Katrina’s Tort Litigation: An Imperfect Storm

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Tort suits? This was an act of nature, just furious and destructive nature, was it not? People should just pick themselves up by their bootstraps, perhaps with a helping hand from government and not go to court to point an accusing finger at others, should they not? The tort system is for something else, is it not?

In his 1998 landmark book, Rising Tide: The Great Mississippi Flood of 1927 and How it Changed America, John Barry describes the momentous social and political changes brought about by a natural disaster that displaced some seven hundred thousand Americans and flooded more than 27,000 square miles of land. Republican Secretary of Commerce Herbert Hoover’s leading role in the response effort helped put him in the White House in 1928. More important for our discussion of toxic torts, the Great Flood accelerated a shift away from individual self-reliance in the face of natural disasters, as more and more people came to believe that government was responsible for protecting individual citizens. In extreme circumstances where state resources were inadequate, people would look to the federal government for that protection. This was a sea change in the public’s understanding of an individual’s relationship with government.

Although concepts regarding self-reliance and individual responsibility may have been knocked askew by that natural disaster, the idea that one might recover in tort from individuals, companies, and even government entities for losses suffered in a natural disaster would have been almost as foreign to a 1927 flood victim as the idea that a helicopter might pluck him from his rooftop. Most cases from the 1927 flood involved claims against a state Reparations Committee established to provide compensation for property damages incurred when state officials intentionally dynamited the levee in St. Bernard Parish to relieve the pressure on the New Orleans levee and prevent flooding in the city. Clearly, much changed during the interim between America’s two greatest natural disasters.

Indeed, in those intervening years, the role of government in responding grew far larger—FEMA being the obvious example. After Katrina, there was a large, although at times awkwardly functioning, helping hand from government.

In those same intervening years, the tort system expanded to occupy a larger place in the country’s responses to many situations and perceived ills in society. Not surprisingly then, tort suits emerged as one of the immediate responses to Katrina, including suits contending that the government failed in the helping-hand role it had assumed and, therefore, was liable for damages.

Within days of Hurricane Katrina’s landfall in August 2005, numerous lawsuits were filed seeking tort recovery under several theories of liability. Suits continue to be filed for claims related to the immediate impact of the hurricane, and potential new causes of action arise out of the response and ongoing recovery efforts. Suits have been filed in spite of the destruction or closure of courthouses. Flooded offices, power outages, and displacement have not prevented advocates from asserting claims, even when forced to resort to hand-written petitions.

The term “natural disaster” implies the absence of a human cause. Mother Nature causes hurricanes, tornados, and earthquakes. Nevertheless, at the time of the Great Flood of 1927, Pennsylvania Governor Gifford Pinchot declared, “This isn’t a natural disaster. It’s a man-made disaster,” referring to the flawed river control policies of the Army Corps of Engineers. Governor Pinchot’s comment recognizes that humans influence the effects of nature, both positively and negatively. The power to control nature to the extent that millions of people can live in a hurricane-prone coastal area at or below sea level necessarily entails mutual obligations among citizens and between citizens and the government. Some argue that tort law is one method of enforcing those obligations. How does that theory apply in this instance?

Mississippi’s southern counties directly abut the sea, with no man-made barriers to separate them from the 30 foot storm surge that moved ashore. Residential areas, gambling barges, hotels, and small towns simply collapsed under the blow. Primary litigation issues there involve who will pay to repair the damage caused by an act of nature alone—largely disputes with insurers over coverage.

Louisiana presented different geography and industries. Man, not nature, played a far larger role. Consequently, the tort system occupies a far greater role in sorting out the question of who will pay. Louisiana’s primary southern population center, the Metropolitan New Orleans area, sits many miles back from the sea, behind a natural barrier of marshes built by the meandering of the Mississippi River over centuries. Man has modified this natural barrier materially through flood control (leveses on the Mississippi eliminate sediment deposits that sustain and build the marshes),

