of being called into service twenty-four hours a day, do judicial duties encompass all speech and conduct by a judge? For the purpose of analysis under this canon, judicial duties will be used in reference to speech and conduct which occur while on the bench or while carrying out a judicial function. 204 Consequently, anything that a judge says or does in direct connection with judicial duties can and will be subject to examination under this rubric. 205

1. On the Bench Speech and Conduct

On the bench speech may encompass the following: 1) "lacking judicial temperament;" 2) "failing to be impartial;" 3) "engaging in ex parte communications;" 4) "exhibiting a lack of candor during official proceedings;" 5) "criticizing juries and . . . officials;" and 6) "use [of] intimidation." 206 The use of intimidation must be examined on a case-by-case basis since the speech or conduct may be indicated by a single event. 207 Arguably, both failing to be impartial and the use of intimidation could also occur off the bench for personal advantage or some other reason. 208 However, those instances, for the purpose of this analysis, will be characterized as "misus[e]
of office [either] for personal gain” or for the benefit of others.\textsuperscript{209} All of these categories, which were identified by Judge Wolf, provide an opportunity for useful analysis, especially when examined in the context of improper judicial speech.\textsuperscript{210}

Again utilizing the categories identified by Judge Wolf, on the bench conduct that will be examined consists of the following: 1) “Violating Recusal and Disclosure Requirements;” 2) “Failing to Follow the Law While Conducting Judicial Duties;” 3) “Inappropriately Using Contempt Power;” 4) “Delay in Ruling;” 5) “Failing to File Required Disclosure” Documents; and 6) “Use of Intimidation.”\textsuperscript{211} While there is some overlap in these categories of judicial discipline, the designation of on the bench conduct provides a common thread for analyzing the speech and conduct.

2. Off the Bench Speech and Conduct

Determining the parameters of the off the bench judicial speech and conduct that may be subject to discipline may be ascertained more easily. The off the bench designation essentially includes any other speech and conduct that does not occur on the bench and in direct connection with judicial duties. The aspects of speech and conduct that may be examined under Canon 4 will be judicial activities specifically defined as: 1) “Avocational Activities;”\textsuperscript{212} 2) “Governmental, Civic or Charitable Activities;”\textsuperscript{213} 3) “Financial Activities;”\textsuperscript{214} 4) “Fiduciary Activities;”\textsuperscript{215} 5) “Service as Arbitrator or Mediator;”\textsuperscript{216} and 6) “Practice of Law.”\textsuperscript{217} These activities govern judicial conduct relating to participation in non-judicial activities.

3. Political Speech and Conduct

The final analysis of judicial speech and conduct will examine political activity.\textsuperscript{219} Political activity will take into account speech and conduct of judges and judicial candidates in a judicial election.\textsuperscript{220} It will also examine
speech and conduct within the context of the appointment process.\footnote{See id.} Finally, it will examine speech and conduct on behalf of another candidate within the context of an election or political appointment of a judge or any other person.\footnote{See id.} Political activity will include both speech and conduct because the political environment is the principal catalyst in the analysis of misconduct.\footnote{Model Code of Jud. Conduct Canon 5.}

V. THE EXAMINATION OF JUDICIAL SPEECH AND CONDUCT

A. On the Bench Speech and Conduct

The concept of limiting judicial speech and conduct on the bench can be easily justified since what a judge says and does can have serious ramifications for those who appear in court. A large percentage of the cases of misconduct occur as a result of incivility.\footnote{Wolf, supra note 57, at 367. In Florida, complaints of incivility constitute a large percentage of the referrals to the Judicial Qualifications Committee. Id.} Both speech and conduct are the subjects of these complaints.\footnote{See id. at 368.} The consequences of improper speech can extend further than discipline against the judge and lead to the reversal of a conviction.\footnote{See Shaman, supra note 55, at 8–9. When legal error results in the reversal of a conviction, a question may arise whether such grounds should be the basis for judicial discipline. Id.} These instances of judicial misconduct become more than legal error because they represent a departure by the judge from the obligation to “[p]erform the [d]uties of [j]udicial [o]ffice [i]mpartially and [d]iligently.”\footnote{Model Code of Jud. Conduct Canon 3 (2004).} Judicial misconduct resulting in legal error has ramifications far greater than the cost of judicial disciplinary proceedings.\footnote{See Shaman, supra note 55, at 8.}

As a rule, judges should “not be disciplined for errors of judgment or errors of law.”\footnote{In re Tucker, 501 S.E.2d 67, 71 (N.C. 1998) (citing In re Martin, 424 S.E.2d 118, 120 (N.C. 1993)).} To allow discipline for anything less than egregious examples of misconduct may have the “tendency to chill . . . independence.”\footnote{Ben F. Overton, Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions, 54 Chi.-Kent L. Rev. 59, 66 (1977).} The disciplinary process should not be a substitute for the appellate process.\footnote{See Shaman, supra note 55, at 8.} Conversely, failing to address legal error that is the result of inten-
tional, repeated, or blatant misconduct does not promote confidence in the impartiality and integrity of the court. 232 A judge presides over little, if anything else, that is more solemn, decisive, or significant than a first degree murder case in which the death penalty is being sought. 233 Therefore, the judge whose improper speech or conduct creates legal error that causes a reversal is significant, as evidenced in the speech of Judge Donald McCartin. 234

In a decision filed on March 6, 2006, the Supreme Court of California reversed the death penalty imposed in a 1992 triple homicide, noting that at several crucial instances, the trial judge made comments in front of the jury that constituted misconduct and required reversal. 235 The judge blatantly and repeatedly crossed the line from legal error to judicial misconduct. 236 First, during the jury selection, the judge falsely told the jury that premeditation was a "gimme." 237 He interrupted two defense expert witnesses (a pharmacologist and a psychologist) to ridicule their testimony 238 He made objections and comments on behalf of the state, while repeatedly chastising the defense attorney. 239

