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Gerald Uelman
Dean, Santa Clara Univ. School of Law
John McClay
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Published by NSUWorks, 1993

VOLUME 17

SPRING 1993

NUMBER 3
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The Board of Editors welcomes the submission of manuscripts by members of the legal community. However, all manuscripts, both text and endnotes or footnotes, must be typed and double or triple spaced. The Nova Law Review will contact all contributors within two weeks of receipt of the manuscript, but does not assume responsibility for the return of any material.

Subscriptions are available at $20.00 for one year. Individual issues may be purchased for $10.00. If a subscription is to be discontinued, or address changed, notice to that effect should be sent one month in advance; otherwise, the Review will be mailed as usual. Foreign mailings are an additional $6.00 per issue.

To cancel, notice must be received by the Nova Law Review prior to publication of the first issue of the volume.

Address all correspondence to:
The Nova Law Review
Nova University
Shepard Broad Law Center
3305 College Avenue
Fort Lauderdale, Florida 33314
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Past issues of the Nova Law Review are now available through William S. Hein & Company, Inc., 1285 Main Street, Buffalo, New York 14209.

Issues contained in the current volume may be obtained through the Review.

The Nova Law Review is a member of the National Conference of Law Reviews and generally follows the rules of citation found in the fifteenth edition of The Bluebook, A Uniform System of Citation, published by the Harvard Law Review Association.

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The Lessons of Hurricane Andrew: A Prescript

On August 24, 1992, at about 5:00 a.m., a freight train named Andrew hit our home in Plantation, Florida, a western suburb of Fort Lauderdale. A few hours earlier, as the wind began to howl, my son Seth moved a mattress and pillow into our bedroom. By 4 a.m., Seth and my wife Fran had fallen asleep. There was no sleep for me that night.

For reasons still unexplained, our television cable and the electricity continued to function. I sat mesmerized as WTVJ meteorologist Brian Norcross did the play-by-play while this awful storm made landfall and raged across Dade County. On the north side of the storm, Broward County felt its heavy winds. At about 5:15, Norcross said the radar showed a heavy cell moving through Plantation. That is when I heard the train blast into the back of our house. The winds lifted the solid steel structure that held our patio enclosure. The beams crashed like toothpicks. Seth, Fran, and I planned our next move. If a loose beam hit a window, we would jump into the walk-in closet. That next move never came.

Compared with our neighbors in South Dade, we suffered very little damage. The insurance company eventually covered the loss, and the neighborhood stayed intact. Not so in Homestead and Florida City. Months after that tragic night, the shock remains. Hurricane Andrew destroyed buildings, neighborhoods, cities, and people. Its uncontrollable fury left permanent scars.

The Shepard Broad Law Center immediately mobilized to help our students, faculty and staff, and then the greater community. First we sent food, supplies, and relief workers. Then, under the leadership of Professor Michael Dale, the Nova Hurricane Legal Relief Project directed hundreds of hours of faculty and student time to help those in need of legal assistance. It is our responsibility as a law school to help, and we shall continue to do so.

In this special issue of the Nova Law Review, the authors review many of the legal issues that arise in the wake of a natural disaster. It is important to remember, however, that the personal pain of Hurricane Andrew cannot be assuaged by legal and administrative remedies. We were all changed that night in August. We were reminded that there are some events, some forces, over which even lawyers can exercise no control. We learned that caring for each other, and for all members of our community, is our primary responsibility.

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Hurricane Andrew: From Devastation and Chaos to Rebirth and Renewal
Alan T. Dimond

On August 24, 1992, a Monday at about 5:00 a.m., Hurricane Andrew danced ashore as a whirling dervish—building in intensity until it was a frenzied maelstrom, out of control, unpredictable, and leaving its South Florida dance floor a heap of ruin and rubble. By noon that day, it was apparent that the hurricane had been a macabre dance of death and destruction—to an extent never before experienced in our country, let alone our state.

Hurricane Andrew became an unparalleled equalizer within our area: the rich became the have-nots, the arrogant were humbled, the mighty were rendered powerless, and entire neighborhoods, some distinguishable from others by varying degrees of elegance and charm, all became slum-like in their appearance of neglect, assault and desperate chaos.

Days, even weeks, passed before the disaster relief people and inhabitants were to totally discern the full effects of the 160-plus-mile-an-hour winds had on the people and the place they called home. Nearly 200 square miles of suburban Miami were practically wiped off the map. That last week of August and the first week of September, generally celebrated as the last weeks of summer preceding Labor Day, were simply a time primarily to survive. Almost immediately, plans to rebuild were made, and the reconstruction began.

Many South Floridians woke to find they had nothing. They needed it all—food to eat, water to drink, a place to live, a place to work, a place to play. Victims needed baby formula, diapers, food, bedding, cots, insect repellent, can openers, sunscreen, matches, sterno fuel, charcoal, furniture, candles, flashlights, batteries, pots and pans, toilet paper, soap, tents, yard tools. Ice and anything to drink became extremely valuable. Chain saws were sold on street corners for three times their usual retail price.

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Published by NSUWorks, 1993
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The task ahead is almost daunting. Some 270,000 of the 350,000 elderly in the county were affected with some 70,000 severely impacted and approximately 10,000 found homeless. An estimated total of 250,000 people of all ages became homeless overnight. Some 63,000 homes destroyed. Power in some areas was out for weeks. Some 85,000 jobs were lost. An entire 3,300 acre major air base was destroyed with 8,700 military and civilian jobs affected. Losses were estimated to be more than $20 billion—the costliest natural disaster in American history.

The Florida Bar has no way of knowing precisely how many lawyers were affected, but a reasonable guess would be of the 9,600 Dade County lawyers, perhaps about 6,000 were directly affected, some 4,000 severely so. Perhaps as many as 2,500 were rendered homeless, at least temporarily. Some courthouses had to be closed—Homestead and Cutler Ridge—while others functioned but with limited staff. A Category 4 hurricane is governed only by the laws of nature and has no respect for our Constitution or legal rights.

Recognizing that the disaster would "temporarily impede the ability of attorneys, litigants, witnesses, jurors and others in the performance of their duties and obligations with respect to many legal processes," the Supreme Court of Florida immediately authorized a two-week hiatus in the time limits required by law for certain legal filings and proceedings.

As evidence of even further disruption in the lives of judges, lawyers, jurors and witnesses, some 1,400 pretrial detainees at the Metropolitan Correctional Center and Federal Prison Camp at Homestead Air Force Base, due to extensive damage, were transferred to several Southeast Regional and contract facilities.

For the past several years, The Florida Bar has had a "Disaster Response Plan" on the shelf. Our "plan" was intended and designed for catastrophic events far more limited and focused in their impact, such as plane crashes, train derailments, and refinery explosions. Basically, the plan calls for a coordinated public response by The Florida Bar, coordination with other agencies, response to requests for advice, and response to press inquiries.

Following the plan, The Florida Bar staff issued a news release the day after the hurricane offering free general legal information to the victims of Hurricane Andrew through distribution of the consumer pamphlet "Mass Disaster: A Victim’s Guide." The Bar also asked citizens to report any lawyer solicitation or other improper behavior on the part of attorneys.
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On Monday, August 31st, I had published, as president of The Florida Bar, an open letter to the lawyers in the Miami Herald and in the Miami, Palm Beach, and Broward Reviews—for a total circulation of some 444,000 subscribers. Through this means and subsequently through local bar associations and The Florida Bar News, lawyer victims of the hurricane were informed that The Florida Bar's Ethics Hotline was temporarily assigned as the Hurricane Disaster Hotline for Lawyers. The Florida Bar staff gave priority to all calls for emergency assistance, particularly by lawyers whose practices were affected by Hurricane Andrew. For lawyers concerned about rebuilding their practice, replacing or restoring lost or damaged files or documents, obtaining practical help in reconstructing trust account records, or being informed of ethical responsibilities regarding attorney-client relations when the court, community, and communications services are disrupted, the Bar staff either provided advice or found the appropriate assistance.

On September 3rd, as president of The Florida Bar, I had another open letter printed in the same newspapers informing lawyers how they could volunteer their services to the hurricane victims. Specifically, lawyers were asked to volunteer through the ABA's Young Lawyers Division assistance program to (FEMA), the United Way of Dade County, or the Dade County Bar Association.

The Florida Bar mailed 5,000 "Mass Disaster: A Victim's Guide" pamphlets to the Red Cross during the week following the hurricane, and had printed and shipped an additional 50,000 within two weeks after that. The additional pamphlets were printed free of charge as a public service by G&L Qwik Print & Bindery (Tallahassee) for the Florida Publishers Association. For that service we have great appreciation.

The Florida Bar News staff worked indefatigably to gather information regarding the impact of the storm on lawyers, the practice of law and the administration of justice in South Florida. The Bar's Law Office Management Advisory Service (LOMAS) researched and had published tips on recovering documents, computer records recovery and reconstructing trust account documents as well as providing tips for the future protection of records.

On site in South Florida, there are certainly too many heroes and brave—good—lawyers, good people who sacrificed their personal interests to selflessly serve others—to name in an honor roll. And certainly that includes the 800 lawyers who signed up to provide hurricane disaster relief at the thirteen DACs. Bar associations around the state staffed YLD hot lines giving advice on Florida law and the Lee County Bar even sent four attorneys to Miami.
to help. The people of South Florida will never forget the help they received from their lawyers when it was most needed.

Space does not permit kudos to all the individuals who deserve praise and recognition. The attorneys mentioned here will have to stand in for all the others. But their efforts have not gone unnoticed. Newspapers around the country praised these volunteer lawyers. A September 9th Associated Press report from Homestead began, "Hurricane Andrew has produced some unlikely heroes. Lawyers, for example." The article went on to detail how lawyers were helping people "through the confusing legal tangle of insurance, policies, contractor's repair bids and government aid programs."

The Florida Bar's Council of Sections endorsed and encouraged its members to help with the publication of a legal aid advisory brochure for victims of hurricanes in Florida. Miami lawyer Stephen T. Maher coordinated the project. The bilingual booklet, printed and also distributed by the Review newspaper in Dade, Broward and Palm Beach counties is sixty pages and includes information on how to hire an attorney and basic hurricane-related legal topics that run the gamut from tax issues to landlord and tenant problems. Other articles written by lawyers and Review reports include labor and employment, price gouging, insurance, mobile home law and government benefits. We distributed 50,000 copies to various community agencies as well as individual citizens upon request.

Most of the original 17,000 soldiers, sailors and Marines have left. They cleared debris, patched up schools, fixed roofs, constructed four tent cities, and handed out tons of food. The Red Cross handed out tens of millions of dollars in vouchers to victims to be used for rent, deposits, food, clothing, furnishings and other necessities. The Small Business Administration has reviewed applications for assistance in rebuilding businesses. FEMA has processed its reams of paperwork. And now South Floridians are pretty much on their own again.

And with that indomitable spirit that seems to permeate the citizenry throughout our great state, residents of Dade County declared "We Will Rebuild." As a full-page insert in the Miami Herald proclaimed, in part, "It will be a Herculean effort. No American community has ever faced physical destruction on such an epic scale. And we are determined to build a better, more just and promising community than before, not just restore the world that Andrew's ferocious winds swept away."

The legal community will do its part and more to make South Florida a community of justice and service to the others. In the next few years (the time some estimate it will take to recover fully), the learned counsel and professional advocacy of many lawyers will be needed. South Florida citizens will experience, and at times be tested by that experience, just what
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Emergency Decisionmaking During the State of Florida's Response to Hurricane Andrew

Stephen T. Maher**

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I. INTRODUCTION

This article focuses attention on emergency decisionmaking during the State of Florida's response to Hurricane Andrew, the nation's costliest natural disaster.¹ I begin in part II with a discussion of some relevant facts about the storm and I review some of the studies of the storm and its aftermath that are just now becoming available. In part III, I address emergency decisionmaking at the state level and argue that certain proposals

¹Copyright © 1993 Stephen T. Maher.
²Lawyer and legal educator.
¹Juanquin Avino, After Andrew Comes Action, MIAMI HERALD, Nov. 26, 1992, at 35A.
Emergency Decisionmaking During the State of Florida’s Response to Hurricane Andrew

Stephen T. Maher**

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I. INTRODUCTION

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for change in the way the state responds to a disaster may improve emergency decisionmaking in future disasters. In part IV, I deal with selected examples of emergency decisionmaking to make points about the strengths and weaknesses of the process employed by the state when responding to Andrew. I also make some more specific suggestions for improving emergency decisionmaking in the future.

II. THE FACTUAL BACKGROUND

The magnitude of the disaster that befell the state of Florida when Hurricane Andrew struck South Florida on August 24, 1992 is hard to overstate. It was the third most powerful storm to hit the United States in recorded history.2 The storm was classified a category four storm. It brought sustained winds of 145 miles per hour, gusts up to 175 miles per hour and a 16.9 foot storm surge in Biscayne Bay to bear on southern Dade County.3

The result was overwhelming devastation.4 Ten percent of Dade County’s housing stock was rendered useless.5 28,066 homes were destroyed and 107,380 homes were damaged, leaving 180,000 persons homeless.6 82,000 businesses were damaged, and a month after the storm an estimated 86,000 people were out of work and 7,800 businesses were closed at least temporarily.7

Significant damage was also done to the region’s economy. Homestead Air Force Base was heavily damaged by the storm and it is uncertain whether it will reopen, given the cost of repair and changing defense priorities. Damage to agriculture has been estimated at one billion dollars, with permanent income loss of $250 million and $580 million in damage to structures.8 Tourism, a $500 million per year industry, is also likely to be severely impacted in the future.9 Estimates of the storm’s financial cost range from twenty billion10 to thirty billion dollars.11

When a storm of the scale of Hurricane Andrew sweeps across the land, things once hidden become exposed. Those who have seen pictures of some devastated homes in the aftermath of the storm have viewed graphic evidence of poor workmanship that was once buried beneath paint and shingle. Those hidden weaknesses are now exposed for all to see. Much attention in the aftermath of the storm has been paid to failings of this kind. In a Special Report, The Miami Herald documented, in pictures, maps and news stories, the role that inappropriate design, weak building materials, poor construction techniques, inadequate inspection and other similar failings played in the destruction of homes and businesses.12 The Herald Report superimposed a map of the of estimated wind zones over a map of the damage and concluded that “[m]any of the worst-hit neighborhoods were far from the worst winds.”13 The Herald study also concluded that newer houses did much worse in the storm than older houses.14 “Houses built since 1980 were sixty-eight percent more likely to be uninhabitable after the hurricane than homes built earlier.”15 The Herald Report supports the conclusion that there were common failings shared by many damaged homes. The report cited an independent engineering study commissioned by a major insurance company. The engineers inspected 121 houses in areas where the sustained winds were estimated below 120 miles per hour and concluded that seventy percent had damage traceable to code violations.16 The report concluded that “[c]onstruction quality and design largely determined the degree of hurricane damage.”17

A. The Grand Jury Report

The Dade County Grand Jury also conducted an investigation of storm related matters. Its report reflected a great frustration with the community’s failure to learn from its experience in prior storms and a great fear that, in the rush to rebuild, the same mistakes that had caused great losses during

2. GOVERNOR’S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT 1 (1992) [hereinafter GOVERNOR’S FINAL REPORT].
3. Id.
5. Id.
7. Id.
8. Id.
9. Id.
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3. Id.
5. Id.
7. Id.
8. Id.
9. Id.
10. Id. at 1.
11. GRAND JURY REPORT, supra note 4, at 1.
14. Id.
15. Id.
16. Id.
17. Id. at 1SR.

Published by NSUWorks, 1993
Andrew would be repeated. The Grand Jury made a number of specific recommendations designed to better prepare South Florida for the next hurricane. For example, the report recommended the revision of the South Florida Building Code to increase wind load standards and to extend coastal construction standards twenty miles inland. It also suggested changes to the South Florida Building Code to address the design failures in residential construction identified in the wake of Andrew, including recommending the greater involvement of structural engineers in the design of residential construction. The report also urged a series of changes in the South Florida Building Code to strengthen the structure of new construction, including the elimination of wood frame gables atop masonry walls and the use of double hurricane bracing.

The Grand Jury Report also concluded that "the use of building materials with evident design limitations also contributed greatly to the failures of many structures." The report urged that the entire products approval process be overhauled. The report was also very critical of both the material used in roofing and the way that it has traditionally been applied. It found that about eighty-five percent of property destruction was related to roofing system and roofing material failures. The report recommended the immediate testing of roofing materials to determine their suitability for use in South Florida and recommended greater seriousness in the roofing inspection process.

Code enforcement in general was a prime target of the Grand Jury's criticism. The report recounted a history of serious problems with code enforcement and urged quick action to increase code enforcement during the rebuilding effort to prevent substandard repairs to homes damaged in the hurricane. The report also urged improving both the competence of homebuilding professionals and their knowledge of building codes through testing, through the creation of statutory workmanship standards and through mandatory continuing education requirements. The report also attempted to introduce accountability into the homebuilding process by recommending that disciplinary action be taken against the license of builders who repeatedly fail inspections and by recommending that each professional involved in building a home be required to conduct an on-site inspection and certify compliance with code. These proposals are sound, but it is not clear whether they can weather the political process and become law.

The Grand Jury had harsh words for the Board of Rules and Appeals. It was criticized because it weakened the South Florida Building Code by recommending approval of building materials like particle board, wafer board, masonite sheathing, pneumatically installed roofing staples, lower weight roof felt, wood frame gables, glass windows and doors without storm shutters, wood and metal partitions instead of block partitions, the very "materials that ... contributed considerably to the destruction caused by Andrew." The Bureau of Rules and Appeals was also criticized for being representative of the community and in clear violation of the board composition requirements set out in the South Florida Building Code, for "puffinoid" recordkeeping, and for conflicts of interest and being unduly influenced by the construction industry. The Grand Jury report urged the construction industry to play "an active role in maintaining the integrity and quality of construction in our community." Thus, failures in the construction industry have been a focus of much attention in the post-Andrew analysis that has occurred.

Another weakness that was exposed by the storm was the pre-disaster and post-disaster planning that occurred prior to Andrew. The Grand Jury Report did not focus much attention on this issue, but found that "[d]espite the best of intentions, the State of Florida has failed to develop an effective leadership role on hurricane preparedness issues. The Grand Jury recommended that the Department of Community Affairs assume a greater role in pre-disaster and post-disaster planning at the statewide, regional and local level.

19. Id. at 4.
20. Id. at 5.
21. Id. at 5-6.
22. Id. at 6.
24. Id. at 8.
25. Id. at 9-10.
26. Id. at 10-13.
27. Id. at 13-15.
29. Id. at 18.
30. Id. at 17-20.
31. Id. at 21.
32. Id. at 27.
33. GRAND JURY REPORT, supra note 4, at 28.
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19. Id. at 4.
20. Id. at 5.
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26. Id. at 10-13.
27. Id. at 13-15.
29. Id. at 18.
30. Id. at 17-20.
31. Id. at 21.
32. Id. at 27.
33. GRAND JURY REPORT, supra note 4, at 28.
The State of Florida’s present approach to emergency management is
summarized by the Final Report of the Speaker’s Task Force on Emergency
Preparedness, completed in April of 1990. 34

The current system of emergency management is under the
direction of the Department of Community Affairs through the Division of
Emergency Management. Chapter 252, Florida Statutes, authorizes
the Division of Emergency Management to develop a comprehensive
emergency management plan and program. This plan is to be integrated
into, and coordinated with, the federal and local governments. The state
comprehensive plan is comprised of three separate plans. The first plan
responds to natural disasters, the second plan responds to a nuclear
confrontation between the United States and a hostile adversary, and the
third plan responds to a radiological accident (fixed nuclear facility). 35

Counties are also required to have plans which specify how they will
respond to emergencies and county plans are in turn coordinated with
cities. 36

B. The Governor’s Committee Report

A Governor’s Disaster Planning and Response Review Committee was
appointed to study and report on the effectiveness of the state response to
Andrew. The committee held hearings and heard testimony on a wide
variety of issues related to the storm. The Governor’s Committee Report
contained ninety-four recommendations for changes that the committee
believed would improve the state response to a future disaster.

The primary weakness of the Governor’s Committee Report is that it
largely failed to identify where the state response broke down. Instead of
determining where the state government succeeded and where it failed in
responding to the storm, the report was constructive to a fault. It recom-
manded solutions without explaining the problems that the solutions were
designed to address. While the reader might guess at problems that were
never quite stated, this Karnac-style 37 approach to critique may lead people
to draw erroneous conclusions concerning what in fact went wrong. While
this approach is tactful, it may prove to be less helpful.

Some greater attempt to catalogue the mistakes made in the state’s
response to Andrew would have been helpful for two reasons. First, it
would have given the Governor some guidance on which criticisms of the
state response his committee thought were valid and which they thought
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thoughtful and carefully crafted recommendations. Many recommendations
call for legislative action and the expenditure of funds. It seems logical that
these calls for action would have benefitted from a more complete
discussion of the problems that the recommended changes are designed to
solve, especially if the changes cost money.

In the committee’s defense on this point, the Governor did not
espressly ask the committee to develop a report which found facts. Executive Order 92-242, which created the committee stated that:

The purpose of the Committee shall be to evaluate current state and
local statutes, plans and programs for natural and man-made disasters,
and to make recommendations for improvements to the governor and
State Legislature. 38

The report identified “four key solutions to the problems uncovered”
by the committee: to improve communications at, and among, all levels of
government; to strengthen plans for evacuation, shelter, and post-disaster
response and recovery; to enhance inter-governmental coordination; and to
improve training. 39 Many of the report’s ninety-four recommendations
related to these four proposed solutions.

1. Improve Communications

The Governor’s Committee made a series of detailed recommendations

34. FLORIDA HOUSE OF REPRESENTATIVES SPEAKER’S TASK FORCE ON EMERGENCY
35. Id. at 1-2.
36. Id.
37. Karnac the Magnificent, a fictional character made famous by Johnny Carson on the
Tonight Show, guesses the question from the answer.
39. GOVERNOR’S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT 3
(1992). The preliminary draft of the report had a fifth key solution that was dropped in the
final report: to increase funding for emergency preparedness and recovery programs.
GOVERNOR’S DISASTER PLANNING & RESPONSE REVIEW COMM., PRELIMINARY DRAFT OF
FINAL REPORT 5 (1992) [hereinafter GOVERNOR’S COMM. REPORT]. Appendix
A to the final report contains detailed “Fiscal Notes” which attempt to estimate the cost of
each of the committee’s recommendations. GOVERNOR’S DISASTER PLANNING & RESPONSE

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1. Improve Communications

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35. Id. at 1-2.
36. Id.
37. Karnac the Magnificent, a fictional character made famous by Johnny Carson on the Tonight Show, guesses the question from the answer.
focusing on how communications could be improved both before\(^40\) and after\(^4\) a disaster. Some ideas were simple yet show promise. For example, it was recommended that each county publish emergency information and instructions to the public in local telephone directories.\(^42\) If this recommendation is implemented, individuals threatened by a hurricane in the future could look in their phone book and find important emergency telephone numbers, maps of evacuation areas and flood-prone areas, locations of pre-designated information centers and other critical disaster response sites, key definitions and terminology, hurricane evacuation routes, guidelines for determining when to evacuate, and other information.\(^43\)

2. Strengthen Evacuation, Shelter and Post-Disaster Response and Recovery Plans

Concerns about evacuation and shelter seemed to be high on the committee’s list. Concerns about the ability of evacuation routes to handle traffic as some future hurricane approaches were driven by the fact that “hurricane experts anticipate an exodus of nearly ninety-five percent of our population when a similar storm threatens this community.”\(^44\) The committee recommended that the Department of Transportation implement a rule for the automatic lifting of tolls when an evacuation order is issued\(^45\) and further recommended that the Florida Highway Patrol have the authority to request the suspension of tolls prior to that time in the event of severe traffic problems.\(^46\) Tolls were suspended in response to Andrew by an Executive Order signed by the Governor.\(^47\) The report also addressed traffic concerns by recommending a study of which highways would constrain evacuation,\(^48\) by recommending the study of a reversible lane system on limited access highways\(^49\) and by recommending that plans to

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40. Id. Recommendation 1-8, at 7-11.
41. Id. Recommendation 37-50, at 28-35.
42. Id. Recommendation 3, at 9.
43. Id.
44. Dade County Grand Jury, Final Report 26 (Spring Term A.D. 1992, Filed Dec. 14, 1992). The Grand Jury also noted that such a panic would result in untold deaths and injuries, and stated “[t]his is a scenario which terrifies us.”
46. Id. Recommendation 15, at 14.
49. Id. Recommendation 16, at 14.

http://nsuworks.nova.edu/nlr/vol17/iss3/1
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The concern about mass evacuation in response to some future storm also prompted a large number of recommendations designed to improve shelters within threatened areas.\(^51\) The committee's thinking appeared to be that better shelters within the threatened areas would offer an alternative to those who might otherwise evacuate. The committee found a "shelter deficit" which suggested should be addressed by a program designed to eliminate that deficit over five years.\(^52\) This concern also prompted a recommendation that public information efforts be undertaken to convince people who were not ordered to evacuate to stay either at home or in a shelter near home.\(^53\)

Post-disaster response and recovery operations were also a focus of much attention.\(^54\) One excellent suggestion made in this section and in the introduction to the report was that the state and its local governments should use three categories to describe disasters: minor, major and catastrophic.\(^55\) The report recommends that this new general principle guide emergency preparedness and recovery planning and that the state and local governments adopt different plans for each of these levels of disaster, because the needs of people and demands on government vary with the intensity and scale of disasters.\(^56\)

A number of recommendations in the planning and response area focus on amending Chapter 252, Florida Statutes. One recommendation asks the

\(^40\) Id. Recommendation 1-8, at 7-11.
\(^41\) Id. Recommendation 37-50, at 28-35.
\(^42\) Id. Recommendation 3, at 9.
\(^43\) Id.
\(^44\) DADE COUNTY GRAND JURY, FINAL REPORT 26 (Spring Term A.D. 1992, Filed Dec. 14, 1992). The Grand Jury also noted that such a panic would result in untold deaths and injuries, and stated "[t]his is a scenario which terrifies us."
\(^46\) Id. Recommendation 15, at 14.
\(^49\) Id. Recommendation 16, at 14.
\(^50\) Id. Recommendations 17, at 15.
\(^51\) Id. Recommendation 22-36, at 17-25.
\(^52\) Id. at 17.
\(^53\) GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT Recommendation 1, at 7-8 (1992).
\(^54\) Id. Recommendation 51-79, at 36-52.
\(^55\) Id. Recommendation 51, at 36. The report defines a disaster as "a natural, technological, or civil emergency that results in a declaration of a state of emergency by a county, by the Governor, or by the President." Id. at 4. Minor disasters are defined as those that are "less likely to be within the response capabilities of local government and to result in only a minimal need for state and federal assistance, such as a tropical storm or limited flooding." Major disasters are defined as those "that will likely exceed local capabilities and require assistance from a broad range of state and federal assistance, such as a category one to three hurricane." Id. Catastrophic disasters are defined as those "that will require massive state and federal assistance, including immediate military involvement, such as a category four or five hurricane that hits a densely populated area." The federal government is also considering using this three tier approach to disaster planning. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT 4 (1992).
\(^56\) Id.
Legislature to require the Department of Community Affairs to adopt a post-disaster response and recovery element to the state comprehensive emergency management plan by June 1, 1993 and that it include regional and interregional planning provisions. The discussion in connection with this recommendation illustrates the committee's almost total lack of criticism of the state response to the storm. The preliminary draft noted that the department "has been preparing a state recovery plan for several years" and that a "draft document" exists. The final report states only that the department and the Florida Emergency Preparedness Association "are both in the process of preparing state recovery plans." What is clear only by implication from this discussion is that, because the department took years to develop a response and recovery element for the state's emergency plan, only a draft of that section of the plan was available to assist in the response to Andrew. The fact that the report calls for the development of such an element within six months suggests that this element need not take years to develop. The fact that the report contains pages of suggestions concerning what the department should include in this element when it finishes developing it suggests that the draft that was available during the storm needed work. Despite these apparent failings, no criticism of the department was offered on this score. Not all who have critiqued the state response have been so gentle. It should also be noted that the Governor's committee was not nearly as gentle when it came to noting the failings in the federal response.

57. Id. Recommendation 52, at 36-39.
58. PRELIMINARY GOVERNOR'S COMM. REPORT, supra note 39, at 49.
60. Id. at 36-39.
61. See, e.g., Keith G. Baker & Craig F. Reese, Lessons of Hurricane Andrew: State and Local Failures and Successes, IDEAS IN ACTION (Florida Tax Watch, Inc.), Dec., 1992, at 2, make the following assessment:

Unfortunately, when Andrew struck, the Florida Department of Community Affairs (DCA) had not completed the state's post-disaster recovery plan or even developed state guidelines for local post-disaster development planning. The state recovery plan was not available despite three years of recurring complaints by local emergency management directors that a plan was not forthcoming.

62. For example, in support of its Recommendation 75, which asks for changes in the efforts of the Federal Emergency Management Agency, the report supports its recommendation with the kind of material missing when the state government is involved: concrete examples of what went wrong, such as inequities in federal assistance, lack of material assistance, award of contracts to out of state contractors and exclusion of local and state officials from the contracting process. GOVERNOR'S DISASTER PLANNING & RESPONSE REVIEW COMM., FINAL REPORT Recommendation 52, at 36-39 (1992).

3. Enhance Intergovernmental Cooperation

The Committee heard "substantial testimony" that during the response to Andrew there was inadequate communication between levels of government concerning specific needs, lack of full awareness of supply inventories and agency capabilities, failure to have a single person in charge with a clear chain of command and the inability to cut through bureaucratic red tape. Concerns about coordination between the various levels of government responding to a disaster were addressed by a number of committee recommendations. The committee recommended the establishment of a Disaster Field Office (DFO) as soon as possible after a major or catastrophic disaster to house key decisionmakers from all levels of government and the location of a joint information center close to the DFO. The committee also recommended the establishment of a coordination task force in connection with catastrophic disasters and the location of that task force in the DFO. That task force would cluster key decisionmakers together and would meet at least daily in the DFO to assure good communication and the chair of the task force would have authority to commit resources and compel action. The committee found that the Presidential Task Force chaired by Secretary Card in the second week after Andrew demonstrated the potential of such a task force.

The committee also called for more proactive federal involvement in future catastrophic disasters but it recognized that this would require changes in federal law. This suggestion also raises questions about the proper role of the state and federal government in connection with disasters, and it will likely be the subject of debate in the legislature.

Concerns about coordination between the state and local government were also suggested by the committee's recommendation that Chapter 252 be amended to require all counties to adopt post-disaster response and recovery elements as part of their Peacetime Emergency Plans by June 1, 1995 and that cities' emergency planning efforts to be consistent with the county plan and that the Department of Community Affairs establish...

http://nsuworks.nova.edu/nlr/vol17/iss3/
Legislature to require the Department of Community Affairs to adopt a post-disaster response and recovery element to the state comprehensive emergency management plan by June 1, 1993 and that it include regional and interregional planning provisions. The discussion in connection with this recommendation illustrates the committee’s almost total lack of criticism of the state response to the storm. The preliminary draft noted that the department "has been preparing a state recovery plan for several years" and that a "draft document" exists. The final report states only that the department and the Florida Emergency Preparedness Association "are both in the process of preparing state recovery plans." What is clear only by implication from this discussion is that, because the department took years to develop a response and recovery element for the state’s emergency plan, only a draft of that section of the plan was available to assist in the response to Andrew. The fact that the report calls for the development of such an element within six months suggests that this element need not take years to develop. The fact that the report contains pages of suggestions concerning what the department should include in this element when it finishes developing it suggests that the draft that was available during the storm needed work. Despite these apparent failings, no criticism of the department was offered on this score. Not all who have critiqued the state response have been so gentle. It should also be noted that the Governor’s committee was not nearly as gentle when it came to noting the failings in the federal response.

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57. Id. Recommendation 52, at 36-39.
58. PRELIMINARY GOVERNOR’S COMM. REPORT, supra note 39, at 49.
60. Id. at 36-39.
61. See, e.g., Keith G. Baker & Craig E. Reese, Lessons of Hurricane Andrew: State and Local Failures and Successes, IDEAS IN ACTION (Florida Tax Watch, Inc.), Dec., 1992, at 2, make the following assessment:
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95. Id. 104, 106, 106.
96. Id. 104, 106.
97. Id. 104, 106.
98. Id. 104, 106.
minimum criteria for county plans.  

4. Improve Training of Facility Managers, Emergency Responders and Volunteers

The report recognized the importance of training to the success of even well designed plans. At various points, the report called for the drafting of manuals to assure that the planning is understandable to those who must act, the training of the people who must carry out those instructions so they understand their role, and the conduct of annual exercises to assure that the plans will work in practice. This level of preparedness probably is necessary to assure success of plans in practice.

5. Fiscal Concerns

The report concluded that Florida devotes insufficient resources to preparedness and recovery programs. In fiscal year 1992-93, Florida is spending about sixty-eight cents per person on these programs, and the Department of Community Affairs has requested an increase to eighty-seven cents per person in fiscal year 1993-94. The committee found these sums inadequate to fund its many recommendations in this area, and recommended the establishment of an Emergency Management Preparedness and Assistance Trust Fund to be administered by the Department of Community Affairs. The committee suggested funding the trust fund with surcharges on premiums paid for property and casualty insurance policies, a surcharge on marina and docking fees or other boat fees, a surcharge on building permits, or fees on transactions or specified activities in high risk areas. These funds were recommended to be in addition to existing funding.

6. Conclusion

This summary obviously only scratches the surface of Governor's Committee Report, but it gives some insight into the reports strengths and weaknesses as I perceive them. As a whole, it is fair to say that the report reflects the committee's careful consideration of much detailed testimony, and there is no doubt that many of its recommendations would improve disaster planning and preparedness. The weakness in the report is its failure to engage in a critical assessment of the state's response.

III. EMERGENCY DECISIONMAKING

Despite the disaster planning that preceded the storm, the state was not well prepared to deal with a catastrophe of the magnitude of Andrew. Not only was the post-disaster planning incomplete in a formal sense, because despite years of work the Department of Community Affairs has not yet completed a final post-disaster response and recovery element to the state comprehensive emergency management plan, it was incomplete in a conceptual sense as well. It was as if the planners had failed to comprehend the extent to which the things we take for granted each day of our lives would be unavailable in the aftermath of the storm and how much the realities of a disaster area themselves hamper relief efforts. One must only read the headlines of the Miami Herald during the relevant period to get a feel for the situation at this time. "We Need Help," "Hope Amid Chaos," "A Deepening Crisis," "The War Zone," and "Why Help Took So Long."

Perhaps one must live through a disaster of this magnitude to truly appreciate the difficulties it can cause. I understand that the relief crews who had worked on the recovery efforts in connection with Hurricane Hugo showed up in South Dade carrying several days of c-ration while others who showed up to help, but had no such experience, were less prepared for the realities they found. Today we are better able to do disaster planning because of the mistakes we made.

The state government was forced, by weaknesses in preparation, to make up its response as it went along to a greater degree than is desirable. The Governor issued more than two dozen executive orders to address post-disaster response and recovery. State agencies promulgated dozens of emergency rules. Much of the material in these emergency pronounce-

69. Id. Recommendation 54, at 39-41.  
70. Id. at 63.  
71. Id.  
73. Id.  
74. Id.  
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This need for quick response, though understandable under the circumstances, could have been avoided, at least in part, had better planning been done. The demands that would likely be placed on state government in an emergency and the government’s options in responding to them could and should have been discussed in the disaster planning process. Better planning leads to better emergency decisionmaking because better planning allows issues to be considered in advance where there is time for study, thought and input.

One important contribution that the Governor’s Committee Report makes is to address this problem in two ways. First, it zeroes in on some of the areas where we learned planning can help emergency decisionmaking and it makes good recommendations for improving planning to avoid spur of the moment decisions. For example, the committee recommends that the Department of Community Affairs evaluate the executive orders issued by the Governor after Hurricane Andrew and prepare draft executive orders by May 1, 1993 to be used when declaring a state of emergency in response to major and catastrophic disasters. This will hopefully lead to an examination of the demands made on the Governor, an analysis of how he responded and the use of some form of process to permit participation by the public in the preparation of the draft executive orders. The existence of two sets of draft executive orders, tailored to the severity of the disaster, will improve emergency decisionmaking in the future because the substance of many emergency decisions will have been made under non-emergency conditions.

Some things that were done by executive orders will now be done without need for an executive order. One example, mentioned earlier, is that the committee recommended that the Department of Transportation implement a rule for the automatic lifting of tolls when an evacuation order is issued and further recommended that the Florida Highway Patrol have the authority to suspend tolls prior to that time in the event of severe traffic problems. Tolls were suspended in response to Andrew by an Executive Order signed by the Governor. The recommendation to move decisionmaking from the Governor’s office into the rulemaking process improves emergency decisionmaking because it improves input into the process.

Second, the Governor’s Committee Report offers a new paradigm for emergency decisionmaking. By suggesting that different emergency plans be developed for different levels of disaster, the report advocates planning that, ideally, would alert decisionmakers, with some level of specificity, to the types of problems they are actually likely to face in that type of disaster, before those problems appear. Also ideally, such planning would provide emergency decisionmakers with a list of possible solutions to likely problems from which the decisionmakers might choose.

It is not difficult to see how this approach to planning would improve decisionmaking, because it would make it less likely that emergency decisionmakers would be blindsided by problems and less likely that they would fail to fully consider their options when devising solutions. This recommended approach improves decisionmaking by preserving thought and input, and moving them to a more convenient time: the time the emergency plan is developed.

IV. SELECTED ISSUES

It is important to review at least some of the problem areas in emergency decisionmaking that occurred during Andrew. The purpose of this discussion is not to criticize people who did the best they could under difficult circumstances. Rather, it is to help us learn from our mistakes so the same mistakes are not repeated. Three types of emergency decisionmaking will be briefly reviewed: Emergency orders, executive orders and emergency rulemaking.

A. Emergency Orders

One way that state agencies responded to the devastation of Hurricane Andrew was to issue emergency orders. Emergency orders are authorized by the Florida Administrative Procedure Act, but the act requires agencies that use emergency orders to find an immediate danger to the public health, safety or welfare and the facts that underlie that finding must be recited with
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81. Id. at 46-47.
82. It is not clear whether, or how, this activity by the Department of Community Affairs (DCA) is governed by the Florida Administrative Procedure Act. The Governor is not bound by the Administrative Procedure Act (APA) in preparing executive orders, but DCA is bound by the APA in its activities. Is the preparation of these draft executive orders rulemaking? If so, rulemaking procedure must be followed.
83. See supra text accompanying note 45.
84. See supra text accompanying note 46.
85. See supra text accompanying note 47.
particularly in the order, because no opportunity for hearing is provided before issuance.\textsuperscript{86}

Emergency orders are perhaps most familiar in the context of emergency license suspension or revocation. In response to Andrew, emergency orders were used in a much different way, they were used to issue emergency general permits in the environmental area. Emergency action was necessary because damage from the storm had created a threat to public health, safety and welfare that required "quick action by Florida's citizens and government to repair, replace and restore structures, equipment, and operations damaged by the hurricane in the Emergency Area."\textsuperscript{87} The state's Department of Environmental Regulation found that an emergency general permit was required to address the need for such quick action "because many property owners will require authorization from the department to repair and replace structures, equipment, or fill or take other remedial measures to restore essential services, protect the public health, safety and welfare and otherwise respond to the environmental and other damage wrought by the storm."\textsuperscript{88} The use of an emergency general permit was designed to avoid a flood of permit requests to authorize needed actions and the delays that processing those requests would create.

The department's decision to respond by issuing an emergency general permit raises issues that can be considered with more detachment now that the emergency has passed. The order was clearly a swift and decisive response to an immediate danger. The discussion of it here is not intended as a criticism of the action taken, because some immediate action was required. The question to be considered now is whether some other form of response might have been preferable to the form chosen.

An emergency general permit is different from a regular permit in several ways. A regular permit is issued to an applicant. It is issued after consideration of individual circumstances. An emergency general permit is issued to the world without consideration of individual circumstances. In fact, there is only one party in the proceeding in which the emergency general permit is issued: the agency issuing it. Others, in essence, join as parties to the permit by using it. The permit may, by its terms, require some or all of those who use it to notify the department. Some may do the things specified in the permit and not even know of the emergency general permit's existence at the time of their actions, but might later still be able to claim the permit as a defense if their actions are ever called into question.

What other alternatives did the department have to issuing an emergency general permit? One possible option was the issuance of an emergency rule. In some ways, an emergency general permit has more in common with an emergency rule than it does with an administrative order. Like an emergency rule, an emergency general permit has no parties when it is issued. Like an emergency rule, it contains statements of general applicability that implement, interpret or prescribe law or policy, the operative language in the Florida Administrative Procedure Act's definition of a rule.\textsuperscript{89} In fact, the argument could be made that an emergency general permit is an unpromulgated emergency rule.

What are the positives and negatives of issuing an emergency general permit? On the positive side, an emergency general permit is easier to issue than an emergency rule is to adopt and can perhaps be adopted more quickly.\textsuperscript{90} No rulemaking documents must be prepared. Also, perhaps the use of the permit form, rather than the rule form, has some substantive value, if some form of permitting, rather than mere rule authorization, is required by statute. If that is true, however, a good argument can be made that a general permit that does not involve the investigation of an applicant's individual circumstances prior to issuance would be no more or less faithful to such a statutory scheme than an emergency rule that created an exception to permitting requirements during an emergency.

On the negative side, the issuance of an emergency general permit might be less desirable in some ways than the adoption of an emergency rule that created an exception to normal permitting requirements during an emergency. Assuming someone is aggrieved by an emergency general permit, the remedy is to appeal to the District Court of Appeal without a record.\textsuperscript{91} Emergency rulemaking gives those who are unhappy with the emergency policies a better remedy, the emergency rule challenge authorized by section 120.56(3), Florida Statutes. It also would permit review of the emergency rule by the Joint Administrative Procedures Committee of the Legislature. Also, the issuance of a permit, rather than the creation of an

\textsuperscript{86} Fla. Stat. § 120.58(3) (1991).
\textsuperscript{87} In re: Emergency Authorization For Repairs, Replacement, Restoration, and Certain Other Measures made Necessary By Hurricane Andrew, No. 92-1476, at 2 (Emergency Final Order, Florida Department of Environmental Regulation 1992).
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B. Executive Orders

As was noted earlier, over two dozen emergency orders were issued in connection with the hurricane. One problem with this extensive use of the executive order process is the fact that executive orders are not usually used to develop policy of this broad importance and the procedure for issuing executive orders and the dissemination of the orders issued is not well suited for the development of policy.

Executive orders have traditionally not been subject to any of the procedural requirements of the Florida Administrative Procedure Act. They are developed by the Governor’s legal staff, signed by the Governor and filed with the Secretary of State. They expire, unless renewed, in sixty days. No notice or hearing is required before they are issued and they are not published. During the storm, many important decisions with wide ranging impact were made by executive order, but those orders were not generally available. For example, Executive Order 92-225 declared that “[a]ll state agencies are temporarily relieved, for a period of thirty days, from procedural and notice requirements of Chapter 120, Florida statutes, to the extent such requirements cannot be complied with due to the emergency.”

No notice of that significant order was ever published. If executive orders are used in this very substantive manner in the future, I suggest that important orders be published two places. First, they should be published immediately upon issuance in a major newspaper covering the disaster and available to victims of the disaster. Second, they should be published in the Florida Administrative Weekly which is available to subscribers and law libraries throughout the state. I also suggest that the Governor continue the practice, used in the issuance of some executive orders during the storm, of seeking input on important questions before issuing executive orders on those points.

93. According to my unofficial count, 59 of 102 emergency rules noticed in the Florida Administrative Weekly between September 11, 1992 and December 18, 1992, were related to Hurricane Andrew. Expressed another way, this represents more than a 100% increase in emergency rulemaking as a result of the storm.
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C. Emergency Rulemaking

Hurricane Andrew unleashed a flood of emergency rules as agencies tried to respond quickly to emergency conditions.93 Some actions proved controversial. For example, Insurance Commissioner Gallagher was criticized for his decision to implement price guidelines on home repairs by emergency rule.94 A controversy arose concerning whether the guidelines were designed to help consumers, by holding down prices, or the insurance industry, by holding down insurance reimbursements to a reimbursement level too low to pay for the actual cost of repair. One area of dispute in connection with this rulemaking was the degree to which the Department of Insurance sought input from affected groups before adopting the rule.