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Eastern District of Louisiana against Murphy Oil USA and others, oil spills often generate tort suits. More than twenty hurricanes causes a spill or that oil floats into homes on floodwaters, overwhelmed oil and gas facilities in its path and, most destructively, overwhelmed the levee system. Man’s fingerprints on all of this are far more pronounced in Louisiana than in Mississippi, resulting in a greater use of the tort system in Louisiana. Professor Oliver A. Houck, in his November 2005 paper Environmental Protection and Sustainable Development, http://rebuildinglouisianacoalition.org/index.php?option=com_content&task=view&id=49&Itemid=65, begins with the following premise:

Hurricanes Katrina and Rita were natural events, but the loss of lives and property were acts of man. More specifically, acts of government. Federal hurricane protection monies were diverted to other projects; federal levees were improperly built and failed; federal canals such as the Mississippi Gulf Outlet, long protested by St. Bernard and other parishes, brought the hurricane surges directly into St. Bernard, the Lower Ninth Ward, Lake Pontchartrain and the city proper. Post-Katrina tort claims focus generally on two theories. The first is that the defendant negligently allowed his property to escape during the storm and damage the plaintiff’s property. The other is that the defendant’s conduct exacerbated the effect of the storm and caused additional damages. In the former scenario, man’s role is direct: “Your oil tank failed and leaked your oil onto my property.” In the latter scenario, the suits assert that the hand of man (negligently designed and constructed levees, a runaway barge, abandoned pumping stations) caused flooding that would not have occurred otherwise. Man’s role in other scenarios is more attenuated. Whatever the approach, in order to state a viable tort claim it is necessary to assert that human hands helped Mother Nature along.

**Oil Spills Affecting Flooded Homes and Fisheries**

The most conventional tort suits are those involving damages from oil spills. While it is not every day that a hurricane causes a spill or that oil floats into homes on floodwaters, oil spills often generate tort suits. More than twenty class action lawsuits have been filed in federal court in the Eastern District of Louisiana against Murphy Oil USA and related entities. All suits seek to recover damages from oil spilled from an eighty-five thousand-barrel oil tank operated by Murphy Oil in Meraux, Louisiana, in St. Bernard Parish—an area particularly hard hit by the Katrina storm surge. Murphy Oil reports that some twenty-five thousand barrels of oil spilled from the tank. The plaintiffs assert liability under theories of negligence, strict liability, and absolute liability, and seek to recover for damages to property, mental anguish, emotional distress, and diminution in property value. Certain of the suits also allege liability under the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2701 et seq., which, in addition to property damages, provides for recovery of revenue losses relating to property damage, loss of subsistence use of natural resources, and lost profits or earning capacity relating to property damage.

Other lawsuits have been filed against Shell Pipeline and against other oil and gas operators in Plaquemines Parish, south of New Orleans, for separate oil spills. These lawsuits assert similar claims based in negligence and under OPA. Additionally, a class action lawsuit on behalf of all commercial fishermen who depend upon waterways, now contaminated, for their livelihood has been filed against Shell Pipeline, Chevron, and other oil and gas operators for oil spills at seven separate facilities in southeastern Louisiana, downriver from New Orleans.

In much of the litigation over spills, negligence and OPA appear to be the likely battle grounds. Tort reformers in the 1990s successfully lobbied to amend portions of the Louisiana Civil Code that recognized civil law strict liability concepts. Prior to 1996, strict liability applied to things in one’s garde (custody) and for damages caused to neighbors by one’s use of his or her property. The Civil Code now imposes liability only upon a showing that the person knew or, in the exercise of reasonable care, should have known of the vice or defect in the thing, and that the damage could have been prevented by the exercise of reasonable care. As part of the same tort reform package, absolute liability for ultrahazardous activities specifically was limited to pile-driving or blasting with explosives. Without the benefit of strict or absolute liability standards, plaintiffs must establish defendants’ negligence. In Louisiana, this follows a duty-risk analysis, and requires a plaintiff to prove that: (1) the defendant had a duty, (2) the defendant breached that duty, (3) the defendant’s conduct was the cause-in-fact of plaintiff’s injury, (4) the defendant’s conduct was the legal cause of plaintiff’s injury, and (5) the plaintiff suffered actual damages.

