

## DISASTER RECOVERY

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Before 9/11 and before Hurricanes Katrina and Rita hit, those who thought about planning for a disaster were focused on devastation that was confined to only a part of a city.<sup>2</sup> Even after 9/11, disaster planning often involved a consideration of what happens if a part of a city shuts down.<sup>3</sup> After Hurricanes Katrina and Rita, however, we must rethink our concept of

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<sup>2</sup> See Green, "CATASTROPHIC SERVICE INTERRUPTION IN COMMERCIAL LEASES," 8 Feb. Probate & Property 6 (1994), which begins:

"A sudden breach of a water barrier floods the central business district of Chicago. The Mississippi River spills into downtown St. Louis. A bomb explodes in the basement of the World Trade Center. Heavy rains flood Des Moines' water treatment plant, shutting off water to downtown office buildings. When you first learned of these recent disasters, chances are that your most immediate concern was not the manner in which the numerous commercial leases interrupted by these events would allocate the resulting financial losses between landlords and tenants. If one of these catastrophes had affected one of your leasing clients, however, you undoubtedly would have had occasion to consider the issue in your next meeting with that client. Would the meeting have been pleasant?"

Also see DiSciullo, "When Disaster Strikes - - Will Your Lease Survive," 9 Probate and Property 34 (1995), which states, in part:

Increasingly, landlords and tenants must wrestle with the issues arising from natural and man made calamities and will ask, "How safe is our building"? With this increased awareness, the time has come to discard the harsh rules of "as is" and "caveat emptor" and replace them with a standard that gives the commercial user the same warranty of habitability available to residential tenants.

<sup>3</sup> See, e.g., Hudaish, "DISASTER RECOVERY AND BUSINESS CONTINUITY IN THE AFTERMATH OF 9/11," Practising Law Institute PLI Order No. G0-0163 October, 2002; and two articles by G. Pressman, "LEASES & SALE CONTRACTS IN THE WAKE OF 9/11," 4 N.Y. Real Est. L. Rep. 1 (2002), and "REAL ESTATE-RELATED LEGAL ISSUES AFTER 9/11," 3 N.Y. Real Est. L. Rep. 1 (2002); and Sciullo, "Negotiating Lease Clauses to Address the Possibility of Terrorism," 16 Probate And Property 32( 2002).

what constitutes a disaster and how one goes about planning for it, particularly from a real estate documentation and drafting standpoint.

It has been more than a year and a half since Hurricanes Katrina and Rita hit Louisiana, yet:<sup>4</sup>

- More than 18,000 businesses remain shuttered, their employees out of work, and many of their lenders and vendors unpaid;
- While more than 225,000 homes were damaged and rendered uninhabitable by the storm, more than 150,000 of them still are uninhabited and, to a large part, uninhabitable;
- Large swaths of previously viable commercial tracts (commercial buildings, strip centers, and malls) remain closed, their tenants unable to pay the rent, their customers gone, and the battle over insurance proceeds continuing.

If Rita had hit Houston, with the traffic jams that were on the streets at the time, thousands of lives would have been imperiled and the business devastation that occurred in New Orleans and Southwest Louisiana would have happened here.

The combined sizes of the double-hit the Gulf Coast took from Hurricanes Katrina and Rita are mind-boggling. The physical area that Hurricane Katrina affected covered more than 90,000 square miles — an area the size of Great Britain.

Any company planning for a disaster, however, need not worry only about hurricanes. Whether you live in San Antonio or Nebraska and believe yourself exempt from the dangers of tropical storms, there are other disasters that can be equally devastating and befall a community, such as an infectious disease that disables a large part of the population,<sup>5</sup> an earthquake, or terrorist acts.

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<sup>4</sup> For more statistical information and data resources, see:  
<http://rememberrebirth.org/documents/LouisianaKatrinaAnniversaryData082106.pdf>;  
<http://www.katrina.lsu.edu/>

<sup>5</sup> For example, the government's Center for Disease Control has a "pandemic planning checklist." See:

Thus, preparing for a disaster requires a comprehensive evaluation of what makes your business viable and then protecting those intellectual assets, hard assets, and soft assets.