In announcing its decision, the court noted that "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." 240 The Sturm

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232. See id. at 8–9.
233. See generally id.
234. See People v. Sturm, 129 P.3d 10, 17 (Cal. 2006).
235. See id.
236. See id.
237. Id. at 18. The court noted that this comment regarding premeditation was of extreme concern because the lack of premeditation was a central theme of the defendant's case in mitigation. Id. The jury specifically found him guilty of felony-murder instead of premeditated murder and deadlocked ten to two in favor of life instead of death during the penalty phase. Sturm, 129 P.3d at 12.
238. See id. at 19. The judge jokingly told the pharmacology expert that his "$4 million [in] . . . federal grants . . . [while at] the University of California . . . [had] contributed to the federal deficit." Id. (internal quotations omitted). He indicated that the government had "spent too much already" on such research and that testimony about it "would be very depressing and we will need cocaine." Id. (internal quotations omitted). He accused the psychologist of embellishing answers and responding incorrectly to a defense question. Id. at 20.
239. See Sturm, 129 P.3d at 20–21. During the overall presentations by the state in aggravation and defense in mitigation, the judge "sua sponte intervened more than 30 times during the defense case" and the state "less than five times." Id. at 24 (emphasis added). The interruptions were generally negative and/or disparaging. Id. at 24 n.3.
court stated that "[i]t was reasonably probable that the . . . penalty phase jury’s verdict would have been different had the trial judge exhibited the patience, dignity, and courtesy that is expected of all judges." This incidence of discourteous speech is an apposite paradigm of the intemperate and impartial speech that has been the subject of the discipline of judges and the reversal of criminal cases. Maintaining impartiality requires a judge to act in absence of bias or prejudice and keep an open mind. The use of the code to overturn criminal cases provides an additional level of examination, thereby contemplating an additional consequence of judicial misconduct. Retrial, after fifteen years of even the penalty phase of a death penalty case, will be difficult and costly. Because Judge McCartin retired in 1993, the real cost of this judicial misconduct may never be fully realized.

In 2004, Judge Faith Johnson invited the media to a party replete with a cake and balloons for the sentencing of a defendant who absconded during trial. The defendant “previously served time in prison for killing his wife . . . [and] was convicted in absentia of aggravated assault” for choking his girlfriend. Judge Johnson noted that each year in the United States, four million women are physically assaulted and thirty percent of female homicide victims are slain by husbands, boyfriends, or live-in partners Judge Johnson also said that “when these kinds of stats begin to shrink, then we’ll have cause to celebrate . . . Until then, this man’s recapture—particularly in national domestic violence month—sends the message that the law is against domestic violence."

On April 29, 2005, the Texas Commission on Judicial Conduct found that Judge Johnson violated the judicial code by not maintaining “order and decorum in [her] courtroom.” Further, they found that her actions “were

241. Sturm, 129 P.3d at 27 (citing CAL. CODE OF JUD. ETHICS Canon 3B(4) (2006)).
242. See Wolf, supra note 57, at 366–67. Examples include “lack of decorum . . . [and] dignity . . . disapproving lawyers, . . . litigants, . . . witnesses . . . [and court personnel], . . . and inappropriate humor or sarcasm.” Id. (internal citations and quotations omitted).
244. See Sturm, 129 P.3d at 17.
245. See Donald A. McCartin, A ’Hanging Judge’s’ Second Thoughts: Fairness and Balance Aren’t Possible, So Death Penalty Should Be Scrapped, ORANGE COUNTY REG., June 24, 2005, at editorial page.
247. Id. (emphasis added). The defendant fled during the trial proceedings. Id.
248. Id.
249. Id. (internal quotations omitted).
willful and cast public discredit upon the judiciary."\textsuperscript{251} A public admonition was imposed against the judge, who had earlier apologized before the commission.\textsuperscript{252} Similar to the misconduct in this case, many cases of judicial misconduct deal with the judge's lack of decorum in the courtroom.\textsuperscript{253}

B. \textit{Off the Bench Speech and Conduct}

Is the private expression of a bias or prejudice by a judge analogous to an expression of bias and prejudice on the bench? Do these expressions warrant First Amendment protection that may not be available for on the bench speech and conduct? Although a judge does not abdicate all constitutional rights with assumption of the bench, some restrictions must be imposed.\textsuperscript{254} Once bias and prejudice are expressed publicly, even if not from the bench, the independence, integrity, and impartiality of the judiciary may be compromised.\textsuperscript{255} The very public nature of the judge's role may subject any speech and conduct to scrutiny.\textsuperscript{256}

Scrutiny of off the bench speech may be subject to scrutiny, with or without discipline, but the cost may be measured in terms of the independence, integrity, and impartiality of the judiciary.\textsuperscript{257} The Supreme Court of Mississippi's five to two refusal to discipline a judge for making obviously prejudicial comments poignantly illustrates the difficulty of addressing speech and conduct that brings the independence, integrity, and impartiality of a judge into question; especially where no manifestation of bias or prejudice has been exhibited by the judge in the execution of his or her judicial duties.\textsuperscript{258}

Judge Connie Glen Wilkerson wrote a letter to his local newspaper in response to the enactment of legislation in California that granted same sex partners the same rights granted to spouses and families.\textsuperscript{259} Judge Wilkerson