Louisiana recognizes act of God as a defense to tort liability where a defendant proves that the injury is due directly and exclusively to natural causes without human intervention, and that no negligent behavior by defendant contributed to the accident. Louisiana courts have found hurricanes to be acts of God as recently as Hurricanes Georges (1998) and Lilly (2002). Plaintiffs attempt to avoid the defense by arguing that the act of God was not the sole cause of their injury; that is, that the defendant’s negligent conduct contributed to the damages. Plaintiffs
likely will focus on the many oil, gas, and chemical manufacturing and processing facilities in the area that are subject to extensive state and federal environmental regulations. Louisiana also recognizes the doctrine of res ipsa loquitor, which allows an inference of negligence when facts and circumstances demonstrate that the only fair and reasonable explanation is that the accident would not have resulted absent a defendant's breach of duty. The survival of nearby tanks and pipelines under similar or worse storm conditions could play a role in arguments that res ipsa loquitor should be applied.

A recent line of cases puts another chink in the act of God defense armor. Two Louisiana appellate courts have held in past hurricane-related cases that despite a successful act of God defense, a defendant is not protected against claims for the cost of removing its property from wherever it came to rest after the storm. One case involved a tree falling on a neighbor's house. Allen v. Simon, 888 So. 2d 1140 (La. App. 2004). The second involved a barge swept away from its mooring and deposited on the plaintiff's marshland property 1,000 feet from the nearest waterway. Terre Aux Boeufs Land Co., Inc. v. J.R. Gray Barge Co., 803 So. 2d 86 (La. App. 2001). Neither plaintiff challenged the trial court's ruling that the act of God defense precluded liability for their property damages. However, in both cases, the appellate court agreed with the plaintiffs that, regardless of fault (or lack thereof), the defendants were liable for the cost of removing their tree or barge from the plaintiffs' property. The act of God defense, therefore, does not entitle a defendant to abandon property swept away by a hurricane.

Additionally, claims under OPA may prove attractive to plaintiffs. OPA established a strict liability scheme similar to that found in CERCLA. The owner or operator of a vessel or onshore facility from which a discharge of oil into navigable waters has occurred (responsible party) is liable for the cost of removing the oil, cleaning up contamination, property damages, natural resource damages, and certain lost use/profit damages. Liability for the owner of an onshore facility is limited to $350 million per incident. Fault is not an element, although a responsible party may escape liability if the discharge was solely the fault of a third-party or caused by an act of God. As under the Clean Water Act (CWA) and CERCLA, this act of God defense is more restrictive than the common law concept of act of God. OPA requires that the natural phenomenon must be exceptional, inevitable, and unresistible. There is little jurisprudence interpreting the act of God defense under OPA, although courts interpreting that defense under CERCLA and the CWA view the defense narrowly. Federal courts have reasoned in CERCLA litigation that a hurricane striking a hurricane-prone area during hurricane season does not qualify as an act of God because it is not "unanticipated." Apex Oil Co., Inc. v. United States, 208 F. Supp. 2d 642, 653 (E.D. La. 2002).

One additional point is the scope of recoverable damages. Louisiana law permits punitive damages only under limited circumstances where expressly authorized by statute. No Louisiana exemplary damage statute applies here. Beginning in 1984, Louisiana recognized a cause of action for exemplary damages based on the reckless and wanton handling of hazardous substances. However, that statute was repealed in 1996 and it is unlikely that exemplary damages will be a factor in any Louisiana hurricane litigation.

**Other "Conventional" Tort Suits**

Some healthcare facilities and nursing homes were not evacuated fully prior to the storm. As widely reported in the media, a number of people died in those locations or while being evacuated. Suits against those facilities and their insurers will address the reasonableness of preparedness plans, evacuation efforts in the face of the storm, and efforts to evacuate and treat the patients in the days after the storm. The suits will involve procedural and substantive issues arising out of the medical malpractice law and out of federal and state regulation of such facilities. The existence of ongoing criminal probes complicates this litigation. The Louisiana attorney general's office has issued a broad array of subpoenas, and information concerning these incidents is largely out of the public eye at present as the parties involved and potentially involved react to the criminal investigations and to the threat of civil litigation.