### **1. People Protection – The First Priority**

No business can operate without its personnel. They are the most important aspect of any business. Therefore, any disaster plan begins with a number of assumptions:

- The disaster will be long-lived enough that personnel will be unable to reach the business' office(s) for an extended period of time.
- The office(s) may be either:
  - i. Inaccessible
  - ii. Accessible but unworkable (e.g., even if there is limited electricity, there are no elevators or HVAC)
- The disaster will be widespread enough that personnel may be dispersed outside of the City and perhaps outside of the State.
- Communications will be extremely difficult.
- During the disaster, your employees will need emergency personal assistance (both physical and fiscal) before they can begin to help the business.

While there are numerous resources for emergency checklists,<sup>6</sup> any checklist that does not include consideration of each of the five points just listed is incomplete.

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<http://www.cdc.gov/flu/pandemic/pdf/businessChecklist.pdf>. One of the factors identified is “community containment and quarantines.”

<sup>6</sup> See, e.g.:

(a) The Red Cross personal checklist,

[http://209.85.165.104/search?q=cache:-ueV\\_Du6rP0J:www.redcross.org/services/disaster/foreignmat/epceng.pdf+emergency+checklist&hl=en&gl=us&ct=clnk&cd=1](http://209.85.165.104/search?q=cache:-ueV_Du6rP0J:www.redcross.org/services/disaster/foreignmat/epceng.pdf+emergency+checklist&hl=en&gl=us&ct=clnk&cd=1)

(b) The FEMA personal checklist

[http://www.fema.gov/areyouready/appendix\\_b.shtml](http://www.fema.gov/areyouready/appendix_b.shtml)

(c) The FEMA business checklist:

<http://www.fema.gov/business/bc.shtml>

(d) The FAA personal checklist:

[http://www.faa.gov/aso/HurricaneInfo/Preparedness\\_checklist.htm#Emergency%20Checklist](http://www.faa.gov/aso/HurricaneInfo/Preparedness_checklist.htm#Emergency%20Checklist)

(e) the Government's Avian Flu checklist:

<http://www.pandemicflu.gov/plan/businesschecklist.html>

(f) The San Francisco Bay Area earthquake checklist:

<http://209.85.165.104/search?q=cache:rkernH0YmIYJ:quake.abag.ca.gov/traffic/BusinessChecklist.PDF+business+emergency+checklist&hl=en&gl=us&ct=clnk&cd=10>

(g) The SBA disaster preparedness site:

## 2. How Do You Contact Your Employees and How Do Employees Contact You?

Obviously, the first step is to make sure your employees are safe. Therefore, employee lists and contacts are critical.

Every company should not only have a list of the employees' home and cell phone numbers, as well as the same information for one or more close relatives of each employee, but there also should be a request that the employee provide contact information for at least one person out of state who will be "the key" contact in the event the employee cannot be found or relocates temporarily. This enables the company set up a phone tree to try to reach those key contact points if employees are scattered to areas unknown because of a disaster.

During Hurricanes Katrina and Rita, phone lines were down so that landlines did not work, cell phone towers were down and cell phone bands were overloaded so that cell phones essentially became inoperable and internet service providers in the region were impact. How, therefore, could employees contact their employers and vice versa?

In Katrina, it turned out that the only system of communication that seemed to work at all was text messaging; therefore, the ability to send out "blast" text messages to all your employees' cell phones can become a critical aspect of any disaster plan.

A careful employer will have set up a back-up -- an out-of-region web server to be activated in the event of an emergency. This server would act as the contact point for employees to notify the company of where they are and how they should be reached, as well as allowing the company to post notices and information for employees.

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<http://www.sba.gov/npm2006/>

(h) The Pinellas County business continuity checklist:

[http://www.pced.org/download/document/20060412\\_112941\\_13084.pdf](http://www.pced.org/download/document/20060412_112941_13084.pdf)

(i) The smallbusiness.com checklist:

[http://www.smallbusiness.com/wiki/Emergency\\_planning](http://www.smallbusiness.com/wiki/Emergency_planning)

### **3. Will Your Employees Work If They Don't Get Paid?**

A disaster can upset and impact the banking system and transactions. Many employees live paycheck-to-paycheck, so even if they can access their banks remotely or withdraw money from an ATM, this does not help them if their bank accounts are low. Therefore, employers should have back-up systems to enable them to make payroll in the event of a disaster. Companies ought to consider whether there should be some type of "emergency loan" or other special funding for employees in drastic need and have back-up lines of credit to deal with this.