\textsuperscript{251} Id. at 32.
\textsuperscript{252} Id. This is the least severe punishment that can be issued. \textit{See id.}
\textsuperscript{253} \textit{See In re J.Q.C. (Hammill)}, 566 S.E.2d 310, 316 (Ga. 2002); \textit{In re Trettis}, 577 So. 2d 1312, 1313 (Fla. 1991).
\textsuperscript{254} \textit{See MODEL CODE OF JUD. CONDUCT Canon 1A (2004).}
\textsuperscript{255} \textit{See In re Stevens}, 645 P.2d 99, 99 (Cal. 1982). The judge was publicly censured by the Supreme Court of California for using racial and ethnic epithets repeatedly and consistently, even though he performed his duties free from any bias and the comments were generally made from his chambers. \textit{Id.}
\textsuperscript{256} \textit{MODEL CODE OF JUD. CONDUCT Canon 1A cmt.}
\textsuperscript{258} \textit{See id.} at 1016.
\textsuperscript{259} Id. at 1008.
said that “[i]n [his] opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them.”

He followed up the publication of his letter with an interview on a radio show, during which he said that his deeply religious beliefs led him to believe that homosexuality is a mental illness that requires treatment.

Can gay and lesbian litigants expect fair and impartial treatment on the bench from a judge who makes such comments off the bench? Should a gay parent seeking custody of a child after divorce expect the judge to be fair and impartial in deciding custody issues? How will bias be proven? Should the judicial discipline be delayed unless and until improper influence from bias or prejudice is manifested in his on the bench conduct? The answer to these questions is a resounding “yes” according to the Mississippi Commission on Judicial Performance.

Consider the Supreme Court of Mississippi’s application of Canons 2A and 4A in addition to Canons 1, 2, and 4. The commentary of Canon 1 explicitly states that “[a]n independent judiciary is one free of inappropriate outside influences.” An opinion, unsupported by expert

260. Id. at 1009 (quoting Connie Glen Wilkerson, Letter to the Editor, GEORGE COUNTY TIMES, Mar. 28, 2002).

261. Id. at 1008.

262. See Wilkerson, 876 So. 2d at 1015–16.

263. “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” MODEL CODE OF JUD. CONDUCT Canon 2A. The Mississippi Code of Judicial Conduct is materially similar to this canon of the ABA Model Code of Judicial Conduct. Compare id., with MISS. CODE OF JUD. CONDUCT Canon 2A (2005).

264. “A judge shall conduct all of the judge’s extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.” MODEL CODE OF JUD. CONDUCT Canon 4A(1)-(3). The Mississippi Code of Judicial Conduct is identical to this canon of the ABA Model Code of Judicial Conduct. Compare id., with MISS. CODE OF JUD. CONDUCT Canon 4A(1)-(3).


266. “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” MODEL CODE OF JUD. CONDUCT Canon 2. The Mississippi Code of Judicial Conduct is identical to this canon of the ABA Model Code of Judicial Conduct. Compare id., with MISS. CODE OF JUD. CONDUCT Canon 2.

267. “A judge shall so conduct the judge’s extra-judicial activities to minimize the risk of conflict with judicial obligations.” MODEL CODE OF JUD. CONDUCT Canon 4. The Mississippi Code of Judicial Conduct is identical to this canon of the ABA Model Code of Judicial Conduct. Compare id., with MISS. CODE OF JUD. CONDUCT Canon 4.

268. MODEL CODE OF JUD. CONDUCT Canon 1A cmt.
testimony, that homosexuality is a mental illness may be seen as an inappropri- 
ate outside influence, especially without a commitment to follow the law.269 “The test for [determining whether a judge’s activities would constitute the] appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.”270

“‘Impartiality’ . . . denotes [the] absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.”271 Consequently, it appears clear that impartiality is impaired by the expression of bias and prejudice off the bench.272 As an extra-judicial activity, the judge’s speech—i.e., radio broadcast and newspaper editorial—does not “minimize the risk of conflict” as mandated by Canon 4, for a judge sitting in a court in which same-sex litigants may appear.273

The Supreme Court of Mississippi reasoned that a “[c]ourt clearly may not impose sanctions for violation of a Canon where doing so would infringe on rights guaranteed under the First Amendment, including the freedom of speech.”274 It found that there was no compelling state interest to warrant a requirement that judges not announce their prejudices, provided that the appearance of impartiality is intact.275 The court noted that “the objects of judicial prejudice are entitled to seek a level playing field through recusal motions, and citizens who disagree with a judge’s views are entitled to voice their disagreement at the ballot box.”276

First, the appearance of impartiality cannot be intact since the conduct277 would “create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities . . . is impaired.”278 Second, recusal as a result of the “judge’s extra-judicial activities”279 creates a certain “risk of conflict with judicial obligations”280 that is in direct conflict with the Canon 3A provision which states “[t]he judicial duties of a judge take precedence.

270. MODEL CODE OF JUD. CONDUCT Canon 2A cmt.
271. Id.
272. See generally id.
273. Id. Canon 4.
275. Id. at 1015.
276. Id. at 1016.
277. I.e., the bias expressed.
278. MODEL CODE OF JUD. CONDUCT Canon 2A cmt.
279. Id. Canon 4. I.e., the bias expressed.
280. Id.
over all the judge’s other activities.” Therefore, the agreement or disagreement by voters about clearly improper conduct should not come into operation if the Code of Judicial Conduct is enforced properly.

Canon 2A provides, *inter alia*, that “[a] judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” There is no allowance for off the bench conduct that erodes public confidence in the “integrity and impartiality of the judiciary.” Neither bias nor prejudice is proper judicial conduct and both are expressly prohibited on the bench. Public confidence is eroded, and not promoted by, manifestations of bias and prejudice. “A judge shall conduct all of the judge’s extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.” Undoubtedly, “[e]xpressions of bias or prejudice . . . may cast reasonable doubt on the judge’s capacity to act impartially,” and must be avoided.