Another fairly conventional tort suit relates to damages allegedly caused by a runaway barge. Federal class action suits have been filed against various parties with respect to a barge that is alleged to have broken through the floodwall on the Industrial Canal, causing the flooding in New Orleans' Ninth Ward. A significant fact issue will be whether the barge struck the floodwall, causing or assisting in its failure, or simply was swept through the breach after the floodwall failed for other reasons. The owner of the vessel, Ingram Barge Company; the barge operator, Lafarge North America; the Army Corps of Engineers; and the Coast Guard are named as defendants in the complaint that contends that the Industrial Canal breach flooded areas that otherwise would have survived the storm relatively intact. The suit asserts claims in negligence and under OPA and seeks to recover for death, bodily injury, property damages, mental suffering and emotional distress, and environmental damages. In addition to allegations that the owner and operator negligently failed to secure the barge in the face of the storm, Lafarge, the Corps of Engineers, and the Coast Guard are faulted for failing to sink the barge in advance of the storm. The Corps also is faulted for failing to properly design, build, and maintain the floodwalls.

A class action suit brought by the owner of several flooded townhouses against Jefferson Parish faults parish representatives for ordering drainage pump operators to leave their posts prior to the full impact of the storm, allowing various canals to overflow. Each parish has its own pumping system, designed to push water out of the confines of the levee system into drainage canals emptying into Lake Pontchartrain. As the land is largely lower than the lake, the pumps are a critical part of the protection system. The
pumps are not automatic and require operators who are employed by the parish government. The pumping stations do not include living facilities designed to survive Category 4 or 5 hurricanes, and the Jefferson Parish government, in advance of the storm and in accord with its emergency plan, ordered the evacuation of the pump operators, which necessitated shutdown of the pumps. Operators were evacuated to an area some distance from the parish and were unable to return rapidly. It has been reported that several areas of Jefferson Parish flooded as a consequence.

The tort litigation will address issues that have become hot topics in the community. Should the pump operators have stayed at their posts? If evacuated, should they have been kept closer proximity to the pumps so that they could have returned rapidly? Should steps have been taken to ensure that there were facilities to house them under such storm conditions? Can government be held accountable under these circumstances?

Levees and Floodwalls: Man Made Them, But How Well, and Is Anyone Responsible?

This is the elephant in the living room. If floodwalls had not failed subsequent to the storm, much of the flooding and damage in New Orleans would not have happened. Investigations to date by the Corps of Engineers, the state, the National Academy of Sciences and a variety of engineering groups from around the country—all reported in front-page stories in New Orleans and elsewhere—reportedly conclude that those floodwalls failed because of inadequate design and perhaps due to faulty construction. Primary questions include who is at fault for that, whether they are immune from liability, and whether those who are not immune have sufficient assets given the massive scale of the damages. The primary candidates identified thus far are the Corps of Engineers, the parish levee boards, the Orleans Parish Sewerage and Water Board, the engineering firms that did soil testing and floodwall design, and the companies that constructed the floodwalls.

Most people in the country now know about the geography of New Orleans and the nature of its storm protection system. Here are a few of the basics to give this discussion context. Much of New Orleans sits below sea level. It is bounded on the south by the Mississippi River and on the north by Lake Pontchartrain. To the east is marshland and through the two navigational waterways, the Intracoastal Waterway (separates eastern New Orleans into northern and southern sections) and the Mississippi River Gulf Outlet. Thus, there were three separate leveed pockets. Each flooded for a separate reason.

East of the Industrial Canal, two principal things happened. First, the storm surge, rushing up from the east over the marsh and through the two navigational waterways, poured over the top of some levee systems and eroded large sections of the levees. The northern section of this eastern part of the city was flooded in that fashion. Second, when the punch of the flood surge hit the Industrial Canal, floodwalls on the eastern side of that canal toppled, flooding the Lower Ninth Ward. Taken together, the two failures of the floodwall system flooded virtually all of eastern New Orleans.

The situation in western New Orleans was quite different. While the storm surge caused a breach in the western floodwall in the Industrial Canal, that did not cause most of the flooding. West of the Industrial Canal, most of the critical floodwall failures took place after the storm passed. The floodwalls that failed are in canals running south into New Orleans from Lake Pontchartrain that are used to drain water out of the city. Those floodwalls failed in three places, filling much of the city with water from the lake. While the damages potentially resulting from the three floodwall failures cannot be estimated accurately, some estimates reported in the media put it at $40 billion. The following brief overview undoubtedly oversimplifies what will become complex litigation.