### **4. Once Your Employees Are Found, What Are They Going To Do?**

The ability of employees to continue to do their work will depend upon the functionality of the company's software to allow remote access to necessary files and documents as well as being able to communicate with each other.

Therefore, a comprehensive IT evaluation of the business is in order and companies need to have back-up servers out-of-region where all of their necessary materials are available.

Further, companies need to consider whether they are too dependent upon paper files. Lawyers are notoriously bad about this. Think about your own office. Do you have original client documents in your possession? Do you have only paper files of critical, ongoing matters or documents? Could you really do what you needed to do for clients if you had to leave your city office on a moment's notice without your laptop?

Even if you can get back to your building for a limited time, however, is that really a practical solution? For example, in New Orleans, although many high-rise buildings were structurally undamaged, their elevator systems, electrical and other systems were knocked out so that they were uninhabitable for up to several months. There are harrowing tales of law firm trudging up thirty stories and bringing down computers and files by hand in darkened staircases with only flashlights.

A thoughtful and comprehensive imaging procedure, where all critical documents, correspondence, and files are available electronically, would have alleviated the need to physically retrieve documents immediately and would have allowed for work to proceed apace within days, rather than weeks, of a disaster.

**5. How are Your Clients Going To Find You ?**

Once your people are safe, how are your clients going to locate you if (a) your physical office address is inaccessible; (b) mail doesn't work; (c) your phones (even your cell phones) don't work; and (d) your web site is down because your service provider is down?

Part of any disaster plan is thinking about covering these practical issues that seem theoretical and remote but which become of immediate concern once a disaster hits.

Some businesses, as a result of Katrina, now have separate sites for receipt of all payments on bills the businesses send out. These businesses have either set up alternative sites on their own or have retained third parties to manage lock-boxes for payments.

Many businesses are now looking at "back-up" or "default" websites that are activated in the event of an emergency and to which all internet traffic is directed once an emergency strikes or is threatened.

Others have set up "roll-over" phone numbers through third party services that will automatically pick up and reroute all calls to a new number and provide answering capabilities until your staff can reassemble.

**6. What About Your Cash Flow? Is Your Insurance Sufficient, and, Even If It Is, Will It Pay Fast Enough To Tide The Business Over?**

An equally important question will be how do you access the checks and payments that are integral to your business's cash flow if the mail is delayed, sometimes for months.

The first step is to check your lines of credit.

The next step is to check the credit limit on company credit cards. Many small businesses in areas affected by Katrina and Rita found that they rapidly “maxed out” on the personal and business credit cards, particularly if they had to make purchases of a number of computers and other equipment during the emergency to replace items that had been damaged or that could not be easily retrieved.

In lease negotiations, we often easily conclude that “risk” analysis is a matter to be dealt with by each party’s insurance coverage. In actuality, however, obtaining insurance monies is a long-term process for matters that demand urgent solutions. Many businesses in the Katrina and Rita-affected areas are either still negotiating with their insurers or in litigation about coverage issues, and even those who settled business interruption claims found that it took a minimum of six months or more.

While there are many sources for checklists on property damage and business interruption coverages,<sup>7</sup> the problem is often not having the coverage but collecting on it.

One of the defenses that law firms and accounting firms have faced in making claims on their business interruption insurance is the insurer’s argument that the hours “lost” to a disaster are not really “lost” at all, but are mere “postponed.” The insurers’ argument is that, because of a disaster, if you didn’t work 40 hours on a matter that you had planned to work on, you’re going to eventually work on that matter and thus the 40 hours is not “lost” but would be billed in the future and is therefore not covered by business interruption insurance. As you can imagine, this position has been the major topic of negotiations and the insurers’ position has led to a number of lawsuits filed by insureds.

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<sup>7</sup> For example, see <http://www.abanet.org/litigation/committee/insurance/katrina.html> for a number of these checklists.