The Supreme Court of Louisiana reached a much different result regarding off the bench conduct that was determined to be a manifestation of bias and prejudice. Judge Timothy C. Ellender wore a black afro wig, shackles, an orange prison jumpsuit, and black makeup to a private Halloween party held at a public restaurant owned by his brother-in-law. There was no further allegation of misconduct regarding the costume. Though

281. *Id.* Canon 3A. The Mississippi Code of Judicial Conduct is identical to this canon of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with MISS. CODE OF JUD. CONDUCT Canon 3A.

282. *See generally* MODEL CODE OF JUD. CONDUCT Canon 3A-B.

283. *Id.* Canon 2A (emphasis added).

284. *Id.*

285. *Id.* Canon 3B(5). Canon 3B(5) provides that:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status . . .

*Id.* The Mississippi Code of Judicial Conduct is identical in this prohibition. Compare MODEL CODE OF JUD. CONDUCT Canon 3B(5), with MISS. CODE OF JUD. CONDUCT Canon 3B(5).

286. *See* MODEL CODE OF JUD. CONDUCT Canon 1A cmt.

287. *Id.* Canon 4A(1)-(3).

288. *Id.* Canon 4A cmt.


290. *Id.* at 227.

charged with violations of Canons 1, 2A, 2B, 3B(5), and 3E. Judge Ellender entered into a stipulation and was found in violation of Canons 1 and 2A. In affirming the recommendation of the Louisiana’s Commission on Judicial Conduct, the court found that the judiciary was brought into disrepute by the judge’s conduct and sentenced him to a year’s suspension without pay. Specifically, the court considered ten factors previously utilized by the court to determine the proper sentence it should impose. These factors provide a useful framework for analysis.

292. Id. at 228. “A judge shall uphold the integrity and independence of the judiciary.” MODEL CODE OF JUD. CONDUCT Canon 1. “An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.” Id. Canon 1A. The Louisiana Code of Judicial Conduct is identical to this canon of the ABA Model Code of Judicial Conduct. Compare id. Canon 1, with LA. CODE OF JUD. CONDUCT Canon 1 (2006).

293. “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” MODEL CODE OF JUD. CONDUCT Canon 2A. The Louisiana Code of Judicial Conduct is identical to this canon of the ABA Model Code of Judicial Conduct. Compare id., with LA. CODE OF JUD. CONDUCT Canon 2A.

294. “A judge shall not lend the prestige of judicial office to advance the private interests of the judge . . . .” MODEL CODE OF JUD. CONDUCT Canon 2B. The Louisiana Code of Judicial Conduct is identical to Canon 2B of the ABA Model Code of Judicial Conduct. Compare id., with LA. CODE OF JUD. CONDUCT Canon 2B.

295. MODEL CODE OF JUD. CONDUCT Canon 3B(5). “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . and shall not permit staff, court officials, and others subject to the judge’s direction and control to do so.” Id. Canon 3A(4) of the Louisiana Code of Judicial Conduct is materially similar to Canon 3B(5) of the ABA Model Code of Judicial Conduct. Compare id., with LA. CODE OF JUD. CONDUCT Canon 3A(4).

296. MODEL CODE OF JUD. CONDUCT Canon 3E. Recusal. The judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule. In all other instances, a judge should not recuse himself or herself.


298. Id. at 231, 233, 233 n.2. The judge was also ordered to pay the costs of investigation and prosecution. Id. at 227.

299. See id. at 232. The Supreme Court of Louisiana adopted a non-exhaustive list of ten factors to consider in imposing discipline on a judge:

(a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent, and frequency of occurrence of the acts of misconduct; (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge’s official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his
The Supreme Court of Louisiana deferred six months of the one year suspension on the condition that the judge receive racial sensitivity training. In a concurring opinion, the court specifically noted that:

Those who would write off Judge Ellender's lapse in judgment as a harmless prank requiring only a token sanction do not understand how deeply such an act resonates throughout the African-American community as a harsh reminder of a not too distant past . . . Requiring Judge Ellender to undergo racial sensitivity training sends the message not only to Judge Ellender but to the rest of the country that racial slurs and stereotyping, whether intentional or merely thoughtless, will no longer be tolerated in Louisiana . . . . [Such training] could be beneficial in preventing similar infractions of the judicial code of conduct and [in] promoting the impartial administration of justice to all our citizens.

It is of value to note that this court, unlike the Mississippi court and commission, specifically found it appropriate to punish the judge in spite of the fact that no evidence existed that the judge had been unfair and partial in his treatment of blacks. The disparity between Mississippi's finding that there had been no violation and Louisiana's imposition of a one-year suspension is troubling. It is important to note that both of these states reached their diametrically opposed results using canons that essentially mirror the ABA Model Code of Judicial Conduct. There is no clearinghouse or national review of a state court's application and imposition of its code of judicial conduct.

Some speech and conduct is so prejudicial as to warrant the kind of discipline administered in Louisiana. However, the disparity between the Mississippi and Louisiana courts cannot be reconciled. The disparity in disciplinary actions from state to state creates great difficulty in establishing

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conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires.

In re Chaisson, 549 So. 2d 259, 266 (La. 1989) (citing In re Deming, 736 P.2d 639, 659 (Wash. 1987)).

See Ellender, 889 So. 2d at 232.

Id. at 233.

Id. at 236 (Lombard, J., concurring).

Id. at 232–33.