This emergency rule demonstrates some of the dangers of tackling controversial problems through emergency rulemaking. Because the opportunities for careful consideration and public participation are more limited in emergency rulemaking, it is more likely that mistakes will be made and public reaction will be misjudged in that process. Agencies using emergency rulemaking can protect themselves, to some degree, from these misjudgments by better disaster planning and with outreach for public input at the time the emergency rule is adopted. Just as the Governor’s executive orders should be reviewed as part of future disaster planning, the emergency rules and emergency orders filed in connection with the hurricane should be reviewed as part of each agency’s preparation for the future. To the extent that options can be drawn from those documents and adopted through the normal rulemaking process, that should be considered.

V. Conclusion

It is true in disaster planning, as in life, that there is no substitute for experience. Now that we have had that experience, we can choose to learn from it or to miss that opportunity. Many of the recommendations that have come from those who have studied the storm and its aftermath show great promise. The true test of whether we learn from our experience is whether those recommendations are put into practice.

93. According to an unofficial count, 59 of 102 emergency rules noticed in the Florida Administrative Weekly between September 11, 1992 and December 18, 1992, were related to Hurricane Andrew. Expressed another way, this represents more than a 100% increase in emergency rulemaking as a result of the storm.

Price Gouging: Application of Florida's Deceptive and Unfair Trade Practices Act in the Aftermath of Hurricane Andrew

Gary E. Lehman

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* Associate, Trial Division, Broad and Casel, Miami, Florida; B.A., Columbia University, 1987; J.D., Boston University School of Law, 1990. The author wishes to thank Eric D. Rosenberg of the Nova Law Review staff for his research assistance in the preparation of this article.
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Published by NSUWorks, 1993
I. INTRODUCTION


By virtue of Executive Order 92-222-E, the Florida Attorney General, Department of Legal Affairs, Office of Consumer Protection (the Attorney General), has been given primary responsibility to investigate and enforce the Act.6 Specifically, the Attorney General has been given the responsibility of investigating complaints by consumers of price gouging.7

Generally, if the Attorney General has a "reason to believe" that a violation of the Act has occurred, a subpoena will be issued requiring the alleged price gouger to produce all information and documents regarding his pricing practices.8 The Attorney General is also empowered by the Act to refer any matter to the State Attorney's office for concurrent civil enforcement.9

After investigation, if the Attorney General finds sufficient evidence that a violation of the Act has occurred, it may bring an action to obtain a declaratory judgment that a violation of the Act has occurred, an injunction action against the alleged wrongdoer to enjoin him from continued violations of the Act, or an action on behalf of one or more consumers for actual damages caused by the particular defendant's violation of the Act.10

In addition, persons found to have engaged in price gouging may be fined up to $10,000 for each violation.11 Civil penalties are paid to the State of Florida and are not paid to the consumer(s) who has been gouged.12 A prevailing party is also entitled to recover its reasonable attorneys' fees and costs.13

Under the Act, the above remedies are also available to private litigants who may bring individual actions for consumer losses suffered as a result of a violation of the Act, plus reasonable attorneys fees and costs.14 However, in private actions, the court may, after an evidentiary hearing, require the party bringing in the action to post the bond in an amount sufficient to cover the defendant's damages (including reasonable attorneys fees and costs) in the event that the court finds the suit to be frivolous.15 Damages recoverable by consumers are generally equal to the difference between the inflated price paid for the goods or services as a result of Hurricane Andrew minus the market value of the goods or services when provided or delivered prior to Hurricane Andrew. Although the Governor's Executive Order does not define the meaning of the term "exorbitant or excessive price," it is defined in the Dade and Broward County ordinances as "any cost greater than the price for similar goods, services or materials that was imposed or demanded prior to August 24, 1992."16

2. This demand is commonly called "price gouging."
5. Dade County, Fla., Ordinance 92-89, § 2 (Aug. 27, 1992); Broward County, Fla., Ordinance 92-26, § 2 (Aug. 11, 1992). The Dade County ordinance remained in effect until September 26, 1992, after which time it was deemed repealed. The Broward County ordinance remained in effect until October 1, 1992, after which time it was deemed repealed.
I. INTRODUCTION

On August 23, 1992, in the wake of Hurricane Andrew, Florida's Governor, Lawton Chiles, issued Executive Order 92-222-E, making the imposition or demand of an exorbitant or excessive price by any vendor of fuels, foods, medicines or other necessities a violation of Florida's Deceptive and Unfair Trade Practices Act (the Act). Similarly, both Dade and Broward County Commissioners have passed county ordinances making price gouging an unlawful and unfair business practice in these counties.

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Thus, under the Act, alleged price gougers must show that increased prices reflected increased costs, or they would likely have been in violation of the Act.

II. THE ROLE OF THE MEDIA AND STATE ENFORCEMENT ACTIVITIES

Accusations of price gouging naturally attract a great deal of public attention, as well as media coverage. In the days following Hurricane Andrew, articles appeared in newspapers across the country outlining two basic positions as to the issue of price gouging. Some commentators have taken the view that alleged "profiteering" and "price gouging" is nothing more than a free market economy working to distribute goods in an efficient manner. Generally, they argue that prices rise for the simple reason that demand has increased. Consumers crowd into stores in an attempt to purchase supplies that are woefully insufficient to meet their needs. In response to the competition among consumers, businessmen raise their prices. Literally, these businessmen are "profiteering," that is, they are seeking to make a profit. But in following their own narrow interest, so the argument goes, they are actually providing an indispensable public service and promoting the public good.

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18. Hoffman, supra note 17, at 39A; Sowell, supra note 17, at 13A.

19. Hoffman, supra note 17, at 39A; Sowell, supra note 17, at 13A.

20. Shinn, supra note 17, at 13A.

21. Id.

22. Hoffman, supra note 17, at 39A; Beatrice E. Garcia, Prices for Building Supplies Souring, MIAMI HERALD, Aug. 28, 1992, at 6A.

23. It should be remembered that in any action brought by the State against an alleged price gouger, the Attorney General is both a party and an attorney to the proceeding. Although Mr. Butterworth's remarks were not directed towards any particular party, such
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In the short run, price increases will equilibrate consumer markets lowering demand to meet supply. If prices remained at pre-storm levels, it is argued that the first consumers to arrive would purchase all of the existing supplies, leaving none for others. However, when prices are allowed to increase in response to higher demand, consumers engage in a voluntary rationing process, each responding to higher prices by reducing his purchases. Thus, this allows scarce goods to be distributed among many people, instead of hoarded by a few.

On the other hand, other commentators argue that price gouging merely rations scarce resources on the basis of who has the most money, without regard to who has the most need. They argue that when someone exploits a disaster to quadruple the price of a basic necessity, thereby taking advantage of desperate people who must pay the inflated price, it is nothing more than blatant, unconscionable greed and profiteering, and not the "benign working of the invisible hand of the free market." Regardless of which viewpoint one finds more persuasive, the Florida Legislature has enacted laws evining a policy that is decidedly in favor of consumers as opposed to theories espoused by free market economists. In the chaos and hysteria immediately following Hurricane Andrew, Florida's Attorney General, Bob Butterworth, made the following statements to the press:

I don't see any difference between the looters, who go through the rubble in the trailer parks, and the business people who cash in on this disaster by gouging customers. I can't give you a good definition of the difference between a looter and a price gouger, except that the price gouger may wear a suit and a tie. The price gouger looks you right in the face and takes your money.

While such hyperbole may be appropriate in contexts outside of the legal arena, Mr. Butterworth's statements appear to be unduly inflammatory and could potentially prejudice an alleged price gouger's right to a fair and impartial trial.
III. PRICE GOUGING ENFORCEMENT: PRACTICES AND PROCEDURES OF THE ATTORNEY GENERAL

To assist practitioners who may defend price gouging actions brought by the State, the following information is provided to acquaint the reader with certain practices and procedures of the Attorney General's Office regarding enforcement of Governor Chiles' August 24, 1992 Executive Order.24

A. Consumer Complaints

The first step in the enforcement process is that a consumer must file a complaint with the Attorney General. Complaints are generally received by telephone and recorded on a form called "Complaints On Pricing Of Items." Initial complaints following Hurricane Andrew involved ice, water, batteries and generators. Later complaints involved repairs, windows, roofs and tree trimmers. The last type of consumer complaints to be received by the Attorney General involved rent-hike disputes between landlords and tenants.

After receipt by the Attorney General's Office, complaints are then generally followed up by either a phone call or a visit from an investigator from the Attorney General's Office. However, not all complaints are investigated by the Attorney General's Office. For example, complaints concerning companies in regulated industries are generally referred to the corresponding regulatory agency. Thus, complaints regarding contractors are referred to the Department of Professional Regulation; complaints regarding extreme remarks should be carefully avoided by state prosecutors to avoid even the appearance of impropriety and to ensure responsible enforcement. Thus, in the face of future public outcry, the Attorney General should well heed the words of our supreme court: [The] [sic] limitations placed upon lawyers, litigants and officials directly affected by court proceedings may be made at the court's discretion for good cause to assure fair trials. Muzzling lawyers who may wish to make public statements to gain public sentiment for their clients has long been recognized as within the court's inherent power to control professional conduct. The constant spotlight of public attention focused upon public officials during litigation makes it imperative that they be more subject to judicial restrictions against inflammatory and prejudicial statements than other persons. 26


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hotels are referred to the Department of Business Regulation; and complaints regarding insurance companies are referred to either the Department of Insurance or the Department of Banking and Finance. It should also be noted that the Attorney General's Office handles only civil matters. Any criminal actions, pursuant to section 501.2045,25 are handled exclusively by the State Attorney's Office.

B. Investigation

Generally, consumer complaints are followed up by the Attorney General's Office in one of two ways: 1) the majority of complaints are followed up by an investigator from the Attorney General's Office who telephones the alleged price gouger to investigate the allegations contained in the complaint; and 2) where there are more substantial allegations of price gouging, an investigator from the Attorney General's Office is sent into the field to make an on-site investigation.

In either case, information is gathered by the Attorney General's Office in order to make a determination as to whether there is "reason to believe" that the alleged violator has engaged in price gouging. Lawyers in the Attorney General's Office review the information obtained by their investigators, and make a determination whether there is sufficient evidence of price gouging to issue a subpoena to the alleged violator. According to the Attorney General's Office, there is no standard under which a determination of price gouging is made.26 Florida Statute section 501.206 provides a "reason to believe" standard, and determinations are made on a case-by-case basis. The initial standard used by the Attorney General's Office to determine whether there was sufficient evidence to reasonably believe that a violation of the Act had occurred was simply to compare the price paid for goods or services provided or delivered after Hurricane Andrew, to the price paid for goods or services provided or delivered prior to Hurricane Andrew. Beyond this benchmark, there are no written guidelines, no percentages, and no basis upon which such a determination is made. The decision to issue a subpoena, therefore, is essentially subjective (hence, arbitrary) and left to the discretion of the reviewing attorney.27

25. FLA. STAT § 501.2045 (1991) (concerns the sale of "used" goods as "new" goods).
26. Id. § 501.206(1). During Mr. Rosenberg's interview of Mona Fandel, Esq., Ms. Fandel was either unable or unwilling to provide any verbal indication as to what basis the Attorney General's Office was using, if any, to make such determinations. Fandel, supra note 24.
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24. Interview with Mona Fandel, Esq., Florida Deputy Attorney General, Department
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Published by NSUWorks, 1993
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At the investigation stage, most of the cases are either settled, referred elsewhere, or a determination is made that no action is required. As indicated earlier, many of the complaints are directed to other state agencies. Some cases, particularly landlord-tenant cases, are not viewed by the Attorney General’s Office as instances of price gouging, but are otherwise seen as valid disputes. In these cases, the consumer is advised by the Attorney General’s Office to contact an attorney for representation.

As might be expected, many of the cases are settled at the investigation stage. The alleged price gouger may be required to refund the purchase price to the complaining consumer. The alleged price gouger may also be given the opportunity to volunteer, or be required, as part of a settlement, to make a donation to a hurricane relief organization.

In many of the cases, the investigator determined that no action by the Attorney General’s Office was required. In some cases, the investigator found that the alleged violator had not engaged in price gouging. In others, the alleged violator had a sufficient reason for charging higher prices. In a few cases, the consumer was unable to document the allegations made while in others, there was insufficient information supplied by the consumer.

General’s Office in pursuing their cases. Therefore, she was unable to pursue this specific subject further. Ms. Fandel did relate, however, that the Attorney General’s Office has use to establish “acceptable” prices. Id.

28. During Mr. Rosenberg’s interview with Mona Fandel, Esq., several of the complaint forms showed that the consumer had been advised by the Attorney General’s Office to contact Legal Services of Greater Miami, Inc. or some other legal aid organization. Id.

29. Obviously, it is financially preferable to the alleged price gouger to settle such cases. In most, if not all, instances, the potential fines far exceed any payments made by the alleged price gouger pursuant to a settlement or donation to a hurricane relief organization. In fact, which have included some or all the following: apologizing for any overcharging; explaining to an employee without the knowledge or authorization of the owner or the management.

30. Id.


32. Approximately one-third of the alleged violators to whom subpoenas had been issued settled their cases during this stage.

33. 578 So. 2d 864 (Fla. 3d Dist. Ct. App. 1991); Fandel, supra note 24.


35. Based upon his interview with Mona Fandel, Esq., Mr. Rosenberg was given the impression that the Attorney General gives an alleged violator every possible opportunity to settle a case prior to filing an action under the Act. Thus, in the final analysis, it appears that most cases will settle, and few, if any, will reach the litigation stage. Fandel, supra note 24.
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30. Id.

C. Issuance of Subpoenas

Upon a determination that there is "reason to believe" that one has engaged in price gouging, the Attorney General's Office issues a "subpoena duces tecum without appearance." As with the initial determination as to whether price gouging has occurred, there is no standard or guidelines (other than "reason to believe") to determine whether the Attorney General's Office shall issue a subpoena.31 All such determinations to issue a subpoena are made on a case-by-case basis by attorneys from the Attorney General's Office.32 Subpoenas are issued by the Attorney General's Office under the authority of State v. Jackson.33

D. Filing a Complaint

If, upon review of the documents and other information provided under the subpoena, the Attorney General's Office believes that price gouging has occurred, it may file a civil complaint under the Act.34 As of October 8, 1992, no complaint had yet been filed by the Attorney General's Office.35

In sum, over 1,500 consumer complaints have been filed with the Attorney General's Office in the wake of Hurricane Andrew. In response to those complaints, the Attorney General's Office has issued less than seventy-five subpoenas. About one-third of the cases in which subpoenas had been issued have been settled with no further action taken. Those cases which have not yet settled are either in the process of being settled, or under further investigation by the Attorney General's Office. As previously noted, there is tremendous leeway to allow alleged violators to settle. Ultimately, it appears that only a few cases, if any, will actually proceed to the stage at which the Attorney General's Office will institute litigation. Because alleged violators are allowed substantial opportunities to settle their cases, there is little deterrent effect. In most cases, the alleged violator merely settles with the consumer who complained, and is otherwise not held

32. Approximately one-third of the alleged violators to whom subpoenas had been issued settled their cases during this stage.
33. 576 So. 2d 864 (Fla. 3d Dist. Ct. App. 1991); Fandel, supra note 24.
35. Based upon his interview with Mona Fandel, Esq., Mr. Rosenberg was given the impression that the Attorney General gives an alleged violator every possible opportunity to settle a case prior to filing an action under the Act. Thus, in the final analysis, it appears that most cases will settle, and few, if any, will reach the litigation stage. Fandel, supra note 24.

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accountable for his actions. There is neither a fine or other penalty, nor is there necessarily any redress to others who did not complain. Thus, it appears that there is very little risk involved in engaging in such price gouging activities.

IV. SECTION-BY-SECTION ANALYSIS OF FLORIDA’S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

As initial point of analysis, there are no reported Florida decisions construing Florida’s Deceptive and Unfair Trade Practices Act as it relates to price gouging in the wake of a natural disaster. However, there are two reported New York decisions involving the same case at the trial and appellate levels that arose in the aftermath of Hurricane Gloria. These decisions construe a statute similar to Florida’s Deceptive and Unfair Trade Practices Act. 36 Two Wheel Corp. involved a retailer of portable electric generators who sold approximately 100 generators at inflated prices ranging from four percent to seventy-seven percent over the “base prices” for those models during a two-week period commencing immediately prior to Hurricane Gloria and continuing for ten days following the storm. 37 The defendant first argued that the generator sales were not governed by the price gouging statute because they did not constitute “necessities.” In addition, the defendant contended that the price increases were justified by increased freight and labor costs, and various business risks associated with the sales, such as the possibility that customers might cancel their orders if power were restored before the generators were delivered, leaving the defendant with a large inventory. The defendant also argued that the prices charged were not “unconscionably excessive” because, in the majority of sales, there was no “gross disparity” between the sales price at the time of the market disruption and the price charged before the disruption.

Ruling in favor of the plaintiff, the New York Court of Appeals rejected all of defendant’s arguments and upheld the lower court’s decision which imposed a civil penalty of $5,000, ordered the defendant to make restitution to thirteen known consumers who had submitted affidavits in support of the petition, and ordered the defendant to establish a $20,000 restitution fund for other consumers who purchased generators from the defendant during the period for any amount exceeding the base price. While

37. Id. at 693.
38. See id. at 696-98 (Alexander, J., dissenting).
accountable for his actions. There is neither a fine or other penalty, nor is there necessarily any redress to others who did not complain. Thus, it appears that there is very little risk involved in engaging in such price gouging activities.

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37. Id. at 693.

the majority’s interpretation of the New York statute is broad and probably incorrect, 38 its holding is nonetheless instructive in that it addresses arguments that a prospective defendant might assert to claims brought under Florida’s Deceptive and Unfair Trade Practices Act. For sake of convenience and to familiarize practitioners with Florida’s Deceptive and Unfair Trade Practices Act, amendments to the Act and relevant Florida decisions, a section-by-section analysis follows.

A. Section 501.201, Short Title

Section 501.201 states that sections 501.201 to 501.213 shall be known, and may be cited as the “Florida Deceptive and Unfair Trade Practices Act.”

B. Section 501.202, Purposes; Rules of Construction

Section 501.202 states:

The provisions of this part shall be construed liberally to promote the following policies:

(1) To simplify, clarify, and modernize the law governing consumer sales practices.
(2) To protect consumers from suppliers who commit deceptive and unfair trade practices.
(3) To make state regulation of consumer sales practices consistent with established policies of federal law relating to consumer protection.

C. Section 501.203, Definitions

Section 501.203 defines the following terms, as used in the Act.
Definitions are included only to the extent that they are relevant to an action based upon allegations of price gouging.

(1) “Consumer transaction” means a sale, lease, assignment, award by chance, or other disposition of an item of goods, a consumer service, or an intangible to an individual for purposes that are primarily personal, family, or household . . . .
(2) "Final judgment" means a judgment, including any supporting

38. See id. at 696-98 (Alexander, J., dissenting).
40. Id. at § 501.202

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opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(3) "Supplier" means a seller, lessor, assignor, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

(4) "Enforcing authority" means the office of the state attorney if a violation of [the Act] occurs in or affects the judicial circuit under the office's jurisdiction. "Enforcing authority" means the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of state attorney fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.

(5) "Violation of this part" means either a violation of a provision of this part or a violation of any rule promulgated pursuant to this part.

(6) "Department" means the Department of Legal Affairs.

(7) "Order" means a cease and desist order issued by the enforcing authority as set forth in s. 501.208.

(8) "Interested party or person" means any person affected by a violation of this part or any person affected by an order of the enforcing authority.

(9) "Consumer" means an individual; child, by and through its parent or legal guardian; firm; association; joint adventure; partnership; estate; trust; business trust; syndicate; fiduciary; corporation; or any other group or combination.

D. Section 501.204, Unlawful Acts and Practices

Section 501.204(1) states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

41. Under subsection (4), both the appropriate state attorney and the Department of Legal Affairs have concurrent jurisdiction to enforce the Deceptive and Unfair Trade Practices Act, even when the violation is also occurring in or effecting other judicial circuits, when the matter has been referred to the state attorney by the Department of Legal Affairs.


43. Id. § 501.204(1).

August 23, 1992: declaring the existence of a state of emergency as a result and consequence of the serious threat Hurricane Andrew posed to public health, safety and property in Section three of this executive order provides:

The imposition or demand of any exorbitant or excessive price by any vendor

Under section 501.204, proof of misrepresentation or deceit, as would constitute fraud, is not a necessary element in all causes of action brought under the Florida Deceptive and Unfair Trade Practices Act.

E. Section 501.2045, Sale of Used Goods As New; Penalty

Section 501.2045 states:

(1) It is unlawful for a seller in a consumer transaction, as defined in s. 501.203, where the purchase price of goods exceeds $100, to misrepresent orally, in writing, or by failure to speak that the goods are new or original when they are used, repossessed, or where they have been used for sales demonstration.

(2) Whoever violates the provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided in ss. 775.082 or 775.083.

F. Section 501.205, Rule-making Power

Section 501.205(1) states, in apposite part, that "[t]he department shall

of fuels, foods, medicines or other necessities, the shortage of which was created by the hurricane disaster, is shocking to the conscience and is an unfair business practice, in violation of Section 501.204, Florida Statutes.


Section 4 of the Governor's Executive Order also states:

The vendor or person engaged in this unfair business practice shall be reported to the law enforcement agencies, local emergency management agencies and the State Attorneys in the city, county or area in which such unfair business practice occurs.


Executive Order 92-922-E further provides:

Each local emergency management agency receiving notice that any vendor or person has engaged in unfair business practice shall be authorized to give notice to the public of the unfair business practice of such vendor or person, and the State Attorney for the Judicial Circuit in which such unfair business practice has occurred shall enforce the remedies provided in Chapter 501, Florida Statutes.


44. Donald Frederick Evans & Assoc. v. Continental Homes, Inc., 785 F.2d 847 (11th Cir. 1986) (construing Florida law).

45. FLA. STAT. § 501.2045 (1991). As previously noted, criminal prosecutions, under § 501.2045, are handled exclusively by the State Attorney's Office.
opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

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More importantly, the Governor's Executive Order authorizes "[e]ach law enforcement agency . . . to take all necessary legal measures to curtail the unfair business practices of . . . unscrupulous suppliers." Fla. Exec. Order No. 92-222-E(5) (Aug. 23, 1992)

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45. FlA. STAT. § 501.2045 (1991). As previously noted, criminal prosecutions, under § 501.2045, are handled exclusively by the State Attorney's Office.
adopt rules which prohibit with specificity acts or practices that violate this part and which prescribe procedural rules for the administration of this part.  

G. Section 501.206, Investigative Powers of Enforcing Authority

Section 501.206 states:

(1) If, by its own inquiries or as a result of complaints, the enforcing authority has reason to believe that a person has engaged in, or is engaging in, an act or practice that violates this part, he may administer oaths and affirmations, subpoena witnesses or matter, and collect evidence. Within 10 days after the service of a subpoena or at any time before the return date specified therein, whichever is longer, the party served may file in the circuit court in the county in which he resides or in which he transacts business and serve upon the enforcing authority a petition for an order modifying or setting aside the subpoena. The petitioner may raise any objection or privilege which would be available under this chapter or upon service of such subpoena in a civil action. The subpoena shall inform the party served of his rights under this subsection.

(2) If matter that the enforcing authority seeks to obtain by subpoena is located outside of the state, the person subpoenaed may make it available to the enforcing authority or his representative to examine the matter at the place where it is located. The enforcing authority may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his behalf, and he may respond to similar requests from officials from other states.

(3) Upon failure of a person without lawful excuse to obey a subpoena and upon reasonable notice to all persons affected, the enforcing authority may apply to the circuit court for an order compelling compliance.

(4) The enforcing authority may request that an individual who refuses to comply with this subpoena on the ground that testimony or matter may incriminate him be ordered by the court to provide the testimony or matter. Except in a prosecution for perjury, an individual who complies with a court order to provide testimony or matter after asserting a privilege against self-incrimination to which he is entitled by law shall not have the testimony or matter so provided, or evidence derived therefrom, received against him in any criminal investigation or proceeding.

H. Section 501.207, Remedies of Enforcing Authority

Section 501.207 states:

(1) The enforcing authority may bring:

(a) An action to obtain the declaratory judgment that an act or practice violates this part.

(b) An action to enjoin a supplier who has violated, is violating, or is otherwise likely to violate, this part.

(c) An action on behalf of one or more consumers for the actual damages caused by an act or practice performed in violation of this part. However, no damages shall be recoverable under this section against a retailer who has in good faith engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

(2) Before bringing an action under paragraph (1)(a) or paragraph (1)(c), the head of the enforcing authority shall review the matter and determine if an enforcement action serves the public interest. This determination shall be made in writing, but shall not be subject to the provisions of chapter 120.

(3) Upon motion of the enforcing authority or any interested party in any action brought under subsection (1), the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, to reimburse consumers found to have been damaged; to carry out a consumer transaction in accordance with consumers' reasonable expectations; to strike or limit the application of clauses of contracts to avoid an unconscionable result; or to grant other appropriate relief. The court may assess the expenses of a master or receiver against a supplier. Any injunctive order, whether temporary or permanent, issued by the court shall be effective throughout the state unless otherwise provided in the order.

(4) If a violator shows that a violation of this part resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, by which the violator was unjustly enriched by violation.


47. As previously mentioned, the Attorney General issues subpoenas pursuant to this subsection and the authority of State v. Jackson, 576 So. 2d 864 (Fla. 3d Dist. Ct. App. 1991).


49. Florida Statute § 120, entitled Administrative Procedure Act, sets forth certain agency rule-making procedures and methods of public inspection and judicial review. Id. § 120.51.
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49. Florida Statute § 120, entitled Administrative Procedure Act, sets forth certain agency rule-making procedures and methods of public inspection and judicial review. Id. § 120.51.
(5) No action may be brought by the enforcing authority under this section more than 4 years after the occurrence of a violation of this part or more than 2 years after the last payment in a consumer transaction involved in a violation of this part, whichever is later.

(6) The enforcing authority may terminate an investigation or an action upon acceptance of a person's written assurance of voluntary compliance with this part. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or to take other appropriate corrective action. An assurance is not evidence of a prior violation of this part. However, unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this part. No such assurance shall act as a limitation upon any action or remedy available to a person aggrieved by a violation of this part.30

I. Section 501.2075, Civil Penalty

Section 501.2075 states:

Except as provided in s. 501.2077, any person, firm, corporation, association, or entity, or any agent or employee of the foregoing, who engages in any act or practice declared in this part to be unlawful, or who violates any of the rules of the Department of Legal Affairs promulgated under this part, with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive or is prohibited by rule, is liable for a civil penalty of not more than $10,000 for each such violation. This civil penalty may be recovered in any action brought under this part by the enforcing authority; or the enforcing authority may terminate any investigation or action upon agreement by the person, firm, corporation, association, or entity, or the agent or employee of the foregoing, to pay a stipulated civil penalty. The department or the court may waive any such civil penalty if the person, firm, corporation, association, or entity, or the agent or employee of the foregoing, has previously made full restitution or reimbursement or has paid actual damages to the consumers who have been injured by the unlawful act or practice or rule violation. A civil penalty so collected shall accrue to the state and shall be deposited as received into the General Revenue Fund unallocated.31

30. FLA. STAT. §§ 501.207(1)-6 (Supp. 1992) (the final subsection, (7), applies to hearar statements).
31. Id. §§ 501.2075. As previously noted, civil penalties are unavailable to private

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K. Section 501.209, Other Supervision

Section 501.209 states: "If the enforcing authority receives a complaint or other information relating to noncompliance with this act by
(5) No action may be brought by the enforcing authority under this section more than 4 years after the occurrence of a violation of this part or more than 2 years after the last payment in a consumer transaction involved in a violation of this part, whichever is later.

(6) The enforcing authority may terminate an investigation or an action upon acceptance of a person's written assurance of voluntary compliance with this part. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or to take other appropriate corrective action. An assurance is not evidence of a prior violation of this part. However, unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this part. No such assurance shall act as a limitation upon any action or remedy available to a person aggrieved by a violation of this part.  

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51. Id. § 501.2075. As previously noted, civil penalties are unavailable to private litigants.
a supplier who is subject to other supervision in this state, the enforcing authority shall inform the official or agency having that supervision.\textsuperscript{53}

L. Section 501.2091, Stay of Proceedings Pending Trial

Section 501.2091 states:

Notwithstanding anything in this act to the contrary, any person made a party to any proceeding brought under the provisions of this part by any enforcing authority may obtain a stay of such proceedings at any time by filing a civil action requesting a trial on the issues raised by the enforcing authority in the circuit court in the county of said party’s residence. All parties shall be bound by the final order of the circuit court.\textsuperscript{54}

M. Section 501.2101, Enforcing Authorities; Monies Received in Certain Proceedings; Consumer Frauds Trust Fund

Section 501.2101 states:

(1) Any moneys received by an enforcing authority for attorney’s fees and costs of investigation or litigation in proceedings brought under the provisions of s. 501.207, s. 501.208, or s. 501.211 shall be deposited as received in the Consumer Frauds Trust Fund in the State Treasury.

(2) There is created in the State Treasury a trust fund to be known as the Consumer Frauds Trust Fund. Money deposited therein shall be disbursed to the enforcing authority responsible for its collection for the funding of activities conducted by enforcing authorities pursuant to s. 501.201-501.213, inclusive.

(3) Any moneys received by an enforcing authority and neither received for attorney’s fees and costs of investigation or litigation nor used to reimburse consumers found under this law to be damaged shall accrue to the state and be deposited as received in the General Revenue Fund unallocated.\textsuperscript{55}

N. Section 501.2105, Attorney’s Fees

Section 501.2105 states:

\textsuperscript{53} Id. § 501.209.
\textsuperscript{54} Id. § 501.2091.
\textsuperscript{55} FLA. STAT. § 501.2101 (Supp. 1992).

(1) In any civil litigation resulting from a consumer transaction involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, shall receive his reasonable attorney’s fees and costs from the non-prevailing party.

(2) The attorney for the prevailing party shall submit a sworn affidavit of his time spent on the case and his costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(3) The trial judge shall award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(4) Any award of attorney’s fees or costs shall become a part of the judgment and subject to execution as the law allows.

(5) In any civil litigation initiated by the enforcing authority, the court may award to the prevailing party reasonable attorney’s fees and costs if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(6) In any administrative proceeding or other non-judicial action initiated by an enforcing authority, the attorney for the enforcing authority may certify by sworn affidavit the number of hours and the costs thereof to the enforcing authority for the time spent in the investigation and litigation of the case plus costs reasonably incurred in the action. Payment to the enforcing authority of the sum of such costs may be made by stipulation of the parties a part of the final order or decree disposing of the matter. The affidavit shall be attached to and become a part of such order or decree.\textsuperscript{56}

\textsuperscript{56} FLA. STAT. § 501.2105 (1991). In Cuevas v. Potamkin Dodge, Inc., 483 So. 2d 55 (Fla. 3d Dist. Ct. App. 1986), the court held that a car buyer who prevailed in arbitration with a car dealer regarding known, unrevealed defects in a car was entitled to recover costs reasonably and necessarily incurred in the arbitration. However, the car buyer could not recover legal fees where the car buyer’s success in the action was achieved not after judgment in the trial court, but through an arbitration process to which she had voluntarily agreed.

To be entitled to recovery of attorney’s fees pursuant to § 501.2105, a party must recover a judgment on the deceptive trade practices claim and recover a net judgment in the same case. Heindel v. Southside Chrysler-Plymouth, Inc., 476 So. 2d 266 (Fla. 1st Dist. Ct. App. 1985).

A defendant against whom a deceptive trade practices action was brought and subsequently voluntarily dismissed by the plaintiffs could not recover attorney’s fees under § 501.2105, which allows a prevailing party to recover attorney’s fees after a judgment is entered in the trial court, since no judgment had been entered. Nolan v. Altman, 449 So. 2d 896 (Fla. 1st Dist. Ct. App. 1984).
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L. Section 501.2091, Stay of Proceedings Pending Trial

Section 501.2091 states:

Notwithstanding anything in this act to the contrary, any person made a party to any proceeding brought under the provisions of this part by any enforcing authority may obtain a stay of such proceedings at any time by filing a civil action requesting a trial on the issues raised by the enforcing authority in the circuit court in the county of said party's residence. All parties shall be bound by the final order of the circuit court.\textsuperscript{54}

M. Section 501.2101, Enforcing Authorities; Monies Received in Certain Proceedings; Consumer Frauds Trust Fund

Section 501.2101 states:

(1) Any moneys received by an enforcing authority for attorney's fees and costs of investigation or litigation in proceedings brought under the provisions of s. 501.207, s. 501.208, or s. 501.211 shall be deposited as received in the Consumer Frauds Trust Fund in the State Treasury.

(2) There is created in the State Treasury a trust fund to be known as the Consumer Frauds Trust Fund. Money deposited therein shall be disbursed to the enforcing authority responsible for its collection for the funding of activities conducted by enforcing authorities pursuant to ss. 501.201-501.213, inclusive.

(3) Any moneys received by an enforcing authority and not received for attorney's fees and costs of investigation or litigation nor used to reimburse consumers found under this law to be damaged shall accrue to the state and be deposited as received in the General Revenue Fund unallocated.\textsuperscript{55}

N. Section 501.2105, Attorney's Fees

Section 501.2105 states:

(1) In any civil litigation resulting from a consumer transaction involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, shall receive his reasonable attorney's fees and costs from the non-prevailing party.

(2) The attorney for the prevailing party shall submit a sworn affidavit of his time spent on the case and his costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(3) The trial judge shall award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(4) Any award of attorney's fees or costs shall become a part of the judgment and subject to execution as the law allows.

(5) In any civil litigation initiated by the enforcing authority, the court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a complete absence of a justifiable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(6) In any administrative proceeding or other non-judicial action initiated by an enforcing authority, the attorney for the enforcing authority may certify by sworn affidavit the number of hours and the costs thereof to the enforcing authority for the time spent in the investigation and litigation of the case plus costs reasonably incurred in the action. Payment to the enforcing authority of the sum of such costs may be made by stipulation of the parties a part of the final order or decree disposing of the matter. The affidavit shall be attached to and become a part of such order or decree.\textsuperscript{56}

\textsuperscript{53} Id. § 501.209.

\textsuperscript{54} Id. § 501.2091.


\textsuperscript{56} Fla. Stat. § 501.2105 (1991). In Cuervas v. Potamkin Dodge, Inc., 483 So. 2d 55 (Fla. 3d Dist. Ct. App. 1986), the court held that a car buyer who prevailed in arbitration with a car dealer regarding known, unrevealed defects in a car was entitled to recover costs reasonably and necessarily incurred in the arbitration. However, the car buyer could not recover legal fees where the car buyer's success in the action was achieved not after judgment in the trial court, but through an arbitration process to which she had voluntarily agreed.

To be entitled to recovery of attorney's fees pursuant to § 501.2105, a party must recover a judgment on the deceptive trade practices claim and recover a net judgment in the entire case. Heidell v. Southside Chrysler-Plymouth, Inc., 476 So. 2d 286 (Fla. 1st Dist. Ct. App. 1985).

A defendant against whom a deceptive trade practice action was brought and subsequently voluntarily dismissed by the plaintiffs could not recover attorney's fees under § 501.2105, which allows a prevailing party to recover attorney's fees after a judgment is entered in the trial court, since no judgment had been entered. Nolan v. Alman, 449 So. 2d 888 (Fla. 1st Dist. Ct. App. 1984).
Section 501.211, Other Individual Remedies

Section 501.211 states:

(1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a supplier who has violated, is violating, or is otherwise likely to violate this part.

(2) In any individual action brought by a consumer who has suffered a loss as a result of a violation of this part, such individual may recover actual damages, plus attorney’s fees and court costs as provided in s. 501.2105; however, no damages, fees, or costs shall be recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

(3) In any action brought under this section, upon motion of the party against whom such action is filed alleging that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may, after hearing evidence as to the necessity therefore, require the party instituting the action to post a bond in the amount which the court finds reasonable to indemnify the defendant for any damages incurred, including reasonable attorney’s fees. This subsection shall not apply to any action initiated by the enforcing authority.57

Section 501.2105 does not require that the trial court reserve jurisdiction in order to award attorney’s fees and costs on a later date. Jefcoast v. Heinicka, Inc., 436 So. 2d 1042 (Fla. 2d Dist. Ct. App. 1984).

57. FLA. STAT. § 501.211 (1991). In Hamilton v. Palm Beach Chevrolet-Oldsmobile, Inc., the court held that the trial court, which did not hear evidence concerning the need for a bond, was not permitted to require buyers to post a bond in order to pursue a claim against an auto dealership based upon alleged violations of Florida’s Deceptive and Unfair Trade Practices Act. 366 So. 2d 1233, 1234 (Fla. 2d Dist. Ct. App. 1979).

The purpose of requiring a bond [under this section, where frivolous complaints are alleged], is to provide defendants an opportunity for redress rather than to discourage plaintiffs from seeking access to the courts ... [Thus, evidence adduced at evidentiary hearings pursuant to such motions] must be directed toward the merits of the cause[s] of action which [are] being prosecuted ... [and] the amount of any bond which is required should not exceed the amount of damages the defendants might legally be able to recover from the plaintiffs should the plaintiffs lose.

Id.

P. Section 501.212, Application

Section 501.212 states that Florida’s Deceptive and Unfair Trade Practices Act does not apply to:

(1) An act or practice required or specifically permitted by federal or state law.

(2) A publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter, insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this part.

(3) A claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction.

(4) The holder in due course of a negotiable instrument or the transferee of a credit agreement received in good faith without knowledge of a violation of this part.

(5) Any person or activity regulated under the laws administered by the Department of Insurance or the Florida Public Service Commission or banks and savings and loan associations regulated by the Department of Banking and Finance or banks and savings and loan associations regulated by federal agencies.58

Q. Section 501.213, Effect on Other Remedies

Section 501.213 states that: "(1) The remedies of this part are in addition to remedies otherwise available for the same conduct under state or local law. (2) This part is supplemental to, and makes no attempt to preempt, local consumer protection ordinances not inconsistent with this part."59

V. CONCLUSION

As of January 19, 1993, there have been no cases filed by private litigants against alleged price gougers based upon violations of Florida’s Deceptive and Unfair Trade Practices Act. Although these actions are widely available to private litigants, it appears that only in exceptional cases will the damages sustained as a result of price gouging be substantial.

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With regard to enforcement activities by the Attorney General's Office, the first lesson to be learned is that if one is going to raise prices in the aftermath of a storm, there should be a justification for such increased prices supported by documentation demonstrating additional costs to the retailer or supplier. Without such documentation, the alleged price gouger bears little chance of prevailing in an action commenced by any enforcing authority.

At the same time, it appears that the current procedures utilized by the Attorney General's Office are lacking in two areas. First, the standard under which a determination that price gouging has actually taken place is extremely arbitrary. It is totally within the discretion of the reviewing attorney without any standards or guidelines. Further, there is currently no indication as to what a merchant may rightfully do in order to recoup additional costs legitimately incurred as a result of such a crisis without becoming the target of an investigation by the Attorney General's Office. It is therefore suggested that the Attorney General's Office prepare and publish enforcement guidelines that set forth specific criteria for making determinations as to whether price gouging has occurred. This would add uniformity, as well as objectivity, to an enforcement process that is all too subjective and creates unnecessary legal costs to innocent persons who may find themselves the targets of zealous prosecutors for unknowingly or unwittingly violating the Act.

When faced with another natural disaster, such guidelines would also put merchants on notice as to what constitutes lawful or unlawful conduct. For example, under the guidelines, merchants could be allowed to raise prices up to a certain percentage of the pre-storm price to cover increased operating costs in the aftermath of such a storm. In short, people deserve to know what conduct is permissible and what conduct is unlawful before they become the targets of an investigation by a state agency.

The second area in which the law is lacking is that, under the current enforcement procedures, few price gougers are ever penalized. Consequently, the general deterrence created by current enforcement policies is minimal at best. Indeed, the steep fine of $10,000 creates an incentive to settle the matter privately. In most cases, this means merely refunding the amount overcharged or making a quiet donation to a hurricane relief organization. In sum, the lack of penalties coupled with the fact that the current procedure is far too involved and drawn out, means that the majority of the complaints cannot be addressed in any meaningful manner.
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It is therefore suggested that the Attorney General’s Office create additional methods that result in better enforcement and greater deterrence. For example, the Attorney General could issue citations, similar to traffic tickets, to anyone who has been determined to have violated the Act in accordance with the enforcement guidelines. The more serious the offense, the bigger the fine. The citations could be handled procedurally in the same manner as traffic citations. More serious offenses could be handled under the current procedure, as modified by the enforcement guidelines. Thus, if a merchant knew that there would be a fine, regardless of the remedial action taken after a complaint is filed, there would be much greater general deterrence created under the Act. This, in turn, would curtail future abuses by those who would seek to profit at the expense of desperate people who find themselves in equally desperate situations. It is inevitable that natural disasters will continue to visit our shores. We can only hope that our lawmakers shall have the wisdom, insight, courage and creativity to make changes in our laws to prevent needless suffering and the scourge of price gouging.
That Sinking Feeling—A Boat Owner’s Liability in the Aftermath of a Hurricane

James E. Mercante*

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Published by NSUWorks, 1993
I. INTRODUCTION

True to the notion that "it's better to know a friend with a boat than to own one," wrecks are all that remain of many pleasure boats which were moored in the path of Hurricane Andrew. This hurricane devastated South Florida in August of 1992, and is regarded as one of the most powerful hurricanes ever to strike a metropolitan area in the United States, with winds that exceeded 160 miles per hour.¹ According to the Boat Owners Association of the United States, the hurricane damaged an estimated $500 million worth of pleasure boats, or one of every eight boats in south Florida.²

In the aftermath of the hurricane, boat owners were suddenly questioning their insurance coverage as well as their liability for wreck removal, pollution and property damage. These select topics will be discussed in this article.

There are certain concepts in admiralty law that underlie these issues that first need to be addressed. These are Force Majeure/Act of God and liability based on fault. Hurricane forecasting and the unpredictability of a hurricane's path must also be understood.

II. UNDERLYING ADMIRALTY CONCEPTS

A. Force Majeure/Act of God

In admiralty law, such overwhelming wind forces as possessed by Hurricane Andrew are generally considered as "heavy weather," and may be sufficient to successfully invoke the defense of "act of God." The numerical scale expressing wind force is known in maritime practice as The Beaufort Scale of Wind Forces. The force numbers range from zero, representing calm conditions, to force twelve (and above), representing a hurricane. The Beaufort Scale describes winds above seventy-five miles per hour (sixty-five knots) as a hurricane, or typhoon.

Courts have frequent occasion to make reference to "acts of God" in deciding various contract and casualty cases.³ The definition of this term varies more in form than in substance. Some courts treat similar phrases,


such as "inevitable accident" and "force majeure," as entirely equivalent to "act of God," while others draw certain technical distinctions between them.⁴

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, pain, or care, reasonably to have been expected could have been prevented;⁵

[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.⁶

Thus, extreme weather conditions, such as hurricanes, are considered in law to be acts of God.⁷ The burden of proving an act of God defense rests upon the party asserting it.⁸ However, one who asserts the defense of "act of God" or "force majeure," has the added burden of establishing his lack of fault in order to be exonerated from liability for damages to property of a third-party,⁹ such as a marina or other boat owner. Yet, the defense may be sustained without this additional proof if the force of nature is of "catastrophic" proportions sufficient to overcome all reasonable preparations.¹⁰

B. Liability Based on Fault

Liability in admiralty is based on fault. The mere fact of damage

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¹. 1 AM. JUR. 2D Act of God § 4 (1962). Unlike an act of God, a force majeure may consist of, for example, governmental intervention resulting from the necessities of war.
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An accident is said to be "inevitable" not merely when caused by *via major* or the act of God but also when all precautions reasonably to be required have been taken, and the accident has occurred notwithstanding. That there is no liability in such a case seems only one aspect of the proposition that liability must be based on fault.\textsuperscript{12}

The "inevitable accident" defense is most often invoked when a vessel has been caught in the full force of a storm and driven against another vessel or vessels, or against a fixed structure. In such a case, presumption is against the moving vessel, and the owner's efforts to rebut it take the "inevitable accident" form.\textsuperscript{13} To avoid liability, it must be shown that the force of the storm was truly irresistible and that all precautions had been taken.\textsuperscript{14}

In *Boudoin v. J. Ray McDermott & Co.*\textsuperscript{15}, the court found a barge owner liable for a dockage after a barge broke free from its moorings during Hurricane Audrey.\textsuperscript{15} The tug captain's precautions, taken prior to the storm, were judged in comparison to what a "prudent shipmaster" would have done under similar circumstances.\textsuperscript{16} Although the court found that Hurricane Audrey was an act of God, it determined that the damage was directly caused by the failure of the captain to take reasonable precautions in the face of known conditions. Importantly, the court emphasized that it is within the professional responsibilities of the shipmaster to know the proper precautions to be taken in such a situation.\textsuperscript{17}

The *Boudoin* court touched upon a key issue to be resolved in cases involving the pleasure boater. Specifically, what standard of reasonableness is to be applied in defining the appropriate conduct of these recreational boaters. This standard will likely be based upon the marine experience of each individual. By virtue of their different experience and responsibilities, the weekend sailor and the professional mariner cannot be expected to act similarly in the face of a hurricane.

\begin{itemize}
\item \textsuperscript{11} The *Java*, 81 U.S. (14 Wall.) 189 (1872) (a collision case).
\item \textsuperscript{12} *GILMORE AND BLACK*, JR., *THE LAW OF ADOLRITALITY* 486-87 (2d ed. 1975).
\item \textsuperscript{13} Id. at 488.
\item \textsuperscript{14} See *Boudoin v. J. Ray McDermott & Co.*, 281 F.2d 81 (5th Cir. 1960).
\item \textsuperscript{15} Id. at 81.
\item \textsuperscript{16} Id. at 85.
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the weekend sailor and the professional mariner cannot be expected to act
similarly in the face of a hurricane.