The Corps of Engineers has the overall responsibility with respect to the flood protection system, a responsibility that runs back decades. The levees must conform to the requirements of the Corps of Engineers, and any construction is subject to Corps of Engineers approval, both as to design and final construction. In 1967, after flooding caused by Hurricane Betsy, the Corps of Engineers took on the task of substantially improving hurricane protection in New Orleans. That included raising the level of levees and floodwalls. In doing so, the Corps reviewed and approved engineering work done by other entities. Each parish has a separate “levee board”—a political subdivision of the state with members appointed by the governor. The levee districts retained engineers to perform soil testing and floodwall design. The Corps’ district office in New Orleans reviewed and approved that engineering work. The Corps’ regional office in Vicksburg questioned the aspect of the design that apparently caused the failures (sheet piling length), was told by its New Orleans district that “engineering judgment” explained the apparent design problem, and then the Vicksburg office just let the matter drop.

Keeping storms from breaching the levees from the outside is only one problem that faces a city below sea level. The more routine problem is getting rain water out. Large pumps drain water out of New Orleans and into Lake Pontchartrain via the canals. The pumping stations are run by a city agency, the Sewerage and Water Board. The 17th Street Canal was dredged out at the behest of the Sewerage and Water Board after it added additional pumping capacity to address flooding caused by heavy rains in prior years. That canal was one of...
those that had a floodwall breach after Katrina.

The engineering investigations of the possible causes of
the levee failures, as reported in the media, have resulted in
a number of preliminary conclusions. Unstable soil from
previously drained swamps underlies the levees and flood-
walls at shallow depths and must be penetrated by the sheet
piling supporting the floodwalls in order to get to stable soil
beneath; however, the sheet piling used in the floodwalls
did not go that deep. The floodwalls are poured in sections,
separated by rubber gaskets; they are not continuous walls,
and they failed in sections. The dredging done to improve
water flow down the 17th Street Canal went deeper than
the adjacent sheet piling, may have penetrated into the
porous soil below the level of the sheet piling and was done
closer to the side that failed, thus giving water a path under
the sheet piling, weakening its grip in the soil. The canals
did not fill to the top of the floodwalls after Katrina, elimi-
nating erosion caused by “overtopping” as a potential cause
of the failure. Rather, as the water rose in the canals it also
penetrated down into the porous soil underneath. The
weakening at the bottom of the floodwall sheet piling,
when coupled with the water’s pressure on the side of the
floodwall, combined to simply push sections of the flood-
walls over and open. Media accounts have discussed some
other potential contributing causes, such as wave action in
the canals. However, there seems to be substantial consen-
sus around this series of initial conclusions, even on the part
of the Corps of Engineers. The media often refers to this as
"the largest civil engineering disaster in American history."

Where will that lead in terms of possible tort litigation?
State entities and political subdivisions have immunity from
liability for claims based upon their policy-making or discre-
tionary acts. Courts generally have limited this immunity
to true policy-making decisions and have resisted extending
it to “operational level” acts. To illustrate that distinction,
decisions on where and how tall to build levees might fall
within the scope of the immunity, while operational errors
or defects in the inspection, repair, and maintenance of the
levee system and supporting equipment might not. The
Louisiana Constitution waives immunity in tort suits for all
political subdivisions of the state, which includes munic-
ipalities, parishes, and their subdivisions (such as levee dis-
tricts and the New Orleans Sewer and Water Board).

However, that constitutional waiver also provides that pub-
lic assets are not subject to seizure. Judgments against polit-
cal subdivisions must be satisfied by funds appropriated by
the subdivisions for that purpose. By statute, there is a
$500,000 cap on personal injury and wrongful death judg-
ments against the state, state agencies, and political subdivi-
sions. That cap applies to each person suffering a personal
injury, and to each decedent in the case of wrongful death.
The cap does not apply to property damage claims. LA.
REV. STAT. ANN. § 13:5106.