Compare Miss. Comm'n on Jud. Performance v. Wilkerson, 876 So. 2d 1006, 1016 (Miss. 2004), with Ellender, 889 So. 2d at 234.

Compare Wilkerson, 876 So. 2d at 1016, with Ellender, 889 So. 2d at 232.

See Ellender, 889 So. 2d at 233–34.

Compare Wilkerson, 876 So. 2d at 1016, with Ellender, 889 So. 2d at 233–34.

https://nsuworks.nova.edu/nlr/vol31/iss3/1
and enforcing standards for regulating speech and conduct. A salient distinction in the treatment of the cases may be the First Amendment issue of regulating the speech of Judge Wilkerson versus the conduct of Judge Ellender. Undoubtedly, it is this kind of disparity in disciplinary actions that erodes the public’s confidence in the integrity and independence of the bench.

C. Political Speech and Conduct

The regulation of the political activity of judges invites an even greater opportunity for disparate treatment as speech and conduct are examined. On May 10, 2006, the Texas Commission on Judicial Conduct issued a public admonition to Supreme Court of Texas Justice Nathan L. Hecht regarding comments he made to the press last year in support of the nomination of White House Counsel Harriet Miers to the United States Supreme Court. Court records reveal that Justice Hecht, “by his own admission, participated in approximately 120 media interviews concerning Miers’ nomination.” Justice Hecht also appeared on several television and radio news and talk shows to discuss Miers’ nomination.

The commission found that Hecht’s actions constituted “persistent and willful violations” of two canons of the Texas Code of Judicial Conduct. The first violation was found based on Canon 2B which states that “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.” The second violation was found based on Canon 5(2) which provides that “[a] judge or judicial candidate shall not authorize the

308. See generally Model Code of Jud. Conduct (2004); Wilkerson, 876 So. 2d at 1016; Ellender, 889 So. 2d at 233–34.
309. Compare Wilkerson, 876 So. 2d at 1016, with Ellender, 889 So. 2d at 233–34.
311. See id. Canon 5.
313. Id. at 2.
314. Id. “At that time, Hecht jokingly said to Texas Lawyer that he had been acting as a ‘PR office for the White House’ and had been filling in gaps about Miers’ background to the press, countering some conservatives’ skepticism about her qualifications.” John Council, Commission on Judicial Conduct Admonishes Justice Hecht, Tex. Law., May 23, 2006.
315. Hecht, Nos. 06-0129-AP & 06-0130-AP, slip op. at 4.
The public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party.\textsuperscript{317} The commentary to Canon 2B of the \textit{Model Code of Judicial Conduct} provides that "[j]udges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquires."\textsuperscript{318} Justice Hecht, in his defense, asserted that "I believe that my statements on matters of national public interest did not offend canons of judicial ethics and were fully protected by the First Amendment as core speech."\textsuperscript{319} Hecht further stated that "[a]s best I can determine, the Commission's action is unprecedented despite many judges, over the years, providing factual information and endorsements to the judiciary committee and the public concerning nominees to the federal bench."\textsuperscript{320}

Judges are often in the position to be able to knowingly comment on the qualifications of a judicial candidate.\textsuperscript{321} While such comments may raise the specter of political involvement, they are allowed nonetheless.\textsuperscript{322} Justice Hecht's statements in his defense accurately depict allowable judicial participation in Texas.\textsuperscript{323} However, the Commission identifies the public use of the judge's name as the nature of the violation.\textsuperscript{324} Specifically, the Commis-

\begin{itemize}
  \item \textsuperscript{317} \textit{TEX. CODE OF JUD. CONDUCT} Canon 5(2). Texas judges face partisan elections and are allowed to participate in limited partisan activities. \textit{See generally id.} Canon 5. While there is no analogous canon in the Model Code, the \textit{Model Code of Judicial Conduct} does provides that "[a] judge or candidate subject to public election . . . , except as prohibited by law, [may], when a candidate [is up] for election, publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running." \textit{MODEL CODE OF JUD. CONDUCT} Canon 5(C)(1)(b)(iv).
  \item \textsuperscript{318} \textit{id.} Canon 2B cmt.
  \item \textsuperscript{319} Council, \textit{supra} note 314 (internal citations omitted).
  \item \textsuperscript{320} \textit{id.} (internal citations omitted).
  \item \textsuperscript{321} \textit{See generally MODEL CODE OF JUD. CONDUCT} Canon 5 cmt.
  \item \textsuperscript{322} \textit{See id.} An Oklahoma advisory opinion, in looking at the appropriateness of judicial participation, developed five factors to be considered when determining the limitations on a judge's participation in the selection of another judge:
    \begin{enumerate}
    \item The judge must have personal knowledge of the person being recommended;  
    \item The judges' recommendation should: (a) be and appear to be directed only to the factors relevant to performance of the judicial office; (b) be factual, evenhanded, succinct and discreet;  
    \item A judge should not lend his or her name to any publicity campaign for any candidate;  
    \item A judge should avoid pleading for a candidate of the judge's choosing in opposition to others under consideration;  
    \item A judge should not provide a letter of endorsement for a candidate if the judge could reasonably expect that the endorsement will be publicly announced or public distributed in support of the endorsed candidate.
    \end{enumerate}
  \item \textsuperscript{323} \textit{In re} Hecht, Nos. 06-0129-AP, 06-0130-AP, slip op. at 4 (Tex. State Comm'n on Jud. Conduct May 10, 2006).
  \item \textsuperscript{324} \textit{Id.}
\end{itemize}
sion concluded that "Justice Hecht allowed his name and title to be used by the press and the White House in support of his close friend, Harriet Miers, a nominee for the office of United States Supreme Court Justice."\(^{325}\)