12. GRANT GILMORE & CHARLES BLACK, JR., THE LAW OF ADMIRALTY 486-87 (2d ed.
1973).
13. Id. at 488.
15. Id. at 82.
16. Id. at 85.
17. Id. at 84.

C. Hurricane Forecasting

In Weather for the Mariner,18 Rear Admiral William J. Kotsch,
U.S.N.R., said the following about hurricanes:

From a vantage point in space, hurricanes appear as rather small, flat
spirals drifting benignly on the sea—gentle eddies in the endless flowing
of our planet's atmosphere. Nothing could be more misleading. Where
the drift of hurricanes takes them across shipping lanes and islands and
the coasts of continents, their passage is commemorated by the vast
destruction of property, the great diminution of prospects—and death.19

Forecasting the tracks and speeds of a hurricane is one of the most
challenging and difficult tasks encountered by the meteorologist. Despite
aircraft, land, shipboard reconnaissance, weather satellites, and other sources
of data, exact hurricane paths are rarely predicted with precision.20 Instead,
hurricane tracks exhibit "humps, loops, staggering motions, abrupt course
and/or speed changes, and so forth."21 Indeed, no two, recorded, severe
tropical cyclone tracks have ever been exactly the same in any ocean.22

To summarize, liability of the pleasure boater for damages to property
will be based on fault, and will likely be judged in accordance with the
marine experience of the particular boat owner. A storm of "catastrophic"
proportions, however, may prove to be an intervening cause sufficient to
sustain an act of God defense without the necessity of additional proof.

III. INSURANCE

A. Hull Coverage

In the wake of Hurricane Andrew, insurance coverage is on the minds
of hundreds of boat owners in South Florida. As outlined herein, the boat
owner must carefully review the policy terms to determine not only its
coverage provisions, but also any obligations, and importantly, conditions
precedent to payment. This article will address certain principles of marine
insurance of general applicability. However, it must be emphasized that

19. Id. at 151.
20. Id. at 151.
21. Id.
22. Id.
variations in policy language together with the unique facts and circumstance of a particular claim must be considered.

A typical policy of marine insurance will insure losses resulting from "perils of the sea," or from any accidental physical loss by any "external cause," known as "all-risks" coverage. Some homeowner policies may, for an additional premium, cover a pleasure boat that is specifically identified in the policy.

There is no question that a hurricane is a peril insured against in a policy of marine insurance. Sea perils have been defined as those perils "which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence." Examples of loss by sea perils include heavy weather (whether or not of hurricane force) stranding, collision, contact with floating objects, and striking on rocks or on the sea bottom.

Thus, a constructive total loss or total loss to a boat due to a hurricane should be covered by the standard marine hull policy. A constructive total loss occurs if the vessel’s damage exceeds half of its value due to any peril for which it is insured. However, hull policies invariably provide that there will be no recovery for a constructive total loss unless the cost of recovering and repairing the vessel exceeds its insured value. When a total or constructive total loss occurs, the policy deductible is not applied to the settlement of the insured’s claim.

It is important that the boat owner read the marine policy and comply fully with its loss provisions. For example, insurers require immediate notice containing details that will assist in investigating the loss. Such details include the insured’s name, yacht involved, time and place of loss, where the boat may be inspected, and any witness information. Failure to give notice to the insurer within the time specified in the policy may be fatal to the claim in the event the delay is considered prejudicial to the insurer. Similarly, the policy may require a sworn statement of loss and supporting documents be submitted by the insured as soon as practicable after the loss. Failure to comply with such provision will not only delay resolution of the claim, but if prejudicial to the insurer’s rights of investigation and recovery from third parties, may void it altogether.

25. Id. at 94.

B. Sue and Labor Coverage

The boat owner should check the policy to determine whether it provides "sue and labor" coverage. In a typical yacht policy, the sue and labor provision reads as follows:

If your yacht . . . is damaged, you must take all lawful and reasonable steps to protect the yacht from further damage. We will reimburse you for the reasonable expenses of protecting the property.

The insured has a duty not to assume any obligation, admit any liability or incur any expense for which we may be liable without our permission, except expenses incurred to protect the property from further loss or damage.

It is an insured’s duty to mitigate the loss. This duty requires reasonable steps be taken to reduce the total damage incurred. Sue and labor charges arise when the insured incurs expenses to protect the boat in order to minimize the loss.

The responsibility to minimize the loss stems from the insured’s duty to exercise the care of a "prudent uninsured owner." Acting as a "prudent uninsured," the boat owner is obligated to protect the vessel and save it from further damage resulting from occurrences which the underwriter would otherwise protect against under the policy.

The insured will be reimbursed for all "reasonable" sue and labor expenditures, even if unsuccessful in saving the vessel, because such expenditures "are made primarily for the benefit of the underwriter either to reduce or eliminate a covered loss altogether."

C. Protection and Indemnity Coverage

Protection and Indemnity (P & I) policies are issued to insure owners against risks outside the scope of coverage provided under standard hull
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policies.\textsuperscript{30}

Where storm loss coverage is sought, it is imperative to determine whether P & I coverage is provided in the marine policy. The P & I policy covers a wide range of possible claims, including physical injuries or property damage sustained by others, expenses resulting from the rescue of the insured or passengers, and costs of any attempt to raise, or the actual raising, removal or destruction of the wreck or debris of the insured yacht. Additionally, pollution expense coverage, if provided, will be found in the P & I portion of the marine policy.

If the boat owner’s fault for any of the aforementioned liabilities is contested, the insurer typically covers the costs and related expenses of legal representation to defend against such third-party claims. The boat owner must cooperate with the insurer and its counsel during any such legal proceedings.

A third-party has no legal basis, in Florida, to sue the boat owner’s insurer directly for loss or damage, nor to include the insurer as a defendant in a suit against the insured boat owner.\textsuperscript{31}

Wreck removal is a primary concern to owners in the wake of a hurricane. P & I insurance usually covers expenses incurred by the boat owner to remove or dispose of the sunken or wrecked vessel. However, the policy may condition payment for removal expenses on those instances where removal is “compulsory by law” or “mandated by law.”

The term “compulsory by law” is open to different interpretations. Compulsory removal may be pursuant to an express governmental order,\textsuperscript{32} a subjective belief that such removal is necessary by law,\textsuperscript{33} or a legal obligation to remove the vessel.\textsuperscript{34}

IV. RESPONSIBILITY FOR WRECKS

The owner of a vessel has legal responsibilities that do not sink with the vessel. Rather, the owner is subject to both federal and state statutory requirements pertaining to the marking and disposing of the wreck, ensuring the wreck does not obstruct navigable waters,\textsuperscript{35} preventing the wreck from causing damage to other property, and bearing the costs associated with these procedures.

A. U.S. and State Laws

Of primary concern to the vessel owner is a United States statute known as the Wreck Act.\textsuperscript{36} This Act delineates the owner’s obligations to locate, mark and remove the sunken vessel.\textsuperscript{37} According to section 409 of the Wreck Act, it is unlawful to:

[S]ink, or permit or cause to be sunk, vessels or other craft in navigable channels; . . . in such manner as to obstruct, impede, or endanger navigation. . . . [I]t shall be the duty of the owner, lessee, or operator of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, . . . and it shall be the duty of the owner, lessee, or operator of such sunken craft to commence the immediate removal of the same, and prosecute such

\textsuperscript{30} Insurance Co. of N. Am. v. Board of Comm’rs, 733 F.2d 1161, 1166 (5th Cir. 1984).

\textsuperscript{31} FLA. STAT. ANN. \textsection 627.7262 (1991) (renumbered as FLA. STAT. \textsection 627.4136 (Supp. 1992)). Section 627.7262 prohibits direct actions by third parties against liability insurers that had been previously available under the doctrine of Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969). See National Corporacion Venezolana, S.A. v. M/V Manuela V, 826 F.2d 6, 7 (11th Cir. 1987); Weeks v. Beryl Shipping, Inc., 845 F.2d 304 (11th Cir. 1988) (involving a marine indemnity policy wherein the Eleventh Circuit affirmed the district court’s summary judgment dismissing the plaintiff’s complaint against the defendant “Protection and Indemnity” insurer of the vessel owner).

However, the Eleventh Circuit has held that \textsection 627.7262, Florida Statutes, does not bar a salver’s action directly against the insurer because such action is an independent cause of action based upon the salver’s efforts which directly benefit the marine insurer.

\textsuperscript{32} See Seaboard Shipping Corp. v. Jochanan Tugboat Corp., 461 F.2d 500, 504 (2d Cir. 1972).


34. See Continental Oil Co. v. Bonanza Corp., 706 F.2d 1365 (5th Cir. 1983).

35. “Navigable waters” need not be a defined channel as such, but merely “waters capable of sustaining the traffic of other vessels.” United States v. Raven, 500 F.2d 728, 732 (5th Cir. 1974), cert. denied, 419 U.S. 1124 (1975).


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removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States . . . . 38

State or local navigational laws may also apply within their respective boundaries if not in conflict with existing federal admiralty law. 39 Florida law defines abandoned and derelict vessels and authorizes recovery of removal costs from the boat owner. 40 Thus, an owner of a wrecked vessel within Florida's territorial waters will be liable 41 under state or local municipal laws for the costs of removing the wreck. 42

B. Locating and Marking the Wreck

The boat owner, whether negligent or not in the cause of the sinking, is required to locate the sunken vessel, immediately mark it, and maintain these marks until the vessel is removed or abandoned. 43 The phrase "immediately mark" can be taken to mean a reasonable time from when the owner knew the vessel had sunk. 44

While the duty to mark the wreck is not delegable, the owner may be relieved of this task if the United States Coast Guard marks it. 45 However, once the Coast Guard undertakes to mark the wreck, the boat owner should determine whether the Coast Guard has in fact completed the effort. 46 In any event, the Coast Guard, having the authority to mark the sunken vessel 47 also has the right to be reimbursed by the owner for performing this task. 48

Of course, in order to mark a sunken vessel, one must know its location. Courts have held that the statutory duty to mark may be relieved if a good faith search for the vessel has been unsuccessful. 49

C. Removing the Wreck

The language of section 409 50 of the Wreck Act 51 was amended in November of 1986, so as to no longer relieve the boat owner of the statutory duty to remove a wreck which was caused by a force majeure or act of God. Prior to these amendments, negligence in causing the wreck was required to prove liability for removal expenses. 52 Section 409 now imputes strict liability for removal. Sections 414 and 415 (both also amended in 1986), require the owner to pay any costs associated with removal. 53

Given the situation of most South Florida boat owners who lost their vessels in August, 1992, the most consequential aspects of sections 414 and 415 are contained in the aforementioned 1986 amendments. 54

39. See Askew v. American Waterways Operation, Inc., 411 U.S. 325, 341 (1973) ("Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.").
41. If removal is conducted under the Florida statute, any subsequent attempt to recover costs against the boat owner might be countered by the owner filing a limitation of liability proceeding in Federal Court. The right to limit liability pursuant to 46 U.S.C. §§ 181-288 (1988), while superseded by the federal Wreck Act, may override Florida statute § 823.11 through the Supremacy Clause. See Askew, 411 U.S. at 331; see also FLA. STAT. § 823.11 (1991).
42. FLA. STAT. § 823.11(2) (1991).
44. Mornia Barge No. 140, Inc. v. M. & J. Tracy, Inc., 312 F.2d 78, 80 (2d Cir.1963).
45. Bewind-White Coal Mining Co. v. Pitney, 187 F.2d 665 (2d Cir. 1951).
46. Failing to ascertain that the Coast Guard has in fact marked the wreck could note the owner liable for damages caused by failure to mark. Id. at 669.
48. Id.
49. Nunley, 727 F.2d at 460.
52. Id. at 459.
53. Under § 415, the Secretary of Army may take immediate possession of a sunken vessel in an emergency situation, either destroying it or causing it to be removed.
54. The amendments to §§ 409, 414 and 415 of the Wreck Act were effective Nov. 17, 1986 as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, Title IX, § 939(e) & (b), 100 Stat. 4199.
55. The identical amendments to §§ 414 and 415 appear to have been factually motivated, as explained in S. Rep. No. 126, 99th Cong., 2d Sess. 26 (1986), reprinted in U.S.C.C.A.N. 6639, 6663, in part:
56. This section involves vessels that have sunk or otherwise become wrecks. Under present law . . . costs for removal can be only offset by the salvage value of the wreck. In the case of abandoned vessels, this is usually far less than the cost of removal.
57. The amendments read as follows:
(b) Liability of owner, lessee, or operator
The owner, lessee, or operator of such vessel, boat, water craft, raft or other obstruction as described in this section shall be liable to the United States for the cost of removal or destruction and disposal as described which exceeds the costs recovered under subsection (a) of this section. Any amount recovered

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sections, the 1986 amendments are identical in impact, i.e., the boat owner is personally liable to the United States government for all removal and disposal costs that exceed the salvage value of the boat. Prior to the 1986 amendments, the owner would have been liable to the government only for the salvage proceeds derived from the wrecked vessel. The vessel and its contents become the property of the government contractor upon removal.

Another consideration for the boat owner is who will remove the wreck. A well-intentioned but inexperienced "salvor" may possibly cause more damage by incompetent removal efforts than might otherwise have occurred had the owner: 1) abandoned the vessel to the U.S. government and paid for the ensuing government-directed removal; or 2) engaged the services of a professional salvor whose expertise could limit the expense and risk involved.

Prior to engaging in a do-it-yourself salvage operation, it would be prudent of the boat owner to contact his insurance carrier or broker concerning policy coverage, i.e., sue and labor, wreck removal and like clauses to determine the most proper course of action.

D. Abandoning the Vessel

"Abandonment is the surrendering of all rights to a vessel... by the owner... This is accomplished by the boat owner affirmatively declaring an intention to abandon the vessel or by the owner's failure to "commence immediate removal of the [sunken vessel] and prosecute such removal diligently."

There are certain procedures which the vessel owner must comply with concerning abandonment. "Declaring" one's intention to abandon a sunken boat is done by sending notice to the local district office of the Army Corps from the owner, lessee, or operator of such vessel pursuant to this subsection to recover costs in excess of the proceeds from the sale or disposition of such vessel shall be deposited in the general fund of the Treasury of the United States.

56. Id. § 245.45(a)(1)(2). If no notice is given, abandonment is presumed 30 days after the sinking, pursuant to 33 U.S.C. § 414 (1985).

However, the court in Nunley v. M/V Dauntless Colocotronis, 863 F.2d 1190, 1198-99 (5th Cir. 1989), declined for policy reasons to hold that thirty days "inactivity" by the owner of a sunken vessel constituted "legal abandonment." The court reasoned that such an interpretation of the Wreck Act "removes the owner's incentive to mark or remove... if the cost of such efforts does not exceed the salvage value..." Id. at 1199 n.12. However, with the 1986 amendments to the Wreck Act, even a non-negligent owner who has abandoned his vessel will be responsible for marking and removal costs.

of Engineers. Such "notice" acts as the owner's declaration of abandon-
ment. It The Army Corps of Engineers, while not "accepting" abandonment notices, will nevertheless acknowledge its receipt.

Under the 1986 amendments to the Wreck Act, abandoning one's vessel will not relieve the boat owner of responsibility for removal or the costs associated with removal of the wreck.

V. LIABILITY FOR DAMAGE

A. Marina Liability

When a boat is placed in the care, custody and control of a marina, a bailment results for the mutual benefit of the boat owner (bailor) and the marina operator (bailee). This contractual relationship imposes upon the bailee a duty to exercise reasonable care for boats placed in its custody. Failure of the marina operator to exercise reasonable care constitutes a breach of the bailment, or a breach of contract where a storage agreement is in effect, or a tort (negligence), where a duty is implied by law.

Courts have considered various factors in determining the reasonableness of the care used by the marina to protect boats in its custody, including: 1) the standard in the locale or industry; and, 2) the foreseeability of the harm. The burden of proving liability is on the boat owner. In a bailment relationship, however, the boat owner may make out a prima facie case of liability by showing that the vessel was delivered to the marina in good condition and damaged while in the marina's possession. The burden of persuasion then shifts to the bailee (marina operator) to present evidence that shows that the cause of the damage was beyond its control.

57. 33 U.S.C. § 245.45(b).
58. Prior to the aforementioned 1986 Wreck Act amendments, abandonment was a viable alternative only for non-negligent boat owners, relieving owners of liability for costs of wreck removal and subsequent damages to third parties. The 1986 amendments clearly indicate that wreck removal is to be borne by the owner regardless of responsibility for the sinking.
62. Id.
63. Stegemann, 213 F.2d at 564.
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62. Id.
63. Siegmann, 213 F.2d at 564.

Published by NSUWorks. 1993
Nova Law Review, Vol. 17, Iss. 3 [1993], Art. 1

(i.e., act of God), or that the marina and its personnel at all times exercised reasonable care with respect to the yachts. Therefore, liability for damage to a boat while in a marina's possession will generally depend upon the presence or absence of the marina's negligence.

A marina's potential liability for damages sustained to a yacht by a hurricane, is fact sensitive and a court will examine such incidents on a case-by-case basis.

An act of God defense may or may not relieve the marina of liability. For example, even if the act of God cannot be foreseen, the marina will be liable if, by its negligent conduct, it has risked the same harm that ultimately occurred. Thus, to be entitled to exoneration from liability, the burden is on the defendant (marina operator) to prove not only that the storm constituted an act of God, but also that the marina's acts or omissions did not contribute to the damage.

There are numerous cases in which courts have exonerated defendants because the claimed damage was caused by a storm found to be an act of God. However, in certain instances, liability of the bailee was established notwithstanding the presence of a storm, due to some act or omission found to be the proximate cause of the damage.

B. Boat Owner Liability

A boat owner may be held responsible for damages to property of another despite heavy weather. The cause of action could lie in negligence, or breach of contract if a marina docking contract is involved. The contract cause of action will be discussed in the safe haven section of this article.

69. Woodworth v. Tacoma Yacht Club, 377 F.2d 486 (9th Cir. 1967); The Heiderberg, 794 (N.C. 1967) (after a finding for the plaintiffs boatowner in the trial court, a new trial was ordered on appeal because the trial court's instructions were found to have been confusing to the jury).

With respect to the negligence aspect, the issue to be resolved would be the proximate cause of the property damage, whether it be to the marina, or to another vessel. The court may look to whether the owner properly secured the vessel with enough lines, and with lines of sufficient strength and size. Any acts or omissions of the boat owner will likely be judged in accordance with that individual's marine experience. It could be expected that a defendant in such an action will raise the act of God defense. As mentioned, such defense is usually considered to cover losses resulting from lighting, earthquakes, tidal waves of great size, or extraordinary storms, such as hurricanes or typhoons. One who asserts this defense may have the added burden of establishing lack of fault in order to be exonerated, unless the court determines the storm was severe enough to overcome all reasonable preparations.

In Dion's Yacht Yard, Inc. v. Hydro-Dredge Corp., the sole question presented was whether the damage to a pier was a result of the boat owner's negligence or the result of an intervening act of God. The court found against the defendant boat owner for failing to adequately secure the vessel in the existing weather conditions, therefore, displaying a lack of good seamanship. The court determined that notwithstanding a storm of great force, the accident and damage could have been prevented with the use of reasonable care that the situation demanded, and which was within the capability of the boat owner. The storm was forecasted and consisted of snowfall, high tides, and wind gusts to seventy miles per hour. The act of God defense did not relieve the owner of liability because the defendant's negligent conduct risked the same harm that ultimately occurred.

In United States v. Bruce Dry Dock Co., a lightship owned by the United States was secured to a shipyard at the height of a hurricane. The hurricane, accompanied by an unusually high tide, caused the bow lines to part and the lightship to collide with and destroy a floating dry dock. The court found the vessel owner liable despite the act of God defense. The court determined that the owner was not entitled to take that position because the master and crew failed to take reasonable precautions in advance to prevent the damage that resulted. Here, the court found fault because the

70. 2A BENEDICT ON ADMLRITY § 152, 15-2 (1977).
73. Id. at 1662.
74. 65 F.2d 938 (5th Cir. 1933).
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\textsuperscript{64} Id.; Leyendecker v. Cooper, 1980 AMC 1061 (D. Md. 1979).


\textsuperscript{66} See Johnson v. Koamou Portland Cement Co., 64 F.2d 193, 195-97, 1933 AMC 1023, 1026-30 (6th Cir. 1933).


\textsuperscript{69} Woodworth v. Tacoma Yacht Club, 377 F.2d 486 (9th Cir. 1967); The Heiderberg v. Pennsylvania R. R., 17 F. Supp. 721 (E.D.N.Y. 1937); Pennington v. Styron, 153 S.E.2d 776 (N.C. 1967) (after a finding for the plaintiff boatowner in the trial court, a new trial was ordered on appeal because the trial court’s instructions were found to have been confusing to the jury).

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owner was negligent by leaving the vessel inadequately secured. In Swenson v. The ARGONAUT, the Third Circuit Court of Appeals reversed the lower court which had characterized a collision as an "inevitable accident" when the vessel ARGONAUT, moored to a New Jersey pier, broke adrift and struck a catamaran and four barges moored nearby. The storm lasted only twenty minutes, with wind gusts to sixty miles per hour. It was described in testimony as a typical summer thunderstorm, common for the locality. The circuit court noted that the ARGONAUT failed to overcome the "moving vessel presumption" and concluded that the storm was not of "catastrophic" proportions, nor of such unusual character as to constitute an inevitable accident.

C. Pollution

The recent emergence of environmental standards, statutes and heightened public awareness, coupled with pollution exclusions in many insurance policies have created a quandary for the unlucky owner of a sunk or wrecked pleasure boat. A boat owner must be concerned with numerous state and federal laws concerning pollution liability. Of primary concern is the Federal Water Pollution Control Act (FWPCA), and the Oil Pollution Act of 1990 (OPA), which collectively cover marine pollution prevention, pollutant removal, clean-up, and vessel owners' liabilities in this regard. In the face of actual or imminent pollutant discharge from a marine disaster, the federal government can summarily remove or destroy the culpable vessel. In the event of actual discharge of a pollutant, the vessel owner is strictly liable to the federal government for clean up and removal charges pursuant to the FWPCA, and, under the OPA, to private parties as well. The OPA precludes the vessel owner from limiting liability under the Limitation of Liability Act. Additionally, the OPA allows a state to enforce its own pollution laws. Likewise, the vessel owner may not limit liability under state pollution laws by invoking the Limitation of Liability.

75. Id. at 939.
76. 204 F.2d 636 (3d Cir. 1953).
77. Id. at 640.
83. 33 U.S.C. § 2718(a).
85. However, to avail oneself of the act of God defense, the incident must be reported, and full cooperation and assistance must be provided in connection with the oil removal in accordance with § 2703(c).
87. Id. § 376.122(7)(a), (b).

Act. The boat owner may escape liability for pollution damages if it is established that the pollution was caused by an act of God. This could be problematic, however. If the hurricane has destroyed the boat and released oil upon the waters in one fell swoop, an act of God defense may be asserted. On the other hand, if the boat is partially sunk, abandoned by the owner, and subsequently left to deteriorate, the owner may be viewed as negligent, and thus liable for resulting damages. Further, considering state pollution laws such as Florida's Pollutant Discharge Prevention and Control Act, an owner who has "reason to know of the discharge" or does not reasonably cooperate and assist as "requested by a state or federal on-scene coordinator," may be held accountable. While this particular statute was drafted for oil tanker and terminal spills, the liability of a pleasure boat owner for pollutant clean-up costs may, arguably, be applicable.

In any case, there is no alternative to strict adherence to the OPA and FWPCA regulations which require the owner's full cooperation in connection with pollutant removal operations.

D. Safe Haven

Some marina docking contracts contain "hurricane clauses." This provision provides that when a hurricane watch is issued, boat owners shall immediately remove their vessels and all personal property from the marina and seek safe haven. Failure to comply with this requirement, according to the clause, will result in the boat owner being liable for all damages to docks, piers, other vessels, or any property damaged by the owner's vessel as a result of its presence.

It appears that no court has construed the validity of such a "hurricane clause" in this context. However, with the extensive amount of damages realized by boats and marinas in the aftermath of Hurricane Andrew, the validity of this clause may be tested. The courts will likely be called upon to decide whether the clause is void as against public policy for numerous
owner was negligent by leaving the vessel inadequately secured. 75

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In view of the unpredictability of a hurricane's path, efforts by a pleasure boater to seek "safe haven" may be futile. It may also be unreasonable to expect a weekend boater to determine the existence of a safe haven. Moreover, the clause may be suspect in that it purports to hold boat owners contractually responsible for damages sustained by the marina expressly as a result of an act of God.

A marina seeking to recover damages against boat owners, shoulders the added burden of apportioning the fault among the various vessels. Each boat owner must be judged individually. Apportioning the liability will prove difficult in light of the magnitude of the post-Andrew wreckage. Additionally, there may have been damages caused by vessels which were not owned by customers of the marina, but were carried by wind and tide into the marina. Obviously, there would be no "hurricane clause" claim against these vessels which were not under contract to the particular marina.

Yet, in apportioning damages boat-by-boat, similar difficulties will likely arise as to those confronted in the more straightforward marina-owners liability situations.

In testing the validity of a hurricane clause, consideration may also be given to whether the marina has in place and has enforced a "hurricane plan of action" for its customers. Such a plan requires the boat owner to provide information to the marina when the docking agreement is signed, including a contact person in case of the owner's absence, and the intended location of the boat during the hurricane.

In most circumstances, an action by a marina against a boat owner for breach of a hurricane clause in a docking agreement would seem difficult to establish. Such a case will contain factually sensitive arguments to be determined on a boat-by-boat basis. For example, there will likely be questions as to whether the particular boat owner had notice of the storm, whether the owner had sufficient marina experience to take adequate precautionary measures, whether the boat was secured prudently, whether additional mooring lines could have been positioned, whether the boat owner was in a position to travel to the marina on a timely basis, whether there were any preparations or precautions the boat owner could have taken to prevent the boat from breaking loose, whether any safe haven existed nearby and its location, whether a safe haven could have been safely reached, and whether the marina itself could have removed the boat from the water, thereby reducing the likelihood of damage to its facility.

VI. CASES INVOLVING SEVERE WEATHER

The existence of weather which may be considered an act of God/force majeure will not necessarily exonerate the boat owner from liability. For example, in the Boudoin case, the courts found against the boat owner despite the presence of weather classified as an act of God. A key issue raised by the Boudoin court, was how to judge the actions of the vessel owner. Specifically, the court looked to the marine experience of the owner and in light of his significant experience, determined that his precautionary actions were inadequate.

However, in the following cases involving property damage to a facility, the defense of force majeure was sustained. In Dammers & Van Der Heide Shipping & Trading, Inc. v. S.S. JOSEPH LYKES, the court found that the proximate cause of the vessel's coming adrift and causing property damage was the "unprecedented and catastrophic phenomenon of Hurricane Betsy, rather than negligence in mooring." The court found that Betsy, which at the time "caused more devastation in New Orleans and to the marine community than any hurricane of record, with unprecedented wind velocity, tidal rise and up-river tidal surge, is a classic case of an act of God." Hurricane Betsy was found to be a storm of such magnitude as to overcome all reasonable preparations, and therefore, the defense of force majeure was successful.

In the appeal of Dammers' decision, the Fifth Circuit Court of Appeals held that the test for determining whether shipowners were free from fault is whether they took reasonable precautions under the circumstances as known or reasonably to be anticipated. The Fifth Circuit stated that if those responsible for the vessels were "reasonable in their anticipation of the severity of the impending storm and undertook reasonable preparations in light of such anticipation, then they are relieved of liability. The standard of reasonableness is that of a prudent man familiar with the ways and vagaries of the sea." In affirming the district court, the Fifth Circuit held that the vessel owners were not negligent in making preparations for the

88. 281 F.2d 81 (5th Cir. 1960).
89. Id. at 84-86.
91. Id. at 365.
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93. 425 F.2d 901, 905 (5th Cir. 1970).
94. Id.
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In United Geophysical Co., Inc. v. John Vela,96 the Fifth Circuit rejected a property owner’s claim for damages to his dock and structure during a hurricane because the owner failed to prove that the collapse of the structure was caused by plaintiff’s vessel. The court found for the defendant because the property owner failed to produce "a single witness [to] testify that the buildings collapsed upon, not before, being hit by [the vessel]." 97 Importantly, the court also stated that "a vessel is not to be condemned simply because lines part in the face of nature’s unrelenting violence or because men, braving these elements, cannot rectify the failure before damage is done." 98

In Eva Twery v. Houseboat Jilly’s Yen,99 the Southern District Court of Florida found that the owners of a houseboat had exercised reasonable precautions in securing their boat, which broke free from its mooring during Hurricane Betsy and subsequently damaged a dock downstream. Accordingly, the court stated that the owners "could not have anticipated that the [vessel] would have broken loose during [the] hurricane. There was no showing that the [vessel] could, or should, have been made more secure, or that it should have been moved prior to the hurricane." 100 The court ruled that the vessel broke from its mooring as a result of an inevitable accident or an act of God.101

VII. LIMITATION OF LIABILITY

When faced with damage claims by third parties, the pleasure boat owner must consider whether to invoke the benefits of the Limitation of Liability Act (Limitation Act).102 The Limitation Act limits a vessel owner’s liability for an accident to the vessel’s post-casualty value if the owner had no knowledge of, or privity to, any negligence or unseaworthiness that caused the accident. The privilege of limiting liability is not widely known among pleasure boat owners.103 This privilege may also assure to the benefit of a marine insurer when its assured is entitled to limitation.

Section 183(a) of the Limitation Act provides that “the liability of the owner of any vessel . . . for any . . . loss . . . without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.” 104 This 1851 statute was designed to allow American commercial vessels to compete with their foreign counterparts who were permitted to limit liability, and to promote investment in the domestic commercial shipping industry. 105 The owner’s “interest” in the vessel, within the meaning of the statute, does not include insurance money received by the vessel owner106 on the rationale that the insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured.107

A request for limitation of liability is raised in a separate proceeding by filing a petition or complaint,108 or may be raised by the vessel owner as a defense in an answer to a suit for damages.109 There is a requirement that a petition for limitation be filed within six months after the first written notice of claim is received by the owner.110

A benefit of the limitation proceeding is the “concursus,” which is the power of the court to bring together “into concourse” all claims against a vessel owner in one forum, and to thereby avoid a multiplicity of lawsuits. This restrains all other proceedings against the vessel owner outside of the limitation action.111 A boat owner who may face multiple claims upon the

95. Id. at 996.
96. 1956 AMC 745 (5th Cir. 1956).
97. Id. at 752.
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416. City of Norwich, 118 U.S. 468 (1886).
417. Id. at 494.
420. 46 U.S.C. app. § 185; PIZZI, R. CIV. P., Supplemental Admiralty Rule F.
421. Maryland Casualty Co. v. Cushing, 347 U.S. 409, 1954 AMC 837 (1954) (stating that at the heart of this system is a concursus of all claims to insure prompt and economical disposal of controversies in which there are often a multitude of claimants).
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While some courts are critical of the application of the Limitation Act to pleasure crafts, the decisions allow this application, and leave any alterations "up to Congress to fix."112 One lower court that disallowed limitation to a pleasure boat owner noted that insurance companies have become the principal beneficiaries of the Limitation Act.113

The Supreme Court's 1990 decision in Sisson v. Ruby, has put the question to rest.114 Sisson involved the owner of a fifty-six foot pleasure craft who petitioned to limit liability. The Court determined that district courts have jurisdiction over a pleasure boater's limitation of liability claim.115

The law in the Eleventh Circuit is in accord. Keys Jet Ski, Inc. v. Keys,116 involved the owner of a jet ski who sought to limit liability subsequent to a collision between the jet ski and a fishing boat. The court determined that a jet ski was a "vessel" for purposes of the act, and followed the Fifth Circuit,117 reasoning that: "[T]he weekend sailor is as privileged to limit liability for damages committed by his yacht as are hard pressed commercial owners for those by their multi-tonnaged merchantmen plying their trade across the crowded shipping lanes . . . ."118

Some courts have held that when the boat owner is operating his pleasure craft at the time an accident occurs he obviously has "privity or knowledge" of the boat's negligent operation, and therefore, will not be entitled to limit liability.119 On the other hand, where an unmanned moored vessel sinks in a hurricane and where the boat owner is without personal fault, limitation of liability should be looked upon favorably.

115. Under the Rivers and Harbors Act of 1899, however, the boat owner is not permitted to limit liability when the government seeks to recoup its costs associated with wreck removal. See Wyandotte Transp. Co. v. United States, 389 U.S. 191, 205 (1967); also United States v. Blaha, 889 F.2d 422 (2d Cir. 1989).
116. 893 F.2d 1225, 1228 (11th Cir. 1990).
117. The Eleventh Circuit Court of Appeals adopted, as precedent, all of the decisions of the former Fifth Circuit decided prior to Oct. 1, 1991, in Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc).
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Apres le Deluge: National Flood Insurance

Marilyn Cave
Paul A. Caldarrelli*

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I. INTRODUCTION

On August 24, 1992, Hurricane Andrew slammed into the South Florida coast, continued across the peninsula of Florida into the Gulf of Mexico and eventually into Louisiana.¹ The damage caused by flooding as a result of Andrew that will be covered by the National Flood Insurance Program (NFIP), is expected to be about $50 million in South Florida and $100 million in Louisiana.² While traditional homeowner’s policies don’t cover damage caused by floods, flood insurance available through the NFIP created in 1968 and administered through the Federal Emergency Management Agency (FEMA), covers this risk.³

Part II of this paper will examine the background of the NFIP from its inception to the present time. Part III will review proposed changes in the NFIP as a result of perceived problems with the current program. Constitutional "takings" issues concerning the NFIP will be reviewed in part IV.

¹ Marilyn B. Cave is a Professor of Law, Nova University Shepard Broad Law Center.
² Paul A. Caldarrelli is a third year law student and Leo Goodwin Research Fellow at Nova University Shepard Broad Law Center. B.B.A., University of Wisconsin.
³ Bonita E. Griffin, Florida’s Expected to File $50 Million in Flood Claims, MIAMI HERALD, Sept. 9, 1992, at C1.

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I. INTRODUCTION

On August 24, 1992, Hurricane Andrew slammed into the South Florida coast, continued across the peninsula of Florida into the Gulf of Mexico and eventually into Louisiana. The damage caused by flooding as a result of Andrew that will be covered by the National Flood Insurance Program (NFIP), is expected to be about $50 million in South Florida and $100 million in Louisiana. While traditional homeowner's policies don't cover damage caused by floods, flood insurance available through the NFIP created in 1968 and administered through the Federal Emergency Management Agency (FEMA), covers this risk. Part II of this paper will examine the background of the NFIP from its inception to the present time. Part III will review proposed changes in the NFIP as a result of perceived problems with the current program. Constitutional "takings" issues concerning the NFIP will be reviewed in part IV.

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1. Beatrice E. Garcia, FLORIDIANS EXPECTED TO FILE $50 MILLION IN FLOOD CLAIMS, MIAMI HERALD, Sept. 9, 1992, at C1.
2. Id.
3. Id.
II. BACKGROUND

The Congress finds that (1) from time to time flood disasters have created personal hardship and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources; (2) despite the installation of preventive and protective works and the adoption of other public programs designed to reduce losses caused by flood damage, these methods have not been sufficient to protect adequately against growing exposure to future flood losses; (3) as a matter of national policy, a reasonable method of sharing the risk of flood losses is through a program of flood insurance which can complement and encourage preventive and protective measures; and (4) if such a program is initiated and carried out gradually, it can be expanded as knowledge is gained and experience is appraised, thus eventually making flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection.4

In the United States, nine out of every ten natural disasters are flood related.5 The United States Water Resources Council expects that losses from floods will rise significantly in the near future and estimates that annual property losses will exceed $4.3 billion by the year 2000.6 Even though seventeen percent of the nation's lands are located in lands classified by the United States Army Corps of Engineers as floodplain, the disproportionately large population lives within the floodplain creates the potential flood problems.7 The Congress has found that, "annual losses throughout the Nation from floods and mudslides are increasing at an alarming rate, largely as a result of the accelerating development of, and concentration of population in, areas of flood and mudslide hazards."8

The National Flood Insurance Program (NFIP)9 is a federal program created to make subsidized flood insurance available to homeowners and businesses located on the nation's coasts and floodplains. Congress created the insurance program in response to several major storms of the mid-1960's. Those storms cost millions of dollars in direct disaster assistance because many oceanfront homeowners were uninsured. Most private insurers, citing high risk, would not insure against flooding.10 In August 1968, the National Flood Insurance Act of 1968 was enacted as Title XIII of the Housing and Urban Development Act of 1968.11 The availability of subsidized flood insurance under the National Flood Insurance Act of 1968 did not, by itself, provide sufficient incentive to attract extensive local community enrollment in the program.12 Finding a strong public policy favoring participation in a flood insurance plan of national scope in December 1973, Congress passed the Flood Disaster Protection Act of 1973.13 The 1973 Act sought to significantly enhance the attractiveness of enrollment in the program through a dual scheme of sanctions against both non-participating communities, as a whole, and against flood prone designated property located in an area which is eligible for and participating in the flood insurance program, but which is not covered by flood insurance. The NFIP was again amended in the Housing and Community Development Act of 197714 to remove a prohibition against the extension of financing by federally supervised private lending institutions in flood hazard areas of non-participating communities. The amendment left untouched the direct federal assistance sanction which extend to direct federal grant aid as well as FHA and VA home mortgages.

In 1982, Congress passed the Coastal Barriers Resource Act15 withdrawing the availability of flood insurance for undeveloped coastal barrens so designated by the Department of the Interior. A major modifica-

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5. See NATIONAL SCIENCE FOUND., A REPORT IN FLOOD HAZARD MITIGATION 1-2 (1980).
6. Id.
II. BACKGROUND

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In the United States, nine out of every ten natural disasters are flood related. The United States Water Resources Council expects that losses from floods will rise significantly in the near future and estimates that annual property losses will exceed $4.3 billion by the year 2000. Even though seven percent of the nation’s lands are located in lands classified by the United States Army Corps of Engineers as floodplain, the disproportionate population living within the floodplain creates the potential flood problems. The Congress has found that, “annual losses throughout the Nation from floods and mudslides are increasing at an alarming rate, largely as a result of the accelerating development of, and concentration of population in, areas of flood and mudslide hazards.”

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In 1982, Congress passed the Coastal Barriers Resource Act withdrawing the availability of flood insurance for undeveloped coastal barriers so designated by the Department of the Interior. A major modification of NFIP was created in 1983 with the advent of Write-Your-Own (WYO) Program, in which private sector insurers market flood insurance, with the federal government acting as guarantor and reinsurer. WYO policies are sold through 130,000 insurance agents and brokers. As of July, 1991, there were 167 WYO companies, of which eighty-five were actually writing flood policies. WYO coverage totalled $187,462,218,300 as of July 31, 1991, or 85.4% of the total policy-in-force base.

Congress decreed that in order to protect the nation's investment in property that is situated in a known hazardous area, the community in which property is located must participate in the program to be eligible for federal assistance, and further, that property located in a participating community must be covered by flood insurance not to be eligible for direct federal assistance, but also to receive mortgage money from a federally supervised private institution. Section 4012a(a) of the NFIP generally provides that no federal agency shall approve any financial assistance for acquisition or construction purposes in any area that has been identified as a special flood hazard area (SFHA) where the NFIP has been made available. Moreover, section 4012a(b) requires that federal agencies responsible for the regulation of banks, thrifts and other lenders to implement regulations to ensure compliance with the requirement of flood insurance in order to receive federal approval of financial assistance.

To participate in the NFIP, communities in designated flood-prone areas must agree to minimize flooding risks by the adoption and enforcement of floodplain regulatory ordinances. Participating communities have

17. Id.
18. Id.
20. 42 U.S.C. § 4001(e) (1982). Section 4001(e) states: 'Land use adjustments by State and local governments; development of proposed future construction; assistance of lending and credit institutions; relation of

regulated floodplain land use in a number of ways including banning construction in the floodway, requiring drainage channels, designating detention areas for flood runoffs, enacting grading, construction and building codes, and prohibiting construction below certain flood levels. Within participating communities, NFIP makes subsidized flood insurance available to homeowners located in floodplains for an average cost of $300 per year if the communities have adopted and enforced floodplain regulatory ordinances.

The program has approximately 2.5 million policies in over 18,000 communities in all fifty states, protecting against floods from rivers, lakes and oceans. However, the Flood Insurance Administration estimates that only twenty-five percent of the properties located in flood-prone areas and are eligible for coverage are taking advantage of the availability of federally subsidized insurance. The area covered by NFIP is estimated at 170,000 square miles of coastal land, a tract larger than Montana. To date, NFIP has paid just five percent of claims for coastal damage, while ninety-five percent has gone for interior floods caused by river flooding.

The NFIP collects about $600 million a year in premiums and pays an average of $300 million per year in claims. Its current reserve is $390 million, although some experts have said a major coastal storm could cost in excess of $4 billion.
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insurance is approximately $950 per year to coastal homeowners, according to
C.M. Schauer, head of the Federal Insurance Administration. However, without
the federal subsidy, the same flood insurance would cost the homeowner close to
$7,500 per year on the private market, according to Joyce White of Wilshire National
Corp., one of the nation's few private providers of flood insurance.

III. PROPOSED CHANGES TO THE NFIP

The Federal Insurance Administration (FIA), the component of the
Federal Emergency Management Agency (FEMA) which administers the
NFIP, has undertaken many studies which make it clear that the very
worst flood damages are yet to come. Sophisticated simulation techniques
have indicated that a serious flood risk exists in the United States, and both
the private and public interests have not been adequately notified of the risk.
In response to perceived problems with the NFIP, bills were introduced in
the House of Representatives and the Senate to revise the NFIP to
provide for mitigation of potential flood damages, ensure the financial
soundness of the program and increase compliance with the mandatory
purchase requirement of flood insurance. House Report 1236, which
contained a provision to help protect the taxpayer by prohibiting federally
backed flood insurance for new development in eroding portions of
the nation's shoreline, passed by an overwhelming vote of 388 to 18.
However, the Senate version of the House Report 1236 was strongly
opposed by The National Association of Homebuilders and the National
Association of Realtors since without the availability of federally subsidized
flood insurance, private construction and development along the coastal
areas becomes prohibitively expensive. In response to the opposition
of Senator John Kerry (D-Mass.) introduced compromise legislation in June of 1992 that would provide more flexibility to the
owners of current shore development. Senate Report 2907 kept many of
the proposed revisions to the NFIP contained in Senate Report 1650, but
modified many controversial proposals concerning erosion management.

Compliance with the requirements of the NFIP is a major concern since
only about fifteen percent of properties located in floodplain areas are currently
insured. Under the proposed legislation, banks and other federally regulated
lending institutions must ascertain that all properties in flood-prone areas
have flood insurance, if such insurance is available. Lenders must periodically review their loan portfolio to ensure compliance with the NFIP
and are required to escrow for flood insurance premiums in cases where
they already escrow for taxes and other insurance premiums. The
proposed legislation provides a civil penalty to the lender of $350 per
violation (not to exceed $100,000 a year per lender) if such lender has
a pattern of neglecting flood insurance compliance. The legislation also
provides for continuing compliance with the NFIP in the event of a sale or
transfer of a loan by requiring that lenders notify the purchaser of a
mortgage that the property is located in a SFHA prior to executing a
mortgage on a property in a SFHA and requires records retention to prove
compliance with this rule.

The current maximum flood insurance coverage purchased through the
NFIP available for a single family home is $185,000. This amount has not
been adjusted since 1978 and consequently has not kept pace with inflation.
The proposed changes would raise the amount of flood insurance for single
family homes to $250,000.