**7. Does Your Force Majeure Clause Really Work?**

“Standard” *force majeure* clauses attempt to allocate risk by excusing performance from one or both parties and then leaving each party to its own devices to deal with the ensuing risk. This type of “it’s-not-my-problem-it’s-yours” approach, while common in many types of real estate leases and contracts, really does not address the difficulties tenants face, particularly when a *force majeure* clause may excuse some of the landlord’s performance obligations but not the tenant’s rent obligations, nor does it solve a tenant’s problem of where and how to operate a business at a facility that may be theoretically “habitable” but inaccessible, nor does it address the landlord’s cash flow problems if tenants are unable to generate revenue because their businesses are closed and if the property cannot be immediately re-leased because of the disaster.

**8. Typical Force Majeure Clauses**

Typical “standard” *force majeure* clauses can be found in a number of publications and WEB SITES:

**CLAUSE WHERE TENANT REMAINS OBLIGATED:<sup>8</sup>**

This Lease and the obligations of Tenant to pay the minimum annual rent and all additional rent and to perform all of the terms, covenants, and conditions on the part of Tenant to be performed shall in no way be affected, impaired, or excused because Landlord, due to any and all delays beyond Landlord's reasonable control, including, but without limitation, delays caused by Tenant, governmental restrictions, governmental preemption, strikes, labor disputes, lockouts, shortage of labor or materials, acts of God, enemy action, civil commotion, riot or insurrection, or fire or other unavoidable casualty (*Force majeure Delays*) is

1. Unable to fulfill any of its obligations under this Lease;
2. Unable to supply or delayed in supplying any service expressly or impliedly to be supplied;

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<sup>8</sup> From: 2 Real Estate Leasing Practice Manual § 55:8 Real Estate Leasing Practice Manual Database updated October 2006 Alvin L. Arnold and Jeanne O'Neill Part II. Complete Leases Chapter 55. Net Leases I. Stores §55:8. Absolute net lease of office/warehouse

3. Unable to make or delayed in making any repairs, replacements, additions,

(Publication page references are not available for this document.)  
alterations, or decorations; or

4. Unable to supply or delayed in supplying any equipment or fixtures.

Landlord shall in each instance exercise reasonable diligence to effect performance when and as soon as possible. Landlord's obligations under this Lease shall in no way be affected, impaired, or excused, except as specified in this Lease, because Tenant, due to any and all delays beyond Tenant's reasonable control, including *force majeure* delays, is

1. Unable to fulfill any of its obligations under this Lease;

2. Unable to supply or delayed in supplying any service expressly or impliedly to be supplied;

3. Unable to make or delayed in making any repairs, replacements, additions, alterations or decorations; or

4. Unable to supply or delayed in supplying any equipment or fixtures.

Tenant shall in each instance exercise reasonable diligence to effect performance when and as soon as possible.

CLAUSE WHERE *FORCE MAJEURE* MERELY SUSPENDS PERFORMANCE BY EITHER SIDE:<sup>9</sup>

9.1 Should either Party be prevented wholly or in part from fulfilling any of its obligations under this Agreement for reasons of *force majeure*, such obligation shall be suspended to the extent and for as long as such obligation is affected by the *force majeure*. The Party claiming *force majeure* under this Article 9 shall be entitled to such extension of time to fulfill such obligation as may be reasonably necessary in the circumstances, subject to the provisions of Article 9.3 below.

9.2 *Force majeure* hereunder shall be defined as any unforeseeable events, the happening and consequences of which are unpreventable or unavoidable, including but not limited to earthquake, typhoon, flood, fire, embargoes, riots or war, but shall exclude the financial difficulties of the Party claiming *force majeure*.

9.3 Within seven (7) days from the date of commencement of any event of *force majeure* or as soon as practicable thereafter, the Party affected shall advise the other Party by effective means of

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<sup>9</sup> From: <http://contracts.onecle.com/china-finance/fuhua.lease.2004.05.27.shtml>

communication of the occurrence of such event and of the date when such event commenced; likewise, within seven (7) days after the end of such event, the Party affected shall advise the other Party by facsimile or e-mail of the date when such event ends, and shall also specify the re-determined time by which the performance of its obligations hereunder is to be completed.

In case one Party fails to acknowledge such notification hereunder within fourteen (14) days after receipt hereof, the date of dispatch of communication shall be considered to be the date of notification, provided, however, that e-mail shall be confirmed in writing subsequent to the said date of dispatch.