Actual recovery of damages awarded presents yet anoth-
er hurdle. New Orleans does not have money even to con-
duct all of its own operations. It has laid off a substantial
number of employees and undoubtedly will be strapped for
cash for many years to come. Absent direct assistance from
the federal government, it is not likely that the city would
appropriate money to satisfy tort judgments against it. The
Orleans Levee District, a political subdivision of the state,
reportedly has $10 million in liability insurance. If there is
a judgment against the district, recovery beyond insurance
coverage may prove impossible, absent action by the state
legislature, even if the immunity hurdle is overcome. And
since the State of Louisiana does not have enough money
to pay $40 billion in claims in the event of a judgment,
appropriation of funds for that purpose is highly unlikely.

While engineering and construction companies have
been named in some of the levee failure suits, their roles
remain to be defined. In any event, the insurance and
assets of private companies almost surely will be modest in
comparison to the scope of the damages.

That leaves the Corps of Engineers and the federal gov-
ernment as the principal potential targets of such litigation.
Not surprisingly, lawsuits have been filed against the Corps
of Engineers. Plaintiffs’ lawyers have talked in the media
about additional suits. In these suits, sovereign immunity is
a significant issue. There are two layers to that immunity.
The first layer is found in the Federal Tort Claims Act of
1946 (FTCA), 28 U.S.C. §§ 2671 et seq., an act that
waived sovereign immunity for certain specified torts com-
mitted by federal employees. Under the FTCA, the govern-
ment can be sued only under circumstances where the
United States, if a private person, would be liable to the
claimant in accordance with the law of the place where the
act or omission occurred. However, the FTCA is limited by
a number of exceptions under which the government is not
subject to suit, even if a private person could be liable under
the same circumstances. The discretionary function excep-
tion, 28 U.S.C. § 2680(a), bars a claim “based upon the
exercise or performance or the failure to exercise or perform
a discretionary function or duty on the part of a federal
agency or an employee of the Government, whether or not
the discretion involved be abused.”

Second, the Flood Control Act of 1928, 33 U.S.C.
§ 702c, states that “[t]he liability of any kind shall attach to
or rest upon the United States for any damage from or by
floods or flood waters at any place.” This immunity provi-
sion was enacted as part of the federal government’s deci-
sion to take on primary responsibility for a broad range of
flood control projects after the 1927 flood. Many cases
have challenged the scope of Section 702c. While holdings
vary, the courts generally hold that the words “floods or
flood waters” in Section 702c encompass all water that
flows through a federal facility that was designed and is
operated, at least in part, for flood control purposes.

Section 702c typically bars recovery where the federal gov-
ernment otherwise would be liable under the FTCA for
injury caused by the government’s negligence associated
with a federal flood control project. Should a suit be filed
against the federal government claiming that it is negligent
under the FTCA and that the acts were not discretionary in
nature, the United States will maintain that the govern-
ment is protected under Section 702c.

Plaintiffs’ counsel suggest that immunity does not necessarily preclude recovery from the federal government, a concept that is not without precedent. In 1976 the Grand Teton Dam, in the Teton River Canyon in Idaho, collapsed while under construction, sending 80 billion gallons of water rushing downstream to the valley below. The dam was designed by and being built for the U.S. Bureau of Reclamation. Nearly half a billion dollars in claims were made. Despite immunity, it is reported that the federal government paid claimants approximately $200 million.

The thrust at the moment seems to be as follows: sue the Corps of Engineers and seek to find a chink in the agency’s immunity; try to prove in some forum that the Corps of Engineers in fact was at fault for the failure of the floodwalls and the flooding of New Orleans; and regardless of immunity, seek to persuade the President and Congress to step in to pay for the losses caused by the Corps of Engineers. The scope of damages and extent of ill will probably are sufficient to fuel this litigation for some time. The lawsuits also will fuel bills in Congress, including a likely effort to carve out “criminal activity” from the immunity statutes. Plaintiffs’ counsel have espoused the belief that criminal conduct could be proven in this instance, and both the state attorney general’s office and the U.S. attorney have criminal investigations ongoing.