Another proposed change in the NFIP would create a Community Rating System (CRS) program which would evaluate measures adopted by
communities to provide for adequate land use control, to promote flood

30. Id.
31. All function vested in the Secretary of Housing and Urban Development pursuant
to the provisions of the NFIP were transferred to the Director of the Federal Emergency
34. Senate Hearings on S. 1650, supra note 16.
2, 1992, Editorial.
36. Id.
38. Id.
Subcomm. on Housing and Urban Affairs, 102d Cong., 2d Sess. (1992) [hereinafter Seneate
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41. Id. at 244.
42. Id. at 250.
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insurance awareness and to complement adoption of more effective measures for floodplain and coastal erosion management.\textsuperscript{45} Incentives in the form of lower premiums rates for flood insurance coverage would be available to property owners in communities that have adopted and enforced the goals of the CRS.\textsuperscript{46} Additional adjustments in premium rates would be available in communities where measures relating to the protection of natural and beneficial floodplain functions have been adopted.\textsuperscript{47}

Additionally, Senate Report 1650 proposed a national flood mitigation program, funded by a five dollar surcharge on each flood insurance policy, which would make grants to states, communities or people who take steps to reduce the impact of expected floods.\textsuperscript{48} To be eligible for these funds, communities would have to engage in flood mitigation activities such as elevation, relocation, flood-proofing and acquisition of properties where flood damage has occurred since December 31, 1977 and where the communities are in full compliance with the requirements of the NFIP.

The most important and controversial proposal of Senate Report 1650 concerns the establishment of a program to reduce coastal erosion. Under the proposed erosion management program, FEMA would identify erosion zones along U.S. coastal and Great Lakes coasts by delineating 10-year, thirty-year and sixty-year erosion setbacks.\textsuperscript{49} The setbacks define the area that is likely to erode in ten, thirty and sixty years, respectively, based on historic average annual rate of erosion for that area.\textsuperscript{50} The ten-year erosion setback applies to all buildings, while the thirty-year setback applies to small buildings (one to four family dwelling units), and the sixty-year setback applies to all other buildings.\textsuperscript{51}

In the ten-year setback zones, existing buildings are presumed to be "in danger of imminent collapse," and owners can obtain grants to cover the cost of relocation (forty percent of the value of the building) or demolition (forty percent of the value of the building).\textsuperscript{52} Relocated buildings would have to be placed landward of the applicable setback to continue receiving flood insurance benefits. For example, if a small home is in the ten-year zone, it must be relocated to at least the thirty-year zone. If a property owner who is a flood policy holder chooses to neither relocate nor demolish within two years of notification, such policy holder will be allowed only one more claim of up to forty percent of the building's value on the flood insurance policy after which the policy would be canceled.\textsuperscript{53}

In participating communities, no new construction or "substantial improvements" (anything over fifty percent on the seaward side of the thirty-year erosion setback or, if applicable, the sixty-year erosion setback)\textsuperscript{54} No new buildings would be permitted seaward of the thirty-year zone, and no large buildings seaward of the sixty-year zone. Moreover, participating communities would also be required to agree that any new small buildings built between the thirty and sixty-year zones would have to be readily movable.\textsuperscript{55}

If a community does not choose to participate (participation is voluntary) flood insurance will not be available for new construction or substantial improvement of small buildings seaward of the thirty-year setback zone, or for larger buildings seaward of the sixty-year zone.\textsuperscript{56} Owners of buildings in the ten-year setback zone would be allowed only one claim of up to forty percent of the building before the flood insurance policy is canceled. No additional funds would be made available for relocation or demolition. Buildings built before the Flood Insurance Rate Maps were issued for an area within the erosion zones will likely be subject to increase premium rates closer to actuarial until their community joins the management program. No mitigation assistance would be available until a community chooses to participate in the erosion management program.

The opposition to several of the proposals contained in the Erosion Management Program by several powerful groups such as The National Association of Homebuilders and the National Association of Realtors lead Senator Kerry to introduce compromise legislation to address the concerns of these groups.\textsuperscript{57} Senate Report 2907 will not require owners to relocate or demolish their homes within two years or face the loss of insurance, communities will not have to adopt erosion management as a requirement for participating in the program, and development of the beachfront areas will be allowed.\textsuperscript{58}

\textsuperscript{45} Id. at 261.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 261-62.
\textsuperscript{48} Id. at 275.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 282.
\textsuperscript{52} Id. at 288.
\textsuperscript{53} Id. at 287.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Millemann, supra note 35.
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Additionally, Senate Report 1650 proposed a national flood mitigation program, funded by a five dollar surcharge on each flood insurance policy, which would make grants to states, communities or people who take steps to reduce the impact of expected floods. To be eligible for these funds, communities would have to engage in flood mitigation activities such as elevation, relocation, flood-proofing and acquisition of properties where flood damage has occurred since December 31, 1977 and where the communities are in full compliance with the requirements of the NFIP.

The most important and controversial proposal of Senate Report 1650 concerns the establishment of a program to reduce coastal erosion. Under the proposed erosion management program, FEMA will identify erosion zones along U.S. coastal and Great Lakes coasts by delineating 10-year, thirty-year and sixty-year erosion setbacks. The setbacks define the area that is likely to erode in ten, thirty and sixty years, respectively, based on historic average annual rate of erosion for that area. The ten-year erosion setback applies to all buildings, while the thirty-year setback applies to buildings (one to four family dwelling units), and the sixty-year setback applies to all other buildings.

In the ten-year setback zones, existing buildings are presumed to be "in danger of imminent collapse," and owners can obtain grants to cover the cost of relocation (forty percent of the value of the building) or demolition (forty percent of the value of the building). Relocated buildings would have to be placed landward of the applicable setback to continue receiving flood insurance benefits. For example, if a small home is in the ten-year zone, it must be relocated to at least the thirty-year zone. If a property owner who is a flood policy holder chooses to relocate or demolish within two years of notification, such policy holder will be allowed only one more claim of up to forty percent of the building's value on the flood insurance policy after which the policy would be canceled.

In participating communities, no new construction or "substantial improvements" (anything over fifty percent on the seaward side of the thirty-year erosion setback or, if applicable, the sixty-year erosion setback) No new buildings would be permitted seaward of the thirty-year zone, and no large buildings seaward of the sixty-year zone. Moreover, participating communities would also be required to agree that any new small buildings built between the thirty and sixty-year zones would have to be readily movable.

If a community does not choose to participate (participation is voluntary) flood insurance will not be available for new construction or substantial improvement of small buildings seaward of the thirty-year setback zone, or for larger buildings seaward of the sixty-year zone. Owners of buildings in the ten-year setback zone would be allowed only one claim of up to forty percent of the building before the flood insurance policy is canceled. No additional funds would be made available for relocation or demolition. Buildings built before the Flood Insurance Rate Maps were issued for an area within the erosion zones will likely be subject to increase premium rates closer to actuarial until their community joins the management program. No mitigation assistance would be available until a community chooses to participate in the erosion management program.

The opposition to several of the proposals contained in the Erosion Management Program by several powerful groups such as The National Association of Homebuilders and the National Association of Realtors lead Senator Kerry to introduce compromise legislation to address the concerns of these groups. Senate Report 2907 will not require owners to relocate or demolish their homes within two years or face the loss of insurance, communities will not have to adopt erosion management as a requirement for participating in the program, and development of the beachfront areas will be allowed.

45. Id. at 261.
46. Id.
47. Id. at 261-62.
48. Id. at 275.
50. Id.
51. Id. at 282.
52. Id. at 286.
53. Id. at 287.
55. Id.
56. Id.
57. Milleman, supra note 35.
Another proposal in Senate Report 2907 could potentially help homeowners who suffered damage of fifty percent or greater than the home's market value and live below the flood level set by the federal government. Under the current rules of the NFIP, homeowners cannot rebuild their homes unless they raise the elevation to conform with the federal flood criteria. Several hundred homeowners with homes located in South Florida that were substantially damaged by Hurricane Andrew are currently facing this problem. In many cases, the costs to raise the elevation of a home to conform to the requirements of the NFIP are prohibitive. These costs are not currently covered by existing homeowner or flood policies. However, one of the proposals in Senate Report 2907 would provide Increased Cost of Construction coverage to be included with the flood insurance policy which would allow a policy holder who suffers substantial losses to get benefits to rebuild to the current performance standards of the NFIP which will diminish or eliminate future flood losses.

IV. "TAKINGS" ISSUES AND THE NFIP

The courts have clearly held that the NFIP is constitutional. Texas Landowners Rights Ass'n v. Harris held that: 1) the NFIP did not violate sovereign powers of state and local government or the principles of federalism embodied in the Tenth Amendment; 2) the diminution of land values attributable to the unavailability of certain conventional avenues of financial assistance and mortgage money as a result of sanction imposed by statute on states that did not participate in the NFIP do not constitute a "taking" of property without payment of just compensation, and 3) the NFIP was a rational exercise of Congress' powers and was reasonably related to the legitimate national goal of protecting property owners and the United States against flood damage.

The United States Constitution prohibits a taking of private property for public use or the deprivation of property without due process of law without just compensation. The Supreme Court, in Pennsylvania Coal Co. v. Mahon, stated, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," thus acknowledging that government regulation could result in a Fifth Amendment taking of property. The purpose of the Fifth Amendment private property rights guarantee is to prevent the government from forcing some people to pay the costs for the public good, when these costs should be borne by the public as a whole. Prior to the Court's decision in Pennsylvania Coal Co. v. Mahon, regulation of the use of property through the exercise of the police power would probably not constitute a taking. The Court, in Mugler v. Kansas, explained the characteristics distinguishing a taking from a non-taking:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property . . . . The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals or the safety of the public, is not and, consistently with the existence and safety of organized society, cannot be burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury on the community.

The use of this nuisance abatement theory utilized in Mugler to uphold regulations against taking challenges is often criticized because of the false underlying assumption the private homeowner is responsible for the public nuisance and must therefore be financially responsible. In the context of the NFIP, a homeowner constructing a home in a floodplain before a community opted to participate in the NFIP would be unreasonably transformed into a wrongdoer, and absorb serious financial loss simply because the community enacted floodplain regulation. By utilizing the
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60. Id.
61. Id.
62. Id.
64. See Texas Landowners Rights Ass’n, 453 F. Supp. at 1028-33.
65. U.S. CONST. amends. V, XIV.
68. 123 U.S. 623, 668-89 (1887).
69. Singer, supra note 7, at 342.
70. Id.
nuisance abatement theory in this manner, innocent parties would be harmed by these arbitrary results.\textsuperscript{71}

Regulatory takings cases based on facial challenges to a statute or regulation have been determined by applying a two-prong test to analyze whether: 1) the regulation substantially advances a legitimate state interest; and 2) does the regulation deny all economically viable uses of the property.\textsuperscript{72} In \textit{Agins}, the City of Tiburon limited the development of the plaintiff's five-acre lot to a maximum of five single-family homes through density restrictions. In considering whether the ordinance limiting development prevented the best use of the land or extinguished a fundamental attribute of ownership, the Court held that the general plan advanced the legitimate state interest of protecting against the ills of urbanization.\textsuperscript{73} The ordinance did not impose a burden solely on one landowner since it affected development generally; and therefore, the public did not benefit at the expense of a few. In addition, the ordinance did not prevent the best use of land or extinguish a fundamental attribute of ownership.\textsuperscript{74}

The test in \textit{Agins} was modified in \textit{Nollan v. California Coastal Commission}. The Court formulated the "substantial relationship" test which states that the government's power to forbid particular land uses to facilitate advancement of some legitimate police power purpose is contingent upon the government's ability to demonstrate the prohibited land use furthers the same purpose which the government had advanced as justification.\textsuperscript{75}

In \textit{Nollan}, the Coastal Commission required property owners to dedicate a public easement to provide beach access as a condition to selling a permit for an addition to their home.\textsuperscript{76} The easement requirement was to further the state interest in preserving the public's view of the ocean. The construction of homes and development of the coastal constitutes a "psychological barrier" severely restricting the public's ingress to and egress from the beach.\textsuperscript{77} The Court ruled that the state cannot escape compensation by the indirect imposition of a requirement when direct imposition of the requirement would require just compensation.\textsuperscript{78}

\textsuperscript{71} Id.
\textsuperscript{72} Agins v. City of Tiburon, 447 U.S. 255, 261 (1980).
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 262.
\textsuperscript{75} 483 U.S. 825, 837 (1987).
\textsuperscript{76} Id. at 828.
\textsuperscript{77} Id. at 828-29.
\textsuperscript{78} Id. at 831.

\textit{Cane}

The most common theory used in regulatory takings challenges focuses on the following factors: 1) The character of the governmental action, e.g., a land-use restriction that allegedly protects the health and safety of the greater public; 2) whether there is interference with reasonable investment-backed expectations; and 3) the severity of the economic impact.\textsuperscript{79}

In \textit{Penn Central}, the owner entered into a lease agreement with a property development company to construct an office building above the terminal. Because Penn Central Terminal was designated as a landmark by New York City's Landmark Preservation Commission, the planning commission denied the developer permission to build due to the detrimental effect on the terminal's historic character.\textsuperscript{80} After examining the character of the action and the nature of the interference with the rights in the parcel as a whole, the Court stated the diminution in the value of the property alone, even by as much as eighty-seven percent did not constitute a taking.\textsuperscript{81}

In determining Penn Central's investment-backed expectations, the Court concluded that the owner's primary expectation of operating a transportation terminal was preserved since a reasonable return could still be made.\textsuperscript{82} Penn Central was not singled out because the law was broadly aimed at many historical landmarks for the benefit of many and the government was not appropriating private property for its own use, therefore, there was no taking.\textsuperscript{83}

The problem with using this approach in regulatory taking challenges is that it does not provide a model that FEMA or other regulators can rely on to determine precisely where diminution of value has sufficiently occurred to warrant finding a taking.\textsuperscript{84} The circumstances under which the government can prohibit all economically beneficial or productive use of property without being required to provide the property owner with just compensation,\textsuperscript{85} has been changed by a recent ruling by the Supreme

\textsuperscript{80} Id. at 118-19.
\textsuperscript{81} Id. at 130-31.
\textsuperscript{82} Id. at 136.
\textsuperscript{83} Id. at 134-35.
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71. Id.
73. Id.
74. Id. at 262.
76. Id. at 838.
77. Id. at 828-29.
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80. Id. at 118-19.
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In *Lucas*, the petitioner purchased two undeveloped lots for $975,000 with the intention of building single family homes. At the time of purchase, there were no legal restrictions prohibiting construction of homes. However, two years later, the South Carolina Legislature passed the Beachfront Management Act which effectively barred any construction on the two parcels. The trial court found that the properties had been "taken" by operation of the Act and awarded "just compensation" of approximately $1.2 million. The South Carolina Supreme Court reversed, concluding that based on "uncontested ... findings," the statute was enacted to prevent the infliction of harm on the public and this could be done without the payment of compensation.

Prior to the *Lucas* decision, states have relied on the ability of state legislatures, cities and counties to make legislative findings that certain activities were nuisances subject to abatement without just compensation. The Court stated that in many prior opinions there was the suggestion that "harmful or noxious uses" of property may be prohibited or limited by government regulation without requiring compensation to the owner. However, the Court pointed out that "prevention of harmful use" was only a justification to allow any regulatory diminution in value without compensation and the noxious-use logic does not allow courts to "distinguish regulatory "takeings"—which require compensation—from regulatory deprivations that do not require compensation." The Court was clear that the legislature could not rely on the noxious-use argument to justify a departure from the rule that total regulatory takings must be compensated. The Court concluded that in order to use nuisance law to preclude all economically beneficial use of land without compensation to the owner, an "inquiry into the nature of the owner's estate shows that the prescribable use interests were not part of his title to begin with." Although there are no Fifth Amendment problems under NFIP as currently constituted, depending on the scope of new amendments, Fifth Amendment concerns may come to the forefront.

V. CONCLUSION

The National Flood Insurance Program has become increasingly controversial. It has become a rallying point for environmental groups, such as the National Wildlife Federation, which has asserted that the NFIP does not adequately protect public safety, taxpayers, and the environment. On the other side, the National Board of Realtors has argued that certain proposals to amend the NFIP, particularly relating to coastal erosion zones, potentially raise Fifth Amendment concerns.

We should not forget that the reason for the passage of the NFIP was to protect a significant part of the population from economic disaster and to encourage flood mitigation. At the least, reforms are needed to ensure a higher rate of compliance by property owners and lenders and steps should be taken to shore up the NFIP's fiscal safety and soundness. In the wake of Hurricane Andrew the urgency of these reforms is clear.

87. Id. at 2889.
88. Id. at 2890.
89. Id.
93. Id. at 2899.
94. Id.
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87. Id. at 2889.
88. Id. at 2890.
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93. Id. at 2899.
94. Id.
Construction Contracts and Contractors: Hurricane Andrew Reteaches Consumers

Michael Flynn

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I. INTRODUCTION

In the early morning hours of August 24, 1992 the landscape of a large portion of South Florida changed. The awesome power of Hurricane Andrew ripped through South Florida leaving thousands of people frightened and homeless. The battle cry in the wake of the destruction wrought by Hurricane Andrew was "Relief, Recover and Rebuild!" Thousands of people, either spared by Hurricane Andrew or moved by the pictures of devastation, responded with help for victims. Public agencies eventually delivered relief too. At the same time, victims and government agencies mapped out plans to speed relief and recovery to the effected area. Those efforts will need to continue for a long time. As the relief and recovery efforts moved forward, the victims of Hurricane Andrew, private citizens, businesses and government agencies began the long process of rebuilding.

Nothing was safe from Hurricane Andrew. High priced homes, luxury condominiums, commercial structures, government buildings and other kinds of shelters were blown apart or flooded by the force of the storm. Yet not all of the homes or buildings in the path of Hurricane Andrew were destroyed. Whole subdivisions of houses remained standing with roofs intact. Homes on one side of some residential streets sustained minor

* Professor of Law, Nova University Shepard Broad Law Center. B.A. Gonzaga University, 1973, J.D. Gonzaga University, 1977. The author wishes to thank Jaimie Deckinger for her assistance in the preparation of this article.
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The purpose of this article is to answer these two questions with particular reference to the victims of Hurricane Andrew by first, reviewing the Florida Contracting statute and the requirements for a construction contractor to work in this state and second, by offering some tips for selecting a construction contractor, drafting a construction contract and remedying defects in construction work.

II. FLORIDA’S CONTRACTOR REGISTRATION STATUTE

The Florida Legislature enacted Florida Statute Chapter 489 which regulates the construction industry out of fear. The Legislature reasoned that unsafe or unstable construction pose a danger to the public. Therefore, the purpose of the Florida contracting law is to eliminate the danger from incompetent and dishonest contractors by establishing minimum qualifications and requirements for construction contractors. The Florida contractors statute classifies construction contractors into two groups: certified contractors and registered contractors. Although the requirements for a certified and a registered contractor differ, the bottom line remains that Florida law prohibits anyone from engaging in construction contracting work without being licensed as a certified or registered contractor. The contractor statute subdivides certified and registered contractors into three types of construction contractors. The general contractor is a contractor who is unlimited in the type of construction work that may be performed. The building contractor, however, is limited to the construction of commercial buildings and single and multiple dwelling residential buildings which do not exceed three stories in height. In addition, a building contractor is permitted to remodel, repair or improve any size building as long as the construction work does not affect the structure of the building. The residential contractor is limited to the construction, remodel, repair or improvement of one, two or three family residences and other connected structures which do not exceed two stories in height. Aside from these general classes of certified and registered contractors, Florida law specifies various kinds of certified specialty contractors who are limited to a particular kind of construction work. Specialty contractors include sheet metal contractors, roofing contractors, air conditioning contractors, mechanical contractors, commercial and residential pool/spa contractors, swimming pool/spa servicing contractors and underground utility contractors. The license requirements differ for certified contractors than for registered contractors. These differences can best be illustrated by comparing the requirements for a certified contractor with those of a registered contractor.

The applicant for a certified contractor license must file a written application and pay an application and examination fee not to exceed $350. In addition, the applicant must pay an initial certification fee not to exceed $200. Upon filing of the application and payment of the application and examination fee, the applicant must apply in writing to the Florida Department of Professional Regulation to take the certification examination.

2. Id. §§ 489.109(1)(a)-(b), (7), 111, 113(1)-(2), 115, 117.
3. Id. § 489.101.
4. Id.
5. Id.
7. Id. § 489.113(2).
8. Id. § 489.105.
9. Id. § 489.105(3)(a).
10. Id. § 489.105(3)(b).
12. Id. § 489.105(3)(c).
13. Id. § 489.105(12).
14. Id. § 489.105(3)(d).
15. Id. § 489.105(3)(e).
17. Id. § 489.105(3)(f).
18. Id. § 489.105(3)(f)(1).
19. Id. § 489.105(3)(f)(2).
20. Id. § 489.105(3)(g).
22. Id.
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The purpose of this article is to answer these two questions with particular reference to the victims of Hurricane Andrew by first, reviewing the Florida Contracting statute and the requirements for a construction contractor to work in this state and second, by offering some tips for selecting a construction contractor, drafting a construction contract andremedying defects in construction work.

II. FLORIDA’S CONTRACTOR REGISTRATION STATUTE

The Florida Legislature enacted Florida Statute Chapter 489 which regulates the construction industry out of fear. The Legislature reasoned that unsafe or unstable construction pose a danger to the public. Therefore, the purpose of the Florida contracting law is to eliminate the danger from incompetent and dishonest contractors by establishing minimum qualifications and requirements for construction contractors. The Florida contractors statute classifies construction contractors into two groups: certified contractors and registered contractors. Although the requirements for a certified and a registered contractor differ, the bottom line remains that Florida law prohibits anyone from engaging in construction contracting work without being licensed as a certified or registered contractor. The contractor statute subdivides certified and registered contractors into three types of construction contractors. The general contractor is a contractor who is unlimited in the type of construction work that may be performed. The building contractor, however, is limited to the construction of commercial buildings and single and multiple dwelling residential buildings which do not exceed three stories in height. In addition, a building contractor is permitted to remodel, repair or improve any size building as long as the construction work does not affect the structure of the building. The residential contractor is limited to the construction, remodel, repair or improvement of one, two or three family residences and other connected structures which do not exceed two stories in height. Aside from these general classes of certified and registered contractors, Florida law specifies various kinds of certified specialty contractors who are limited to a particular kind of construction work. Speciality contractors include sheet metal contractors, roofing contractors, air conditioning contractors, mechanical contractors, commercial and residential pool/spa contractors, swimming pool/spa servicing contractors and underground utility contractors. The license requirements differ for certified contractors than for registered contractors. These differences can best be illustrated by comparing the requirements for a certified contractor with those of a registered contractor.

The applicant for a certified contractor license must file a written application and pay an application and examination fee not to exceed $350. In addition, the applicant must pay an initial certification fee not to exceed $200. Upon filing of the application and payment of the application and examination fee, the applicant must apply in writing to the Florida Department of Professional Regulation to take the certification.

9. Id. §§ 489.105(3)(a).
10. Id. § 489.105(3)(b).
12. Id. §§ 489.105(3)(c).
13. Id. § 489.105(12).
14. Id. § 489.105(3)(d).
15. Id. § 489.105(3)(e).
17. Id. § 489.105(3)(j).
18. Id. § 489.105(3)(k).
19. Id. § 489.105(3)(l).
20. Id. § 489.105(3)(n).
examination.23 The certification examination is a competency test.24 An applicant for the certification examination must be at least eighteen years of age, of good moral character and satisfy certain eligibility requirements.25 The eligibility requirements are:

1. The applicant must have received a baccalaureate degree from an accredited four year college in an appropriate field of engineering, architecture or building construction and have one year of experience in the category for which the applicant seeks certification,26 or

2. The applicant must have a total of at least four years of active experience as a worker who learned the trade by serving an apprenticeship for a skilled worker, who can command the pay rate of a mechanic in the particular trade, or as a foreperson who is in charge of a group of workers and usually responsible to a job superintendent or a contractor or the equivalent, provided, however, that the applicant must have at least one year of active experience as a foreperson,27 or

3. The applicant must have a combination of not less than one year of experience as a foreperson and not less than three years college level course credits from an accredited college; must have a combination of not less than one year of experience as a skilled worker, one year of experience as a foreperson and not less than two years of college level course credits from an accredited college; or must have a combination of not less than two years of experience as a skilled worker, one year of experience as a foreperson and not less than one year of college level course credits from an accredited college.28

In addition to paying the required fees, passing the competency examination and satisfying the eligibility requirements, the applicant must satisfy the following minimum financial responsibility criteria:

1. The applicant must submit an affidavit attesting to the procurement of public liability and property damage insurance;29

2. The applicant must furnish proof of financial responsibility, satisfactory credit and business reputation;30 and

3. The applicant must submit a credit report from a nationally recognized credit agency.31

Upon fulfillment of all of the stated requirements, the Florida Department of Professional Regulation will issue a certified contractor license to the applicant.32 The certified contractor’s license is valid for two years unless the Department of Professional Regulation opts to issue a three year license33 and may be renewed upon the payment of a renewal fee not to exceed $200.34 Upon issuance of a certified contractor license, the certificate holder may engage in the certified construction work anywhere in Florida.35 However, the certified contractor needs to present the certificate to the local building official, tax collector or other person authorized to issue local building permits and occupational licenses and pay the required local fees before beginning work.36 The certified contractor does not have to satisfy any local competency or financial responsibility requirements.37 The local construction regulation board may refuse to issue a building permit to a certified contractor if, after a public hearing with notice to the certified contractor, the certified contractor has been found guilty of fraud or a willful violation of the local building code or within the past twelve month period the certified contractor has been found guilty of fraud or a willful violation of any other local building codes which would have also constituted a violation of the local building code.38 The local construction regulation board’s denial of a building permit to a certified contractor must be reported to the Florida Department of Professional Regulation within fifteen days.39

The requirements for a registered contractor parallel, but are more lenient, than the requirements for a certified contractor. The applicant for registered contractor status must file an application and pay an application fee not to exceed $50,40 and also pay an initial registration fee not to exceed $200.41 The applicant must submit the application, pay the required application and registration fee and file proof of a valid local occupational

23. Id. § 489.111(1).
24. Id. § 489.113(1).
25. Id. § 489.111(2)(b)-(c).
27. Id. § 489.111(2)(c)(2).
28. Id. § 489.111(2)(c)(3).
30. Id.
31. Id. § 489.115(5).
32. Id. § 489.115(1)(a).
33. Id. § 489.115(3)(a).
35. Id. § 489.113(1).
36. Id. § 489.113(4).
37. Id. §§ 489.106(8), 113(4).
38. Id. § 489.113(4).
40. Id. § 489.109(1)(b).
41. Id.
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1. The applicant must have received a baccalaureate degree from an accredited four year college in the appropriate field of engineering, architecture or building construction and have one year of experience in the category for which the applicant seeks certification, or

2. The applicant must have a total of at least four years of active experience as a worker who learned the trade by serving an apprenticeship for a skilled worker, who can command the rate of a mechanic in the particular trade, or as a foreperson who is in charge of a group of workers and usually responsible to a job superintendent or a contractor or the equivalent, provided, however, that the applicant must have at least one year of active experience as a foreperson, or

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3. The applicant must submit a credit report from a nationally recognized credit agency.

Upon fulfillment of all of the stated requirements, the Florida Department of Professional Regulation will issue a certified contractor license to the applicant. The certified contractor’s license is valid for two years unless the Department of Professional Regulation opts to issue a three year license and may be renewed upon the payment of a renewal fee not to exceed $200. Upon issuance of a certified contractor license, the certificate holder may engage in the certified construction work anywhere in Florida. However, the certified contractor needs to present the certificate to the local building official, tax collector or other person authorized to issue local building permits and occupational licenses and pay the required local fees before beginning work. The certified contractor does not have to satisfy any local competency or financial responsibility requirements. The local construction regulation board may refuse to issue a building permit to a certified contractor if, after a public hearing with notice to the certified contractor, the certified contractor has been found guilty of fraud or willful violation of the local building code or within the past twelve month period the certified contractor has been found guilty of fraud or willful violation of any other local building codes which would have also constituted a violation of the local building code. The local construction regulation board’s denial of a building permit to a certified contractor must be reported to the Florida Department of Professional Regulation within fifteen days.

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23. Id. § 489.111(1).
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25. Id. § 489.111(2)(a)-(c).
27. Id. § 489.111(2)(c)2.
28. Id. § 489.111(2)(c)3.
30. Id. § 489.115(5).
31. Id. § 489.115(1)(e).
32. Id. § 489.113(3)(a).
33. Id. § 489.109(1)(a) (Supp. 1992).
34. Id. § 489.111(3)(c).
35. Id. § 489.113(1).
36. Id. § 489.113(4).
37. Id. §§ 489.105(8), 113(4).
38. Id. § 489.111(4).
40. Id. § 489.109(1)(b).
41. Id.
license for the type of construction work that the applicant seeks registration. An applicant must then satisfy the competency and eligibility criteria for the type of construction work the applicant wants to perform as required by the county, municipality or development district within which the construction work will be performed. Unlike a certified contractor, a competency test is not required by Florida law for registration of a contractor. In addition to the various local requirements, the applicant must submit an affidavit attesting to the procurement of public liability and property damage insurance and submit a credit report from a nationally recognized credit agency. However, the applicant for contractor registration need not provide the proof of financial responsibility, satisfactory credit and business reputation required for a certified contractor.

Upon satisfying the stated requirements, the Florida Department of Professional Regulation will issue a registered contractor license to the applicant. The registered contractor license is valid for two years unless the Department of Professional Regulation opts to issue a three year license, and may be renewed upon the payment of a renewal fee not to exceed $200.

In contrast to the certified contractor, registration of a contractor only entitles the contractor to engage in the particular type of construction work covered by the registration in the county, municipality or development district for which the registration applies.

Any person who fails to comply with the requirements for certification or registration as a contractor may be subject to sanctions administered by the Florida Department of Professional Regulation. The Department has the power to issue a cease and desist order to prohibit a person from acting as an unlicensed contractor and may enforce a cease and desist order in court. Alternatively, Florida law grants to local government the power to enforce the contractor certification requirements through the issuance of a non-criminal citation and assessment of a civil penalty not to exceed $500 per day if the violating contractor fails to pay the initial amount of any fine. In addition, Florida law states that certain kinds of contractor conduct may constitute a first degree misdemeanor and subject the contractor to criminal penalties. For example, falsely impersonating, advertising, or otherwise fraudulently taking on the status of a certified or registered contractor or forging or otherwise using an invalid contractor certification or registration is subject to criminal sanction. Finally, the Construction Industry Licensing Board, a subdivision of the Florida Department of Professional Regulation, has the authority to discipline wayward contractors. The Construction Board has the power to revoke, suspend or deny issuance or renewal of a contractor's certification or registration, require financial restitution to any consumer injured by the practices of the contractor and impose a fine of up to $5,000 if the contractor engaged in fraud, deceit, gross negligence or incompetence as a contractor. It is important to note that none of the sanctions or remedies provided as part of the contractor law limit in any way the owner of a home or other building, from suing the contractor in court for faulty construction work.

Spearheaded by the construction deficiencies uncovered by the devastation resulting from Hurricane Andrew, the Florida Department of Professional Regulation proposed and on April 10, 1993 the Florida Legislature passed significant revisions to the Florida construction contractor licensing statute. The highlights of the legislative amendments include the following:

1. The amendments do not substantially alter the licensing requirements for certified contractors. However, the amendments do permit the Department of Professional Regulation to withhold issuance of new registered contractor licenses if the local licensing board does not possess and exercise "adequate" disciplinary control over registered contractors.

53. Id. § 489.127(3).
55. Id. § 489.127(2).
56. Id. § 489.129(1).
57. Id. § 489.129(1)(m).
59. FLORIDA DEP’T OF PROF. REG. (Draft No. 4, 1993) (proposed amendments to Fla. STAT. ch. 489).
61. Fla. CS for SB 1552, § 12 (proposed Fla. STAT. § 489.117(2)).
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42. Id. § 489.117(1).
43. Id. § 489.117(2).
44. FLA. STAT. § 489.117(1) (Supp. 1992).
45. Id. § 489.115(4), (5).
46. Id. § 489.115(4).
47. Id. § 489.115(3)(a).
48. Id. § 489.115(3)(a).
50. Id. § 489.117(2).
51. Id. § 489.113(2).
52. Id. § 489.113(2).
53. Id. § 489.127(3).
55. Id. § 489.127(2).
56. Id. § 489.129(1).
57. Id. § 489.129(1)(m).
59. FLORIDA DEP’T OF PROF. REG. (Draft No. 4, 1993) (proposed amendments to FLA. STAT. ch. 489).
61. Fla. CS for SB 1552, § 12 (proposed FLA. STAT. § 489.117(2)).
Although not eliminating the "two-tier" system of licensing construction contractors as either certified or registered contractors as proposed by the Department of Professional Regulation,62 the amendments grant more power to the Department of Professional Regulation to enforce local licensing boards to insure construction contractor competence.63

2. The amendments create the requirement that a business entity applying for a state certified contractor license must apply through a "qualifying agent" who will be responsible for the supervision of the construction work and the financial aspects of the contracting business.64

3. The amendments create the Florida Construction Industries Recovery Fund.65 The purpose of this fund is to reimburse consumers who have obtained a court judgment against a state certified contractor for any loss suffered by the consumer resulting from violations by the construction contractors statute.66 The money for this fund will be collected from a one-half cent per square foot surcharge on building permits67 and consumer recovery is limited to $25,000 per transaction.68

4. The amendments permit the Department of Professional Regulation to set up an arbitration process to resolve money disputes between state certified contractors and their consumers, and mandates binding arbitration for money disputes of less than $2,500.69

5. The amendments require fourteen hours of continuing education as a prerequisite for state certificate renewal.70

6. The amendments raise the criminal penalties against unlicensed contractors who have a prior conviction or who act as an unlicensed contractor in a declared emergency to a third degree felony71 and authorize the Department of Professional Regulation to issue stop-work orders.72

7. The amendments provide for the state certification of building code inspectors.73 The certification process for building inspectors would be administered through the Department of Professional Regulation which will set minimum competency standards.74

The design of the revisions and additions to the construction contractors licensing scheme seems to be three fold. First, the amendments further consolidate the regulation of construction contractors with the Department of Professional Regulation. Consolidation of the regulatory function in one state government agency always presents the danger of bureaucratic overkill. However, assuming adequate staffing and funding, consolidation of construction contractor regulation is an improvement over the existing maze of different local licensing regulations. Such a change has a chance to succeed in providing consistent and even handed regulation of contractors and construction work.

Second, the amendments offer consumers some relief from unscrupulous contractors and shoddy construction work through the Florida Construction Industries Recovery Fund. The repetitive horror story of the consumer stuck with a poorly constructed residence or commercial building, partially or totally destroyed by Hurricane Andrew and a vanished or vanquished construction contractor is one of the legacies of Hurricane Andrew. Furthermore, unlike public construction projects in Florida75 or private construction projects in some other states,76 a contractor in Florida is not required, unless by local ordinance,77 to obtain a payment or performance bond to cover any amount of the cost of the construction project. Consequently, the Florida Construction Industries Recovery Fund provides the victim of faulty construction work with some recourse. The Recovery Fund is not a substitute for a payment and/or performance bond to cover construction projects costing more than $25,000. However, the amendment creating the Recovery Fund is a significant step towards recognizing that consumers need protection from incompetent construction contractors.

Third, the amendments afford consumers a hedge against faulty construction work by requiring the licensing of public and private building inspectors. Key to this licensing requirement is the development and implementation by the Department of Professional Regulation of strict competency standards for building inspectors. This competency based licensing scheme for building inspectors will help to eliminate collusion

63. Fla. CS for SB 1552, § 12, at 37, line 28 (proposed FLA. STAT. § 489.117(2)).
64. Id. § 13, at 40, line 11 (proposed FLA. STAT. § 489.119(2)); FLA. STAT. § 489.1195(1)(a) (1991).
65. Fla. CS for SB 1552, § 21, at 73 (proposed FLA. STAT. § 489.149).
66. Id. § 21, at 73, line 5 (proposed FLA. STAT. § 489.149(3)).
67. Id. § 21, at 73, line 17 (proposed FLA. STAT. § 489.149(2)).
68. Id. § 21, at 76 (proposed FLA. STAT. § 489.143).
69. Id. § 18, at 61, 62-63 (proposed FLA. STAT. § 489.129(11)(a), (c)).
70. Fla. CS for SB 1552, § 10, at 33, line 9 (proposed FLA. STAT. § 489.115(9)(b)).
71. Id. § 16, at 49, (proposed FLA. STAT. § 489.127(2)(b), (c)).
72. Id. § 18, at 50, line 3 (proposed FLA. STAT. § 489.127(3)).
73. Id. § 24, at 82-87 (proposed FLA. STAT. §§ 468.601-633).
74. Id. § 24, at 86, 87 (proposed FLA. STAT. §§ 468.605, 607).
75. FLA. STAT. §§ 225.05 (1991).
76. For example, see IOWA CODE § 910.7 (1991) (a bond of $1,000 or five per cent of the contract price whichever is greater) and UTAH CODE ANN. § 14-2-1 (1992) (any construction contract exceeding $2,000 requires a payment bond equal to contract price).
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between contractors and building inspectors and to insure consumers receive building code quality construction work.

Based on the foregoing synopsis and the perceived purposes of the proposed amendments to the contractor licensing statute in Florida, the amendments are a worthy effort to salvage something good from the destruction left by Hurricane Andrew.

III. CONSTRUCTION CONTRACTING TIPS

Whether a contractor is properly licensed is just one of the questions every consumer or commercial business should ask before beginning any type of construction work. The certification or registration of the construction contractor does not by itself, insure the consumer or commercial business will receive top quality construction work. The following is a list of tips regarding the selection of a construction contractor, the contents of a construction contract and the remedies for poor construction work. Included with these tips is specific addresses and telephone numbers for various public and private agencies that may be useful to any consumer and of special assistance to Hurricane Andrew victims.

A. Choosing a Building Contractor

1. Make sure the contractor has a valid and current local business license. Do not believe what the contractor says, check it out yourself. In Dade County, contact Dade Occupational Licenses at (305) 375-5064. In Broward County, contact Broward County Occupational Licenses at (305) 468-3480.

2. Make sure the contractor is properly licensed with the State of Florida to perform the type of construction work that you want. Florida law requires that any person who wants to work as a construction contractor statewide must first be certified by the State of Florida.\(^76\) In addition, Florida law requires that any person who wants to work as a construction contractor locally within a city or county but not on a statewide basis, must first be registered by the State of Florida.\(^77\) It is illegal for any person to perform construction contracting work for a private home or business without being a licensed contractor.\(^80\) Be sure to check the contractor's

81. Id. § 489.131(3)(6).
82. See generally LARRY R. LEBY, FLORIDA CONSTRUCTION LAW MANUAL § 10.03 (2d ed. 1988).
84. LEBY, supra note 82, § 10.07.
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licensing status before you hire that contractor by contacting the Florida Department of Professional Regulation at 1-800-342-7940.

3. Do not try to be your own contractor unless you have construction experience. Your best bet is to hire a reputable construction contractor.

4. Make sure the contractor is bonded. Florida law does not require every certified and registered construction contractor to obtain a construction performance and/or payment bond to cover the contractor's work. Some cities or counties may require a registered contractor to obtain a performance bond, which usually is not for more than $5,000.

A performance bond is meant to provide a safety net of money for the consumer if something goes wrong with the construction work. If the contractor fails to perform or poorly performs the construction work, then the consumer may request that the bond money be used to finish or correct the contractor's work. These kinds of performance bonds are especially used in large public and private construction projects. A payment bond is meant to provide protection to the consumer by way of ensuring that all of the subcontractors and any other person working on the construction project is paid for their work before the consumer pays the contractor for the completed construction work.

Because of the tremendous amount of construction work in Florida, not to mention the rebuilding required in South Florida, a $5,000 performance bond or even the proposed Florida Construction Industries Recovery Fund with a $25,000 cap on claims, is not much of a cushion for a consumer. Therefore, Florida law permits, and it is a good idea for you to request, the contractor to obtain a specific performance and/or payment bond in the amount of the cost of your construction work. Part or all of the cost of these bonds may be passed on to you by the contractor. However, this kind of bond may be well worth the extra cost should the contractor leave the area before starting or finishing your project, perform shoddy work, fail to pay off the subcontractors or file bankruptcy. A reputable contractor will stand behind his work. Some, but not all, contractors will agree to provide a specific performance and/or payment bond to cover your construction work. Some contractors may not be able to qualify for a bond. If a contractor will not agree to obtain or does not qualify for a performance

81. Id. § 489.13(3)(6).
82. See generally LARRY R. LIEBY, FLORIDA CONSTRUCTION LAW MANUAL § 10.03 (2d ed. 1988).
83. FLA. STAT. § 489.131(2) (Supp. 1992).
84. LIEBY, supra note 82, § 10.07.
and/or payment bond, you should consider other contractors. If you cannot find a contractor who will provide a specific performance and/or payment bond to cover the construction work, you should contact a lawyer to help you obtain a bond on your own before signing any construction contract.

5. You should contact the following agencies before deciding which contractor to hire.

   a. The Florida Attorney General’s Office
      4000 Hollywood Boulevard
      Suite 505 South
      Hollywood, FL 33021
      (305) 985-4780
   b. Florida Division of Consumer Services
      Mayo Building
      Tallahassee, FL 32399
      1-800-435-7352
   c. Broward County Consumer Affairs Division
      201 South Andrews Avenue
      Suite 201
      Fort Lauderdale, FL 33301
      (305) 765-5355
   d. Dade County Consumer Services Department
      Consumer Protection/Advocate Division
      140 West Flagler Street
      Miami, FL 33130
      For General Information (305) 375-1250
      Consumer Advocate’s Office (305) 375-4222
   e. Better Business Bureau of South Florida
      16291 Northwest 57th Avenue
      Miami, FL 33014
      (305) 625-0307

Be patient when contacting these agencies. If the telephone line is busy or you get no answer, hang up and try again later. When you do get through to these agencies, ask if there have been any consumer complaints against your prospective contractor and if so, what the complaints were about and if the complaints remain unresolved. Also ask if the contractor is under investigation by the agency. A contractor with a history of consumer complaints should be avoided.

1. Ask the contractor for at least three references. You should try to get references that match, as closely as possible, the kind of work you want done. If you want a new roof on your garage or new storm shutters, then do not accept references about kitchen cabinets. Most importantly, check out the references to see if the contractor’s former customers are satisfied with the contractor’s work.

2. Shop around for contractors. A great number of contractors are looking for work, not only in South Florida but throughout Florida. Take your time and do not select the first contractor you talk to. Ask neighbors, relatives, and friends for the names of contractors. Talk to as many different contractors as you can. If the contractor is working on another job, go visit the job site and look at his crew, equipment and work. You might even walk through the project during off-work hours to examine the contractor’s work.

3. Avoid "work gangs." With the massive amount of construction work needed in South Florida, local and out of state work gangs will come to Florida, especially South Dade county, to get work. A lot of compassionate and caring people have freely given their time to help many people temporarily repair homes and buildings after Hurricane Andrew. These groups of people are not work gangs. The work gangs usually pose as experienced contractors or construction workers from another job with leftover or extra materials. These gangs usually offer to do a specific job (i.e., roof repair, landscaping, windows, carpeting). These gangs often do shoddy, overpriced work and leave the area before any complaints are filed against them. Avoid these door-to-door work gangs no matter how good they sound.

B. Signing a Construction Contract

1. Get a number of written estimates. Most reputable contractors provide a written estimate of the cost of the construction work. If a contractor does not volunteer to provide a written estimate - demand one. Make sure the contractor signs the written estimate. The written estimate should contain a full description of the construction work, the materials required and an itemization of the cost. You are not required to and should not sign the contractor’s written estimate. Do not confuse the written estimate with the construction contract. You should keep an extra copy of every written estimate.

   a. Compare written estimates. Get at least three written estimates. Be sure all of the written estimates cover the exact same type of construction work and materials. Compare the written estimates on the basis of price, reliability of the contractor, and quality of the contractor’s work. Remember, if the deal appears to good to be true, it probably is. If you suspect price gouging by one or a number of contractors offering work in the area affected by Hurricane Andrew, notify the Florida Attorney General
and/or payment bond, you should consider other contractors. If you cannot
find a contractor who will provide a specific performance and/or payment
bond to cover the construction work, you should contact a lawyer to help
you obtain a bond on your own before signing any construction contract.