In addition to the cost of the misconduct to the independence, integrity, and impartiality of the judiciary, there are obvious conflicts about what constitutes misconduct affect the judge.\(^{326}\) A judge must expect scrutiny and accept restrictions on speech and conduct with the assumption of judicial office.\(^{327}\) The aftermath of *White*\(^{328}\) has been assertions that speech or conduct alleged as improper are a valid exercise of First Amendment rights.\(^{329}\)

The Texas court, in issuing the public admonition against Justice Hecht, focused on two issues.\(^{330}\) First, "'[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.'"\(^{331}\) The second issue was that "'[a] judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party.'"\(^{332}\) There does not appear to be a connection between the misconduct alleged and the "announce clause" of *White*.\(^{333}\)

An additional, yet unexamined, cost of judicial misconduct is that of criminal prosecution. Even from its inception, the code was intended and designed to provide guidance.\(^{334}\) The preamble of the code specifically provides that "'[i]t is not designed or intended as a basis for civil liability or criminal prosecution.'"\(^{335}\) Therefore, the decision by the Court of Appeals of

\(^{325}\) Id. at 3–4.

\(^{326}\) See generally Hecht, Nos. 06-0129-AP, 06-0130-AP, slip op. at 4.


\(^{328}\) Republican Party of Minn. v. White, 536 U.S. 765 (2002). See also Weaver v. Bonner, 309 F.3d 1312, 1323 (11th Cir. 2002) (striking down a Georgia provision of the Code of Judicial Conduct that issued a "cease and desist request which prohibits a judicial candidate from engaging in certain speech" on First Amendment grounds); Spargo v. N.Y. State Comm'n Jud. Conduct, 244 F. Supp. 2d 72, 92 (N.D.N.Y. 2003).

\(^{329}\) Post *White*, Texas eliminated the "announce clause" of the Code of Judicial Conduct. Council, supra note 314 (internal citations omitted).

\(^{330}\) Hecht, Nos. 06-0129-AP, 06-0130-AP, slip op. at 3. On October 20, 2006, a three judge panel heard Judge Hecht's appeal of his punishment by the commission and exonerated him of any wrongdoing. *In re Hecht*, 213 S.W.3d 547 (Tex. Spec. Ct of Rev. 2006).


\(^{332}\) Hecht, Nos. 06-0129-AP, 06-0130-AP, slip op. at 3 (citing Tex. Code of Jud. Conduct Canon 5(2) (2004)).

\(^{333}\) See *White*, 536 U.S. at 765.

\(^{334}\) Model Code of Jud. Conduct pmbl.

\(^{335}\) Id. This provision was intended to insure that judges remain independent and not sit in fear. See also Lofton v. State, 944 S.W.2d 131, 134 (Ark. Ct. App. 1997).
New York to reinstate a criminal prosecution against former Supreme Court of New York Justice Gerald P. Garson introduces the prospect of an additional cost of judicial misconduct.336

In 2003, Justice Garson was suspended without pay as a result of his indictment on criminal charges that directly related to his judicial duties.337 Garson was charged with one count of bribery and six counts of accepting benefits for "violation of his duty as a public servant."338 The violation of public duty alleged in the six counts was misconduct in violation of the New York Rules of Judicial Conduct.339 The nature of the six violations entailed speech and conduct on the bench, off the bench, and during political activity.340

The allegations of misconduct were based on two sections of the New York Rules of Judicial Conduct, Part 100.3(B)(6), which provides in pertinent part that "[a] judge shall not initiate, permit, or consider ex parte communications,"341 and Part 100.2(C), which provides that "[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others."342 The prohibition against personal solicitations and partisan behavior has been upheld.343

337. In re Garson (Garson I), 793 N.E.2d 408 (N.Y. 2003). He is no longer on the bench.
See Garson II, 848 N.E.2d at 1265.
338. Garson II, 848 N.E.2d at 1265.
339. Id.
340. See id. The first of six violations for judicial misconduct was improper ex parte communication during a case in which the judge met with the attorney for one of the parties and instructed him on how to proceed in order to prevail in exchange for a box of expensive cigars. Id. at 1265–66. The second and third allegations of misconduct consisted of the judge requesting and receiving a referral fee on behalf of his wife from a lawyer to whom clients had been referred. Id. at 1266. The fourth, fifth, and sixth counts alleged payments to the judge for referrals by the judge. Garson II, 848 N.E.2d at 1266–67. The sixth allegation of misconduct also included an allegation that the judge instructed the attorney to "make a check out" to the judge’s wife’s judicial campaign committee because she needed $25,000. Id. at 1267.
343. See Garson II, 848 N.E.2d at 1274.
VI. FLORIDA’S APPLICATION OF ITS CODE OF JUDICIAL CONDUCT

The Supreme Court of Florida has been critical of the recommendations of discipline of its Judicial Qualifications Commission, sending a clear message that leniency sends the wrong signal to judges who violate the Code of Judicial Conduct.344 The conduct identified and the penalties imposed provide some insight into the level of severity that is assigned to certain speech and conduct.345 There are three basic penalties available to the Supreme Court of Florida for judicial misconduct: 1) reprimand,346 2) suspension,347 and 3) removal.348 Each of these sanctions may be accompanied by payment of a fine, cost of investigation, and/or cost of prosecution.349

The Supreme Court of Florida "requested that the Judicial Ethics Advisory Committee . . . study the 2003 revisions" that had been made to the Model Code and recommend appropriate amendments to be considered by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct.350 The changes passed by the Supreme Court of Florida on January 5, 2006, embraced the desire of the Court to act further to ensure the independence, integrity, and impartiality of the judiciary and to ensure consistency with existing provisions of the Model Code.351