The Vanishing Wetlands Buffer

Two federal class action lawsuits against oil and gas pipeline and production companies raise the interesting, hot-button issue of the relationship between historic oil and gas operations and Louisiana’s diminishing wetlands. The suits, filed on behalf of a putative class of all residents of St. Bernard Parish, allege that the cutting and dredging of canals through wetland areas has contributed to the destruction of wetlands. The suits contend that the wetlands serve as a hurricane buffer, that oil and gas operations destroyed wetlands, and that the defendants are responsible for the additional loss of life and property that the wetlands buffer should have mitigated.

The major oil companies (Shell, Exxon Mobil, Chevron, and BP) are named defendants in these wetlands suits, which represent only the latest front in the ongoing battle between the plaintiffs’ bar and the oil industry. For several years, Louisiana and Mississippi courts have been the battleground for “legacy” oil field litigation in which property (surface rights) owners have sued oil companies for environmental damages caused by historic oil and gas exploration and production activities, including dredging the canals. These cases have been contested vigorously with mixed results for the oil industry.

One subset of oil field legacy litigation concerns canals cut through wetlands by oil companies. Such canals are necessary to allow access to remote marshland drilling sites, and for pipelines to transport the oil and gas from the wells to terminals and then to production facilities. These canals can damage wetlands by promoting saltwater intrusion into freshwater marshes (the marsh grass dies and the underlying soil is washed away). The legal mechanism authorizing the cutting of such canals is a canal servitude obtained from property owners along the canal’s route. Asserting claims in contract and tort, plaintiff landowners have maintained that the defendant oil and gas companies’ failure to maintain canals has allowed canal banks to deteriorate and caused additional damages to freshwater marshes. Landowners armed with contracts requiring oil and gas companies to maintain their canals and restore the marshes have experienced some success. St. Martin v. Mobil Exploration & Producing, 224 F.3d 402 (5th Cir. 2000). Landowners relying solely on tort principles face difficult prescription problems (the Louisiana civil law equivalent to the common law statute of limitations) when the offending canals were constructed decades ago. Terrebonne Parish School Board v. Mobil Oil Corp., 310 F. 3d 870 (5th Cir. 2002). As a general rule, tort claims involving real property prescribe one year from the date the owner acquired knowledge of the damages.

Additionally, plaintiffs are faced with serious duty and causation issues in the Katrina litigation. Successful “legacy” canal cases have been based on the oil company’s contractual obligation to the surface owner. The premise that Hurricane Katrina damages were incrementally greater because of wetlands destruction presents difficult, if not impossible, quantification problems. How do you prove that the hurricane damage was greater? How do you quantify what hurricane damage is attributable to wetland destruction? How do you quantify how much wetlands destruction is attributable to the canal system, as opposed to being caused by the channelization of the river or the combination of subsidence and the rise of sea level?

Hurricane Katrina drew out renewed discussion of whether there is a link between global warming and two related issues at play here—rising sea levels (which help destroy the natural barriers) and the severity of hurricanes. Some say the historical data and ongoing hurricane research reveal scant evidence linking human-caused warming to more frequent or powerful hurricanes. Others say that the increase in carbon dioxide in the atmosphere causes warmer climate temperatures to produce stronger hurricanes. The reliability of the argument that global warming is causing sea levels to rise and hurricanes to be more powerful is beyond the scope of this article. It seems fair to say, however, that plaintiffs will face significant hurdles in trying to prove that link, and further hurdles in laying global warming at the feet of the oil companies.

A post-Katrina suit filed in federal court in Mississippi alleges global warming as a cause of plaintiffs’ injuries. Joseph B. Cox v. Nationwide Mutual Ins. Co., et al., Case No. 1:05CV436LG-RHW (S.D. Miss., S. Div.). In addition to insurance coverage, this class action complaint focuses on allegations that “[t]he environmental conditions present in the Gulf of Mexico which fostered the
strengthening of Hurricane Katrina are the direct result of a condition sometime described as ‘Global Warming’ which has been manifested by a marked increase in global air and water temperatures, melting of the polar ice caps, and significant increases in the frequency and intensity of storms known as hurricanes.” The complaint seeks to have the matter certified as a class as to plaintiffs who suffered loss and harm as a result of Hurricane Katrina and as to defendants “who contributed to the rise in global warming as a result of their oil exploration, development, refining and production activities.” The complaint does not include further details regarding global warming or the link between the hurricane and the oil company defendants.