ALTERNATIVE CLAUSE WHERE *FORCE MAJEURE* MERELY SUSPENDS PERFORMANCE BY EITHER SIDE:<sup>10</sup>

24. *Force majeure*: Neither party to this Lease shall be liable for non-performance of any obligation under this Lease if such non-performance is caused by a *Force majeure*. "*Force majeure*" means an unforeseeable cause beyond the control of and without the negligence of the party claiming *Force majeure*, including, but not limited to, fire, flood, other severe weather, acts of God, labor strikes, interruption of utility services, war, acts of terrorism, and other unforeseeable accidents.

ANOTHER ALTERNATIVE CLAUSE WHERE *FORCE MAJEURE* MERELY SUSPENDS PERFORMANCE BY EITHER SIDE:<sup>11</sup>

In the event that either party shall be delayed or hindered in, or prevented from the performance of any act required by this lease by reason of strikes, lock-outs, labor trouble, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, natural disaster, or other reason of a like nature, not the fault of the party delayed in performing work or doing acts required under the terms of this lease, the performance of such act shall be excused for the period of the delay,

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<sup>10</sup> From:

<http://72.14.209.104/search?q=cache:VJeLno4bTPYJ:www.maine.edu/system/facMan/documents/LeaseAgreement-Lessee-Standard-092006.doc+%22force+majeure%22+lease&hl=en&gl=us&ct=clnk&cd=7>

<sup>11</sup> From: <http://www.cspmanagement.com/lease.htm#22>

and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

### 8.1 Assumptions Underlying *Force Majeure* Clauses

Most *force majeure* clauses are written with only two alternative assumptions: either they assume that the building is completely destroyed, or they assume that a portion of the building is destroyed.

Most *force majeure* clauses usually are not drafted to take into account (1) the building being occupiable and tenants having limited access, but the public (and the tenants' clients) nonetheless being barred from the City because of a disaster; (2) the building being occupiable but the area around the building impassable; (3) the building being occupiable, but the access through elevators impossible because of severe elevator damage; (4) the building being occupiable but severe mold and mildew in the HVAC system making its occupants so sick that no one wants to return until these problems are remedied; (5) the building being occupiable but the personnel of the building who provide the necessary operations and security are not available or absent from the area.

It is submitted that merely telling each party to "look to its insurer" on these issues often bypasses the severe practical problems that tenants and landlords face, problems that may end up being ones critical to the survival of the business. Many of these problems can be addressed at the front end if the parties spend the time and effort to think through the various options and alternatives that may be available to them. The problem, of course, is that the time and effort it takes to negotiate and draft such clauses may lead one or both parties to conclude that the "remoteness" of a disaster is not worth the time, money and effort to do so.

## 8.2 Articles About *Force Majeure* Clauses

There are numerous articles and treatises that deal with *force majeure* clauses,<sup>12</sup> but few of them contain a detailed examination of the issues set forth in the previous sections.

While some of the articles discuss allocation of risk under *force majeure* clauses, many seem to concentrate on creating a broad-enough definition<sup>13</sup> rather than to work through the real-world implications of putting such clauses into effect.

As can be ascertained by the French term which we use for the concept, "*force majeure*" did not evolve from common law but is an adaptation of a phrase used in French civil law. There are good sources of comparative law approaches to *force majeure* that are worth contemplating, even if one does not deal in multi-national transactions.<sup>14</sup>

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<sup>12</sup> See, e.g., Arnold & O'Neill, "Real Estate Practice Manual: Chapter 36, Damage or Destruction of Premises by Fire or Other Casualty," 1 Real Estate Leasing Manual §36.27; Daniels and Ostermeyer, "A Primer on Remedies for Landlord Defaults (with sample clauses)" 3 Practical Real Estate Lawyer 47 (2004); Hummel & Shultz, "Force Majeure Clauses in Construction Contracts," Construction Briefings NO. 2004-2.

<sup>13</sup> See, e.g.: Wright, "*Force majeure* Delays," 26 Construction Lawyer 33 (Fall, 2006) (footnotes omitted):

"Therefore, *force majeure* clauses need to be drafted differently in today's world to adequately protect clients. The most straightforward change is to insert the phrase "acts of terrorism" as a designated *force majeure* event. This language may be further broadened by including the language "whether actual or threatened" in reference to the terrorist acts. Such a phrase would benefit clients by covering work stoppages caused by false alarms and threats similar to those seen shortly after September 11. Broadening terrorist acts to include threatened acts also would give clients the discretion to protect their employees by stopping work after a terrorist scare without subjecting themselves to contractual liability for delay.