344. Wolf, supra note 57, at 350.
345. Id. at 351.
346. Id. at 354. A reprimand can be issued with or without a requirement that the judge appear before the court. Id. A reprimand without a required court appearance is analogous to an admonition. Id.
347. Wolf, supra note 57, at 354. A suspension may be issued with or without pay, generally depending upon the nature of the alleged misconduct. Id. Lawyer misconduct action can also involve disciplinary sanctions. Id.
348. Id. at 353. Prior to 1996, the court was limited to reprimand or removal for judicial misconduct. Id. at 391 (referring to Fla. Const. art. V, § 12(a)(1)).
349. Wolf, supra note 57, at 388–89.
350. In re Amend. to Code of Jud. Conduct—ABA’s Model Code, 918 So. 2d 949 (Fla. 2006). In 2003, the Commission was formed by ABA President Dennis W. Archer, Jr. Id. at 949 n.1.
A. **On the Bench Speech and Conduct**

The concept that removal from office should occur only as a result of speech and conduct that is "fundamentally inconsistent with the responsibilities of judicial office" is consistent with the examination of the penalties imposed in Florida and throughout the country. Judge Shea of Florida was removed after an accumulation of minor and ostensibly innocuous incidents which created an antagonistic environment and evidenced conduct unbecoming a member of the judiciary. A standard for removal based on a pattern of misconduct is consistent with national trends for disciplining on the bench bias and prejudice.

In Florida, abuse of judicial power is as likely to lead to removal from the bench as it was ten, twenty, or thirty years ago. An abuse of judicial power on the bench that may lead to removal can include: 1) lacking judicial temperament; 2) failing to be impartial; 3) engaging in ex parte communication; 4) failing to follow the law; 5) improper use of contempt.
power; and 6) intimidation. On the bench, conduct that consists of violating recusal and disclosure requirements, as well as delays in ruling, has generally resulted in reprimand or even more informal procedures such as a reminder.

B. Off the Bench Speech and Conduct

The Supreme Court of Mississippi found that manifestations of bias and prejudice made through off the bench speech did not warrant judicial discipline and were protected by the First Amendment in the absence of bias and prejudice on the bench. However, Florida and other states have not been so predisposed. In In re Santora (Santora I), a newspaper article included remarks by the judge regarding interracial dating, integration, racial inferiority, blacks on welfare and in the criminal justice system, using racial slurs, and telling racial jokes. The Supreme Court of Florida was petitioned for the removal of the judge as Chief Judge of a circuit court. The petition alleged that "Judge Santora's public statements have eroded public confidence in the judiciary and cast doubt on his impartiality. They also have caused growing social and racial turmoil in this community. These tensions seriously threaten the effective functioning of the judiciary."
While the judge was immediately removed as Chief Judge, he was permitted to remain as a circuit judge after being reprimanded for his comments.\textsuperscript{370}

The removal of judges for manifestations of bias and prejudice appears to be utilized if accompanied by additional egregious behavior, such as lack of candor during the proceeding,\textsuperscript{371} or threatening to retaliate on the bench based on the bias expressed.\textsuperscript{372} It is difficult to justify a position that bias and prejudice manifested from the bench cannot be "assumed . . . to have an effect on the judge's treatment of litigants and not to reflect racial bias on the part of the judge merely because the judge does not repeat the remarks in the presence of the litigants or in the courtroom."\textsuperscript{373} However, willingness to manifest bias and prejudice on the bench can be viewed as more noxious and problematic, indicating a lack of fitness and a fundamental inconsistency for service as a judge.\textsuperscript{374} Moreover, additional incidences warranting removal of judges for off the bench speech and conduct include criminal offenses.\textsuperscript{375}

C. Political Speech and Conduct

The Supreme Court of Florida has been diligent in its desire to ensure that judicial campaigns are legal and ethical.\textsuperscript{376} An extensive guide was pro-

\begin{itemize}
  \item presidents of the Jacksonville Bar Association, the current president of the Clay County Bar Association, two members of The Board of Governors of The Florida Bar, and two members of the Board of Governors of the Jacksonville Bar Association, among others.
  \item \textit{Id.} at 672 n.2.
  \item \textsuperscript{370} \textit{Santora II}, 602 So. 2d at 1270.
  \item \textsuperscript{371} \textit{See Kuehnel}, 403 N.E.2d at 168.
  \item \textsuperscript{372} \textit{See In re Cerbone}, 460 N.E.2d 217, 218 (N.Y. 1983).
  \item \textsuperscript{373} \textit{SHAMAN ET AL., supra note 76, \S 3.07.}
  \item \textsuperscript{374} \textit{See Wolf, supra note 57, at 369.}
  \item \textsuperscript{375} \textit{See In re Berkowitz, 522 So. 2d 843, 843--44 (Fla. 1988) (stating judge continued to practice law after assuming office, and committed trust account violations that encompassed hundreds of checking transactions, judge failed to file accurate tax returns, and judge's testimony on campaign irregularities was deceptive); In re Garrett, 613 So. 2d 463, 463--65 (Fla. 1993) (stating judge was removed for shoplifting despite exemplary record of public service). In \textit{In re Ford-Kaus}, the judge was removed and disciplined by the Bar for conduct that occurred prior to her election to the bench. 730 So. 2d 269, 272--77 (Fla. 1999). Specifically, she mishandled and over-billed for a case immediately before taking the bench. \textit{Id.} Based on that, the Supreme Court of Florida found her conduct inconsistent with the responsibilities of a judicial officer and that she is presently unfit to hold judicial office, stating that her conduct demonstrates "a pattern of deceit and deception." \textit{Id.} at 277.
  \item \textsuperscript{376} \textit{JUDICIAL ETHICS ADVISORY COMM., AN AID TO UNDERSTANDING CANON 7 (2006), available at} \url{http://www.flcourts.org/gen_public/courted/bin/canon7update.pdf}. Since 1976, the Supreme Court of Florida has authorized the Judicial Ethics Advisory Commission to write "advisory opinions to inquiring judges [and judicial candidates] concerning the propriety of . . . judicial and non-judicial [speech and] conduct." \textit{Id.} at 1. (quoting Petition of the Committee on Standards of Conduct for Judges, 327 So. 2d 5 (Fla. 1976)).
\end{itemize}
duced, titled *An Aid to Understanding Canon 7*, which details acceptable political behavior. Prior to each election cycle, the bench and bar join in encouraging the participation of all judicial members and judicial candidates in a forum in each circuit where there is a contested judicial election. While the use of removal from office has been limited, "the [C]ourt has stated that a candidate should not profit by their misdeeds." The wide variety in each state's method of judicial election makes regulation difficult. The challenge is to construct a canon that adequately addresses the issues that are unique to the various methods of judicial selection.