5. You should contact the following agencies before deciding which
contractor to hire.

a. The Florida Attorney General’s Office
   4000 Hollywood Boulevard
   Suite 505 South
   Hollywood, FL. 33021
   (305) 985-4780

b. Florida Division of Consumer Services
   Mayo Building
   Tallahassee, FL 32399
   1-800-435-7352

c. Broward County Consumer Affairs Division
   201 South Andrews Avenue
   Suite 201
   Fort Lauderdale, FL 33301
   (305) 765-5355

d. Dade County Consumer Services Department
   Consumer Protection/Advocate Division
   140 West Flagler Street
   Miami, FL 33130
   For General Information (305) 375-1250
   Consumer Advocate’s Office (305) 375-4222

e. Better Business Bureau of South Florida
   16291 Northwest 57th Avenue
   Miami, FL 33014
   (305) 625-0307

Be patient when contacting these agencies. If the telephone line is busy or
you get no answer, hang up and try again later. When you do get
through to these agencies, ask if there have been any consumer complaints
against your prospective contractor and if so, what the complaints were
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the area affected by Hurricane Andrew, notify the Florida Attorney General

Published by NSUWorks, 1993
at the telephone number previously listed for the office of the Florida Attorney General.

b. Never sign a construction contract until you have read and understood all of the things written in the contract. Do not be bullied into signing a "standard" or pre-printed form contract without carefully reading every word of the contract. After all, it is your home or business and your money. You can add to or change any part of a standard or pre-printed contract before you sign it. Prior to signing a construction contract be sure to check the following:

1. Be sure that every promise or statement made by the contractor concerning the type and quality of the materials and other products to be used in the construction work is restated in writing in the contract.

2. Be sure that all product, materials, and performance warranties are included in writing in the contract.

3. Be sure that every promise or statement made by the contractor concerning the contractor's performance of the construction work is restated in writing in the contract.

4. If the construction contract contains information about financing the payment for the construction work, contact a lawyer to review this information before signing the construction contract. If you do not know a lawyer, you should contact a local legal services office, the local bar association referral service or the Florida Bar Association. In Dade County you can contact Dade County Legal Services at (305) 576-0080 and in Broward County you can contact Broward County Legal Services at (305) 765-8950 to see if you qualify for free legal services. Otherwise, in Dade County contact the Dade County Bar Association Attorney Referral at (305) 371-2220 and in Broward County contact the Broward County Bar Association Attorney Referral at (305) 764-8040 for assistance in finding a lawyer. You can contact the Attorney Referral Service of The Florida Bar at 1-800-342-8011 or Attorney Referral Service at 1-800-834-8077 for further assistance in finding a lawyer.

5. If the construction contract requires an "up front" deposit, make sure the contract states in writing what bank or other institution your money will be deposited with, when and how you can get a refund of the deposit and that the contract requires the contractor to provide an itemized accounting of how your deposit money is spent. It is also a good idea to make sure that any check written to the contractor is marked "for deposit only" so that the contractor is less likely to cash your check and leave town. Finally, make all payments by check; do not pay a contractor in cash.

6. Be sure that the construction contract states in writing that all of the construction work will be completed to the customer’s satisfaction before any payment will be made.

7. The payment schedule for the construction work should be contained in the written contract. Never pay the full price for the construction work up front. Spread your payments out into at least three equal "progress" payments: one-third at the beginning of work; one-third when the work is two-thirds complete; and one-third upon completion of the work. Do not let the contractor convince you to pay more money than you agreed to pay. Check out the progress of the contractor’s work. Be sure the construction contract states in writing that you will not be obligated to make any payment to the contractor before inspecting the contractor’s work and before receiving an itemized accounting of the cost of the construction work performed up to that time. Finally, do not make your last payment to the contractor until the contractor provides you with proof that all of the subcontractors and any other construction liens have been paid.

8. Be sure that the start date and completion date for the construction work is written in the contract. In addition, be sure that all of the blank spaces in a pre-printed form contract are filled in or crossed out.

9. Be sure the contractor agrees in writing to perform the construction work to conform to all city, county and state laws and regulations including but not limited to building codes, fire and other safety regulations and zoning ordinances.

10. Be sure that the contractor agrees in writing to do all of the clean up after the construction work is completed.

11. Be sure to inspect the contractor's work. You should not be afraid to periodically check on the progress of the contractor's work at any time. Upon the completion of the construction work, you should carefully inspect the work. You may not be an expert, but you can make a list of things that do not look right to you. Do not be afraid to flush toilets, open cabinets, check roof tile, turn on the air conditioner, etc. Finally, do not be afraid to ask the contractor questions; it may be your last chance.

C. Remedies for Faulty Construction Work

Sometimes, no matter how careful you are in selecting a contractor and in reviewing a construction contract, the construction work may be

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at the telephone number previously listed for the office of the Florida Attorney General.

b. Never sign a construction contract until you have read and understood all of the things written in the contract. Do not be bullied into signing a "standard" or pre-printed form contract without carefully reading every word of the contract. After all, it is your home or business and your money. You can add to or change any part of a standard or pre-printed contract before you sign it. Prior to signing a construction contract be sure to check the following:

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C. Remedies for Faulty Construction Work

Sometimes, no matter how careful you are in selecting a contractor and in reviewing a construction contract, the construction work may be
defective. Here is what to do if the contractor’s work is not satisfactory:

A. Contact the contractor and demand the contractor fix his work. Remind the contractor of the performance, product, and material warranties contained in the written contract.

B. If the contractor will not fix his work, then you should do the following:

1. File a written consumer complaint with the Florida Attorney General’s Office, Florida Division of Consumer Affairs, local consumer affairs agencies which include Broward County Consumer Affairs Division, Dade County Consumer Services Department, and the Better Business Bureau. You may also want to file a written complaint with the Florida Department of Professional Regulation located at 1940 North Monroe Street, Tallahassee, Florida, 32399-0750.

   The written complaint needs to identify the contractor and specify the exact nature of your complaint. Attach copies of your construction contract and all other documents, including payment receipts, canceled checks, work orders, and warranties to the written complaint. You should sign the complaint, include your address and telephone number(s), and mail the complaint to the various offices.

2. Consult a lawyer about filing a lawsuit. Check with the legal service organizations and the attorney referral services previously mentioned if you cannot find a lawyer on your own.

   Hopefully by understanding the Florida contractors law and by following these tips, you can be sure that the construction or reconstruction of a home or business does not become another disaster like Hurricane Andrew. Remember, an alert and informed consumer is the best protection against fraud.
Section 553.84: Remedy Without a Cause?

Byron G. Petersen*
Steven S. Goodman**

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I. INTRODUCTION

Hurricane Andrew, the third most intense hurricane to hit the United States, not only caused widespread destruction in South Florida but quickly spawned litigation against homebuilders premised on allegations of building code violations. The complaints assert a variety of causes of action, however, most do not include claims under section 553.84 of the Florida Statutes, which expressly provides a civil remedy to persons injured by

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violations of any of the State Minimum Building Codes. The neglect of the statutory remedy in the aftermath of the hurricane mirrors the nonuse of this provision generally; only a handful of reported cases have arisen under section 553.84 since its promulgation in 1974. The statutory remedy has attracted recent judicial attention, however, in the Third District Court of Appeal, the jurisdiction of which includes Dade County, site of the recent devastation. This Article will address the remedy afforded by section 553.84, its inherent limitations and the potential role this remedy might play in litigation arising from the hurricane or in construction litigation generally. Section II examines the origin and legislative history of The Florida Building Codes Act, which contains section 553.84. Section III reviews the fundamentals of the South Florida Building Code, particularly those aspects which have been challenged following Hurricane Andrew, and the manner in which the building code may be addressed in judicial proceedings. Section IV analyzes the viability of section 553.84 as a remedy for hurricane damage by identifying potential defendants and the possible limitations on their liability. Section V assesses the possible impact of the economic loss rule on the statutory remedy. Finally, section VI examines whether officers and directors of corporate participants in the construction process may be personally liable under section 553.84 and other available theories of recovery.

II. ORIGINS OF THE STATUTORY REMEDY

The Florida Building Codes Act (the Act) was enacted on June 11, 1974. The Act required, by January 1, 1975, every city, county and state

5. These codes include the Standard Building Code, promulgated by the Southern Building Code Congress, the EPCOT Code, the One and Two Family Dwelling Code and the South Florida Building Code. The sponsors of House Bill 3231, which became the Act, expressly sought to allow local governments to select among these recognized minimum building codes. Fla. H.R. COMM. ON COMMUNITY AFFAIRS, STAFF ANALYSIS, at 1 (1974) [hereinafter HOUSE ANALYSIS].
6. The staff commentary on Senate Bill 1080, which resembled House Bill 3231 but ultimately died on the Senate calendar, plainly voiced this concern: Many communities (mostly the smaller ones) have no building codes at all, and are dependent upon state agency administered rules and regulations for the setting of minimum requirements for all aspects of housing construction. The lack of a unified body of such regulations at the state level raises the question of the possibility of sub-standard housing. The wide variation among codes presently in force is far greater than that required to accommodate the differences in climatic and geological conditions.

published in the Florida bar journal 74-167 (codified at Fla. Stat. §§ 553.70-895 (1991)).
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1. Fla. Stat. § 553.84 (1991). Section 553.84 provides:

Statutory civil action: Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the State Minimum Building Codes, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation.

2. See discussion infra and text accompanying notes 50-63.

3. The economic loss rule provides that, unless a defective product causes personal injury or damage to property other than the defective product itself, a plaintiff is limited to contract remedies, if any, for the recovery of economic loss caused by the product, and may not recover in tort. Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 900-02 (Fla. 1987); see also infra text accompanying notes 65-73.


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7. House Analysis, supra note 5, at 1; Senate Evaluation, supra note 6, at 1.

8. Senate Evaluation, supra note 6, at 1.


10. HISTORY OF LEGISLATION, 1974 REGULAR SESSION, HOUSE BILL ACTIONS REPORT, at 332. The Governor signed the measure on June 11, 1974 and the Act became effective.
III. THE SOUTH FLORIDA BUILDING CODE—AN OVERVIEW

The South Florida Building Code (the Code) was included as one of the four minimum building codes which local governments could adopt to comply with the Act.\(^\text{15}\) The Code governed construction activities within Dade and Broward Counties prior to enactment of the statute.\(^\text{16}\) The Dade and Broward editions differ, however, having been amended by the respective counties from time to time.

The Code’s express purpose plays an important role in its interpretation:

The purpose of this Code is to provide certain minimum standards, provisions and requirements for safe and stable design, methods of construction and uses of materials in buildings and/or structures.


12. Id. § 553.79.
13. Id. §§ 553.80, 83.
14. Id. § 553.84.
15. Id. § 553.73(2)(d).
16. In Dade County, the Code was originally adopted by the Board of County Commissioners by Ordinance 57-22 in 1957. In 1971, the Florida Legislature by special act enacted the 1970 Dade County edition of the Code as the building code for Broward County. 1971 Fla. Laws ch. 71-575. The special act was incorporated into the Broward County Charter by public referendum as of March 9, 1976. References herein are to the Dade County edition of the Code.

18. Id. § 501.1. Types of occupancies include theaters, auditoriums and similar uses, schools, hospitals, jails, warehouses and similar storage facilities, stores and office buildings, and multiple-residential and single-family dwellings. This article will focus primarily on single-family and condominium occupancies.
19. Id. § 501.2.
20. See id. Part V, chs. 17-22 (fire resistance of various types of construction), Part VI, chs. 23-30 (engineering and construction regulations).
21. See id. ch. 34.
22. Id. § 204.
23. The equivalency approval for staples and particle board was rescinded following the hurricane. Dade County, Fla., Ordinance 92-89 (Sept. 15, 1992). Likewise, the Dade County
with building construction responsibility to adopt one of the State Minimum Building Codes unless the previous local code, if any, was more stringent than the minimum code. 11 Further, issuance of building permits was prohibited until the local building official reviewed the proposed plans and specifications for compliance with the applicable State Minimum Building Code. 12 The Act placed enforcement responsibility in the hands of the local governments and permitted code enforcement officials to seek injunctive relief to enjoin construction activity which does not satisfy the requirements of the locally adopted State Minimum Building Code. 13

Section 15 of the Act, now section 553.84 of the Florida Statutes, sets forth a civil cause of action and indicates that such remedy is cumulative with other available avenues of relief.14

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To accomplish this purpose, subsequent provisions of the Code detail the standards by which buildings must be constructed and which the performance of systems and materials will be measured.

The Code imposes different construction requirements based upon the proposed use or character, defined as "occupancy," of the building. 18

With respect to all types of occupancies, the Code prescribes standards for, among other things, ingress and egress, structural framework, walls, ceilings, roofs, doors and windows, light and ventilation and plumbing. 19 The Code also includes standards based upon the fire-resistant qualities of the materials used in construction, and contains engineering regulations governing the load-bearing capacities of various design methods and structural building materials and components. 20

Of particular importance in connection with Hurricane Andrew, the Code prescribes the manner in which roofs must be constructed and the materials required for the fastening of roof components and coverings. 21

Much of the controversy surrounding hurricane-related damage stemmed from the use of staples in lieu of nails, and press board in lieu of plywood in roof construction.

Neither the Dade nor Broward County editions of the Code expressly permit staples for fastening or anchoring the sheathing to roof trusses. The Code contains, however, a mechanism for obtaining approval of products functionally equivalent to those specified in the Code. 22

Pursuant to this procedure, builders in Dade County received approval for the use of staples as functionally equivalent to nails, and pressboard as functionally equivalent to plywood in roof construction. 23

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http://nsuworks.nova.edu/nlr/vol17/iss3/1
The Code also governs the characteristics and installation of windows. Standards are prescribed for the design, size, glazing, strength and safety features of windows, glass panels and sliding doors.\textsuperscript{24} To establish that a particular product conforms to these requirements, the Code mandates testing of operative window and door assemblies pursuant to the standards of the pertinent industry authority and in accordance with appropriate inward and outward velocity specifications.\textsuperscript{25}

Decisions to permit the use of staples as functionally equivalent to nails, and other matters of interpretation and enforcement of the Code in Dade County, are typically made by a Board of Rules and Appeals (the Board).\textsuperscript{26} The Board is to be comprised of twenty-one members representing various building trades and design professionals, as well as consumer advocates.\textsuperscript{27} The Board's function is "to determine the suitability of alternate materials and types of construction to provide for reasonable interpretation of the provisions of this Code and to assist in the control of the construction of buildings and/or structures."\textsuperscript{28}

Such Boards, as is the case in Broward County, are typically independent and, their decisions are final within the administrative process, leaving only a court challenge available for further review.\textsuperscript{29} The Board enjoys considerable latitude in interpreting the Code and resolving ambiguities.\textsuperscript{30}

Even with this added layer of review, disappointed participants in the Board's review process in Dade County, like their counterparts in other jurisdictions, may still challenge an adverse decision in court. Litigants,

\begin{itemize}
  \item \textbf{Id.} \textsuperscript{23} The Code permits any person aggrieved by a decision of the Board, whether or not a party to the decision, to apply for a writ of certiorari "to correct errors of law of such decision." \textit{Id.}
  \item \textbf{Id.} \textsuperscript{24} See Seibert v. Bayport Beach & Tennis Club Ass'n, Inc., 573 So. 2d 889 (Fla. 2d Dist. Ct. App. 1990). In Seibert, a condominium association sued the architect who designed the condominium development, alleging improper fire exit design. Both parties presented expert testimony interpreting the fire exit requirements of the applicable building code. The jury found the architect liable for defective fire exit design. The Second District reversed, holding that the trial court erroneously allowed the experts to testify as to their interpretations of the building code. According to the court, "[i]t was the duty of the trial court to interpret the meaning of the code and instruct the jury concerning that meaning. Any conflicts in interpretation were for the court to resolve and their resolution was not a jury issue." \textit{Id.} at 892 (citation omitted).
  \item \textbf{Id.} See also Williams v. Department of Transp., 579 So. 2d 226, 230-31 (Fla. 1st Dist. Ct. App. 1991) (error to permit expert testimony that site plan proposals would comply with applicable codes and ordinances); Harloff v. City of Sarasota, 573 So. 2d 1324, 1327-28 (Fla. 2d Dist. Ct. App. 1991) (agency interpretations of governing statutes are entitled to great weight); Humbosco v. Department of Health & Rehabilitative Servs., 476 So. 2d 258, 261 (Fla. 1st Dist. Ct. App. 1985) ("when an agency committed with authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible or even, in the view of some, preferable"); Devlin v. City of Hollywood, 351 So. 2d 1022, 1026 (Fla. 4th Dist. Ct. App. 1978) (error to rely upon expert testimony to determine the meaning of terms in the Civil Service Act). Expert testimony may only be presented if the expert's specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. \textit{Seibert}, 573 So. 2d at 891.
  \item \textbf{Id.} \textsuperscript{25} See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969) (the "purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws"); see also Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Fortner Enters. v.
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Such Boards, as is the case in Broward County, are typically independent, and their decisions are final within the administrative process, leaving only a court challenge available for further review. The Board enjoys considerable latitude in interpreting the Code and resolving ambiguities.

Even with this added layer of review, disappointed participants in the Board’s review process in Dade County, like their counterparts in other jurisdictions, may still challenge an adverse decision in court. Litigants, however, typically find this avenue quite narrow. Notwithstanding the technical nature of the Code and the problem of interpretation that often lies at the heart of each judicial proceeding in which it is at issue, courts do not permit experts to opine on the proper construction of the Code. Interpretation of the Code is a pure question of law for the trial judge, who generally must defer to the construction advanced by the enforcing official if such construction is permissible, i.e., rational.

The process of code enforcement and interpretation described above principally involves participants in the construction process, particularly contractors and subcontractors. Section 553.84, by contrast, brings the homeowner into the process by affording a cause of action for violation of the building code.

Like the concept of "private attorneys general" that infuses the antitrust laws, section 553.84 encourages homeowners to

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31. Id. § 203.7. The Code permits any person aggrieved by a decision of the Board, whether or not a party to the decision, to apply for a writ of certiorari "to correct errors of law of such decision." Id.

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assist in the code enforcement process by attempting to vindicate individual injuries caused by code violations. As discussed below, although this theory is appealing, the limitations inherent in the statute diminish its utility to homeowners in construction defects litigation.

IV. AVAILABILITY AND SCOPE OF THE STATUTORY REMEDY

As with many statutory remedies, analysis of section 553.84 presents threshold questions of what duty, if any, is owed, and to whom. The broad language of the statute also prompts an inquiry into the nature and scope of the remedy afforded. The seemingly straightforward provision of a civil remedy for violation of the building code belies the complexity of the legal issues involved.

A. Who Can Sue?

Section 553.84 provides that a party may bring a class action to redress violations of the building code.36 Although this aspect of section 553.84 has not been considered by the courts, legislative prescription that a class action may proceed, without more, is likely an unconstitutional encroachment upon an essentially judicial determination.37 Although the Florida Rules of Civil Procedure facially permit individual homeowners to serve as class representatives, prospective representatives must, notwithstanding section 553.84, satisfy all requirements and restrictions of a typical class action.38 In the case of a residential development built by different

contractors with different materials utilizing different methods of construction, and where residents may have suffered different types of damage, class certification may be unattainable.39

The likely unenforceability of the statutory class action provision and the difficulties that will be faced in obtaining class certification under rule 1.220 will effectively thwart efforts by residents of hurricane-ravaged communities to enjoy the benefits of class litigation. Thus, even if hurricane-related lawsuits eventually contain claims under section 553.84, individual homeowners will be left to their own devices, and resources, to pursue their statutory remedies for building code violations.

B. Who Can Be Sued?

One of the most perplexing questions under section 553.84 is the identity of potentially culpable defendants in actions arising under the statute. To answer this question, it is necessary to determine the nature of the statutory remedy in the first instance.

Actions for construction defects typically contain contract and tort claims. Contract based theories ordinarily include claims for breach of express warranties, where the construction or purchase and sale documents include such warranties,40 and for breach of the judicially implied warranties of habitability, compliance with plans and specifications, and good workmanship and compliance with the building code.41 Tort claims gen-

1. See Maner Properties, Inc. v. Siksay, 489 So. 2d 842, 845-46 (Fla. 4th Dist. Ct. App. 1986) (class action inappropriate to claims by mobile home park residents regarding negligent placement and installation of mobile homes; "where separate fact situations are involved concerning alleged negligence or violations with regard to separate pieces of property, a class action is generally not an appropriate means of resolving the claims"); Cohen v. Camino Sheridan, Inc., 466 So. 2d 1212, 1214 (Fla. 4th Dist. Ct. App. 1985) (class action inappropriate where homeowners alleged liability for leaks in individual roofs, which may have been built at different times and by different people). K.D. Lewis Enters. v. Smith, 445 So. 2d 1033, 1034 (Fla. 5th Dist. Ct. App. 1984) (trial court properly refused to allow class action by tenants regarding landlord's noncompliance with housing code as to their individual apartments, because "[t]he extent nature and effect of such omission or non-compliance would unquestionably vary from apartment to apartment and from tenant to tenant").

40. See e.g., Rodriguez v. Leonard, 477 So. 2d 19 (Fla. 3d Dist. Ct. App. 1985) (purchase agreement provided that, at the time of closing, there would be no "violation of applicable building codes" and "the house would conform to the plans submitted").

41. See Schmeeck v. Sea Oats Condominium Ass'n, Inc., 441 So. 2d 1092 (Fla. 5th Dist. Ct. App. 1983) (good workmanship and compliance with building code); David v. B & J


37. See Avila S. Condominium Ass'n, Inc. v. Kappa Corp., 347 So. 2d 599, 607-08 (Fla. 1977) (statutory provision attempting to permit condominium association to maintain class action seeks "to define the proper parties in suits litigation substantive rights" and is thus unconstitutional).

38. Fla. R. Civ. P. 1.220. These requirements include, in all class actions, the numerosity of the class members; common questions of law and fact among the members of the class; the typicality of the class representative's claim; and fair and adequate protection and representation of the class members by the class representative. Id. at 1.220(a). In addition, a class action also requires that separate prosecution of claims would create a risk of inconsistent adjudications; the propriety of injunctive relief concerning the class as a whole; or predominance of common questions of law and fact over individual questions of law or fact. Id. at 1.220(b). Condominium associations, however, are expressly permitted to maintain actions, without being subject to the requirements of rule 1.220. Id. at
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41. See Schmeck v. Sea Oats Condominium Ass’n, Inc., 441 So. 2d 1092 (Fla. 5th Dist. Ct. App. 1983) (no breach of compliance with building code); David v. B & J
eral negligence in the construction process.\footnote{6} Section 553.84 falls into a third and separate category, that of statutory remedies. As a general proposition, the legislature may grant or create a right, impose an obligation or liability, or give a right of action unknown to the common law.\footnote{4} There is an important distinction, however, between substantive rights and statutory remedies. The remedy is merely the means by which the substantive right is enforced. Accordingly, if the legislature intends to differentiate a statutory remedy from existing common law theories of recovery, it is incumbent upon the legislature clearly to define the conditions under which liability will arise for violation of the statute.\footnote{4}

Section 553.84 provides a remedy in damages for violation of the building code, but does not specify the standards by which violations should be determined, or identify the parties who may properly be held liable for such violations. In this respect, section 553.84 on its face suggests strict

\textbf{Holding Corp.}, 349 So. 2d 676 (Fla. 3d Dist. Ct. App. 1977) (material compliance with plans and specifications); \textbf{Gable v. Silver}, 258 So. 2d 11 (Fla. 4th Dist. Ct. App.), aff'd, 264 So. 2d 418 (Fla. 1972) (warranty of habitability). Because this Article treats the statutory remedy provided in § 553.84, rather than contract remedies, warranty claims are not further discussed. It is notable, however, that the legislature has created a statutory warranty in favor of condominium unit owners. Section 718.203 of the Florida Statutes provides a warranty for structural defects for three years from completion or one year from turnover, whichever is greater, but in no event more than five years. \textbf{Fla. Stat.} § 718.203 (Supp. 1992). The statutory warranty, unlike judicially-implicit warranties, extends to subsequent purchasers. \textit{id.}

\footnote{42} See, e.g., \textit{Continuum Condominium Ass'n v. Continuum VI, Inc.}, 549 So. 2d 1125 (Fla. 3d Dist. Ct. App. 1989); \textbf{Drexel Properties, Inc. v. Bay Colony Club Condominium}, 406 So. 2d 515 (Fla. 4th Dist. Ct. App. 1981); \textbf{Navajo Circle, Inc. v. Development Concepts Corp.}, 373 So. 2d 689 (Fla. 2d Dist. Ct. App. 1979); \textbf{Simmons v. Owens}, 363 So. 2d 142 (Fla. 1st Dist. Ct. App. 1978). The efficacy of the negligence theory has been eroded by judicial embrace of the economic loss doctrine. See \textit{infra} text accompanying notes 65-73. Tort claims for intentional or negligent misrepresentations or nondisclosure, particularly where a developer markets homes or communities by reference to the quality of construction, may also be asserted. Additionally, the Florida Statutes offer civil remedies for false statements in connection with the sale of lots or units and false advertising generally. \textbf{Fla. Stat.} §§ 486.022(1)(b), 817.41(1) (Supp. 1992). Both statutes require plaintiffs to prove each element of the common law tort of fraudulent inducement. See \textbf{Vance v. Indian Hammock Hunt & Riding Club, Ltd.}, 403 So. 2d 1567, 1570 (Fla. 4th Dist. Ct. App. 1981). Claims based upon misrepresentations in the marketing process are beyond the scope of this article.

\footnote{43} See \textbf{Drake Lumber Co. v. Semple}, 130 So. 577 (Fla. 1930).

\footnote{44} Cf. \textbf{Thomber v. City of Fort Walton Beach}, 568 So. 2d 914, 918 (Fla. 1990) (the presumption is that no change in the common law is intended unless the statute is explicit in that regard).

\footnote{45} Strict liability, or liability without fault, governs activities which, though lawful, are so fraught with the possibility of harm to others that the law permits them only if they pay their own way. See \textbf{Cities Serv. Co. v. State}, 312 So. 2d 799, 801-02 (Fla. 2d Dist. Ct. App. 1975) (the justification for strict liability is that useful but dangerous activities must pay their own way). The doctrine of strict liability applies primarily to abnormally dangerous, nonsuitable uses of land and with respect to products which cause physical injury. See \textit{id.}; \textbf{West v. Caterpillar Tractor Co.}, 336 So. 2d 80 (Fla. 1976). Strict liability is imposed by statute upon the owner of a dog which bites a person who is in a public place or who is lawfully on the property of the dog's owner. \textbf{Fla. Stat.} § 767.04 (1986).

\footnote{46} See \textbf{Holland v. Baguette, Inc.}, 540 So. 2d 197, 198 (Fla. 3d Dist. Ct. App. 1989) (violation of South Florida Building Code only constitutes evidence of negligence); \textbf{Cadillac Fairview, Inc. v. Casperos}, 468 So. 2d 417, 423 (Fla. 3d Dist. Ct. App. 1985) (violation of code could not, by itself, support a finding that developer was liable for injuries in worker's compensation action) (citing \textbf{Fla. Stat.} § 553.72 (1988)); \textbf{Grand Union Co. v. Rocker}, 454 So. 2d 14, 15-16 (Fla. 3d Dist. Ct. App. 1984) (in personal injury action resulting from fall on ramp which did not comply with building code, it was error to instruct jury that violation constituted negligence per se). The Fourth District has reached the opposite conclusion. See \textbf{Brown v. South Broward Hosp. Dist.}, 402 So. 2d 58 (Fla. 4th Dist. Ct. App. 1981). Even in the Third District, however, violations of fire safety provisions are deemed to give rise to per se liability. See \textbf{Del Riosa v. Industrial Affiliates, Ltd.}, 556 So. 2d 1148 (Fla. 3d Dist. Ct. App. 1990).

\footnote{47} See \textbf{Easterday v. Maiello}, 518 So. 2d 260 (Fla. 1988); see also \textbf{Neumann v. Davis Water & Waste, Inc.}, 433 So. 2d 559, 561 (Fla. 2d Dist. Ct. App. 1983) (declining to extend strict liability principles to structural improvements to real estate); \textbf{Alvarez v. DeAguirre}, 395 So. 2d 213, 216 (Fla. 3d Dist. Ct. App. 1981) (general contractor could not be held strictly liable as a matter of law for allegedly faulty electrical system installed in house); \textbf{Strathmore Riverine Villas Condominium Ass'n v. Pever Dev. Corp.}, 369 So. 2d 971, 972-73 (Fla. 2d Dist. Ct. App. 1979) (declining to apply strict liability principles in connection with real estate transactions).

\footnote{48} This approach logically follows from the Third District's prior holdings that the violation of the building code constitutes evidence of negligence (and not negligence per se). See \textbf{Holland}, 540 So. 2d at 198; \textbf{Cadillac Fairview}, 468 So. 2d at 421; \textbf{Grand Union}, 454
lary allege negligence in the construction process.\(^{42}\)

Section 553.84 falls into a third and separate category, that of statutory remedies. As a general proposition, the legislature may grant or create a right, impose an obligation or liability, or give a right of action unknown to the common law.\(^{43}\) There is an important distinction, however, between substantive rights and statutory remedies. The remedy is merely the means by which the substantive right is enforced. Accordingly, if the legislature intends to differentiate a statutory remedy from existing common law theories of recovery, it is incumbent upon the legislature clearly to define the conditions under which liability will arise for violation of the statute.\(^{44}\)

Section 553.84 provides a remedy in damages for violation of the building code, but does not specify the standards by which violations should be determined, or identify the parties who may properly be held liable for such violations. In this respect, section 553.84 on its face suggests strict liability for construction defects arising from non-compliance with the Code.\(^{45}\) The Third District Court of Appeal has held in the negligence context, however, that a violation of the Code does not give rise to strict liability,\(^{46}\) and other courts have similarly rejected attempts to hold developers strictly liable for defects in construction.\(^{47}\) In view of the importance of the construction industry to Florida’s economy and growth, it seems unlikely that the legislature intended section 553.84 to be used to impose strict liability upon participants in the construction process.

Assuming that the legislature did not intend liability without fault, the Third District Court of Appeal, in two recent cases interpreting section 553.84, has applied negligence principles to determine the scope of liability under the statute.\(^{48}\) The elements of negligence include a duty to protect

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42. See, e.g., Continuum Condominium Ass’n v. Continuum VI, Inc., 549 So. 2d 1125 (Fla. 3d Dist. Ct. App. 1989); Drexl Properties, Inc. v. Bay Colony Club Condominium, 48 So. 2d 515 (Fla. 4th Dist. Ct. App. 1981); Navajo Circle, Inc. v. Development Group Corp., 373 So. 2d 689 (Fla. 2d Dist. Ct. App. 1979); Simmons v. Owens, 363 So. 2d 142 (Fla. 1st Dist. Ct. App. 1978). The efficacy of the negligence theory has been endorsed by judicial embrace of the economic loss doctrine. See infra text accompanying notes 65-73. Tort claims for intentional or negligent misrepresentations or nondisclosure, particularly where a developer markets homes or communities by reference to the quality of construction, may also be asserted. Additionally, the Florida Statutes offer civil remedies for false statements in connection with the sale of lots or units and false advertising generally. Fla. Stat. §§ 498.022(1)(b), 817.41(1) (Supp. 1992). Both statutes require plaintiffs to prove each element of the common law tort of fraudulent inducement. See Vance v. Island Hammock Hunt & Riding Club, Ltd., 403 So. 2d 1367, 1370 (Fla. 4th Dist. Ct. App. 1981).

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46. See Holland v. Baguette, Inc., 540 So. 2d 197, 198 (Fla. 3d Dist. Ct. App. 1989) (violation of the Publications Florida Building Code only constitutes evidence of negligence); Cadillac Fairview, Inc. v. Cespedes, 468 So. 2d 417, 421 (Fla. 3d Dist. Ct. App. 1983) (violation of code could not, by itself, support a finding that developer was liable for injuries in worker’s compensation action) (citing FLA. STAT. § 553.72 (1988)); Grand Union Co. v. Rocker, 454 So. 2d 14, 15-16 (Fla. 3d Dist. Ct. App. 1984) (in personal injury action resulting from fall on ramp which did not comply with building code, it was error to instruct jury that violation constituted negligence per se). The Fourth District has reached the opposite conclusion. See Brown v. South Broward Hosp. Dist., 402 So. 2d 58 (Fla. 4th Dist. Ct. App. 1981). Even in the Third District, however, violations of fire safety provisions are deemed to give rise to per se liability. See Del Ricas v. Industrial Affiliates, Ltd., 556 So. 2d 1148 (Fla. 3d Dist. Ct. App. 1990).

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 Published by NSUWorks, 1993

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Sierra sued Omni, Jordan Marsh, its parent Allied Stores, the restaurant and the Omni architects on theories of negligence and building code violations. Following settlements with the restaurant and the architects, the case proceeded to trial against Omni and Jordan Marsh. The jury exonerated Jordan Marsh and Sierra appealed, relying upon section 553.84, arguing that Jordan Marsh should have been held strictly liable.52

The Third District recognized that section 553.84 "creates an independent cause of action," but rejected "the proposition that the statute creates strict liability against the owner whose property, although the source of damage, is not in violation of the building code."53 The court found that Jordan Marsh's building complied with the building code until altered by Omni's contractors, and that Jordan Marsh had not, by conduct or contract, assumed liability for Omni's negligence or that of its contractors.54

More importantly for purposes of section 553.84, the Third District cast its conclusions in negligence terminology by examining whether Jordan Marsh owed any duty to Sierra. The court stated that the Code does not impose a duty upon a landowner to supervise construction undertaken by an independent contractor.55 Quoting section 553.84, the court indicated that liability under the statute is imposed on the person or party who commits the violation, which was not Jordan Marsh.56 Applying these principles, the court held that, as a matter of law, Jordan Marsh owed no duty to Sierra under the Code and thus could not be liable under the statute.57

The Third District next visited section 553.84 in Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.58 In Toppino and its companion cases, several condominium unit owners sued a supplier of concrete used in the construction of the condominium. The homeowners alleged that the concrete had an excessive chloride content which caused the reinforcing steel used in the building to rust and expand, in turn causing the structural components of the building to crack. The complaints included claims for breach of implied warranty, negligence, product liability and, pursuant to section 553.84, violation of the Code.

The trial court dismissed all counts with prejudice. The court dismissed the warranty count because of lack of privity and the negligence and product liability counts by applying the economic loss rule.59 With respect to the statutory claim, the trial court ruled that the building code does not govern suppliers; Toppino thus had no duty to comply with the Code and, as a matter of law, had no liability to the homeowners.60

The Third District Court of Appeal affirmed. The court stated that, pursuant to section 553.73(2)(d) of the Act, the State Minimum Building Codes "shall govern the construction, erection, alteration, repair or demolition of any building."61 As a supplier, Toppino had not performed

54. Id.
55. Sierra, 538 So. 2d at 944.
56. Id.
57. Id.
58. 588 So. 2d 631 (Fla. 3d Dist. Ct. App. 1991). The case is pending on appeal in the Florida Supreme Court under Case Nos. 79-127 and 79-128.
59. For a discussion of the economic loss rule, see infra text accompanying notes 65-73.
60. Toppino, 588 So. 2d at 633.
61. Id. at 634.

So. 2d at 16. Negligence is the failure to exercise that degree of care, precaution and vigilance that an ordinarily prudent person would exercise. See De Wald v. Quausten, 69 So. 2d 919, 921 (Fla. 1952). The Code establishes the minimum standards for construction. S. FLA. BDG. CODE § 102. Violation of the building code would thus translate into failure to meet the minimum standards of proper construction, which seems more like a formulation of negligence per se than mere evidence of negligence.

49. See Tierder v. Little, 502 So. 2d 923, 925 (Fla. 3d Dist. Ct. App. 1987).
50. 538 So. 2d 943 (Fla. 3d Dist. Ct. App. 1989).
51. Id.
52. Id. at 944.
53. Id.
others, a failure to perform that duty, and injury or damage to the plaintiff proximately caused by such failure. The Third District has imported the requirements of duty and causation into its analysis of section 553.84. The Third District first addressed the statutory remedy in Sierra v. Allied Stores Corp. In Sierra, a restaurant patron in the Omni mall complex in Miami allegedly suffered carbon monoxide poisoning while dining. As related by the court:

The Omni development was constructed around an already existing Jordan Marsh store. An exhaust pipe from Jordan Marsh's emergency generator was originally vented outside the store in accordance with building-code requirements. Subsequently, Omni's builders extended Jordan Marsh's exterior wall in order to provide an inside fire corridor adjacent to the new restaurant. The generator's exhaust pipe was improperly vented through a concealed attic inside the Omni structure. On the night of the restaurant's grand opening, Jordan Marsh's emergency generator was automatically activated by an electrical power failure, emitting carbon monoxide fumes into the restaurant through its air conditioning system.

Sierra sued Omni, Jordan Marsh, its parent Allied Stores, the restaurant and the Omni architects on theories of negligence and building code violations. Following settlements with the restaurant and the architects, the case proceeded to trial against Omni and Jordan Marsh. The jury exonerated Jordan Marsh and Sierra appealed, relying upon section 553.84, arguing that Jordan Marsh should have been held strictly liable. The Third District recognized that section 553.84 "creates an independent cause of action," but rejected "the proposition that the statute creates strict liability against the owner whose property, although the source of a harmful agent, is not in violation of the building code." The court found that Jordan Marsh's building complied with the building code until altered by Omni's contractors, and that Jordan Marsh had not, by conduct or contract, assumed liability for Omni's negligence or that of its contractors.

More importantly for purposes of section 553.84, the Third District cast its conclusions in negligence terminology by examining whether Jordan Marsh owed any duty to Sierra. The court stated that the Code does not impose a duty upon a landowner to supervise construction undertaken by an independent contractor. Quoting section 553.84, the court indicated that liability under the statute is imposed on the person or party who commits the violation, which was not Jordan Marsh. Applying these principles, the court held that, as a matter of law, Jordan Marsh owed no duty to Sierra under the Code and thus could not be liable to her under the statute.

The Third District next visited section 553.84 in Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc. In Toppino and its companion cases, several condominium unit owners sued a supplier of concrete used in the construction of the condominium. The homeowners alleged that the concrete had an excessive chloride content which caused the reinforcing steel used in the building to rust and expand, in turn causing the structural components of the building to crack. The complaints included claims for breach of implied warranty, negligence, product liability and, pursuant to section 553.84, violation of the Code.

The trial court dismissed all counts with prejudice. The court dismissed the warranty count because of lack of privity and the negligence and product liability counts by applying the economic loss rule. With respect to the statutory claim, the trial court ruled that the building code does not govern suppliers; Toppino thus had no duty to comply with the Code and, as a matter of law, had no liability to the homeowners.

The Third District Court of Appeal affirmed. The court stated that, pursuant to section 553.73(2)(d) of the Act, the State Minimum Building Codes "shall govern the construction, erection, alteration, repair or demolition of any building." As a supplier, Toppino had not performed

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49. See Tinder v. Little, 502 So. 2d 923, 925 (Fla. 3d Dist. Ct. App. 1987).
50. 538 So. 2d 943 (Fla. 3d Dist. Ct. App. 1989).
51. Id.
52. Id. at 944.
53. Id.
54. Id.
55. Sierra, 538 So. 2d at 944.
56. Id.
57. Id.
58. 588 So. 2d 631 (Fla. 3d Dist. Ct. App. 1993). The case is pending on appeal in the Florida Supreme Court under Case Nos. 79-127 and 79-128.
59. For a discussion of the economic loss rule, see infra text accompanying notes 65-73.
60. Toppino, 588 So. 2d at 633.
61. Id. at 634.
any of these functions on the condominium project. The court concluded that Toppino had no duty to comply with the building code, absent which the homeowners had no remedy against Toppino under section 553.84.62

The Sierra and Toppino decisions present two significant issues regarding the scope of section 553.84. As discussed above, the first pertains to the identity of potential defendants in an action under the statute. Reading Sierra and Toppino together, a developer apparently has a duty to comply with the building code but, acting through contractors and subcontractors, arguably cannot itself "commit" a violation of the code. A supplier may "commit" a violation of the standards prescribed in the code, but has no duty of compliance. General contractors typically hire subcontractors, who may have a duty of compliance and may "commit" violations, unless they retain sub-subcontractors. Although general contractors coordinate and supervise the work of subcontractors, and subcontractors, in turn, supervise the work of sub-subcontractors, it is unclear whether negligent supervision equates with "committing" a building code violation under section 553.84.

Who may be liable under section 553.84? Under its present formulation, this is difficult to determine. The answer may turn, however, on the second issue raised but not addressed by Sierra and Toppino, namely the interrelation between the statutory remedy and the economic loss doctrine, to which we now turn.63

V. SECTION 553.84 AND THE ECONOMIC LOSS RULE

As discussed above, construction defects actions raise both contract and tort issues. Different impulses guide tort and contract duties, however. Tort law focuses on safety and the possibility of physical injury to persons or other property. Contract principles, particularly the principles of warranty, govern product value and quality. The classic formulation of the divergence between contract and tort protection was enunciated by Justice Traynor in Seely v. White Motor Co.64

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not

62. Id.
63. Toppino involved both the economic loss rule and § 553.84, but the Third District did not have occasion to discuss their relationship. See infra text accompanying notes 72-73.
64. 403 P.2d 145 (Cal. 1965).

arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.65

The question in the construction law context, as it has long been in the context of products, is whether economic loss—repair and replacement costs and diminution of value—is recoverable under a tort or a contract theory. Economic loss has traditionally been the province of contract and warranty law.66 Courts have generally thought the law of sales, with its rules governing the foreseeability of loss and expectation damages, to be better suited to redress purely economic loss.67 Courts also have cast a wary eye on the expansion of tort law into this area: "[I]f this development were allowed to progress too far, contract law would drown in a sea of tort."68

The majority of states, and the United States Supreme Court in East River, have thus held that pure economic loss, unaccompanied by physical injury or injury to property distinct from that which causes the damage, is not recoverable in a negligence action, including in the construction context.69 This is the law of Florida.70

65. Id. at 151.
67. See East River, 476 U.S. at 866; Florida Power & Light, 510 So. 2d at 901.
68. East River, 476 U.S. at 866.
70. Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899 (Fla. 1987); see also AFM Corp. v. Southern Bell Tele. Co., 515 So. 2d 180 (Fla. 1987); Actona
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64. 403 P.2d 145 (Cal. 1965).
65. Id. at 151.
66. See East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986); Seely, 403 P.2d at 151.
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In Toppino, the Third District reaffirmed the economic loss rule. The court rejected the homeowner plaintiffs' contention that the allegedly defective concrete caused damage to "other property," the steel reinforcing bars and the buildings themselves, removing their claims from the ambit of the economic loss doctrine.71 Toppino "supplied a component which became an integral part of the homeowners' structure."72 Holding that the entire condominium was the property for purposes of applying the economic loss rule, and finding that the homeowners did not allege personal injury or damage to property apart from their condominium, the court ruled that the plaintiffs could not maintain a cause of action against Toppino in tort.73

The Third District next addressed the homeowners' claims against Toppino for building code violations. The court rejected these claims,74 but did not discuss whether the economic loss doctrine might bar the statutory remedy. Because Florida Statute section 553.84 is, on its face, a statutory, as opposed to tort or contract, remedy, it is tempting to postulate that the economic loss doctrine does not apply to actions under section 553.84, which permits homeowners to recover purely economic losses stemming from construction defects. If this were the case, the statutory remedy would be of immeasurable value in construction litigation arising from Hurricane Andrew. However, this conclusion would be too easily reached in view of the silence of the legislative history on this issue75 and the Third District's analysis of the statutory remedy in the language of traditional negligence concepts.76 It should not be presumed that the legislature intended in 1974 simply to gloss over the long-standing distinctions between contract and tort or would intend today to sweep aside the economic loss doctrine which has taken firm root in Florida. If section 553.84 is predicated upon negligence standards as the Third District's decisions suggest, the economic loss rule would bar recovery of repair and replacement costs made necessary by the hurricane, making the statutory remedy virtually useless in the aftermath of the hurricane.

Since the purpose of the Act, however, is to "allow reasonable protection for public safety, health, and general welfare for all the people of Florida at the most reasonable cost to the consumer,"77 this formulation is also unpalatable. Under the maxim ut res magis valeat quam pereat,78 courts are required to find ways within the terms of a statute to give effect to its purpose rather than to defeat it.79

Moreover, although the Supreme Court stated in Florida Power & Light v. Westinghouse Electric Corp.80 that the economic loss rule was "not a new principle of law in Florida" and had "a long, historic basis,"81 in 1973, one year before promulgation of section 553.84, the court had ruled that a general contractor who sustained an economic loss at the hands of a negligent architect had a cause of action against the architect notwithstanding the absence of privity.82 Accordingly, in 1974 the legislature could have believed that there was no economic loss impediment to a statutory-based negligence action premised on violations of the building code.