"One potential danger, however, in drafting *force majeure* provisions to include "acts of terrorism" is the fact that, although the term "terrorism" is commonplace in the media and society, the term has not been directly interpreted and scrutinized judicially. As a result, clients may benefit from additional broadening language. For example, the phrase "acts of a public enemy" is increasingly more common in *force majeure* provisions. Other terms that *force majeure* drafters should add in light of post September 11 biological warfare fears may include "epidemics" and "quarantines." Another benefit that such broadening language may provide to clients is protection against acts by deranged individuals as well as acts by organized groups of terrorists. Finally, any *force majeure* clause also should include a catchall phrase such as "or other causes similar to those enumerated." This catchall phrase, inserted at the end of the list of enumerated *force majeure* events, may help to "capture" events similar to those listed but that "defy exact definition."

In considering the increased importance of *force majeure* clauses, counsel should take advantage of the freedom to contract enjoyed by the parties. The parties should draft and negotiate *force majeure* clauses that are pertinent to their particular circumstances and fairly allocate the risks to the party best suited to cover or insure the risk.

<sup>14</sup> For a discussion of other countries' approaches to *force majeure*, see: Catherine Kessedjian, "COMPETING APPROACHES TO *FORCE MAJEURE* AND HARDSHIP," 25 Int'l Rev. L. & Econ. 415 (2005).

For a comparison of U.K. and French approaches, see:  
<http://www.mondaq.com/article.asp?articleid=44640>

There will be an obvious set of detailed negotiations about who should bear the risk in each one of these areas. There will be a temptation on the side of the lessor to contend that the tenant should bear the risk and cover that risk with business interruption insurance. The problem is that the definition of “business interruption” does not correspond in all cases to the types of risks that have just been detailed. Therefore, a negotiation where business interruption insurance is to lessen the burden on one of the parties requires that there be a correlation of the lease to the business interruption provision terms and, perhaps, a “default” clause if the business interruption coverage changes or if the terms altered, as occurred in many cases post-storm in Florida and Louisiana. Further, business interruption insurance claims normally take a long time to resolve and they did not solve the immediate problem of the tenant having to pay rent during these types of disasters that might not be included in the typical *force majeure* clause (see the discussion in section 7, above).

Thus, even if business interruption insurance may cover a portion of the tenant’s risk, the tenant will still want to negotiate for a rent abatement with perhaps some right of the landlord to get back a portion of through a claim on the business interruption insurance. This type of clause would need to be carefully parsed, because any rent abatement may be seen by the insurer as not part of the insured’s risk and therefore not covered as a business interruption cost.

From the landlord’s side, the landlord needs to be concerned not merely about income from the tenant but also obligations to the landlord’s lenders, whether they be lenders with a security interest in the land, in the rental income, or even lenders with mezzanine financing and a potential right to take over an equity position in the landlord in the event of a default. Therefore, the landlord needs to be thinking about the *force majeure* clause in its loan documents as well as

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For a Canadian approach, see:  
<http://www.lmls.com/index.cfm?fuseaction=content.contentDetail&ID=9154&tID=244>

in its lease documents. The same type of business interruption coverage issues that arise for tenants apply with similar force to the landlord.

9. **When The Disaster Really Hits: Will Your Plan Work?**

No matter how carefully you craft contractual provisions, however, these may be a comfort but not a remedy once a disaster hits. None of these clauses can possibly foresee every contingency.

Careful landlords and tenants, therefore, may want to think about a disaster plan in a spectrum broader than merely crafting the proper *force majeure* clause.

For example, landlords may want to have contracts in place with out-of-region service providers who will give the landlord the first priority in sending in personnel to do repairs, remedies, repair, etc. in the event of a disaster when no one local is available, or when the few people who are left locally are overbooked. Tenants who deal with national landlords may want to negotiate for back-up space out-of-region in the event of a disaster.

Another example can be found in the fact that many businesses in New Orleans have, since the storm, contracted with hotels and apartment complexes around the South that allow them, on a few days' notice, to occupy a set number of rooms or spaces in the event of a disaster. The cost to maintain this "first right of refusal" on these hotels and apartments is, for many, a small price to pay given the great difficulty in finding suitable accommodations that many had following the storm.