**Potential Future Claims**

Mold, even without a hurricane, is relatively common in the Deep South. Litigation concerning mold has evolved in Louisiana and Mississippi much as it has in other parts of the country over recent years. In the aftermath of the widespread flooding caused by Hurricane Katrina, however, mold has become an all-encompassing reality of the affected areas, including both residential and commercial facilities. Great efforts have been made to attack the mold problem as these areas are repopulated and as commercial establishments go back into service. “House gutting” has emerged as a growth industry, with everything being stripped out down to the studs and then coated with mold preventing substances. The “gutted” houses and businesses are then rebuilt and put back into service.

Although mold caused by hurricane flooding probably will not result in much near-term tort litigation, it would not be surprising to see mold litigation in future years based upon the contention that the steps taken to eliminate mold proved to be inadequate, thus exposing people to harmful mold in the air. Landlord/tenant situations would seem to provide the most likely scenarios. Commercial enterprises could also be at risk for exposure of employees or customers.

While it is difficult to predict what claims we may see in future years as a result of the environmental response to Hurricane Katrina, clearly one potential source of tort litigation is the manner in which debris disposal is handled. Louisiana is facing the daunting task of dealing with construction and demolition wastes, and as commercial establishments go back into service.

For decades, residents of New Orleans lived with speculation and dire predictions as to what damage could be caused by a direct hit from a major hurricane. Katrina turned speculation into fact and a baseline may have been established. City, state, and federal officials now face the dilemma of needing to repopulate the city, although it may take several years to upgrade the levee system. In the interim, the intertwined mutual obligations among citizens, and between citizens and the state will be evolving. A landowner may or may not rebuild his home on the same land flooded by Katrina. The city potentially may ban residential construction in certain extremely vulnerable low areas. Conduct that was “reasonable” pre-Katrina could be termed “reckless” post-Katrina. New Orleans may present an object lesson for this post-disaster evolu-
tion of rights and duties because repopulation is inevitable. People and businesses are moving back into the city regardless of potential risks. These risks cannot be eliminated entirely, nor will they be addressed completely by insurance. Tort law will continue to play a role in determining who will bear the burden of future losses associated with such risks.

When the floodwaters covered much of New Orleans, they brought with them silt and other materials. When the floodwaters receded, much of this settled in place, covering the inside of homes, yards, vehicles, streets, playgrounds—everything. In some places it was paper thin, in other places it was deep enough to wade through. There is substantial debate with regard to whether and, if so, to what degree, this sludge may be toxic. Federal and state environmental authorities have taken the position that the sludge is not toxic, except in some very limited areas—generally those affected by the oil spills in St. Bernard and Plaquemine Parishes. Environmental groups, on the other hand, maintain that the sludge is quite toxic, is particularly dangerous for children and the impaired, and has been analyzed inadequately so far. Federal and state officials encourage people to repopulate the affected areas, while environmental groups encourage the opposite and demand more government investigation and cleanup before anyone returns.

It seems unlikely that this toxicity debate will be resolved soon. Nonetheless, people will return to the affected areas, though the numbers are uncertain. Will anyone who returns actually be harmed? Will suits be filed in later years, whether people are actually harmed or not? Who might they sue who is not immune or broke? While these questions will not be answered in the near term, it would not be surprising to see them raised in the future.

Unresolved science, governmental immunity, acts of God versus acts of man, and measuring reasonableness in the face of overwhelming forces of nature all will prove to be challenges to tort litigation arising immediately in the aftermath of Katrina, particularly when one gets beyond the oil spills and healthcare facility cases. Those challenges may protract the litigation, make it less likely of success and make it necessary for plaintiffs and their counsel to seek creative solutions. In years to come, there may be a second wave of litigation, suits premised upon whether the actions taken after the hurricane were reasonable and whether those actions have created future risks and harm that could have been avoided. Only time will tell how viable any of that proves to be. But tort suits are and will remain part of the Katrina landscape.