The difficulty essentially lies with the legislature's failure to indicate precisely why it included a private right of action. It is unlikely that the legislature desired either to impose strict liability on construction activities or to allow the economic loss doctrine to defeat the statutory cause of action. Because these appear to be the competing alternatives, however, and the legislative history of section 553.84 does not offer any clues, only the legislature can resolve this conundrum.

In so doing, the legislature should measure the distinct purposes of contract and tort law against the stated purpose of the Act to allow


71. Toppino, 588 So. 2d at 633.
72. Id.
73. Id. at 633-34.
74. See supra text accompanying notes 60-62.
75. See supra text accompanying notes 6-9.
76. See supra text accompanying notes 55-57.
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72. Id.
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VI. INDIVIDUAL LIABILITY OF CORPORATE OFFICERS AND DIRECTORS

Assuming that at least some participants in the construction process had a duty to comply with the Code and committed a violation, a likely question in hurricane-related litigation, as it is in construction and civil litigation generally, is whether officers and directors of corporate builders or contractors may be individually liable to homeowners. This question is germane to other potential theories of recovery as well, not only to the statutory remedy.

A. Section 553.84

Section 553.84 provides a cause of action against "the person or party who committed the violation." 84 In view of the duty requirement interpolated into the statute by the Third District and the requirement that the person sought to be held liable have committed the code violation, it would appear that the statutory remedy would not be available against individual officers and directors unless they actively participated in the conduct alleged to have violated the building code. 85 This would presumably require that

84. Id. § 553.84.

the officer or director have participated in specific aspects of the design and construction process.

B. WARRANTY CLAIMS

Contracts and associated sales materials may provide the predicate for express warranty claims, and the judicially implied warranties are available. Warranties, however, express or implied, are corporate responsibilities. Officers and directors are not individually liable for breaches of corporate contracts or corporate warranties. 86 As long as the officer or director does not personally make any warranties to home purchasers or sign any of the sales contracts in a manner suggesting execution in an individual capacity, he should not be held liable on a contract or warranty theory.

C. TORT CLAIMS

Unlike contract or warranty claims, an officer or director can be held liable for misrepresentation or negligence even though committed during the course of corporate employment and regardless of whether the corporation is also liable. 87 Florida law requires, however, as a prerequisite to individual liability on tort claims, personal participation by the officer or director sought to be held liable. 88 A corporate officer or director must have acted tortiously in his individual capacity to be individually liable. 89 If the officer or director has not himself committed a tort, directed another to do so, or ratified another's tortious conduct, he may not be held liable simply by virtue of his status as an officer or director. 90

As a logical matter, if the developer/owner does not "commit" a violation of the building code, see Sierra, 538 So. 2d at 944, neither does the developer's officers or directors.

86. See White-Wilson, 486 So. 2d at 661; Naranja Lakes Condominium No. One, Inc. v. Rizzo, 422 So. 2d 1080, 1080 (Fla. 3d Dist. Ct. App. 1982); Plaza del Prado Condominio Assn' v. GAC Properties, Inc., 295 So. 2d 718, 720 (Fla. 3d Dist. Ct. App. 1974).
87. See P.V. Constr. Corp., 538 So. 2d at 504; Naranja Lakes, 422 So. 2d at 1080; Adams v. Brickell Townhouse, Inc., 388 So. 2d 1279, 1280 (Fla. 3d Dist. Ct. App. 1980).
88. P.V. Constr. Corp., 538 So. 2d at 504; McElveen, 444 So. 2d at 271; White-Wilson, 486 So. 2d at 661.
89. McElveen, 444 So. 2d at 271; White-Wilson, 486 So. 2d at 661.
90. See P.V. Constr. Corp., 538 So. 2d at 504; McElveen, 444 So. 2d at 272. Courts are inclined to limit personal liability. For example, a bare allegation that a corporate officer personally made a misrepresentation or directed another to disseminate misrepresentations, is not insufficient to maintain a cause of action against such officer. See Alsip v. Your Graphics Are Showing, Inc., 531 So. 2d 222, 224 (Fla. 2d Dist. Ct. App. 1988).
protection to the public "at the most reasonable cost to the consumer." 84 Clarification of the statutory remedy in a manner which suggests strict liability for construction activities will likely increase the cost of construction to all consumers at the outset by increasing the cost of doing business to all participants in the construction industry. The existing combination of contract and tort remedies available in the construction context, in which the economic loss rule plays a role, may fix responsibility for loss more effectively on the single individual who owes the duty breached. Accordingly, to balance the competing considerations, the legislature may wish to consider amending section 553.84 to provide expressly which participants in the construction process have a duty to comply with the building code. This approach would avoid the difficulties encountered in Sierra and Toppino and clarify the intended scope of the statutory remedy.

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D. Claims Against Directors

The foregoing analysis applies equally to officers and directors of a corporation. The Florida Statutes contain specific provisions, however, with respect to the role of directors and their potential liability for decisions and conduct in the course of their direction of the corporation.92

Section 607.0830 sets forth the duties of a director, requiring directors to act in good faith, with the care of an ordinarily prudent person in a like position under similar circumstances, and in a manner the director reasonably believes to be in the best interests of the corporation. In discharging these duties, a director is entitled to rely upon information presented by officers and employees of the corporation and others whom the director reasonably believes are reliable or competent in the matters presented, and to consider such other factors as the director deems relevant. Under section 607.0830, "[a] director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section."93

Section 607.0831 elaborates on directors' personal liability. The pertinent portion of section 607.0831 provides that a director cannot be personally liable for monetary damages unless his action or omission regarding corporate management or policy constitutes "recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property."94 This section defines recklessness as "the action, or omission to act, in conscious disregard of a risk . . . [k]nown, or so obvious that it should have been known, to the director; and . . . [k]nown to the director, or so obvious that it should have been known, to be so great as to make it highly probable that harm would follow from such action or omission."95

The legislature added these provisions to the Florida Statutes in 1977, and to date no Florida court has had occasion to address them. Commentators have suggested, however, that they purposely pose a high bar to individual liability.96 Moreover, liability under the statute would seemingly require an underlying personal participation in the construction process of the type discussed earlier. Thus, the stringency of the statutory requirements, in conjunction with the deference to business decisions traditionally accorded by the courts, appears to foreclose this statutory remedy to potential homeowner claimants.

VII. CONCLUSION

Section 553.84 is a remedy in search of a plaintiff, a duty and, perhaps, a purpose. In the wake of Hurricane Andrew, precisely when the statutory remedy could be expected to be of greatest significance, it stands at the intersection of the economic loss rule and strict liability, with no guidance from the legislature as to the direction it should take. Only the legislature can resolve this dilemma, which involves the potential expansion of tort-based liability or contraction of the statutory remedy. In so doing, the legislature should be cognizant of the historic distinctions between different types of remedies and the mechanisms that have been established to apportion liability in the construction context.

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91. See McElvain, 544 So. 2d at 272 ("With regard to personal fault, personal liability cannot be imposed upon the officer simply because of his general administrative responsibilities for performance of some function of his employment. He must have a personal duty towards the injured third person . . . ").
93. Id. § 607.0830(5).
94. Id. § 607.0831(5).
95. Id. § 607.0831(2)(a), (b).
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Equitable Conversion: The Effect of a Hurricane on Real Estate Sales Contracts

Gary S. Gaffney

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I. INTRODUCTION

In August of 1992, Hurricane Andrew slammed the South Florida coast with winds clocked at over 160 miles per hour.¹ It has been estimated that over 63,000 homes (and many more businesses) were either damaged or destroyed.² All types of property were affected; valuable and not-so-valuable; residential and commercial holdings alike. The storm did not discriminate. Property owners incurred damage in more ways than one. Some incurred only slight inconvenience, while others had their homes entirely obliterated. In some cases, the property itself was left undamaged, but the surrounding neighborhood was completely decimated or left somewhat "undesirable."

When the storm hit, a number of these properties were subject to real

¹ Gary S. Gaffney is an attorney and licensed real estate broker whose practice includes all of South Florida. Mr. Gaffney received his J.D. at Nova University, where he served as Editor-in-Chief of the Law Review. He currently sits on the Board of Editors of the Florida Bar Journal.
² Miami Herald, Aug. 30, 1992, at 1A, 32A (citing data released by the National Hurricane Center located in Coral Gables, Florida).
³ Id. at 1A (estimated that 175,000 to 250,000 people were left homeless).
Equitable Conversion: The Effect of a Hurricane on Real Estate Sales Contracts

Gary S. Gaffney

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I. INTRODUCTION

In August of 1992, Hurricane Andrew slammed the South Florida coast with winds clocked at over 160 miles per hour. It has been estimated that over 63,000 homes (and many more businesses) were either damaged or destroyed. All types of property were affected; valuable and not-so-valuable, residential and commercial holdings alike. The storm did not discriminate. Property owners incurred damage in more ways than one. Some incurred only slight inconvenience, while others had their homes entirely obliterated. In some cases, the property itself was left undamaged, but the surrounding neighborhood was completely decimated or left somewhat "undesirable."

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estate contracts set to close. Do purchasers of these damaged properties have to close despite the damage? Must they pay full purchase price? Can sellers be forced to make repairs before closing, or at least grant the buyer a credit? Can either party get out of the deal?

Some of these issues are just now reaching Florida's courts. While a few cases will no doubt settle, quite often neither buyer nor seller will budge. This means litigation. In many cases, the primary issue will be: who bears the risk of the loss? The answer to that question can be found in contract law and principles of equity.

That law, and those principles, as well as the answers to some of the questions posed above, are contained in this article. First, the basic principals of law and equity are identified and reviewed. These principals are then applied to the unique facts arising in the wake of a storm as destructive as Andrew. Throughout the piece, the author offers suggestions as to how the courts can, and most probably will, resolve these issues. It is hoped that the article will provide courts and litigators with an introduction to the basic issues which arise in these situations and a primer (of sorts) with which to deal with them.

3. See, e.g., Mike Vogel, What Happens to a Home Sale Contract When a Hurricane Comes to Town?, MIAMI REV., Sept. 1, 1992, at 1; Robert Kurtz, Post Andrew Suit May Be Few, But Varied, MIAMI REV., Sept. 22, 1992, at 1. The week the hurricane struck, the author's firm had three closings pending. One closing was delayed for several weeks, but eventually closed without further incident; one was mutually rescinded after protracted negotiations; and the third is still left unresolved, among the several cases now pending in South Florida's court system.

4. There is, of course, a preliminary inquiry with respect to the extent of the "damage" incurred. See, e.g., Triple E Dev. Co. v. Floridagold Citrus Corp., 51 So.2d 435, 439-40 (Fla. 1951) (discussing the extent of damage necessary to be deemed "material").

These issues crystallize in situations where a home has been completely destroyed, and the buyer does not wish to purchase it. But what if the roof has blown off the home, while the structure itself remains intact? What if just the pool or driveway have been damaged? What if a large tree has been uprooted, or other distinctive landscaping has been substantially damaged? What if the property itself was left untouched, but the surrounding neighborhood (or economic market) has been devastated? These situations are obviously more problematic, and no doubt it is these situations where most disputes will arise.

5. It should be noted that these situations all involve serious complications or impediments to closing, and do not deal simply with the reasonable time delays caused by the storm. Indeed, many (if not all) scheduled real estate closings in South Florida experienced some sort of delay that week, primarily due to the inability of third parties (lending institutions, title companies, and attorneys) to cope with the systemic breakdown. Electricity and phone service was unavailable in many areas, and the courthouses could not record deeds or other documents. It was as if the world of real estate stood still.


II. HURRICANE DAMAGE: THE BASIC PRINCIPLES OF LAW

In the event that the buyer and seller of a hurricane damaged property cannot resolve their situation by negotiation, each should be prepared for the resolution a court would most likely impose upon them. Naturally, the starting place for this sort of analysis is based in contract law. Before effecting that analysis, however, it would be advisable to pursue a quick digression through the doctrine of equitable conversion as it applies to real estate contract law.

III. THE DOCTRINE OF EQUITABLE CONVERSION

Put simply, the doctrine of equitable conversion is a legal fiction by which an interest in "reality" is converted into "personality," or vice versa. In effect, the doctrine implies an equitable exchange of the interests of vendor and vendee, with each new interest remaining freely transferable, freely transmissible, and freely capable of descent. The doctrine is based on the equitable maxim, "equity deems done what ought to be done." Under the doctrine, when a vendor and purchaser of real property have entered into an executory contract to convey title, the purchaser immediately becomes the "beneficial" owner of the property and the vendor retains only "legal" title—as security for the payment of the purchase price. The
estate contracts set to close. Do purchasers of these damaged properties have to close despite the damage? Must they pay full purchase price? Can sellers be forced to make repairs before closing, or at least grant the buyer a credit? Can either party get out of the deal? Some of these issues are just now reaching Florida’s courts. While a few cases will no doubt settle, quite often neither buyer nor seller will budge. This means litigation. In many cases, the primary issue will be: who bears the risk of the loss? The answer to that question can be found in contract law and principles of equity.

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vendor's interest—the right to receive payment—is treated as personal, the vendee's interest, as realty. Accordingly, when a buyer and seller enter into a binding contract for sale, and the property is damaged before closing, the purchaser will generally bear the risk of loss, and be required to pay the full purchase price, regardless of the extent of the damage. The doctrine of equitable conversion was first adopted in Florida in *Insurance Co. of North America v. Erickson.* In *Erickson,* the vendor of a building under an executory contract tried to collect from his insurance company when, before conveying title, the building was destroyed by

9. See, e.g., Richard H. Lee, The Interests Created by the Installment Land Contract, 19 U. MIAMI L. REV. 367 (1965); Randy R. Koons, Annotation, Risk of Loss by Casualty Pending Contract for Conveyance of Real Property—Modern Cases, 85 A.L.R.4th 233 (1991), and authorities cited therein; Annotation, Rights and Liabilities of Parties in Executory Contract for Sale of Land Taken by Eminent Domain, 27 A.L.R.3d 572, 581-82 (1968) and authorities cited therein. The vendor, as trustee, holds the legal title to the property as security for payment of the purchase price. It is often referred to as "naked legal title." See BOYER, supra note 7, § 34A.23, at 88. In effect, the vendor is granted an "equitable" lien upon the vendee's "equitable" estate as security for payment of the purchase price according to the terms of the agreement. For a discussion of the vendor's lien in Florida, see Alabama-Fla. Co. v. Mays, 149 So. 61, 65 (Fla. 1933).

10. The purchaser's interest is regarded as real property. See Holbrook v. Betton, 5 Fla. 99 (Fla. 1853); BOYER, supra note 7, § 34A.23, at 88; 1 TIFFANY, supra note 7, § 301, at 514-15; Connaughton, supra note 7, at 657; Hume, supra note 7, at 240.

11. If the contract contains conditions, they should be reviewed to determine whether a binding agreement has in fact been reached or whether the contract is actually contingent upon the occurrence of some event, such as the purchaser's procurement of financing. Similarly, if the purchaser is entitled to have the property inspected and the contract is contingent on a favorable inspection, then the time periods for inspection and approval become extremely critical (i.e., were inspections and approvals completed before, or after, the property incurred the damaged in question?). See BOYER supra note 7, and discussion therein; see also discussion infra notes 41-42.

12. See, e.g., Koons, supra note 9, and authorities cited therein; Huxford v. United States, 299 F. Supp. 218, 222 (N.D. Fla. 1969) ("[U]nder binding executory contracts for the sale of land, where the purchaser is regarded as equitable owner, the purchaser must ordinarily bear any loss that occurs.") (citing Insurance Co. of N. Am. v. Erickson, 39 So. 496 (Fla. 1905)).

This simple analysis does not, of course, take into account the exceptions to the doctrine, discussed infra notes 42-48, nor does it reflect any contractual modification, also discussed infra notes 49-58.

13. 39 So. 495 (Fla. 1905).

14. The opinion contains much discussion as to the exact nature of the contract for sale, but the characteristics the court focused most were that of mutuality and equity; that the contract could be mutually enforced in equity between the parties. Id. at 497.

15. See also Miami Bond & Mortgage Co. v. Bell, 133 So. 547, 548 (Fla. 1931) (same context; citing Aycock).
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The doctrine of equitable conversion was first adopted in Florida in Insurance Co. of North America v. Erickson. In Erickson, the vendor of a building under an executory contract tried to collect from his insurance company when, before conveying title, the building was destroyed by fire. The opinion centers around a typical provision in the insurance policy which served to void coverage in the event the insured ceased to be the "sole unconditional owner" of the insured property. The insurer argued that by entering into the contract for sale, the vendor was not the "owner" of the property, and thus the policy was void. The trial court agreed with the vendor, and The Florida Supreme Court reversed.

As stated by Justice Taylor:

The interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms, is the sole and unconditional ownership within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs.

Since then, a number of Florida cases have dealt with the doctrine in more than a few different contexts. Ultimately, however, the doctrine has
been most often utilized to apportion the "risk of loss" which attends the
usual pre-closing time frame.

Perhaps one of the clearest statements of the doctrine in Florida
jurisprudence can be found in *O’Neal v. Commercial Assurance Co. of
America.* In *O’Neal,* the seller22 of a home entered into an oral con-

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Nat'l Bank, 45 So. 501 (Fla. 1907) (discussing the vendor’s lien rights).

The issue reached the Florida Supreme Court at least two more times in Michaels v.
Albert Pick & Co., 30 So. 2d 498, 500 (Fla. 1947), and Hull v. Maryland Casualty Co., 79
So. 2d 517, 518 (Fla. 1957). In Michaels, the court merely cited to Aycock and reiterated
the common law rule. In Hull, the doctrine is mentioned generically in an opinion issued
upon denial of rehearing. The court restated the rule set forth in Michaels, in clear,
unequivocal terms: "By ordinary common-law principles, the doctrine of equitable
conversion becomes operative upon entry of an agreement to convey title to the vendor.
The vendor immediately becomes the beneficial owner, and the vendor retains only naked legal
title as security for payment of the purchase price." Hull, 79 So. 2d at 518; see also
(discussing the effects of the doctrine on the priority of liens); H & L Land Co. v. Warner,
258 So. 2d 293, 295 (Fla. 2d Dist. Ct. App. 1972) ("If a land contract is specifically
enforceable, and is free of equitable imperfections, the vendor becomes the equitable owner
of the land and the vendor holds legal title as security for the vendor’s performance."); Sweet
v. First Nat’l Bank, 254 So. 2d 562, 563 (Fla. 2d Dist. Ct. App. 1971) (discussing the descent
of the vendor’s interest as personality); McNeill v. McNeill, 135 So. 2d 785, 788 (Fla. 1st
Dist. Ct. App. 1961) (applying the doctrine to allocate fire insurance proceeds between
buyer and seller); Tingle v. Waternby, 111 So. 2d 274, 276 (Fla. 1st Dist. Ct. App. 1959) (citing to
Aycock and Hull for the general rules of equitable conversion).

For an interesting discussion on the history and development of the doctrine of
equitable conversion in Florida, see Arko Enter. v. Wood, 185 So. 2d 734, 736-39 (Fla. 1st
Dist. Ct. App. 1966) and the related annotation, V. Woerner, Annotation, Rights and
Liabilities of Parties to Executory Contract for Sale of Land Taken by Eminent Domain, 27

In *Arko,* the subject property had been condemned prior to closing. The buyer sued
for return of the deposit; the seller sued for specific performance. *Arko,* 185 So. 2d at 736.
After a lengthy discussion of the equitable conversion doctrine, the court held that when
parties enter into a binding contract for the sale of improved property, the purchaser
is entitled to any enhancement in value or loss incurred. *Id.* at 738.

In addition, the *Arko* court enumerated six characteristics of the purchaser’s interest in
such cases: 1) it is subject to sale on execution; 2) it may be mortgaged or made subject
involuntary; 3) it will sustain a claim for homestead; 4) it can descend by testate or intestate; 5)
entitles the purchaser to damages for trespass; and 6) it requires the purchaser to bear any
losses due to fortuitous events. *Id.* at 737-38.

The dissent in *Arko* (by then Chief Judge Rawls) raises the interesting question of
whether the doctrine should apply in all cases in which a contract for sale has been executed.
*Id.* at 743.


22. It should be noted that the seller in *O’Neal* had acquired the property through a

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tract to convey title under an installment contract. Upon contracting,
the purchaser applied for, and procured, a homeowner’s insurance policy. On
her application, the purchaser represented herself as the owner of the
property. After paying several installments, the home was burned by fire,
and the purchaser made a claim under the policy. The insurance company
denied the claim, pointing to the purchaser’s misrepresentation as to her
ownership of the property.23 The trial court found in favor of the purchaser;
insured, and the insurance company appealed.24

On appeal, the insurer claimed that the purchaser had no insurable
interest in the property. Florida’s Third District Court of Appeal disagreed
and affirmed the decision of the trial court. The court held that the
purchaser did in fact have an insurable interest in the property by virtue of
the doctrine of equitable conversion, and as such, was entitled to recover on
the policy, but only to the extent of her equity in the property.25 As Judge
Carroll stated:

When a contract has been made for the sale of improved property the
risk of loss thereof (such as from fire) is upon the vendor, in the
absence of an agreement by the parties that it shall be otherwise. By
reason thereof, where there is a sale contract which is binding and
enforceable, the vendee will be obliged to pay the purchase price
provided for in the contract, notwithstanding the improvements should
be damaged or lost by fire or otherwise.26

A bit more recently, Florida’s Fourth District Court of Appeal reached
a similar result in *J.C. Penney Co. v. Koff.*27 In *Koff,* the J.C. Penney
company had entered into a written contract to sell vacant land located in
the city of Lauderdale Lakes, Florida.28 At the time of the contract, the
property was zoned "R-4-A," a classification which permitted up to twenty-
eight condominium units per acre.29 Prior to closing however, the City
revised its "R-4-A" classification so as to permit only twelve condominium

foreclosure sale, and that the purchaser was in fact the foreclosed mortgagee. *Id.* at 246.

23. *Id.*

24. *Id.*

25. Since the contract to purchase was not in writing, and was within the statute of
frauds, the trial court correctly determined that the purchaser’s insurable interest could not
be permitted to exceed the amount she had paid under the oral contract. *Id.* at 247.

26. *O’Neal,* 263 So. 2d at 247.

27. 345 So. 2d 736 (Fla. 4th Dist. Ct. App. 1977).

28. *Id.* at 734.

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27. 345 So. 2d 732 (Fla. 4th Dist. Ct. App. 1977).
28. Id. at 734.
units per acre. Naturally, this change had the effect of making the venture less profitable to Mr. Koff. Before closing, Koff sent a notice of rescission to J.C. Penney, relying on the fact that the zoning had been changed.30

J.C. Penney filed a complaint for specific performance and damages.31 Koff answered, objecting to J.C. Penney’s right to specific performance and demanding the return of his deposit.32 The trial court denied J.C. Penney’s request for specific performance and damages, rescinded the contract, and ordered that Koff’s deposit be returned.33 J.C. Penney appealed.

At trial, Koff had tried to establish an ambiguity in the contract so that he would be permitted to present parol evidence of his intention not to be bound to any adverse change in zoning density.34 After a lengthy discussion interpreting the express language of the contract, the district court dismissed Koff’s arguments about the ambiguities, and went on to imply the existence of an equitable conversion "provision" in the contract.35

The Koff court held that upon execution of the contract, the purchaser acquired the beneficial title to the property, and thus, became the proper recipient of any subsequent government action.36 If the zoning density had been increased, or the property had otherwise become more valuable, the purchaser would have been enriched.37 Conversely, however, if the property value diminished due to the reduction in zoning density, then it is the purchaser who must suffer the detrimental effect. The court reversed the decision of the trial court and remanded with directions to enter an order for specific performance on behalf of J.C. Penney.38 Consequently, Mr. Koff was obligated to pay J.C. Penney the full contract price.39

In sum, when a buyer and seller have entered into a contract for sale, the purchaser will generally be required to pay full purchase price, regardless of the extent of any damage caused by hurricane (or other similar calamity). There are several exceptions to the doctrine, however, and (as mentioned previously) its harsher effects can be offset by contractual agreement.40 Each of these techniques for avoiding the doctrine and its effects will be discussed in turn.

IV. EXCEPTIONS TO THE DOCTRINE OF EQUITABLE CONVERSION

As previously mentioned, there may be some situations in which the doctrine of equitable conversion simply may not apply. Obviously, if there is a unsatisfied contingency in the contract for sale, or if the seller has failed to perform in some way,41 then the doctrine may not be applicable.42 The key, as stated in Erickson, is whether the contract to convey is enforceable in equity.43 Therefore, any court contemplating conversion must first consider the underlying principles of contract law before invoking the doctrine.

Similarly, in light of the equitable nature of the doctrine, it might very well be possible to convince a court that the facts of a particular case do not warrant conversion. As a creature of equity, the doctrine does not exist as

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30. Id.
31. Id.
32. Koff, 345 So. 2d at 734.
33. Mr. Koff also requested reimbursement for monies he had expended on a collateral agreement with the City of Oakland Park, Florida. Id.
34. The court also ordered the return of $55,000 the purchaser had paid on a collateral agreement with the City. Id.
35. Id.
36. Id. at 736. The court concluded that the contract language was not ambiguous, and that extrinsic evidence should not have been admitted to change or alter its express terms.
Koff, 345 So. 2d at 736.
37. Id. The Koff court quoted from Hull v. Maryland Casualty Co., 79 So. 2d 517 (Fla. 1954), and discussed Arko Enter. v. Wood, 185 So. 2d 734 (Fla. 1st Dist. Ct. Appr. 1966) at some length. Koff, 345 So. 2d at 736.
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39. Id. at 736-37.
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J.C. Penney filed a complaint for specific performance and damages.\textsuperscript{32} Koff answered, objecting to J.C. Penney’s right to specific performance and demanding the return of his deposit.\textsuperscript{33} The trial court denied J.C. Penney’s request for specific performance and damages, rescinded the contract, and ordered that Koff’s deposit be returned.\textsuperscript{34} J.C. Penney appealed.

At trial, Koff had tried to establish an ambiguity in the contract so that he would be permitted to present parol evidence of his intention not to be bound to any adverse change in zoning density.\textsuperscript{35} After a lengthy discussion interpreting the express language of the contract, the district court dismissed Koff’s arguments about the ambiguities, and went on to imply the existence of an equitable conversion "proviso" in the contract.\textsuperscript{36}

The Koff court held that upon execution of the contract, the purchaser acquired the beneficial title to the property, and thus, became the proper recipient of any subsequent government action.\textsuperscript{37} If the zoning density had been increased, or the property had otherwise become more valuable, the purchaser would have been enriched.\textsuperscript{38} Conversely, however, if the property value diminished due to the reduction in zoning density, then it is the purchaser who must suffer the detrimental effect. The court reversed the decision of the trial court and remanded with directions to enter an order for specific performance on behalf of J.C. Penney.\textsuperscript{39} Consequently, Mr. Koff was obligated to pay J.C. Penney the full contract price.\textsuperscript{40}

41. In fact, many form contracts used in the South Florida area contain provisions which address these very issues. Alas, while many so-called “standard contracts” do in fact contain such provisions, many do not. Others fail to shift the risk equitably or do so without proper regard for the circumstances. This is particularly true in form contracts utilized by developers whose contracts are often one-sided, and which specifically place the “risk of loss” on the purchaser regardless of the extent of damage. Each individual contract must be scrutinized in order to determine the extent of protection offered each party.

42. It should be noted that contingencies in real estate contracts typically favor the purchaser, and do not generally impair the purchaser’s right to specific performance. For example, despite the seller’s failure to produce appropriate evidence of title, or the purchaser’s failure to obtain proper financing (two of the more common contract contingencies), the purchaser would still normally have the right to pursue specific performance by waiving those conditions. This might be significant in light of the emphasis some courts place on the purchaser’s right to specific performance in these cases. See, e.g., BUYER, supra note 7, and discussion therein.

43. As the court outlined the elements of the doctrine in Erickson, “[t]he interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms . . . .” 39 So. at 498 (emphasis added).

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a right, and perhaps should not be applied in all circumstances. This would certainly seem appropriate in cases where the loss incurred is too great, or beyond the contemplation of the parties, or if the vendor comes into court with unclean hands. As such, the fundamental principles of equity, and the facts of each particular case should be scrutinized in order to question the doctrine’s application.

There is also a significant question (at least in Florida), as to whether the doctrine of equitable conversion would apply to damage incurred by homestead real property. In fact, in Estate of Skuro, the Supreme Court of Florida specifically held that the doctrine of equitable conversion does not apply to homestead real property. While this opinion does not directly link the doctrine to the potential risk of casualty loss arising prior to conveyance of title, the broadly worded holding of the case provides ample authority for an argument to that effect. It should be consulted.

V. SHIFTING THE RISK OF LOSS BY MUTUAL AGREEMENT

As discussed, unless the purchase and sale agreement provides otherwise, the risk of loss due to casualty will normally fall on the purchaser. As mentioned in O’Neal, however, parties to a purchase and sale agreement can (and often do) alter the risk of loss rules which result from the doctrine of equitable doctrine and the remedy of specific performance. The results achieved by these risk of loss provisions vary; very often they are not the work of skilled legal draftsmen, but are instead the scroungings of a harried real estate agent, or worse, the parties themselves. Some provisions do more harm than good.

Nowadays, form contracts are used extensively in most areas of the country. Some of these forms contain provisions which address the issues at hand, while others do not. Many of these forms take dissimilar approaches. One form may contain extremely detailed, complex and interrelated provisions concerning risk of loss, insurance, and maintenance.

49. 263 So. 2d at 247 (“in the absence of an agreement by the parties that it shall be otherwise”).

50. A typical risk of loss provision will serve to shift some of the casualty risk off the purchaser, and it will do so using one of the following methods: 1) by requiring the seller to repair or rebuild the damaged property; 2) by granting the purchaser a limited right of cancellation; or 3) by allowing the purchaser some form of credit at closing. It should be noted that while most contractual risk of loss provisions do generally contain at least one (or more) of these terms, there is no standard risk of loss provision in use today, and the parameters of these provisions do vary considerably. Each should be analyzed on its own merits. See generally FRANK TADEO, JR., REPRESENTING THE RESIDENTIAL REAL ESTATE CLIENT 55 (1987) (discussing the Uniform Vendor and Purchaser Risk Act (U.V.P.R.A.) which generally places the risk of loss on the seller pending transfer of either possession or title to the buyer).

51. A typical insurance provision will require one party, or both, to maintain insurance on the property. While a comprehensive discussion of insurance law is beyond the scope of this article, it should be noted that whichever party has the burden of procuring insurance (if any), the party seeking coverage must in fact possess an insurable interest in the subject property. With respect to the purchaser, it now seems clear that when the parties have entered into a binding contract for sale of improved property, the purchaser should be regarded as owner for purposes of insurance protection. As such, the purchaser can possess an insurable interest commensurate with the value of the improvement to be insured. See O’Neal, 263 So. 2d at 247; Insurance Co. of N. Am. v. Erickson, 39 So. 495, 497-98 (Fla. 1905). In any event, the policy language itself should always be consulted before that conclusion is presumed correct.

Relatively, a seller who is required to carry insurance during the pre-closing period should review the policy to ascertain whether the current coverage lapses upon sale or disposition of the subject property, whether the amount of coverage is adequate, and whether the sales contract should contain some provision for disbursement of proceeds and participation in same. The contract should also specifically whether the seller is obligated to utilize the insurance proceeds to rebuild, or must assign those benefits to the purchaser on demand. See generally 30 Fla. Jur. 2d Insurance §§ 598-601 & n.34 (1981) (citing as an
a right, and perhaps should not be applied in all circumstances.45 This would certainly seem appropriate in cases where the loss incurred is too great, or beyond the contemplation of the parties, or if the vendor comes into court with unclean hands. As such, the fundamental principles of equity, and the facts of each particular case should be scrutinized in order to question the doctrine’s application.

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45. See Arko, 185 So. 2d at 741-43 (Rawls, C.J., dissenting). Judge Rawls’ dissent makes a convincing argument that the doctrine was not intended to apply in all circumstances.

46. A comprehensive discussion of the term "homestead" is beyond the scope of this article. For a thorough treatment of the subject within this particular context, see Connaughton, supra note 7, at 622-53.

47. 487 So. 2d 1065 (Fla. 1986).

48. In Skuro, the personal representative of a deceased homemaker (who died before conveyance of title) petitioned the court to establish the non-homestead status of the property, arguing that the contract for sale—by the doctrine of equitable conversion—had destroyed the homestead character of the property. Estate of Skuro, 467 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1985). In spite of this argument, and in light of the fact that the deceased homemaker had resided on the property until death, the probate court determined that the property was in fact homestead, and that the contract for sale did not destroy that status. Id. at 1100-01. As such, the probate court ordered the property set aside as homestead, and the personal representative appealed. Florida’s Fourth District Court of Appeal affirmed. Id. In addition, the district court certified the following question to the state supreme court: DOES THE DOCTRINE OF EQUITABLE CONVERSION APPLY TO CONTRACTS FOR SALE OF HOMESTEAD REAL PROPERTY?

Id. at 1101. The Florida Supreme Court answered the certified question in the negative, and went on to hold that "the doctrine of equitable conversion is inapplicable when the potential vendor is physically residing on the property as his home at the time of his death." Id. at 1066. For a comprehensive treatment of the Skuro decision, see Connaughton, supra note 7.

49. 263 So. 2d at 247 ("in the absence of an agreement by the parties that it shall be otherwise").

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Another may set out only basic rights. For this reason, it is important to carefully examine the language contained in the subject provision in order to determine the extent of shift from the doctrine, and the relative rights of the parties with respect to cancellation or reimbursement.

For example, on the form created and approved by the Florida Bar and the Florida Association of Realtors, Standard "O" (governing "risk of loss") reads:

If the Property is damaged by fire or other casualty before closing and cost of restoration does not exceed 3% of the assessed valuation of the Property so damaged, cost of restoration shall be an obligation of the

example, an insurance provision contained in National Ben Franklin Fire Ins. Co v. Gasparilla Realty Corp., 123 So. 736, 736 (1929). See also Standard "N" of the "Contract for Sale and Purchase" developed and approved by the Florida Bar and the Florida Association of Realtors (commonly referred to as the "FAR-BAR" form) and the FAR/BAR CONTRACT PREPARATION MANUAL, Standard N (1988). It is in widespread use in South Florida.

A typical maintenance provision will place the duty to maintain the property (in some agreed-upon condition) upon one party, most commonly the seller. In the absence of an insurance or risk of loss provision, this duty might provide the underpinning for an argument that the obligated party repair or restore the property before closing. If the contract contains language which specifically addresses the circumstance of casualty loss, however, that provision would most probably control. But see Spindler v. Kushner, 284 So. 2d 481, 483-84 (Fla. 3d Dist. Ct. App. 1975) (discussed infra note 57).

In this case, the parties entered into a contract to sell a citrus grove. Id. at 436. The contract provided the risk of loss was essentially on the seller, and it gave the purchaser the right to cancel in the event the property incurred substantial or material damage as a result of hurricane or other calamity. Id.

On August 26, 1949, prior to closing, a hurricane passed through the area and destroyed 162,000 boxes of fruit then on the trees. The seller filed suit requesting an interpretation of the parties' rights under the contract. The trial court dismissed the suit, and the seller filed a petition for interlocutory certiorari. Id. at 438. The Florida Supreme Court quashed the order of dismissal. Id. at 440.

Not surprisingly, the court utilized general rules of contract construction to determine the intention of the parties. It focused on the requirement in the contract that the damage be "material" or "substantial" before the purchaser's right to cancel would arise. Triple E Dev., 51 So. 2d at 439. The court concluded that a proper finding of materiality would require a determination as to the relative value of the damaged fruit. Id. The opinion contains a special concurrence by one justice, and a dissent by two others. Id. at 440-41. The case illustrates the difficulty in reaching consensus regarding the parties' intentions under these circumstances and the necessity for the effective drafting of these provisions.

This provision generally places the "risk of loss" on the seller. Thus, the seller has the affirmative obligation to repair or restore the property, provided the cost of doing so does not exceed three percent of the "assessed valuation" of the damaged property. If the cost of repair is greater than the three percent ceiling, the buyer has the right to cancel the contract.

It should be noted, however, that Standard "N" of that same contract requires the seller to warrant the satisfactory condition of the property as late as ten days before closing. Id. It also obligates the seller to maintain the property—including the lawn and shrubbery—through closing. Id. It might be argued that this provision conflicts with, or perhaps even controls, the "risk of loss provision" contained in Standard "O." A court, however, would most likely rule that the specificity of the "risk of loss" provision constitutes an expression of the parties' intention that it control in circumstances where

55. FAR-BAR CONTRACT FOR SALE AND PURCHASE Standard O (1991). Other local contracts contain similar provisions which (up to a certain amount) offer the seller the opportunity to repair the damage within a given time frame (typically 60-90 days) while granting the purchaser the right to cancel if the property is not restored within that time. Julie Gutten-Goob, Hurricane Damage May Enable Sellers to Void Deal, MIAMI HERALD, Sept. 11, 1992, at 11.

56. FAR/BAR, supra note 51 (Standard N).

57. Standard "N" of the FAR/BAR form also requires the seller to pay up to three percent of the purchase price for necessary repairs. Id. It is interesting to note that this Standard, unlike Standard "O," is tied to the purchase price of the property. Standard "O" is tied to the assessed valuation of the damaged improvements. Id. It would also appear that the two provisions, in dealing with separate sets of circumstances, might provide a cumulative limitation on the seller's obligation to repair and the buyer's right to cancel.

In any event, it is easy to see how the interplay between maintenance, insurance, and risk of loss provisions can provide significant complications to a reviewing court. For example, in Spindler v. Kushner, 284 So. 2d 481 (Fla. 3d Dist. Ct. App. 1973), the court was faced with a "maintenance" provision which placed the duty to maintain on the purchaser, and a "risk of loss" provision which placed all risk on the seller. While not deciding the issue, the court clearly indicated that the maintenance provision could be reasonably read so as to alter the effect of the provision governing risk of loss. The appellate court left the ultimate construction of the contract to the trial court. However, the opinion underscores the importance that all appropriate provisions in the contract be studied before a proper evaluation of the situation can be made.
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54. See discussion concerning the "FAR-BAR" form, supra note 51.

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a "fire or other casualty" has damaged the property—although such rulings cannot be predicted with absolute certainty.

Finally, it should also be pointed out that these provisions typically refer only to damage caused to the "property" or the "premises." Under such limiting terminology, only those items legally considered "property" will give rise to a duty to restore or a right to cancel. It is clear that damage to structures, driveways, landscaping, pools and the like come within the scope of such terminology.

Not every loss of value is covered by this sort of language, however. Most obviously, such terminology does not squarely address the situation in which the "property" has been left relatively undamaged, although the surrounding neighborhood has been destroyed; a common experience after a major hurricane like Andrew. In these situations, the purchaser may very well be obligated to complete the purchase as planned—or forfeit the deposit.

VI. CONCLUSION

This article is intended to provide judges and litigants with direction for conveyance and contract issues raised in the wake of Hurricane Andrew. In sum, anyone seeking to evaluate a real estate purchase delayed or abandoned due to damage from the hurricane must possess a thorough understanding of the applicable law (and the doctrine of equitable conversion), must painstakingly review the contract language involved, and must review the facts of the particular case for the most favorable inferences.

Naturally, the first place to start will be the terms of the contract itself. If the purchaser was represented by counsel during contract negotiations, the contract will most probably contain a provision which specifically governs the relative rights of the parties in the event of pre-closing casualty damage. However, in the event that it does not, the doctrine of equitable conversion may control. A sympathetic court and principles of fairness will undoubtedly play a significant role in these cases; however, the language of the contract and the doctrine of equitable conversion will most likely govern the outcome.

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58. See, e.g., FAR/BAR CONTRACT PREPARATION MANUAL, Standard O (1988); FAR/BAR CONTRACT FOR SALE AND PURCHASE, Standard O (1991) ("If the Property is damaged by fire or other casualty before closing . . . .") (emphasis added).

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Business Interruption Insurance—A Business Perspective

David A. Borghesi

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I. INTRODUCTION

Business interruption insurance policies are contracts of indemnity. The policy undertakes to restore the business to the economic position that

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* David A. Borghesi, a partner in the Chicago office of Arthur Andersen, heads the firm's insurance claims consulting practice. Mr. Borghesi assists clients in preparing and negotiating significant and complex business interruption insurance claims. He has served as an arbitrator in insurance claim and other business disputes, and has testified in numerous engagements involving lost profits and calculations of economic damage. Mr. Borghesi is a graduate of the University of Wisconsin-Madison, a certified public accountant, and a member of the American Institute of CPA's and the Illinois Society of CPA's.

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it could have maintained for itself had there been no insurable loss. In broad terms, business interruption insurance reimburses an owner for: 1) the business’ lost cash flow from operations; and 2) the additional costs and expenses incurred because of the business’ inability to use damaged or destroyed insured assets. Before going into the specifics, a historical perspective on the evolution of insurance coverage is instructive in understanding the context of today’s business interruption insurance policies.¹

II. HISTORICAL PERSPECTIVE

Inherently, the concept of insurance is to spread risk of loss caused by events which are specifically unpredictable but generally inevitable to a homogeneous group. Thereby, losses that could be catastrophic to an individual are spread over a larger group. Annual assessments, or insurance premiums, of the many pay for the losses of the few. Typically, insurance was first identified with losses pertaining to tangible property. Because physical assets can be replaced, insurers could determine the level of premiums based on the probability of loss and the value of the tangible asset. However, with the occurrence of losses to commercial enterprises, it became apparent that another form of economic loss, loss of business income generated by the use of the tangible business property, was also at risk.

It also became clear that there was no direct relationship between the amount of property damage and the amount of business income loss. For example, a small property loss to a vital section of a manufacturing plant could result in the total suspension of all operations resulting in economic losses far in excess of the damage to the property. Owners soon found out that, while the property could ultimately be repaired or replaced, without the stream of normal income, the business could be lost forever.

The precursor to the modern business interruption policy is an older form called use and occupancy insurance. As can be readily understood, the use and occupancy insurance became an enhancement (also referred to as an Endorsement or Rider) to existing property damage policies. Insurers thereby tied business interruption insurance directly to the use or occupancy of the property insured for physical loss or damage. Unlike insuring physical property, wherein a value of that property could be readily determined, valuing the loss of its use was more subjective and depended on the profitability of the business.

But, how was the insurance company to determine the level of premium if the insurer could not determine the maximum and probable exposure of accepting the risk? Under the typical use and occupancy insurance contract, the insurer agreed to pay a flat per diem amount for every day the business was interrupted. The insurer and the insured would agree upon the level of per diem reimbursement based upon the insured’s historic business activity and prospects for its future operations. Additionally, the length of time over which per diem reimbursements could be obtained would be contractually limited.

However, this approach was found to be unacceptable to insurance companies, particularly when partial losses occurred and during times of economic recessions when per diem values significantly overcompensated businesses. During a steep business recession, would an unscrupulous or desperate owner cause a loss to reap a financial windfall? Consequently, most of today’s business interruption contracts are based upon the concept of actual loss sustained. Under this concept, each loss event must be measured to determine the actual economic impact.

III. POLICY FORMATS

Business interruption insurance is written to cover virtually any type of commercial business in existence today. Generally, the insurance industry categorizes business entities into one of two types: 1) manufacturing; 2) mercantile (e.g., retail or service enterprises). There are historical reasons as to why these two basic business categories were identified by the insurance industry. Much of the difference comes in the operating nature and the extent to which the size of the labor force can readily be adjusted to meet the differing needs of each business. However, the main difference arises from the use of the property being insured.

For a mercantile operation, coverage is premised on lost sales or revenues resulting from the inability to use or occupy property in the selling or leasing effort. However, damage to a manufacturing plant interrupts an owner’s ability to produce products. The manufacturing process creates the business’ profitability. The coverage for a manufacturer is therefore premised on lost productive capacity. In this regard, insurance policies

it could have maintained for itself had there been no insurable loss. In broad terms, business interruption insurance reimburses an owner for: 1) the business’ lost cash flow from operations; and 2) the additional costs and expenses incurred because of the business’ inability to use damaged or destroyed insured assets. Before going into the specifics, a historical perspective on the evolution of insurance coverage is instructive in understanding the context of today’s business interruption insurance policies.1

II. HISTORICAL PERSPECTIVE

Inherently, the concept of insurance is to spread risk of loss caused by events which are specifically unpredictable but generally inevitable to a homogeneous group. Thereby, losses that could be catastrophic to an individual are spread over a larger group. Annual assessments, or insurance premiums, of the many pay for the losses of the few. Typically, insurance was first identified with losses pertaining to tangible property. Because physical assets can be replaced, insurers could determine the level of premiums based on the probability of loss and the value of the tangible asset. However, with the incurrence of losses to commercial enterprises, it became apparent that another form of economic loss, loss of business income generated by the use of the tangible business property, was also at risk.