The difficulty of regulation is evident at the state level as well as the national level. The various types of violations have included: 1) misrepresentation regarding candidate or opponent; 2) inappropriate promises; 3) campaign financial irregularities; 4) partisan politics; and 5) endorsing or supporting other candidates.

377. See id.
381. See id.
382. See *Wolf*, supra note 57, at 351 (quoting CYNTHIA GRAY, A STUDY OF JUDICIAL DISCIPLINE SANCTIONS 1 (2002)).
383. *In re Alley*, 699 So. 2d 1369, 1369 (Fla. 1997) (reprimanding a judge for "misrepresent[ing] her qualifications and those of her opponent" in judicial election campaign and injecting party politics into nonpartisan election).
384. *In re McMillan*, 797 So. 2d 560, 562 (Fla. 2001). Removal warranted for: (1) making explicit campaign promises to favor the State and the police in court proceedings; (2) making explicit promises that he would side against the defense; (3) making unfounded attacks on incumbent county judge; (4) making unfounded attacks on the local court system and local officials; and (5) improperly presiding over a court case [despite personal] direct conflict of interest.

Id.
385. See *In re Pando*, 903 So. 2d 902 (Fla. 2005) (finding that during the course of the judge's unsuccessful 1998 election campaign and her successful 2000 election campaign, the Judge: "(1) accepted loans from family members and friends in excess of the $500 statutory limit; [and] (2) misrepresented the source of these loans in submitting and certifying her campaign finance reports during the course of the campaigns"); *In re Rodriguez*, 829 So. 2d 857, 859 (Fla. 2002) (reprimanding a judge for campaign finance activities and reporting practices, such as knowingly accepting campaign contribution loan of $200,000 from a non family member and filing misleading campaign); *McMillan*, 797 So. 2d at 562–64.
386. *In re Angel*, 867 So. 2d 379, 383 (Fla. 2004) (holding that the partisan political activity during campaign for judicial office warranted a public reprimand).
387. *In re Glickstein*, 620 So. 2d 1000, 1002–03 (Fla. 1993) (writing letter endorsing retention in office of fellow member of judiciary, where letter is written on office stationery and identified author as member of judiciary and is published in newspapers, warrants public reprimand).
VII. CONCLUSION

"[P]ublic sentiment is everything. With public sentiment nothing can fail; without it nothing can succeed."—Abraham Lincoln

The real costs of judicial misconduct are measured in the way in which the speech and conduct of judges threaten to erode the independence, integrity, and impartiality of the judiciary. Each act of misconduct by a judge contributes to the public’s perception about judges and their role. Three justifications arise repeatedly for limiting judicial speech and conduct. First, limitations on judicial speech and conduct are necessary “to avoid the appearance of partiality, favoritism, or other misuse.” Second, regulation of judicial speech and conduct promotes confidence in judiciary. Finally, limiting judicial speech and conduct prevents judges from being distracted while performing their duties. Therefore, the case for preserving the independence and impartiality of the judiciary creates a foundation for the need of rules regulating judicial speech and conduct.

The model rules provide a substantive and procedural framework creating a standard for judging speech and conduct. These standards provide guidance to judges regarding improper and proper speech and conduct. They are “intended to establish standards for ethical conduct of judges” in both their judicial and personal roles. Canons 1 and 2 of the Model Code are clearly aspirational, but provide a standard that has been utilized for judicial discipline. Canons 3, 4, and 5 address specific conduct both on and off the bench and provide commentaries to provide further directions and examples for their application.

Ensuring the independence, integrity, and impartiality of the judiciary must continue to be an important societal aim. The continued regulation of judges operates to encourage judges to adhere to high ethical standards. The

388. 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 27, LINCOLN-DOUGLAS DEBATE AT OTTAWAY (Roy P. Basler et al. eds., 1953).
389. In re Leon, 440 So. 2d 1267, 1269 (Fla. 1983).
390. See id.
391. SHAMAN ET AL., supra note 76, §10.02.
392. Id.
393. Id.
395. See id.
396. See id.
397. Id.
399. See MODEL CODE OF JUD. CONDUCT Canons 3-5.
proposals for revisions to the Model Code recognize the need for regulation to ensure the independence, integrity, and impartiality of the judiciary. The additions and amendments being proposed provide clear, concise, and consistent guidance to judges. The independence, integrity, and impartiality of the judiciary rest with continued regulation and discipline.
SYMPOSIUM NOTES AND COMMENTS

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