Consider what would happen if Houston suffered the same area of impact that New Orleans did – that is, eighty percent of Houston was underwater for three weeks. Think about where businesses and their personnel would relocate and think about the available space for homes and commercial areas that would need to be found for the hundreds of thousands of people who are displaced. Therefore, it may be that a Houston business may consider back-up

space in San Antonio rather than Dallas because the Dallas area may be completely filled. In Louisiana, within twenty-four hours of the storm every apartment complex and hotel in a two hundred mile radius of the City of New Orleans was filled and within four days after the storm almost all of the Class A and Class B commercial spaces within a two hundred mile radius of the New Orleans area were fully leased.

10. **A Disaster Plan That Is Merely In Writing May Not Be Worth The Paper On Which It Is Written**

A disaster plan that is merely in writing and never tested has very little worth. Any business that has a disaster plan must test it on a periodic basis. The following is an initial checklist of the type of items businesses should consider once they put their disaster plan into place:

1. Test systems on a periodic basis. If you have an IT back-up system, consider shutting down your existing system, bringing up your back-up system and make sure everything works. This should be done at least on a quarterly basis if not more frequently. Consider whether to have not only back-up tape systems (or other systems for storing information) but back-up tape drives as well. A number of companies found that they could not access their back-up information because while they had the tapes or discs, they could not access the software that enabled them to use the tapes and discs, as these were unavailable or unreachable. In other words, consider having a duplicate back-up *system* (not merely back-up tapes or discs).
2. Correlate your *force majeure* clauses with your insurance. Every time insurance is up for renewal, all the *force majeure* clauses need to be looked at in all leases, contracts, and loan documents to make sure that the insurance coverage meshes with the risk negotiated. Any riders to insurance (either riders that are added or coverage that is subtracted) need to be reviewed in light of *force majeure* clauses in contract and loan documents.
3. Check with back-up vendors and service providers on a periodic basis. If you have been wise enough to secure back-up vendors (*e.g.* extra space in a different city, a first right to call upon a service company, etc.), periodically check with the vendor to make sure that you are still on their list and they are aware of your rights is critical.
4. Create a place and a means for key personnel to stay in touch. It is natural that, during a disaster, all employees' first and foremost concern is about the safety of

their family. Nonetheless, businesses cannot operate unless key personnel can communicate and make decisions. The key personnel should know where they are going to go in the event of a disaster, or, at a minimum, how to contact one another. This needs to be updated on at least a monthly basis because decisions may change as well as personnel.

11. **Who Is In Charge of Keeping Track of Records In The Event Of A Disaster?**

If a disaster occurs, the need to track expenses incurred becomes critical, whether one is negotiating with a contract party or, even more importantly, with one's insurer. Therefore, key personnel who are authorized to incur expenses for the company need to make sure that they know how and in what manner expenses need to be tracked and maintained and that all of this is imaged and kept electronically so that it can be assembled at the appropriate time.

12. **Is All Of This Time And Effort Worth It?**

If a disaster never hits, then the time and effort are merely additional means of assurance that your business has done what it should to operate and effectively and efficiently with foresight. If, unfortunately, a disaster strikes, having the proper procedures and policies and contracts in place will mean that your business will survive and have the ability to thrive following the storm rather than being one of the businesses that lurches, staggering from a disaster and struggling at every turn.

13. **A Quick, Non-Exclusive Checklist**

1. Your People: The Most Important Part of the Recovery Process
  - (a) Contacting them
  - (b) Their contacting you
2. Your Physical Space
  - (a) Your files
  - (b) Your leases
  - (c) Your intellectual property

3. Your Clients
  - (a) Contacting Your Clients
  - (b) Your clients contacting your
  - (c) Servicing your clients
4. Multi-State and Multi-Jurisdictional Issues
5. Court Delays and Transaction Delays
  - (a) Court delays
  - (b) Transaction delays (do you have a *force majeure* clause that really works?)
    - (i) Real estate issues
    - (ii) Lending and security interest issues
6. Meshing *force majeure* clauses in contracts, leases, loan documents and insurance policies.
7. Check your credit lines and credit cards; can you access enough cash when you need it?