It also became clear that there was no direct relationship between the amount of property damage and the amount of business income loss. For example, a small property loss to a vital section of a manufacturing plant could result in the total suspension of all operations resulting in economic losses far in excess of the damage to the property. Owners soon found out that, while the property could ultimately be repaired or replaced, without the stream of normal income, the business could be lost forever.

The precursor to the modern business interruption policy is an older form called use and occupancy insurance. As can be readily understood, the use and occupancy insurance became an enhancement (also referred to as an Endorsement or Rider) to existing property damage policies. Insurers thereby tied business interruption insurance directly to the use or occupancy of the property insured for physical loss or damage. Unlike insuring physical property, wherein a value of that property could be readily determined, valuing the loss of its use was more subjective and depended on the profitability of the business.

But, how was the insurance company to determine the level of premium if the insurer could not determine the maximum and probable exposure of accepting the risk? Under the typical use and occupancy insurance contract, the insurer agreed to pay a flat per diem amount for every day the business was interrupted. The insurer and the insured would agree upon the level of per diem reimbursement based upon the insured’s historic business activity and prospects for its future operations. Additionally, the length of time over which per diem reimbursements could be obtained would be contractually limited.

However, this approach was found to be unacceptable to insurance companies, particularly when partial losses occurred and during times of economic recessions when per diem values significantly overcompensated businesses. During a steep business recession, would an unscrupulous or desperate owner cause a loss to reap a financial windfall? Consequently, most of today’s business interruption contracts are based upon the concept of actual loss sustained. Under this concept, each loss event must be measured to determine the actual economic impact.

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typically refer to coverage as the net sales value of lost production. Ultimately, however, the measure of loss is based on sales lost as a result of lost productive capacity. Valuation concepts will be discussed in greater depth later.

Regardless of the type of business, business interruption insurance is written in two basic formats. One format is called gross earnings and the other is called net profit plus continuing expenses. A gross earnings form measures a business interruption loss by taking the amount of lost sales and subtracting direct costs which were not incurred. Conversely, the net profit plus continuing expense form measures a loss by taking net profit and adding to that those fixed expenses which continue. Theoretically, either format will arrive at the same loss measurement. This can be demonstrated from a typical income statement:

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One should note that the insured does not necessarily have to generate a net profit to recover on a business interruption loss. This is especially true when a business has a high component of fixed and continuing expenses.

IV. CRITERIA FOR BUSINESS INTERRUPTION COVERAGE

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2. One should not confuse the insurance terminology of “gross earnings” with the accounting terminology of gross margin or gross profit. The use of gross earnings was formulated by the insurance industry as a common yardstick for measuring risk and assessing premium dollars. Although gross earnings has a stated definition, the measurement of loss before co-insurance requirements, if any, is not impacted by the definition or use of the term, gross earnings.

from the use of property, coverage is not normally afforded unless coverage under the property damage contract is afforded. Within this context, to have a recoverable business interruption loss under standard insurance contracts typically found today, five criteria must be met. The insured must have: 1) physical damage; 2) to insured property; 3) caused by a covered peril; 4) resulting in a measurable business interruption loss; 5) for the period required to expeditiously restore the damaged property. One could look at each of the five as a link in a continuous chain. Breaking any of the links would render the loss nonrecoverable.

Before discussing valuation concepts, one should look at each of the first three criteria: physical damage to insured property by a covered peril. Physical damage is usually easy to discern. The policy normally identifies the property being insured with adequate specificity. With respect to a covered peril, each policy must be viewed for its specific language. Generally, policies are based on either stated risks or all-risk coverage. In the first instance, those risks or perils which are covered are specifically indicated in the policy. Consequently, any peril or risk not mentioned would not be covered. In the all-risk policy, all risks, except those which are specifically excluded, would be covered. Obviously, in the latter, the list of exclusions can be very lengthy and detailed with some specificity.

Some not so unique loss experiences include the following:

1) Because of a fire to its plant, a major customer cannot purchase products from you. You shut down your factory as a result of the lost sales.

2) Hurricane Andrew, in August 1992, did not significantly damage your facility. However, because of widespread power outages and contaminated water supply, your business was unable to continue normal operations for a period of time.

3) The Los Angeles riots, in April 1992, resulted in curfews. Your property was not damaged but customers and employees could not get to your store. Your store could not operate during its normal and most profitable business hours.

4) In April 1992, numerous office buildings in downtown Chicago were evacuated under order of civil authority. Chicago River water inundated the basement levels of buildings as a result of a breach in an underground tunnel system. Your law offices on the 21st floor were uninhabitable for a period of two weeks because
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Suffice it to say that, in each of the above losses, coverage would be dictated by the specifics of the insurance policy. Because larger businesses generally have a stronger negotiating position, they are able to work with insurance companies, either directly or through insurance brokers, in developing manuscript policies. Manuscript policies are developed to offer broader coverage and address perils which are specific to a business' operation. Coverage for contingent business interruption caused by a physical loss at a major supplier or customer or for differences in conditions are available, but at a cost that a business owner may not be willing to pay.

Smaller businesses typically purchase insurance directly from an insurance company sales force or through independent insurance agents. Most often, these policies are standard forms offered by the insurance company and provide limited customization. Many standard policies would preclude coverage for the loss experiences described above.

V. BUSINESS INTERRUPTION VALUATION CONCEPTS

Once it is determined that coverage is afforded under an existing insurance policy, valuing the business interruption can be a daunting task. There are four critical concepts inherent in any business interruption calculation based on the standard wording found in most contracts:

1) Actual loss sustained.
2) The business interruption period.
3) Expenses incurred to mitigate the loss.
4) Continuing versus non-continuing expenses.

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These concepts must be addressed regardless of the type of business or the form of the business interruption policy. It should be noted that these concepts typically are more complex for manufacturing concerns than for mercantile businesses.

A. Actual Loss Sustained

As previously stated, the purpose of business interruption insurance is to place the business in the same economic position that it would have maintained for itself had there been no loss. This is deemed to be a recovery of the actual loss sustained or the true economic loss. Measuring the loss entails considering many interrelated business activities such as sales, production and inventory levels. These activities must be considered because, even though there is physical damage and a loss of productive capacity, there may not be a related economic (i.e., actual) loss. The insured may be able to use excess capacity at other production facilities to prevent a loss of sales. Likewise, available finished goods inventory may prevent lost sales during the period of restoration. Consider the following:

A department store in downtown Chicago must close its store because of the Chicago flood. However, the company experiences increased sales in its store in a nearby but unaffected location. Did the one store's increase in sales result from a migration of customers and therefore a make-up of lost sales? Or did the increase come from the fact that the loss occurred just prior to Easter when sales increases might normally be expected?

The more frequent issue involves the concept of whether there has been an absolute loss of sales or a delay in sales, made up at a later date. Following are some examples where actual loss sustained was at issue:

1) A shipyard with a long term contract to build multiple vessels sustains a loss and cannot produce steel plate for the fabrication of the hulls. The long-term contract is eventually satisfied over the next five-year period, but the completion is delayed by six months. The delay is entirely attributable to the insured loss. At the end of the contract, the shipyard is not at full capacity because of a lack of new contracts at that time. Was there an actual loss sustained? Should the insured be required to wait until the contract completion to determine or measure its loss?
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2) A coal company loses its most significant mining equipment, a longwall miner, due to an insured event. It had been projected that, under current mining conditions, coal reserves would have been depleted at the end of five years. It is currently expected that, with alternative mining techniques and equipment, the coal reserves will be depleted by the end of eight years. The insurance company claims that there is no actual loss sustained because all the coal that was available to be mined will in fact be mined and consequently, no sales will be lost from those reserves. Would you agree with the insurer's logic?

3) A manufacturer of patented medical equipment sustains a loss and is unable to manufacture and sell its product for three months. For six months after the restoration period, production and sales increase significantly over budget and historical amounts. Is the increase in sales due to pent-up demand and therefore a "make-up" of lost sales?

In determining whether lost production can be made up later, with no loss of sales, consideration must be given to available finished goods inventories. Following is an example of how complex this issue can become.

A fertilizer production facility produces ammonia, a critical raw material for fertilizer production. The fertilizer business is very seasonal, with two peak sales periods, Spring and Fall. Fertilizer production is normally heavy during the late Fall and Winter months to build inventories for its peak selling season. The plant's ammonia production facility operates twenty-four hours a day except for normal operating downtime. In January, the ammonia facility sustained a fire, halting production for the entire month. Inventory at the time of the fire was high and no sales were lost during this one month period. The insurance company denied the claim based on the fact that there was no loss of sales, and therefore no actual loss sustained. But, the insurance company agreed to review the inventories and demand for fertilizer through the Spring selling season. At that time, the insured was able to demonstrate a loss of sales resulting from a depletion of inventory. Consequently, while the loss of production occurred in January, the impact of that loss was not realized until after the period of restoration.

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For manufacturing companies, the destruction of finished goods inventories adds an additional factor to the determination of actual loss.

Most property damage insurance policies written for manufacturers call for finished goods inventories to be valued at a net selling price. This is consistent with the concept that the manufacturing process creates a business’ profitability. The insurer considers the consequent payment for destroyed finished goods inventories the same as purchasing the goods as if the insurer were a regular customer. Essentially, the insured sold the inventory, thereby reducing its lost sales during the interruption period.

The concept of actual loss sustained can also involve measurement issues. Consider the following examples:

1) You are a fifty percent joint venture owner in a facility damaged by fire. Each party shares equally in expenses and the production of the facility is split equally between the owners. The joint venture records as revenue the amount it receives from each of the owners to reimburse expenses. Consequently, the joint venture shows no profit. It costs the owners substantially more to buy production from other sources. What would be the appropriate measurement of loss if only the joint venture carried insurance for the loss?

2) A commodity chemical manufacturer sustains a loss and is unable to produce the chemical. Because of a thin market and the lack of supply occasioned by the loss, the resulting market price of the chemical skyrocketed. At what price should the loss of production be valued?

3) A hotel sustains total damage due to a hurricane. Other hotels in adjacent areas or those less severely damaged and repaired quickly are fully occupied. Average occupancy for that time of year is sixty percent. The insurance company agrees that there is an actual loss sustained and suggests that, had there been no hurricane, the normal occupancy rates would be the measure of damages. There is no dispute that had you not suffered the loss you would have received the same increase in business as your competitors. What is the actual loss sustained under these circumstances?

As can be seen from the above case examples, determining whether an actual loss can be sustained, or the amount thereof, is frequently not a clear-cut issue. Manuscript insurance policies may specifically define valuation criteria based on the particular circumstances of the companies involved.
Standard forms usually leave these valuation criteria open to judgment and ultimately to negotiation.

The projection of lost revenues is often a key factor in the ultimate determination of a business interruption loss. However, unlike replacing tangible property, determining loss of revenue can be subjective and open to differing viewpoints. In any event of loss, it is the insured's duty to prove up its loss to the insurance company. Consequently, how carefully the insured analyzes its financial and operational information becomes critical to its successful proof of damages.

Then, too, the calculation of loss must be communicated to the insurance company loss adjustment representatives. It is not uncommon for insurance company accountants to refute an insured's calculation of damages through an incomplete understanding of the business operation or a lack of detailed analysis. Consequently, a well documented and cogent claim can yield greater recovery than vague ideas and unsupported calculations.

B. Business Interruption Period

Standard business interruption insurance policies cover loss of earnings computed from the time of the damage caused by the insured peril to the time that the property could be repaired or replaced and made ready for normal operations. This time period is commonly referred to as the business interruption period, the period of suspension or the period of restoration. Similar to the actual loss sustained, defining the period of time over which to measure the loss can frequently become a contentious issue, because it is a significant driver of the total magnitude of a business interruption loss.

Contract terminology calls for the restoration of the property damaged to be conducted with due diligence and dispatch. Consequently, the interruption period may be a theoretical period, rather than the actual period of time the owner takes to restore the property. This is especially true if the company chooses to rebuild or replace differently from the property "as was" just prior to the loss. Property damage insurance intends to restore an insured to an "as was" position at the date of loss. Consequently, any loss of revenues resulting from the additional time required to make improvements or modifications generally are not recoverable.

An insured usually has the option to make modifications or improvements during repairs or restoration to the property damaged. In many cases, modifications or improvements can be made concurrent with property restoration, thereby not extending the interruption period. However, determining a theoretical interruption period can become quite subjective.

Arguments made by representatives of the insurance companies to shorten the actual interruption period to a theoretical period have included:

1) The insured did not commence repairs with due diligence and dispatch, but waited several weeks to decide what modifications to make.

2) The insured did not start reconstruction until it received insurance monies on the property damage. This delay, caused by a lack of adequate financial capital, is not covered or addressed in the policy.

3) The insured could have taken steps to shorten the interruption period by expediting repairs or through better management of construction scheduling.

4) The insured was delinquent in obtaining available equipment and waited for custom equipment with improved operating capacity.

5) Other non-insurable and concurrent causes extended the actual restoration period, such as the inability to obtain environmental permits.

There are four major points to be aware of concerning the insured interruption period:

1. Policy Term

A business interruption time period is not typically limited by the term of the insurance contract. Many large property damage losses result in suspension periods extending beyond the end of the policy or its annual renewal date. Some policies may limit the suspension period to twelve months from the date of loss. However, many policies are open-ended with respect to the restoration period.

2. Production Start-Up

Business interruption insurance policies for manufacturing entities provide for additional time to restore work in process inventory levels, but do not provide time to restore finished goods inventories to their pre-loss levels. In theory, the additional time allows the manufacturer to restore productive assets back to normal production through a start-up phase.
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Logically, an insured whose production function was operating efficiently prior to a loss should be compensated for the time necessary to achieve the same level of efficiency after a repair of the property.

The time to replenish finished goods inventories is not similarly insured because the production of such inventories has been completed. As stated previously, the property damage valuation for manufactured finished goods should be at net sales value to compensate the insured for the profit earned through the manufacturing process.

As discussed previously, by tying the business interruption value to the physical property, the standard policy does not cover loss of market beyond the restoration period.

3. Extended Period

Special endorsements may be obtained to contractually extend the length of the interruption period for a specified number of days (usually in increments of thirty days to a maximum of six months). Mercantile businesses, such as hotels and department stores, recognized that, after restoration, a rebuilding of customer traffic was necessary. Insurance companies have accommodated their clients by offering to extend the period for valuing the business interruption through the use of these endorsements.

4. Effects of Building Codes

As with property damage, the business interruption period is generally not extended due to the necessity of incurring additional time occasioned by ordinances or laws regulating the reconstruction or repair of buildings. However, a more recent trend is for insurers to cover both the increased cost of construction as well as the extended time for the effects of such building codes. Again, specific policy wording will dictate the coverage afforded. There are many other possible impacts on the restoration period which may or may not be covered in a specific insurance policy. Work stoppages, abnormal start-up periods and disagreements with contractors can be factors in assessing the period over which the business interruption is to be calculated. Because the business interruption value can be significantly greater than the property damage value, insurance companies will exhorts the owner to take extraordinary measures to get the operations back to normal as quickly as possible. This would normally cause the insured to incur extra expense to mitigate the business interruption loss.

C. Expense Incurred To Mitigate the Loss

Typically, it is a policy requirement that the insured make reasonable efforts to mitigate its loss through whatever means or resources available. Consequently, the policy obligates the insured to use its efforts to reduce the total amount of loss payable by the insurance company. These expenses incurred in reducing the total amount of loss are known as mitigating expenses, or more commonly, extra expenses. As part of the business interruption insurance policy, extra expenses are recoverable when and only to the extent that they reduce the business interruption loss that would otherwise be payable. Such extra expenses are typically incurred either to reduce loss of sales or to shorten the restoration period. The extra expense concept applies in both manufacturing and mercantile types of businesses and can be demonstrated by the following examples:

1) Over-time premiums paid to contractors to expedite the repairs.

2) Excess of air freight expense over normal freight expense to expedite receipt of materials or equipment.

3) Excess cost of more expensive replacement machinery (due to greater capacity or new technology) which may be readily available for installation, compared with replacement equipment of the kind and quality to that which was destroyed, but not currently available from the vendor.

These examples depict extra expenses incurred to reduce the restoration period, thereby decreasing the business interruption loss that would have been paid without those expediting efforts. The following examples depict extra expenses incurred to reduce the loss of production and/or loss of sales:

1) Rental of equipment or lease of facilities for temporary business operations during the restoration of damaged property.

2) Shipping excess finished goods to customers from other locations at an increase in freight costs.

3) Using alternate production facilities or methods which result in a higher cost to manufacture.
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3) Using alternate production facilities or methods which result in a higher cost to manufacture.
4) Purchasing goods at a price in excess of what it would have cost to manufacture those goods.

Each of the above four examples would result in an extra expense to reduce lost sales that would have occurred without taking these mitigating steps. However, there are limits to the amount of extra expense the insurer will be willing to pay. The following example makes this limitation clear:

A bakery is damaged by fire which renders the facility useless for one day. Doughnuts produced on any given day are sold on the same day. Management determines it needs 10,000 doughnuts, its normal production, for sales the day after the fire. Management also determines its variable cost to produce the 10,000 doughnuts to be $3,000; however, it can purchase doughnuts from a competitor for $4,000. These doughnuts are sold for $5,000. Management elects to buy the 10,000 doughnuts at a cost of $4,000 and sells them for $5,000 which results in a $1,000 profit. However, the normal profit would be $2,000.

In this example the insured’s action resulted in no loss of sales despite the loss of production. However, due to the mitigating action taken, the insured did incur an extra expense. It paid $1,000 more than it would have incurred to produce those doughnuts. Therefore the insured in this case would receive $1,000 as an extra expense, representing an actual loss sustained to the insured.

Assume that, in the above example the doughnuts could be purchased from a competitor, but at a cost of $5,500. Despite the loss of $500 when sold, management may decide to take this course of action so as not to lose its customers. In this case, the extra expense incurred by the bakery is $2,500. The insurance company will pay $2,000 which is the amount that it would have paid had no action been taken by management. Under this scenario, the $500 would be extra expense over and above that which the insurance company is obligated to pay. It should be noted that insurance for extraordinary extra expenses of this nature can also be purchased and again the specific policy wording will dictate coverage.

Separate or “pure” extra expense coverage (extra expense over and above mitigating expenses) is often available in much the same way that extended time period coverage is available. Typically, a maximum amount of coverage per occurrence is stated in the policy. This additional coverage alleviates problems in adjusting extra expense claims in situations where it may be difficult to ascertain whether the actual loss was sufficiently reduced. For some businesses, where revenues are not directly dependent upon tangible property, extra expense is an essential element of insurance.

coverage. In these cases, extra expenses are those expenses incurred above normal to continue business operations or return them to normal. Oftentimes, companies with research and development facilities will carry this special type of business interruption coverage. Research and development facilities typically do not manufacture saleable products or generate current revenues. Consequently, it may well be impossible to measure the ultimate loss of sales due to the disruption of ongoing research and development. Yet, these facilities may be essential to the continued long-term success of a business, and it would be the company’s desire to continue those operations, and return them to normal as quickly as possible.

Similarly, financial institutions, with large central office computer operations, would purchase this type of business interruption insurance coverage. Often, communication companies such as newspapers will choose to carry pure extra expense coverage and forgo business interruption coverage.

D. Continuing/Non-Continuing Expenses

The fourth critical concept in valuing a business interruption loss is determining which expenses continue and which expenses diminish as a result of the loss. You may find it helpful to refer to the income statement displayed in the prior “Policy Formats” section while reading the following.

Financial analysts, economists and accountants typically describe the behavior of cost as either variable or fixed. Variable costs (sometimes referred to as direct costs) will increase or decrease with increases or decreases of sales or production. For ease of analysis, most variable expenses are viewed in terms of a constant or linear variation. As an example, commission selling expense may be viewed as a specific percentage of sales dollars. Direct labor may be viewed as a constant variable of production hours worked. The cost of producing a chemical may be stated as a constant amount of dollars per pound of production. As one can see from the above examples, direct or variable expenses would typically be non-continuing expenses as viewed by the insurance contract. Consequently, if a business interruption causes a retail department store to lose sales, non-continuing expenses such as the cost of goods purchased, the commissionable selling expenses, and any other supplies or materials (such as packaging and gift wrap) directly related to those lost sales would be deducted from lost revenues in determining the business interruption value.

At the other end of the spectrum, certain costs are considered fixed or continuing. That is to say that there is no change in the normative dollar amount of an expenditure, despite fluctuations in revenues. Such examples
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would include real estate taxes on property, depreciation, amortization, and the salaries of company executives. In many business interruptions, these expenses would continue at their same dollar levels, and consequently, there would be no deduction for these expenses when determining the business interruption value.

While certain expenditures are more easily categorized as either fixed or variable, a large number of expenses fall somewhere in the middle. Certain expenses tend to increase or decrease in a stair-step fashion over smaller changes in revenues or time periods. As an example, energy cost, because of the demand component in utility bills, may not vary on a constant percentage basis with changes in usage. Similarly, supervisory cost in a factory may not diminish in the same percentage as would the direct payroll during a factory interruption.

The insurance policy makes a distinction, which can be viewed as a more precise definition, of how expenses react under situations of total or partial suspension of business over varying lengths of time. As an example, a fire in a piece of equipment may result in a suspension of operations for several months. It is unlikely that the real estate property taxes related to the entire plant would diminish during a short restoration period. However, if the entire plant sustains major fire damage requiring a rebuilding period of several years, it would be expected that the company would request and receive a tax abatement during the restoration period.

As a further example, let’s look at depreciation. Accounting depreciation by its very definition is the historic cost of tangible assets apportioned over the useful life of the asset. If an asset is entirely destroyed by an insured peril and the insurance company reimburses the loss through property insurance, is it reasonable to assume that depreciation continues on an asset that is no longer in existence? Would depreciation necessarily discontinue if a partially damaged machine were repaired without extending its useful life? Answers to these questions are not always clear-cut in the more complex loss situations.

The treatment of payroll costs in a business interruption claim is often a confusing issue for management of the insured. Historically, insurers viewed factory labor as being a direct cost of production. Over relatively short business cycles, factory labor costs increase or decrease with corresponding changes in the level of production. Consequently, for business interruption values, direct factory labor is considered a non-continuing expense. In insurance parlance, this is called "ordinary payroll," as distinguished from executive payroll which is generally considered a continuing expense.

Interestingly, mercantile businesses were not considered to have ordinary payroll. Generally, where business interruptions of short duration impacted a mercantile business, management believed that it was necessary to maintain its sales staff, as well as key salaried employees, if they were expected to reopen at the pre-loss level of service after the restoration period. Consequently, ordinary payroll was not an issue for business interruption values of a mercantile type of business.

Manufacturing companies must consider whether ordinary payroll must be maintained during the period of restoration, even if there is no production work for the employees. Companies may wish to keep employees on the payroll because of a shortage of skilled labor in a geographic area or because of specific knowledge and training invested in the employees.

In much the same way as specialized coverages can be obtained for extra expenses and extended business interruption period, ordinary payroll coverage can also be purchased. Typically, the coverage is stated in terms of the number of days of coverage, usually in increments of thirty day periods. Therefore, if at the time of loss, the insured had an annual ordinary payroll cost of $1,200,000, then thirty days coverage would equal $100,000. In the above example, the insured can retain twenty-five percent of its ordinary payroll for up to four months before coverage is exhausted. It should be noted that the insurer will not automatically make a payment just because coverage is purchased. The company must make a rational case for continuing to incur payroll expense, especially during an extended restoration period. Furthermore, if the company elects to lay-off all of its ordinary payroll, then the expense is, in fact, non-continuing and will be deducted from lost revenues. Any purchased ordinary payroll coverage would then go unused.

Oftentimes, ordinary payroll laborers are used for clean up and property restoration in lieu of hiring third-party contractors. Such payroll cost would be reimbursed through the property damage insurance coverage. For purposes of business interruption values, this payroll cost is deemed to be discontinued as the insurance company "paid" the payroll. The insurance company would not be expected to reimburse the insured under property damage coverage and again under ordinary payroll coverage. Consequently, it is necessary to be mindful that claims for property damage and business interruption can be necessarily interrelated.
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VI. OTHER ITEMS

There are a few additional issues which typically arise in a loss situation:

A. Income Taxes

The computation of the business interruption value is predicated on a calculation on earnings before income taxes. If a company insures properties located across national borders, consideration should be given as to whether income tax rate differentials represent a significant risk of loss depending on where the insurance proceeds are paid.

B. Extra Expenses

Even with extra expense coverage, not all expenses above normal are reimbursable. Management may determine that certain expenses are prudent and reasonable. However, they may not have been incurred with the objective of reducing the insured loss or returning operations to normal. Claim preparation costs, including consultant’s fees, management’s time and travel expense, are generally not covered. Goodwill expenses, such as a hotel’s forgiveness of current room charges for guests who are displaced to other hotels, would generally not be covered. Additional security may also be questionable as to recovery.

C. Interest on Claimed Amounts

Interest foregone on claimed amounts is excluded from business interruption insurance calculations. Interest expense computed upon the claim itself is not covered by the policy. The policy requires an insurer to make a claim to the insurance companies and as such: a) the insurance company does not have the ability to determine the amount of loss or to verify its reasonableness until such claim is made, and b) the insurance company usually has sixty days to respond after formal proof of loss is made. Most insurance company representatives will work with the insured to advance payments or pay partial loss adjustments on an interim basis for property damage. However, partial payments on business interruption losses during the period of restoration are infrequent because business interruption values are more subjective than property losses by their nature and because losses suffered early in the restoration period may be made up at a later point in time.

VII. SUMMARY

After a major business interruption loss there are three initial hurdles to jump over before an insurance claim can be successfully prepared and negotiated.

Understanding the policy coverage is a necessary first step. The foregoing portions of this article have dealt almost exclusively with this issue.

The second and sometimes overlooked hurdle is understanding the adjustment process from the insurance company’s perspective. In much the same way that a car salesman does not service the car sold, the individual who sold you the insurance policy will not be responsible for settling your loss. The insurance industry has a cadre of full-time insurance adjustment professionals. Over time they have developed a stable of professional consultants including engineers, accountants and lawyers to represent their interests. In contrast to the insurance companies with knowledgeable and experienced personnel, a major business interruption loss can be a once-in-a-career event for management of the insured. While it may appear that the deck is stacked against the insured, an understanding of the expectations of the insurance company and the nature of the settlement process can level the playing field.

The third hurdle is applying adequate project management to the insurance claim task. Frequently, the insured does not have personnel with the available time to address claim preparation. Coping with the more immediate effects of the loss alone can be overwhelming. Consequently, claim preparation often takes a low priority to current business activity. Oftentimes the responsibility of claim preparation is delegated to middle managers, who do not relish this unfamiliar and seemingly thankless task. In major loss situations, reassignment or turnover of personnel can cause a lack of continuity during a lengthy claim preparation/settlement process. Delays and miscommunications result. The insured with a focused and knowledgeable project manager has the best likelihood of achieving the ultimate goal—obtaining the maximum amount of insurance recovery due the insured over the shortest period of time possible.
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Legal Services of Greater Miami, Inc.*

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* Legal Services of Greater Miami, Inc. located at 225 N.E. 34th Street, Suite 300, Miami, FL 33137. Their telephone number is (305) 576-0080. This article was prepared October 15, 1992, and revised January 31, 1993. We would like to acknowledge the following staff attorneys and legal units for their contributions to this article: Sheryl Berkenzweig, Terry Coble, Esther Cruz, Valery Greenfield, Miriam Harnatz, Carolina Lombardi and LSGMI Family/Juvenile/Education Unit, with the assistance of Nova Law School interns.

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* Legal Services of Greater Miami, Inc. located at 225 N.E. 34th Street, Suite 300, Miami, FL 33137. Their telephone number is (305) 576-0080. This article was prepared October 15, 1992, and revised January 31, 1993. We would like to acknowledge the following staff attorneys and legal units for their contributions to this article: Sheryl Berkowitz, Terry Cagle, Esther Cruz, Valory Greenfield, Miriam Harnatz, Carolina Lombardi and LSGMI Family/Juvenile/Education Unit, with the assistance of Nova Law School interns.

http://nsuworks.nova.edu/nlr/vol17/iss3/1

I. HOUSING

1. My house was damaged and I can’t live in it—do I need to pay my mortgage?

Your duty to pay your mortgage continues even if your house is damaged and you cannot live in it. However, check with your lender since many companies are offering a grace period of several months to delay payments (although interest may continue to be added). Some lenders are also arranging for loan modifications, which allow for the missed payments to be added to the outstanding balance, thereby lengthening the term of the mortgage.

2. What if I cannot pay my mortgage?

If you have received a written foreclosure notice as a result of disaster related financial hardship, you may be eligible for Federal Emergency Management Agency (FEMA) payments to help you with your mortgage payments. FEMA benefits are explained in another section of this article. You may file an application for FEMA benefits at a Disaster Assistance Center (DAC) site listed at the end of this handout.

If you have income and you want to keep your house, you may be able to file a Chapter 13 bankruptcy. In this type of bankruptcy, the homeowner proposes a plan of how (s)he will pay regular mortgage payments and all other living expenses, and also pay an amount every month toward the mortgage arrears. If you think you may want to file a Chapter 13 bankruptcy, you should consult an attorney.

3. What if I live in a condominium?

If you live in a condominium or pay maintenance to any type of homeowners’ association, you still need to pay your maintenance fees even if your homeowners’ association isn’t fixing the common areas or you do not like the way they are doing repairs. You should attend the homeowners’ association meetings to voice your concerns, and talk with other owners and members of the Board about your complaints. A group of you may want to get together to pool your money to seek legal advice. However, if you just stop paying maintenance, you can lose your home to foreclosure.

4. I have homeowner’s insurance, but I was told it will take months for an adjuster to look at my house and then it will take longer for a check to be issued—am I eligible for any type of assistance because my house needs lots of expensive repairs and I am not even sure I can live there until it is fixed?

If you have homeowner’s insurance, you will most likely be eligible for money for living expenses while you cannot live in your house. You need to contact your insurance company. If you did not have homeowner’s insurance then you may be eligible for assistance under the Individual and Family Grant (IFG) program to pay for necessary repairs to essential parts of your home. You may apply for IFG at the FEMA DAC site listed at the end of this handout.

5. The apartment I live in is in really bad shape from the hurricane, but the landlord told me that if I want to stay I must pay full rent—what should I do?

Your landlord may also be experiencing financial hardship until his/her insurance money comes through for repairs. Talk to your landlord to see if the rent can be reduced until the apartment is repaired; see if the landlord will give you enough time to move to another place without your having to pay any more rent; see if the landlord will allow you to move to another unit in the building that is liveable.

6. What if my landlord won't negotiate?

If your landlord has not started repairs within a reasonable time, and you cannot afford to move, you may want to consider withholding rent. Call Legal Services at the telephone number listed on the cover of this handout for a article on the proper way to withhold rent.

7. All my belongings were destroyed when the roof fell in on the place I rent—what help can I get?

If you had renter’s insurance at the time of the hurricane, contact your insurance company. If your situation is desperate, make sure you describe your situation to the insurance company. If the company agrees that there is coverage, you can ask for an advance payment to cover a part of your loss. Read the information in the insurance section of this handout about how to prepare for the adjuster’s visit, and how to handle your insurance claim.

8. What if I do not have any insurance on my property?

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to cover your belongings. If your losses are not covered by any insurance policy, you may be able to get IFG money for replacement of necessary items of personal property. You may apply for these benefits at the FEMA DAC site listed at the end of this handout.

9. My landlord told me to move out the next day because he wants the apartment for his daughter who lost her house in the hurricane. He told me if I wasn’t out, he would change the locks—do I have to move?

Florida law does not allow a landlord to just lock you out or turn off the utilities or to use any other "self help" means to get you to leave. The landlord must file an eviction action in County Court and then you have to move out after the Judge in your eviction case enters a final judgment of eviction. Furthermore, in most instances, the landlord must first give you some type of written notice to vacate before the landlord can file in Court.

If you get eviction court papers, you can call Legal Services for a handout on how to file your answer to the eviction lawsuit.

10. My apartment is so bad I cannot live in it and I am going to move and want my security deposit returned—what are my rights?

If you have a written lease, read your lease to see what it says. If you do not have a written lease, or your lease does not say anything about deposits, then the landlord must either return your deposit within fifteen days after you move out or send you a letter saying why you won’t get your deposit back. However, before you leave, you must give your landlord your new address. If you and your landlord disagree about whether you should get your deposit back, you can call Legal Services to ask for our booklet on taking your landlord to small claims court to get back your security deposits.

II. INSURANCE

1. How can I preserve my claims and protect my right to repayment from insurance coverage?

If you have any insurance policy which you think may cover your damage, whether it is a homeowner’s, renter’s or car insurance policy, call your agent, broker, or insurance company as soon as possible, and report your loss, even if you are not sure that there is coverage or if you do not know if the claim will exceed the deductible. Make sure you write down the name of the person you speak to and the claim number they will give you.

If you cannot get through to your insurance company by telephone, write them a letter telling them of your loss and keep a copy of it. If you cannot find the insurance policy, contact your agent, broker or insurance company. If you do not know the name of your homeowner’s insurance company, call your bank or mortgage holder. If you do not know the name of your car insurance company, call the Department of Motor Vehicles.

If you cannot stay in your home, make sure you give the insurance agent or representative your new address and telephone number.

2. What if I live in a condominium?

If you own a condominium, you should look at both the coverage provisions in your Association insurance policy, and the coverage under your individual unit owner’s insurance policy.

3. How do I get an insurance adjuster out to my home to assess the damage?

You should request the insurance company to send an adjuster to look at your property. It is best if this request is in writing. If necessary, you should contact the Florida Department of Insurance at the telephone number listed at the end of this handout.

4. What can I do to prepare for the insurance adjuster?

If circumstances allow, make a list of all property damaged or destroyed, take pictures, collect names, addresses and telephone numbers of witnesses, obtain repair estimates, keep a record of expenses such as alternative housing, etc., and locate original bills and receipts for lost items. Submit these along with your claim to your insurance company.

Take any steps you can reasonably take to protect the property from further damage. Save all receipts for any expenses you incur in protecting your property.

5. What if I cannot wait for the insurance adjuster?

Some insurance policies provide for reimbursement for temporary housing relocation costs while your home is being repaired and for car rental costs while your car is being repaired or replaced. Check your policy or call...
to cover your belongings. If your losses are not covered by any insurance policy, you may be able to get IFPG money for replacement of necessary items of personal property. You may apply for these benefits at the FEMA DAC site listed at the end of this handout.

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If you have a written lease, read your lease to see what it says. If you do not have a written lease, or your lease does not say anything about deposits, then the landlord must either return your deposit within fifteen days after you move out or send you a letter saying why you won’t get your deposit back. However, before you leave, you must give your landlord your new address. If you and your landlord disagree about whether you should get your deposit back, you can call Legal Services to ask for our booklet on taking your landlord to small claims court to get back your security deposit.

II. INSURANCE

1. How can I preserve my claims and protect my right to repayment from insurance coverage?

If you have any insurance policy which you think may cover your damage, whether it is a homeowner’s, renter’s or car insurance policy, call your agent, broker, or insurance company as soon as possible, and report your loss, even if you are not sure that there is coverage or if you do not know if the claim will exceed the deductible. Make sure you write down the name of the person you speak to and the claim number they will give you.

If you cannot get through to your insurance company by telephone, write them a letter telling them of your loss and keep a copy of it. If you cannot find the insurance policy, contact your agent, broker or insurance company. If you do not know the name of your homeowner’s insurance company, call your bank or mortgage holder. If you do not know the name of your car insurance company, call the Department of Motor Vehicles.

If you cannot stay in your home, make sure you give the insurance agent or representative your new address and telephone number.

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6. What if the insurance company offers to settle?

You should consult a lawyer before signing any release or waiver and before cashing any check from the insurance company which might be deemed full and final payment of your claim. Before you settle with the insurance company, be aware of the full extent of your damage and the full value of your claim. It may be important for you to get estimates or to actually have the work completed before you can agree to a specific cost figure.

7. What if the insurance company denies my claim or offers me less than I think I am entitled to?

You should demand that the insurance company give you its reasons in writing for denying coverage or limiting your claim, and consult a lawyer. Most insurance policies require that you bring suit against the insurance company for failure to pay a claim WITHIN ONE YEAR from the date of the occurrence of the damage. If you do not file suit in time, you may be prevented from receiving any reimbursement.

8. What if my insurance does not cover all of the damages to my home or personal property?

You may be eligible for benefits under the FEMA program if you are unable to pay for repair or replacement of essential parts of your home or essential personal property. See the FEMA section of this handout.

You may also keep all of your repair and replacement receipts and file your losses with the IRS either by amending your income tax return for last year or by declaring the losses on your income tax return next year. For information, you may go to the IRS table at the FEMA DAC site listed at the end of this handout.

### A. Some Cautions

1. Beware of anyone who claims that they are working on behalf of the government, the Florida Department of Insurance or your insurance company and asks for money to help you expedite your claim. Ask this person’s name and immediately report this to your insurance company or the State of Florida Department of Insurance for verification.

2. You may be approached by a “public adjuster” who will offer to assist you in handling or expediting your insurance claims in return for a percentage of your insurance benefit payments. Due to the extreme amount of damage caused by the hurricane, it is unlikely that anyone will be of much help in expediting insurance claims.

3. Most insurance companies will only reimburse for reasonable cost of repair. If prices quoted for repairs appear inflated, get another estimate and obtain your insurance company’s agreement before undertaking repairs. Remember that your claim will only be approved to the extent that it does not exceed your policy limit. If you undertake repairs at an inflated price, you will unnecessarily reach your maximum policy limit very quickly.

### III. IMMIGRATION

1. Do I need to be a U.S. resident or citizen to apply for emergency disaster relief?

You can qualify for most of the disaster programs offered at the FEMA Disaster Assistance Center sites, even if you do not have a legal immigration status. This includes Temporary Housing Assistance, mortgage and rental assistance, and Individual and Family Grants for necessary home repairs and replacement of necessary household items.

2. Will I be considered a public charge and denied residency if I apply for emergency disaster relief?

No. Acceptance of emergency disaster relief will not be considered public cash assistance preventing you from becoming a resident. You will not be classified as a public charge solely because you have accepted emergency disaster assistance.
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If your situation is desperate, make sure that you let the insurance company know of the desperation of your situation, and, if the insurance company agrees that there is coverage, ask for an advance payment toward your losses. Due to the extreme amount of damage caused by the hurricane, many insurance companies are recommending that you start repairing the damaged property prior to the adjuster’s visit. You should get the company’s permission before doing so. Many companies will also provide you with an emergency advance to cover some repair costs.

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No. Acceptance of emergency disaster relief will not be considered public cash assistance preventing you from becoming a resident. You will not be classified as a public charge solely because you have accepted emergency disaster assistance.
3. If I lost my "green card" in the hurricane, how can I get a replacement?

You need to fill out a form I-90 and file it in person at the Miami District Office located at 7880 Biscayne Boulevard. Other locations may become available to accept these applications. Along with the I-90 you must submit two recent residency photographs (2"x2", color with a white background) and a cashier's check or money order for $70.00.

4. If I lost my work permit in the hurricane, how can I get a replacement?

You need to fill out immigration form I-765. If you have a photocopy of your lost work permit, attach it to the I-765. Also include a photocopy of any applications or documents which entitle you to receive a work permit, such as an application for asylum, suspension of deportation, or adjustment of status. A $60.00 cashier's check or money order must be included to obtain a replacement work permit. You must mail the I-765 to INS Employment Authorization Unit, 7880 Biscayne Boulevard, Miami, Florida 33138.

5. How do I get the immigration forms I need to apply for new papers?

You can get immigration forms by mail from the INS by calling (800) 528-6000. This service is available twenty-four hours a day, seven days a week. You can get help in completing immigration forms from the agencies listed under "IMMIGRATION" at the end of this handout. These agencies may also have copies of immigration forms. If you have any concerns about your current immigration status, contact one of these agencies for legal assistance before applying for a green card or a work permit, because if you are not eligible you will lose your money.

6. Do I need to let INS or the immigration court know that I have moved as a result of the hurricane?

If you have a pending case, you are required to inform the immigration court of any change in address or telephone within five days of moving. Notice of a change of address is made on immigration form EOIR-33, which should be sent certified mail to: U.S. Department of Justice, EOIR, Office of the Immigration Judge, P.O. Box 381139, Miami, Florida 33238-1139. If you cannot obtain this form, mail a letter to the above address. In the letter include your name, alien registration number, and new address and telephone number.

If your case is pending before the asylum unit, notice of a change of address must be sent to: Miami Asylum Office, 701 S.W. 27th Avenue, Suite 140, Miami, Florida 33135.

If your case is pending before the Immigration Service, notice of change of address should be sent to: 7880 Biscayne Boulevard, Miami, Florida 33138.

Be sure to include your alien registration number on all letters or forms sent to INS. If you are in a shelter or tent site because your home was damaged, you should provide the address of a relative or friend who can receive your mail until you are able to obtain other housing.

IV. DISASTER RELIEF (FEMA)

1. What kinds of benefits does FEMA provide?

The Federal Emergency Management Agency (FEMA) is an umbrella organization that coordinates state and federal government benefits for disaster victims, and determines eligibility for Temporary Housing Assistance (THA).

FEMA Disaster Assistance Centers (DAC) provide a central location for disaster victims to apply for Temporary Housing Assistance (THA), state-administered Individual and Family Grants (IFG), Unemployment Compensation benefits (UC), Food Stamps, Emergency Grants for Migrant and Seasonal Farmworkers, and SBA business and homeowners' low interest loans. FEMA DAC also offer legal advice, advice on Veteran's Administration benefits, and on amending income tax returns to reflect losses due to the disaster. The DAC site is listed at the end of this article.

2. Who is eligible for Temporary Housing Assistance (THA)?

You must have applied for temporary housing assistance (THA) on or before February 19, 1993. You must show that your primary residence has been made uninhabitable or that you are no longer living there because of the disaster. If you have insurance, you must also show that you have made reasonable efforts to obtain insurance benefits and that you have not been successful, and you must agree to repay FEMA to the extent that you later obtain insurance benefits.
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3. What kind of help can I get under THA?

Temporary Housing Assistance usually takes the form of a check to cover the cost of rent, mortgage or essential home repairs. You may also be eligible for a FEMA trailer if you cannot obtain housing in another way. You should apply for a trailer at one of the FEMA housing centers listed at the end of this article.

You may apply for rental or mortgage assistance within six months of the disaster declaration, if you have received written notice of eviction for nonpayment of rent or mortgage. This kind of assistance may be provided for a period not to exceed eighteen months.

Money for home repairs is available for the purpose of quickly repairing or restoring the essential living areas of an owner occupied residence to a livable condition. Residence must be able to be made livable by repairs within thirty days.

4. Is any other housing assistance available?

Yes. There are special section eight housing vouchers for disaster victims which will pay up to seventy percent of your rent. In order to be eligible, your home must have been destroyed or severely damaged by the hurricane, and you must be otherwise eligible for HUD housing. The vouchers can be used anywhere in the United States and are good for up to two years.

If your home was destroyed as a result of the hurricane, you may also be eligible for special FHA mortgage which requires no down payment. You may be eligible for this assistance whether you were renting or purchasing a home in the disaster area at the time of the hurricane. You may apply for this 100% financing at your local financial institution.

5. Who is eligible for Individual and Family Grants (IFG's)?

You must have applied for IFG on or before February 19, 1993. IFG is available to individuals and to families who have disaster related necessary expenses or serious needs and who do not have adequate assistance from other sources, such as insurance.

6. What kind of help can I get under the IFG program?

The maximum grant under the IFG program is $11,500 per family or individual. It is provided to cover necessary expenses or serious needs for essential items or services in the following categories:

7. Will IFG benefits affect my eligibility for SSI, AFDC, Medicaid or Food Stamps?

No. Individual and Family Grant benefits may not be counted either as income or resources in determining your eligibility for any income-tested programs supported by the federal government.

8. If I owe money, can my IFG benefits be taken by my creditor?

No. IFG benefits are exempt under federal law from garnishment, seizure, encumbrance, levy, execution, pledge, attachment, release, or waiver. They also cannot be assigned or transferred away from the recipient to someone else.

9. Do I have to be a U.S. citizen to qualify for IFG benefits?

No. You do not have to be a U.S. citizen or legal resident to get IFG benefits. You may qualify for these benefits even if you do not have a legal residency status. However, in order to obtain money to repair an owner occupied residence, you must show that you are the owner of the home and that you reside there.

10. Who is eligible for Small Business Administration (SBA) loans?

In order to qualify for a low interest SBA loan, you must show that your home or business was damaged by the hurricane, and that you have the ability to repay the loan.

11. What kind of help can I get from the SBA loan program?

The maximum SBA loan for a residence is $100,000. The maximum SBA loan for a business is $500,000. The interest rate is different for home and business loans, and varies depending on whether other financing is available.
3. What kind of help can I get under THA?

Temporary Housing Assistance usually takes the form of a check to cover the cost of rent, mortgage or essential home repairs. You may also be eligible for a FEMA trailer if you cannot obtain housing in another way. You should apply for a trailer at one of the FEMA housing centers listed at the end of this article. You may apply for rental or mortgage assistance within six months of the disaster declaration, if you have received written notice of eviction for nonpayment of rent or mortgage. This kind of assistance may be provided for a period not to exceed eighteen months. Money for home repairs is available for the purpose of quickly repairing or restoring the essential living areas of an owner occupied residence to a livable condition. Residences must be able to be made livable by repairs within thirty days.

4. Is any other housing assistance available?

Yes. There are special section eight housing vouchers for disaster victims which will pay up to seventy percent of your rent. In order to be eligible, your home must have been destroyed or severely damaged by the hurricane, and you must be otherwise eligible for HUD housing. The vouchers can be used anywhere in the United States and are good for up to two years.

If your home was destroyed as a result of the hurricane, you may also be eligible for special FHA mortgage which requires no down payment. You may be eligible for housing assistance whether you were renting or purchasing a home in the disaster area at the time of the hurricane. You may apply for this 100% financing at your local financial institution.

5. Who is eligible for Individual and Family Grants (IFG’s)?

You must have applied for IFG on or before February 19, 1993. IFG is available to individuals and to families who have disaster related necessary expenses or serious needs and who do not have adequate assistance from other sources, such as insurance.

6. What kind of help can I get under the IFG program?

The maximum grant under the IFG program is $11,500 per family or individual. It is provided to cover necessary expenses or serious needs for essential items or services in the following categories:

a. For the repair, replacement or rebuilding of owner occupied housing;

b. To provide clothing, household items, furnishings, and appliances, tools and equipment required as a condition of employment;

c. To replace or repair vehicles or provide public transportation;

d. To provide medical or dental expenses;

e. To pay for funeral expenses.

7. Will IFG benefits affect my eligibility for SSI, AFDC, Medicaid or Food Stamps?

No. Individual and Family Grant benefits may not be counted either as income or resources in determining your eligibility for any income-tested programs supported by the federal government.

8. If I owe money, can my IFG benefits be taken by my creditor?

No. IFG benefits are exempt under federal law from garnishment, seizure, encumbrance, levy, execution, pledge, attachment, release, or waiver. They also cannot be assigned or transferred away from the recipient to someone else.

9. Do I have to be a U.S. citizen to qualify for IFG benefits?

No. You do not have to be a U.S. citizen or legal resident to get IFG benefits. You may qualify for these benefits even if you do not have a legal residency status. However, in order to obtain money to repair an owner occupied residence, you must show that you are the owner of the home and that you reside there.

10. Who is eligible for Small Business Administration (SBA) loans?

In order to qualify for a low interest SBA loan, you must show that your home or business was damaged by the hurricane, and that you have the ability to repay the loan.

11. What kind of help can I get from the SBA loan program?

The maximum SBA loan for a residence is $100,000. The maximum SBA loan for a business is $500,000. The interest rate is different for home and business loans, and varies depending on whether another financing is available.
V. UNEMPLOYMENT COMPENSATION

If you became unemployed because your employer’s business was destroyed or closed because of Hurricane Andrew, or you lost your job because your house or your car was destroyed, or because you were no longer able to get to work due to the hurricane, you may be entitled to receive Unemployment Compensation (UC) benefit.

1. Where can I apply for Unemployment Compensation (UC)?

You may apply for either regular Unemployment Compensation benefit at your neighborhood Unemployment Compensation office. All of the neighborhood offices are open, except for the Perrine office, which was destroyed in the hurricane. (The Homestead office is operating out of trailers at its usual location.) A list of all the places you can apply for UC is at the end of this handout.

2. When should I apply for UC and DUA?

You should apply as soon as possible since you may have to wait about four weeks before your first check is sent to you. In addition, you should plan to go to the office or site as soon as possible. The offices usually open at 8:00 a.m. and there is often a very long line waiting well before 8:00 a.m. to get into the building.

3. How do I know if I am eligible for UC benefits?

You are eligible for regular UC benefits if you are an unemployed U.S. citizen, permanent or temporary U.S. resident, or you have a valid work permit, and:

a. You have filed a UC claim; and
b. You have registered for work at a local Employment Service Office; and
c. You are able to work and available for work; and
d. You meet certain wage requirements; and
e. You have served a one week waiting period; and
f. You are unemployed through no fault of your own.

Even if you meet the requirements listed above, you can be disqualified from receiving UC if:

a. You voluntarily quit your job without good cause; or
b. You were terminated because of misconduct; or
c. You refused employment without good cause.

4. What if I am told that I am not eligible for UC benefits?

If you are denied UC benefits, you have a right to appeal the decision within twenty days from the date on the decision notice. After you have appealed you will get a notice telling you about your appeal rights. If you need a translator, you should ask for one in advance. At the hearing, you will have an opportunity to explain to the appeal referee why you are entitled to UC. You should bring witnesses and documents with you to prove your case.

VI. PUBLIC EDUCATION

1. If my child was in a special program or an ESOL program last year, will (s)he be placed in the same kind of program in the new school?

Your child has a right to continue in a special program or an ESOL program. Make sure that the principal of your child’s new school knows what type of program your child was in last year, because there may be a lot of confusion with school records as a result of transfers. If your child is not placed in the kind of program (s)he needs, your child will be prevented from learning as much as (s)he can.

2. Will I need any documents to show that my child was in a special or ESOL program last year?

If your child was in a special or ESOL program in Dade County, you will not need any documents to prove that (s)he needs a special or ESOL program, because the information will be on the Dade County Public Schools computer. If your child was in a special or ESOL program outside of Dade County last year, tell the school officials or teachers. If the records from your child’s former school district are not sufficient, your child’s new school may need to test your child.

3. Will the change in schools affect my child’s graduation?

The Dade County Public Schools will do its best to make sure that all students graduate on time. If your child is in High School, it is especially important that (s)he takes all the courses needed to graduate.
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2. When should I apply for UC and DUA?

You should apply as soon as possible since you may have to wait about four weeks before your first check is sent to you. In addition, you should plan to go to the office or site as early in the morning as possible. The offices usually open at 8:00 a.m., and there is often a very long line waiting well before 8:00 a.m. to get into the building.

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The Dade County Public Schools will do its best to make sure that all students graduate on time. If your child is in High School, it is especially important that (s)he takes all the courses needed to graduate. The Dade
County Public Schools computer system should indicate what subjects each child has taken and what credits still need to be earned. Be sure to let the school office or teacher know if your child is assigned to a subject that (s)he has already taken. You should help to get your child's records to the guidance office or have your child's new school reconstruct his/her records so that the school can make sure that your child is taking the subjects needed to graduate.

4. What will I need to show for my child to begin school?

If your child has been a student in the Dade County Public School system before, you may register your child by giving the child's name and former address. If the child has any ID's, birth certificates, notarized statements from parents, and especially school records, this will also be helpful. You will also have to show that your child was immunized.

5. How can I prove that my child was immunized?

Your child only needs to be immunized once in his/her school career. If your child was previously enrolled in the Dade County Public Schools, that fact will be accepted as proof of immunization. Your child's new school should be able to find your child's record in its computer if you give them your former address. If your child was immunized at a public health clinic or by a private doctor, ask them for a paper indicating when the immunization was performed. You should try to get your child immunized or obtain his/her record before the first day of school if possible.

6. Where can I get my child immunized?

You can have your child immunized at a public health clinic, or by a doctor. You can call the Dade County Public Schools Help Line at 995-HELP or 995-4357 to obtain the names, addresses, and phone numbers of nearby clinics.

7. Our family has moved to another part of Dade County. Can my child attend the public school in our new neighborhood?

Yes. The school system expects many children to be reporting for schools far from their previous school. It is best to enroll your child in the school near where you are actually living. It would be helpful but not necessary if you have official school records from the old school and any evidence of your child's new address along with your ID when you register

8. If my child is staying with relatives or friends, will (s)he be allowed to register for school where (s) he is staying?

Yes. It will help if you give the adult who is caring for your child a notarized statement authorizing him/her to care for your child, but this is not necessary. The adult with whom your child is living should register your child. The adult will need identification and (s)he needs to bring any available records on your child.

9. How can I obtain my child's school records, if I do not have copies?

Once your child is registered, his/her new school is in charge of obtaining and reconstructing school records.

10. What can I do if the local public school refuses to accept my child or refuses to place my child in a special program (s)he needs?

If you are unable to resolve your child's problem by working with the officials at the school, you should call the Office of Student Advocacy at 995-1234.

11. My child is living in another county or state now, and has started school there. Is this O.K.?

Both Broward and Monroe County schools have offered to take in Dade County students without charging any fees. Other counties in Florida are authorized to waive the usual fees for out of district students during an emergency. Other states are required to offer all educational services to their residents. Any student who intends to reside in the area for an indefinite period is a resident and should qualify for free public education.

VII. FAMILY ISSUES

1. My child is living with a relative. Will my child be able to get medical care if I cannot be reached by telephone?

If a doctor believes that your child's health or well-being will be in danger without immediate medical treatment, the doctor can provide emergency medical care and treatment without your consent. If your child's
County Public Schools computer system should indicate what subjects each child has taken and what credits still need to be earned. Be sure to let the school office or teacher know if your child is assigned to a subject that (s)he has already taken. You should help to get your child's records to the guidance office or have your child's new school reconstruct his/her records so that the school can make sure that your child is taking the subjects needed to graduate.

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medical need is not an emergency and you cannot be reached, the following
people can consent to your child’s treatment in the following order: 1) 
someone to whom you gave the authority to consent to your child’s medical 
treatment through a power of attorney; 2) your child’s stepparent; 3) your 
child’s grandparent; 4) your child’s adult brother or sister; or 5) your child’s 
adult aunt or uncle.

2. Is it still possible to do something about violence in our home?

A natural disaster such as Andrew causes a great deal of stress on 
everyone. This can lead to increased tension and violence in family and 
household units. You can obtain a protective injunction from the Dade 
County Circuit Court at the Metro Justice Building, 1351 N.W. 12th Street, 
Miami, or at any branch Courthouse (even the one in Cutler Ridge). Free 
counseling is also available for victims and families facing increased stress 
and tension. See answer to question 4 below.

3. What can be done about child abuse or neglect?

The same tension and stress which leads to domestic violence can also 
cause child abuse or neglect. You can report abuse by calling the statewide 
Child Abuse Registry at 1-800-96-ABUSE. The Child Abuse Registry 
should refer appropriate cases to the Hurricane Relief Fund for Dade Foster 
Kids, and try to get immediate relief for families to prevent separation. The 
Registry should also take appropriate action when it is necessary to remove 
children to protect them. It is important for families to know that if their 
children are removed, they have the right to a court hearing and a right to 
have a lawyer appointed to represent them. Homelessness alone should never 
be the reason for separating families. Instead HRS should work to help a 
family find housing assistance to stay together. Free counseling is also 
available. See answer to question four below.

4. How can I get counseling for myself or my family?

Free Operation Snap Back group counseling related to the storm is 
available through Family Counselling Services at 379-5720 and Jewish 
Family services at 445-0555. Individual and family counseling is also 
available through Family Counselling services in North Dade at 653-9098, 
West Dade at 279-3722 and central Dade at 379-5730. Similar services will 
be established as soon as possible in South Dade and can be located by 
calling 379-5730. Other services are being offered on a daily basis. You 
can find a listing in the latest edition of the Miami Herald which reports on

assistance in the aftermath of the Hurricane. Additional counseling is also 
be available for children through the school system when school starts.

VIII. FOOD STAMPS

A. Expedited Food Stamps

1. What are expedited Food Stamps?

Expedited food stamps are available to very needy persons within five 
calendar days of application. The expedited process is part of the regular 
food stamp program application process.

2. How do I know if I am eligible for expedited Food Stamps?

To be eligible for expedited Food Stamps, you must show one of the 
following:

a. you or your household has no more than $150 in monthly income 
   before taxes, and $100 or less in cash and bank accounts; or
b. your basic shelter and utility expenses are greater than your present 
   income and resources combined; or

c. you are homeless; or

d. you are a migrant or seasonal farmworker household with $100 or 
   less in cash and bank accounts.

3. What verification do I need for expedited Food Stamps?

You must only be able to verify that you are who you say you are by 
showing documents bearing your name, or by having someone say they 
know you.

4. Do I have to meet any other eligibility requirements?

You will be asked for verification of your immigration status, your 
social security number, your income and your expenses at the time you 
apply. However, you will be eligible for expedited food stamps within five 
days after you apply even if all of the verification cannot be obtained.

5. How long do expedited food stamp benefits last?

You can only get expedited food stamps for one month. After that, you
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5. How long do expedited food stamp benefits last?

You can only get expedited food stamps for one month. After that, you
will have to produce verification of your immigration status, social security number, income and expenses, in order to continue to be eligible.

6. If I do not qualify for expedited food stamps, can I still get regular food stamps?

Yes. HRS must process your food stamp application within thirty days and mail you a written decision stating whether you are eligible and the amount of benefits to which you are entitled. If you are denied benefits or you do not receive them within thirty days of your application, and you believe you are entitled to them, you can call Legal Services of Greater Miami.

B. Regular Food Stamps

1. There are long lines at the food stamp office in my area, and it is hard to get my food stamps or apply for new stamps. Can I go somewhere else?

If you are applying for food stamps for the first time, you can apply at the food stamp office in Dade County, which serves your zip code or neighborhood.

You can also go to any food stamp office in Dade or Broward Counties to pick up your food stamps so long as your case is active and is on HRS’ computers. You should bring your identification and your food stamp card when you go to collect your food stamps. The location of the three Broward County food stamp offices nearest to Dade County are:

- 7261 Sheraton Street, Hollywood
- 311 North State Road 7, Plantation
- 1350 South Pompano Way, Pompano Beach

IX. AFDC BENEFITS

1. Could I be eligible for AFDC even if I never was before?

Yes. If you live in the same household as your minor children, you are poor, and the other parent of your children either does not live in your household or is unemployed, you may be eligible for AFDC. You should apply at the HRS office nearest to you. A list of HRS offices is provided at the end of this handout. If you are denied benefits, or if HRS takes longer than forty-five days to make a decision in your case, call Legal Services.

2. Could my family be eligible for AFDC even if we are a two parent family, if the principal wage earner in the household is unemployed?

Yes. Your family might be eligible and you should apply at your closest HRS office. Unfortunately, the AFDC program can take up to 45 days from the date of your application to provide benefits. If you are denied or HRS takes longer than forty-five days to issue you benefits, call or come by Legal Services.

X. MEDICAID BENEFITS

1. What if my Medicaid card is lost next month?

You should go to an HRS office and ask for a form 2040 as temporary proof of Medicaid eligibility to show to your pharmacy, doctor, or clinic.

2. Could I be eligible for Medicaid now even if I never was before?

Yes. If you are pregnant, have young children, are disabled, elderly, or an unemployed head of household, you and your family may be eligible for Medicaid depending on your immigration status, income, resources, and the size of your household. You should apply at an HRS office. If you are denied or you do not receive a decision within forty-five days, call Legal Services.

XI. SOCIAL SECURITY AND SSI BENEFITS

1. Could I be eligible now even if I never was before?

If you are blind, over the age of sixty-five, or disabled and cannot perform any kind of work, you should apply for benefits at the Social Security office nearest you. You can also start an application by calling the Social Security Administration’s toll free telephone number (1-800-772-1213). Once Social Security has all the necessary documentation, such as proof of earnings, and medical evidence of disability, they will send you a written decision. If you are denied and you think you are eligible, you
will have to produce verification of your immigration status, social security number, income and expenses, in order to continue to be eligible.

6. If I do not qualify for expedited food stamps, can I still get regular food stamps?

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should file a request for reconsideration within sixty-five days of the date of the initial decision. If you are denied again, you should request a hearing and contact Legal Services.

2. Are there any other benefits besides old age and disability benefits for which I might be eligible?

Yes. You may be eligible for other kinds of Social Security or SSI benefits: on your own account; or on the account of another if you want to retire; or you are an aged or disabled widow or widower, or you are the dependent family member of a disabled, retired or deceased worker. If you think you are eligible for any of these benefits, you should contact the Social Security Administration and apply.

XII. DIRECTORY

A. Hotlines & Telephone Assistance

Child Abuse Registry
Dade County Public Schools HELP LINE
FEMA Information
FEMA Registration by phone
FEMA Assistance for speech or hearing impaired
Florida Department of Insurance Consumer Hotline
Legal Services of Greater Miami, Inc.
Legal Hotline for Older Floridians
Medicaid Confirmation
Office of Student Advocacy
Operation Snap Back (Family Counseling)

(800) 96-ABUSE
995-HELP/ 995-4357
(800) 257-1407
(800) 462-9029
(800) 462-7585
(800) 528-7064
(800) 974-2954
576-5997
(800) 289-7799
498-4665
995-1234
379-5720

B. Immigration Assistance

AILA Pro Bono Project
South Dade Immigration Association
B. Unemployment Compensation Offices

Miami Claims Office
Hialeah Claims Office
401 NW 2nd Avenue, Room N-207
3133 Riviera Drive
Miami, Florida
Fort Lauderdale Claims Office
Key West Claims Office
Naples Claims Office
Hollywood Claims Office
Homestead Temp (Trailers)

(800) 96-ABUSE
119 N.E. 54 Street
225 N.E. 34 Street, Suite 300
21 South Krome Avenue
100 N.W. 37 Avenue, 5th Floor
401 NW 2nd Avenue, Room N-207
3133 Riviera Drive
1034 6th Avenue N.
6151 Miramar Pkwy.
381 N. Krome Avenue
Hialeah, Florida
Fort Lauderdale, Florida
Key West, Florida
Naples, Florida
Hollywood, Florida
Homestead, Florida

(305) 757-8358
576-0080
247-4779
642-6822
North Dade
West Dade
South Dade
653-9908
279-3722
379-5790

Social Security Administration
(800) 772-1212
Haitian Refugee Center
Lutheran Ministries
Miami, Florida 33137
Miami, Florida 33317
Miami, Florida 33125

North Dade
West Dade
South Dade

1187
119
193
should file a request for reconsideration within sixty-five days of the date of the initial decision. If you are denied again, you should request a hearing and contact Legal Services.

2. **Are there any other benefits besides old age and disability benefits for which I might be eligible?**

   Yes. You may be eligible for other kinds of Social Security or SSI benefits: on your own account; or on the account of another if you want to retire; or you are an aged or disabled widow or widower, or you are the dependent family member of a disabled, retired or deceased worker. If you think you are eligible for any of these benefits, you should contact the Social Security Administration and apply.

### XII. DIRECTORY

#### A. Hotlines & Telephone Assistance

<table>
<thead>
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<th>Service</th>
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<tr>
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<td>119 N.E. 54 Street, Miami, Florida 33137</td>
<td>757-8538</td>
</tr>
<tr>
<td>South Dade Immigration Association</td>
<td>Lutheran Ministries</td>
<td>642-6822</td>
</tr>
<tr>
<td>Homestead, Florida</td>
<td>21 South Krome Avenue, 100 N.W. 37 Avenue, 5th Floor, Miami, Florida 33125</td>
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#### C. Unemployment Compensation Offices

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<td>3133 Riviera Drive, Key West, Florida</td>
<td>2660 W. Oakland Park Blvd, Fort Lauderdale, Florida</td>
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<td>Naples Claims Office</td>
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<td>1550 SW 6th Street, Homestead, Florida</td>
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http://nsuworks.nova.edu/nlr/vol17/iss3/1
Dislocated Workers Assistance Center
4990 NW 36th Street
Miami, Florida

D. FEMA Assistance Centers

Cutler Ridge Mall
U.S. 1 & Florida Turnpike

E. FEMA Housing Centers

Perrine Homestead Florida City
9843 SW 184 St. 950 Krome Ave. 499 W. Palm Dr.

F. HRS Offices (Food stamps, Medicaid and AFDC)

For information call:

English (800) 4-HRS-181
Spanish (Espanol) (800) 4-HRS-960

Office Locations

1) Juanita Mann 7900 NW 27 Avenue
2) West Dade 9766 SW 24 Street
3) Hialeah South 5700 NW 37 Avenue
4) *Little Havana 970 SW 1st Street
5) Caleb 5400 NW 22 Avenue
6) Hialeah North 245 West 74 Place
7) Northeast Dade 18301 North Miami Avenue
8) Opa Locka 3400 NW 135 Street

9) **Jackson Memorial Hospital

10) Miami Beach 1132 Sixth Street
11) North Central 7900 NE 2nd Avenue
12) Coconut Grove 3750 South Dixie Hwy
13) Central 701 SW 27 Avenue
14) Culmer 1600 NW 3 Avenue

*Little Havana and Culmer provides Food Stamp issuance only.

**Jackson Memorial Hospital does not issue Food Stamps.

G. Other Government Agencies

INS Employment Authorization Unit (305) 536-5741

Immigration & Naturalization
Miami District Office
7880 Biscayne Boulevard
Miami, Florida 33138

US Dept of Justice, EOIR
Office of the Immigration Judge
P.O. Box 381139
Miami, Florida 33238-1139

Miami Asylum Office
701 SW 27 Avenue
Suite 1400
Miami, Florida 33135
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Cutler Ridge Mall
U.S. 1 & Florida Turnpike

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http://nsuworks.nova.edu/nlr/vol17/iss3/1
Results Against the Use of Hurricane Shutters: Are They Enforceable After Hurricane Andrew?

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III. HOW HOMES ARE DAMAGED BY THE FORCES OF A HURRICANE ............................................... 1194
IV. THE REASONABLENESS OF RESTRICTIVE COVENANTS AFTER HURRICANE ANDREW .................................................. 1196
V. CONCLUSION .................................................. 1200

I. INTRODUCTION

In the wake of Hurricane Andrew, many homeowners have discovered that there is more to a deed than merely a conveyance of title to reality. Many housing developments and planned unit developments are governed by deed restrictions which limit the use of properties within these developments. One such restriction is to prohibit the use of hurricane shutters.

* The author wishes to thank the following people for their invaluable insight and help: Ronald Benton Brown, Professor of Law, Nova University Shepard Broad Law Center, Fort Lauderdale, Florida; Joseph M. Grohman, Associate Dean for External Affairs and Professor of Law, Nova University Shepard Broad Law Center, Fort Lauderdale, Florida; Ellen Hirsch, Attorney at Law, Becker & Poliakoff, P.A., Fort Lauderdale, Florida; and everyone else who contributed to this article.

1. Called "PUD" for short and defined as "a device which has as its goal a self-contained mini-community, built within a zoning district, under density and use rules controlling the relation of private dwellings to open space, of homes to commercial establishments, and of high income dwellings to low and moderate income housing." BLACK'S LAW DICTIONARY 1233 (6th ed. 1990).

2. For the purpose of this article, the term "deed restriction" means that there is a land use restriction expressed in a deed to property or a separate document, other than a deed, usually called a declaration of covenants and restrictions. Telephone Interview with Ellen Hirsch, Attorney at Law, Becker & Poliakoff, P.A., Fort Lauderdale, Fla. (Dec. 29, 1992).

3. Id.

4. Some of the most common land use restrictions are ones that give homeowners' associations basic architectural control over community developments and each individual lot therein, or require that no material alterations or additions be made to homes without prior approval. Id. Because the installation of hurricane shutters can change the architectural
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Restrictions on the use of property are enforceable only if shown to be reasonable. This article explains why restrictions prohibiting the use of hurricane shutters are unreasonable. Part II of this article examines the law of restrictive covenants. Part III explains the dynamics by which hurricane forces damage homes and how hurricane shutters can prevent that type of damage. Finally, parts IV and V of this article propose that, in light of Hurricane Andrew, restrictions which prohibit the use of hurricane shutters are unreasonable and, therefore, unenforceable.

II. RESTRICTIVE COVENANTS

Restrictions against the free use and enjoyment of realty are not favored, but will nevertheless be enforced in order to support the fullest liberty of contract and the widest latitude possible in the disposition of land if the restrictions are reasonable. Because most purchasers of realty are

appearance of a home and can also be considered a material alteration or addition, these types of restrictions effectively prohibit the use of hurricane shutters. See Sterling Village Condominium, Inc. v. Breitenbach, 251 So. 2d 685, 687 (Fla. 4th Dist. Ct. App. 1971); Gay A. Polisken, The Florida Condominium Act, 16 NOVA L. REV. 471, 484 (1991). But some developments have been much more direct and specific in the drafting of their restrictive covenants by expressly stating that no awnings or shutters may be installed on any development home without the prior approval of the governing homeowners' association.

To support this contention, the author referred to the Declaration of Covenants and Restrictions for Bermuda Springs at 35 (on file with the author). Bermuda Springs is part of the Weston planned unit development developed by Arvida/JMB Partners located in Broward County, Florida.

5. See Sinclair Refining Co. v. Watson, 65 So. 2d 732, 733 (Fla. 1953); Moore v. Stevens, 106 So. 901, 903 (Fla. 1925); Cottrell v. Miskove, 605 So. 2d 572, 573 (Fla. 2d Dist. Ct. App. 1992); 7 GEORGE W. THOMPSON, THOMPSON ON REAL PROPERTY § 3161 (1962).

6. Concerning real property, a "covenant" is defined as "an agreement by deed to do or not to do some particular act." A covenant is a negative or restrictive covenant if it restrains or prohibits an act concerning the land. 7 THOMPSON, supra note 5, § 3150.

7. Sinclair Refining Co., 65 So. 2d at 733; Moore, 106 So. at 903. If a developer imposes restrictions on his or her real estate, then these restrictions may constitute a continuously running burden and benefit to all of the individual lots in the development. This is because when land is developed under a general scheme, reasonable restrictive covenants expressed for all lots sold "are enforceable alike by the vendor [seller] and the vendee [buyers] and by their successors in title." 7 THOMPSON, supra note 5, § 3163. A "general building scheme" is defined as "one under which a tract of land is divided into building lots, to be sold to purchasers by deeds containing uniform restrictions." Hagan v. Sabal Palms, Inc., 186 So. 2d 302, 307 (Fla. 2d Dist. Ct. App. 1966).

aware of and accept the restrictive covenants that come with acquired land, there is a very strong presumption of validity for such restrictions. However, by showing that the restrictions are unreasonable in application, this presumption can be broken, thus rendering the covenants unenforceable.

The primary purpose for almost all land use restrictions in community housing is to uphold the aesthetic and, therefore, monetary value of the community, while personal safety and property protection values are rarely considered. Ironically, when comparing a home equipped with hurricane shutters that survived Hurricane Andrew with minimal damage to a home without hurricane shutters that suffered serious damage, the former would certainly be more aesthetically pleasing than the latter, even though "aesthetics, harmony and balance . . . [are] very personal, and vague concepts."

Use restrictions pursuant to a general scheme of development for a tract of land that is subdivided and sold in distinct parcels may be enforced by any purchaser against any other purchaser 'either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created; and this doctrine is not dependant on whether the covenant is to be construed as running with the land." Id. "Ordinarily[,] the right to enforce restrictions imposed pursuant to a general scheme must be universal or reciprocal, that is, the same restrictions must apply substantially to all lots of like character . . . ." Id.

"The general theory behind the right to enforce restrictive covenants is that the covenants must have been made with or for the benefit of the one seeking to enforce them." Id. at 308. If authorized by the deed or declaration of covenants and restrictions, restrictive covenants may also be enforced by private property owners' associations, commonly known as homeowners' associations. 7 THOMPSON, supra note 5, § 3163. A "homeowners' association" is defined as "an association in which membership, either by the parcel owner or by an association in which parcel owners are members, is a condition of ownership of a parcel and which is authorized to impose a charge or assessment that, if unpaid, may become a lien on the parcel." FLA. STAT. § 617.301(2) (Supp. 1992).


9. Cottrell, 605 So. 2d at 573.

10. Hirsch, supra note 2; see, e.g., Holiday Pines Property Owners Ass'n v. Wellington, 596 So. 2d 84, 85 (Fla. 4th Dist. Ct. App. 1992) (subdivision had restrictive covenants for the purpose of encouraging the construction of attractive homes in order to enhance the value of the community) (In Holiday Pines Property Owners Ass'n, no apostrophe for the word "Owners" was used); Young v. Tortoise Island Homeowner's Ass'n, 511 So. 2d 381, 383 (Fla. 5th Dist. Ct. App. 1987) (homeowners' association sought an injunction requiring landowners to replace the flat roof of their house with a peaked roof because the association's architect preferred the aesthetics of peaked roofs).

11. Young, 511 So. 2d at 384.
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III. HOW HOMES ARE DAMAGED BY THE FORCES OF A HURRICANE

With preliminary damage estimates ranging from fifteen to thirty billion dollars, Hurricane Andrew\textsuperscript{12} has the notoriety of being the most expensive natural disaster in the history of the United States.\textsuperscript{13} The storm damaged 101,241 South Florida homes and completely destroyed 25,524 others, leaving approximately 250,000 people homeless.\textsuperscript{14}

While the powerful wind and rain of Hurricane Andrew ultimately caused the damage to the homes in Dade County, the actual dynamics by which the hurricane precipitated the destruction is more complicated. Most of the damage caused by Hurricane Andrew was triggered by the failure of windows.\textsuperscript{15} But it was not wind pressure that caused windows to break.

12. Hurricane Andrew caused the evacuation of over 1.2 million people in southeastern Florida before it made landfall in Dade County during the early morning hours of August 24, 1992. ED RAPPAPORT, NATIONAL HURRICANE CTR., PRELIMINARY REPORT HURRICANE ANDREW 8 (1992). During the course of Hurricane Andrew’s two and one-half hour rampage through southeastern Florida, the storm dumped over seven inches of rain and created an area record 16.9 foot storm surge that rolled inland from the waters of Biscayne Bay. Id. at 5, 6.

There is a difference of opinion, depending on what sources are referenced, regarding the wind speeds of Hurricane Andrew as it passed through South Florida. See Jeff Leen et al., Failure of Design and Discipline, MIAMI HERALD, Dec. 20, 1992, at 2SR. There were no official observations of sustained surface winds when Hurricane Andrew made landfall in South Florida; therefore, only estimates are available. RAPPAPORT, supra, at 4. While the actual strength of the storm may never be known, the National Hurricane Center in Coral Gables, Florida estimated that Hurricane Andrew’s maximum sustained surface winds were 145 miles per hour with gusts of up to 175 miles per hour. Id. at 3.

Hurricane Andrew was the third strongest hurricane in this century to make landfall in the United States, and its force was directly responsible for the loss of 15 lives in Dade County. Id. at 1, 5. In this century, only Hurricane Camille in 1969 and the Labor Day Storm of 1935 were stronger than Hurricane Andrew at the time of landfall in the United States. Id. at 5. All Florida deaths directly attributed to Hurricane Andrew occurred in Dade County. As a result of the indirect effects of Hurricane Andrew, an additional 24 lives were lost in Dade County, three lives were lost in Broward County, and one life was lost in Monroe County. Telephone Interview with Ed Rappaport, Meteorologist, National Hurricane Center, Coral Gables, Fla. (Dec. 23, 1992) [hereinafter Rappaport, Telephone Interview].

13. RAPPAPORT, supra note 12, at 1. In Hurricane Andrew’s immediate aftermath, the State of Florida requested federal aid in the amount of two billion dollars for the cleanup of debris alone. Id. at 6.

14. Id. at 1, 6. Insured losses for southern Florida are estimated at a preliminary figure of 7.3 billion dollars. Id. at 6.

15. Don Finefrock, Learning from Loss: Andrew’s Lessons, MIAMI HERALD, Dec. 20, 1992, at 1SSR.


17. Id. After Hurricane Andrew, many Dade County homes appeared relatively undamaged because their exterior structures had survived intact. But this external inspection was deceiving; because their windows had been broken, the interiors of the homes were severely damaged and required rebuilding. In relation to the entire construction cost of a home, it is the cost of building the interior that comprises the majority of expenses. Consequently, homes that survived the storm structurally, but suffered major interior damage, could cost almost as much to repair as homes that were totally leveled. Id.

18. Id.

19. Finefrock, supra note 15, at 1SSR.

20. See Leen et al., supra note 12, at 2SR. While construction practices and the Dade County building code are mentioned in this article, they are substantive and separate topics and are, therefore, beyond the scope of this article.
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18. Id.

19. Finefrock, supra note 15, at 1SSR.

20. See Leen et al., supra note 12, at 2SR. While construction practices and the Dade County building code are mentioned in this article, they are substantive and separate topics and are, therefore, beyond the scope of this article.
would have survived Hurricane Andrew in better condition had they been protected by hurricane shutters, for it is hurricane shutters that protect windows from projectile impact.21

The Dade County building code requires that residential windows be able to withstand pressure from winds of up to 120 miles per hour, but does not require that the glass be tested for missile impact.22 Because of material strength and window shape, most of the windows in Dade County homes have a reserve pressure capacity and should be able to withstand considerably more wind force than the building code requires. Thus, if there had been no projectiles, most of the windows in Dade County homes should not have broken solely as a result of wind pressure. However, it is unreasonable to believe that the high winds of a hurricane would not carry debris through the air. Therefore, during a hurricane, a home without hurricane shutters could be totally destroyed, due to wind propellled debris smashing through the windows, while the home next to it, protected by hurricane shutters, would remain generally undamaged.23

IV. THE REASONABLENESS OF RESTRICTIVE COVENANTS AFTER HURRICANE ANDREW

In consideration of the death and destruction caused by the forces of Hurricane Andrew, the reasonableness of restrictive covenants which prohibit development homeowners from using hurricane shutters to protect their lives and their homes must now be determined by the Florida judiciary. The courts have not given a clear definition of "reasonable.24 Instead, the judiciary has taken an ad hoc approach in deciding what is reasonable and what is not.25 Therefore, "each case must be considered upon . . . [its] peculiar facts and circumstances . . . ."26 Since this would be a case of first impression, there is no case law regarding the reasonableness of hurricane shutter restrictions in housing developments.27 However, an examination of condominium law, even though distinguishable from property law as applied to housing developments, leads to the conclusion that hurricane shutter restrictions are unreasonable and, therefore, unenforceable for any type of domicile.

In the condominium case of Hidden Harbour Estates, Inc. v. Basso,28 the Fourth District Court of Appeal initiated a higher standard for determining the validity of condominium use restrictions than the reasonableness standard employed for determining the validity of use restrictions for other types of real property.29 The court stated that "a use restriction in a declaration of condominium may have a certain degree of unreasonable-ness to it, and yet withstand attack in the courts."30 This stronger presumption of validity for restrictions in a declaration of condominium is not applicable to restrictions in a housing development, where the standard for validity does not allow for any unreasonable restrictions.31 Therefore, logically, if a restrictive covenant in a condominium community is found to be too

21. Sanders, supra note 16.
22. See DEADE COUNTY, FLA., SOUTH FLORIDA BUILDING CODE ch. 23, § 2309 (1988). One change to the building code will replace the current 120 mile per hour wind requirement with the American Society of Civil Engineers’ wind standard of 110 miles per hour. This change will become effective on January 1, 1994. A further building code change will require that new homes be designed to better withstand the forces of a hurricane and resulting flying debris by mandating more resistant windows or protective shuttering. See Terry Sheridan, Tougher Standards, Higher Prices Ahead for Shutters, MIAMI HERALD, Apr. 4, 1993, at 120. While the updated building code will require window protection for new homes in Dade County, no code change will affect already existing homes.
23. Sanders, supra note 16.
24. Hirsch, supra note 2. Black’s Law Dictionary defines the word "reasonable" as meaning "[n]ot immoderate or excessive, [and] being synonymous with rational, honest, equitable, fair, suitable, moderate, [and] tolerable."

25. Hirsch, supra note 2; see, e.g., Holiday Pines Property Owners Ass'n, 596 So. 2d at 87 (court determined that a restrictive covenant amendment which mandated membership in a homeowners’ association was unreasonable); cf. Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. 4th Dist. Ct. App. 1975) (court determined that a restriction against the use of alcohol in certain common areas of a condominium complex was reasonable).
27. Hirsch, supra note 2.
29. See id. at 640.
30. A "declaration of condominium" is a document used to "assuming some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of [condominium] real property." Id. at 639 (quoting Pepe v. Whispering Sands Condominium Ass’n, 351 So. 2d 755, 757 (Fla. 2d Dist. Ct. App. 1977)).
31. Id. at 640. Because condominium unit owners live in such close proximity and share common facilities, it is an inherent principle of the condominium concept that in order "to promote the health, happiness, and peace of mind of the majority of the unit owners . . . . each unit owner . . . . give up a certain degree of freedom of choice which he [or she] might otherwise enjoy in separate, privately owned property." Hidden Harbour Estates, Inc., 309 So. 2d at 181-82.
32. People buy houses and "elect not to purchase . . . . condominiums because they do not want to restrict their control over their own property." Holiday Pines Property Owners Ass’n, 596 So. 2d at 88.
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21. Sanders, supra note 16.
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unreasonable to be enforceable, then the same restriction in a housing
development must also be unenforceable.

While the courts have not yet addressed the issue, the Florida
Legislature has enacted legislation which demonstrates the belief
that prohibiting the use of hurricane shutters is unreasonable. 38 Florida Statute
section 718.113(5) requires that condominium associations "adopt hurricane
shutter specifications for each building within each condominium operated
by the association[s] . . . ." This statute further states that condominium
boards "shall not refuse to approve the installation . . . of hurricane shutters
conforming to the specifications adopted by the board[s]." 39 Therefore,
section 718.113(5) effectively forbids any blanket covenant prohibiting the
use of hurricane shutters. Unfortunately, section 718.113(5) deals only with
condominiums, and does not address any other type of housing. 40 But if
restrictive covenants in a condominium community can have a certain
degree of unreasonableness to them and still be enforced, and the Florida
Legislature has nonetheless enacted a statute which forbids the prohibition
of hurricane shutters on condominiums, demonstrating the belief that this
type of restriction is too unreasonable even for condominiums, then hurricane
shutter restrictions in housing developments, where restrictive
restrictions are not tolerated, are also unenforceable because of their
unreasonableness.

In another condominium case, Schmeck v. Sea Oats Condominium
Ass'n, 41 a condominium association sought an injunction against two pairs of
condominium unit owners in an attempt to force them to remove hurricane shutters
they had installed in order to prevent water seepage through the windows, walls, and doors of their units caused by construction
defects in the building. 42 In affirming the trial court's decision to issue an
injunction, the Fifth District Court of Appeal held that the hurricane shutters
violated the provisions of the declaration of condominium and, consequently,
that the unit owners would have to remove them. 43 However, the court
also stated that the unit owners had "a duty to take reasonable steps to
protect their units and furnishings until the cause of the water leakage . . .
[was] corrected." 44

Although the court did not address the reasonableness of the restriction,
on remand the court did urge the lower court to suspend the immediacy of
the removal order and allow the unit owners to retain the hurricane shutters
until the building defects causing the water damage were repaired. 45 Critical to the issue at hand is the court's indication that the hurricane
shutters would have been allowed to remain permanently had the unit
owners expressed a more compelling reason for installing them. 46 The
devastation caused by Hurricane Andrew is that compelling reason.

It might be argued that allowing the use of hurricane shutters only
during the threat of a hurricane would be a reasonable compromise to an
absolute prohibition. However, this qualified prohibition would still be an
unreasonable restriction because of its impracticability. It can take up to
twenty minutes per window to hang hurricane shutters on homes that have
pre-installed hinges, and even longer on those that do not. 47 When
preparing for a hurricane, time is a crucial factor since hurricane watches
are issued only thirty-six hours before hurricane conditions are possible, and
hurricane warnings are issued just twenty-four hours before hurricane
conditions are likely. 48 During the final, hectic hours before a hurricane
is due to strike, a myriad of necessities command attention. Food, water,

34. Id.
35. See id. While the Florida Legislature has passed limited legislation regarding
  homeowners' associations, the legislature has not yet passed legislation that would afford
  homeowners living under the restrictions of community housing the same protection afforded
  to condominium owners. See Fla. Stat. §§ 617.301-306 (Supp. 1992); Gary A. Poliakoff,
  138, 155 (1992). Therefore, while § 718.113(5) does not mandate homeowners' associations
  to allow the use of hurricane shutters, it does demonstrate the legislature's belief that
  prohibiting the use of hurricane shutters is unreasonable. Consequently, the legislature will
  not have to pass legislation prohibiting hurricane shutter bans imposed on homeowners since
  the judiciary must hold unreasonable restrictions to be unenforceable.
37. Id. at 1994. The owners of one unit spent $4,106 to repair the water damage to their
unit, while the owners of the other unit spent $3,482.25 to repair their damage. Id.
38. Id. at 1995-96. Florida Statute § 718.113(5) became effective on January 1, 1992.
39. Id. Since Schmeck was decided prior to the enactment of Florida Statute § 718.113(5), the outcome would certainly have been different had §
  718.113(5) been effective at the time. See Schmeck, 441 So. 2d at 1992; Fla. Stat. §
40. Id.
41. See id. at 1995.
42. Telephone Interview with Ed Applegate, Owner, Protective Shutter Systems, Pompano
  Beach, Fla. (Dec. 23, 1992).
43. A "hurricane watch" is a weather bulletin that is issued when hurricane conditions
  are possible within the next 36 hours. Rappaport, Telephone Interview, supra note 12.
44. A "hurricane warning" is a weather bulletin that is issued when hurricane conditions
  are likely within the next 24 hours. Id.
unreasonable to be enforceable, then the same restriction in a housing development must also be unenforceable.

While the courts have not yet addressed the issue, the Florida Legislature has enacted legislation which demonstrates the belief that prohibiting the use of hurricane shutters is unreasonable. Florida Statute section 718.113(5) requires that condominium associations "adopt hurricane shutter specifications for each building within each condominium operated by the association[s]..." This statute further states that condominium boards "shall not refuse to approve the installation...of hurricane shutters conforming to the specifications adopted by the board[s]." Therefore, section 718.113(5) effectively forbids any blanket covenant prohibiting the use of hurricane shutters. Unfortunately, section 718.113(5) deals only with condominiums, and does not address any other type of housing. But if restrictive covenants in a condominium community can have a certain degree of unreasonableness to them and still be enforced, and the Florida Legislature has nonetheless enacted a statute which forbids the prohibition of hurricane shutters on condominiums, demonstrating the belief that this type of restriction is too unreasonable even for condominiums, then hurricane shutter restrictions in housing developments, where unreasonable restrictions are not tolerated, are also unenforceable because of their unreasonableness.

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Although the court did not address the reasonableness of the restriction, on remand the court did urge the lower court to suspend the immediacy of the removal order and allow the unit owners to retain the hurricane shutters until the building defects causing the water damage were repaired. Critical to the issue at hand is the court's indication that the hurricane shutters would have been allowed to remain permanently had the unit owners expressed a more compelling reason for installing them. The devastation caused by Hurricane Andrew is that compelling reason.

It might be argued that allowing the use of hurricane shutters only during the threat of a hurricane would be a reasonable compromise to an absolute prohibition. However, this qualified prohibition would still be an unreasonable restriction because of its impracticability. It can take up to twenty minutes per window to hang hurricane shutters on homes that have pre-installed hinges, and even longer on those that do not. When preparing for a hurricane, time is a crucial factor since hurricane watches are issued only thirty-six hours before hurricane conditions are possible, and hurricane warnings are issued just twenty-four hours before hurricane conditions are likely. During the final, hectic hours before a hurricane is due to strike, a myriad of necessities command attention. Food, water,
medication, and batteries are the first priorities when preparing for the arrival of a hurricane. Having to install hurricane shutters at this time is clearly an unreasonable burden.

The Florida Legislature appears to agree that it is unreasonable to only allow the use of hurricane shutters during the threat of a hurricane, since Florida Statute section 718.113(5) allows condominium owners to hang hurricane shutters on a permanent basis. In the aftermath of Hurricane Andrew’s devastation, the Florida judiciary must now follow and expand upon the belief demonstrated by the Florida Legislature, that hurricane shutter restrictions are unreasonable, by holding that restrictions which prohibit the use of hurricane shutters are unenforceable due to their unreasonableness, not just for condominiums, but for all types of housing.

V. CONCLUSION

Hurricane Andrew has made almost everyone in South Florida aware of the devastation that a hurricane can inflict upon a community. A window can be designed to sustain virtually any force. But until the day comes when residential windows are designed to be hurricane proof, the least expensive way to add protection to a home is by installing hurricane shutters. Post-Andrew, the lesson is clear: To prohibit the use of hurricane shutters is an unreasonable and, therefore, unenforceable restriction.

Matthew J. Jowanna

47. Sanders, supra note 16.
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