

# THROUGH PLANNING: LEGAL ISSUES

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## **I. Assumptions.**

- A. Port has a homeland security (NIMS) plan.
- B. Port has an emergency (disaster) response plan.
- C. Port is not the jurisdiction issuing emergency orders.
- D. Port has a tariff/rules asserting its jurisdiction and addressing liability and responsibility for damage to facilities and cargo.

## **II. Tariff/Rules of the Port.**

- A. Does port tariff directly address/reference the emergency (disaster) plan? Is your plan provided to shippers/vendors?
  - B. Does port tariff expressly waive Port liability for force majeure conditions?
  - C. Does port tariff waive common carrier status for cargo claims?
  - D. Does port tariff waive claims for demurrage associated with force majeure conditions?
  - E. Does port tariff address or provide indemnity against environmental claims associated with force majeure conditions?

## **III. Emergency (Disaster) Response Plan.**

- A. Integration with multi-jurisdictional (NIMS) plan?
  - 1. Formal/informal; and
  - 2. Confidentiality issues.
- B. Is port plan capable of execution without mutual aid?
  - 1. Integration/support from outside jurisdictions; and
  - 2. Benefits of mutual aid agreements:
    - a. Promotes effective response;
    - b. Access specialized resources;
    - c. Institutionalize coordinated planning; and
    - d. Minimizes litigation.
  - 3. Legal issues with mutual aid agreements:

- a. *Appropriations law.* Appropriations law restricts the type of financial obligations that can be undertaken by government officials. As to the federal government, federal officials are bound by the federal Anti-Deficiency Act. See 31 U.S.C. §§1341, 1342, 1344, 1349, 1350 and 1511-17. As a general rule, any promise of payments will be limited to amounts that are available under current appropriations. This requirement further means that open-ended agreements to indemnify or compensate another party for possible future response costs are generally prohibited. Any agreement that goes beyond a current fiscal year or is not for a specific dollar amount may require special authorization. See generally Principles of Federal Appropriations Laws, 3<sup>rd</sup> Ed. GOA/OGC-91-5, as amended. Similar provisions may be found in state law binding the actions of state and municipal officials. A careful examination of such laws in each state is necessary to determine if exceptions exist for emergency response expenses.
- b. *Liability claims.* Commentators have urged that there are essentially four categories of governmental emergency preparedness and response activity to which tort liability might attach. These include planning (lack of plan or flawed plan), plan implementation (failure to follow plan), executive-level decision making (making poor decisions), and street-level operations (making poor decisions at the supervisory level). While some commentators further contend that the first three activities should not result in tort liability but the fourth could, “personnel at the operating level or acting without specific mandatory instructions concerning the actions in question.” See Ken Lerner, Governmental Negligence Liability Exposure in Disaster Management, 23 Urb. Law. 333, 348-349 (Summer 1991)

- C. Does port plan waive liability claims consistently with the Port tariff rules?
- D. How is the port plan implemented? What emergency powers does it grant/for what period of time (i.e. emergency procurement)?
- E. What happens when the port plan is implemented?
  1. Continuity of government;
  2. Maintain port security;
  3. Protect Port/third-party assets;
  4. Ensure sanctity of the waterways; and
  5. Save lives.
- F. What happens if the port plan is not implemented nor implemented timely in accordance with the plan? The following theories of liability might be asserted:
  1. Negligent failure to plan;

2. Negligence or gross negligence;
3. Public nuisance;
4. Trespass;
5. Detrimental reliance; and
6. Disclaimer of “Act of God”: Is a hurricane on the Gulf Coast based on the recent years’ weather patterns “reasonably foreseeable”?

#### **IV. Immunity, Immunity, Immunity.**

##### **A. Liability Claims.**

Port liability is always a concern for local governments and mutual aid responses can be a source of potential risk. Major incident response across state lines involving disasters declared at the state level implicates the Emergency Management Assistance Compact (EMAC), which has specific provisions addressing tort liability. However, if EMAC is not initiated, liability issues are governed by each state’s law. The issues arising in mutual aid responses are (i) liability to responders from other jurisdictions for injuries suffered on a mutual aid response and (ii) liability to third parties as a result of participation in a mutual aid response.

1. Mutual aid and liability to responders: Under typical workers’ compensation laws, an employee is entitled to benefits when the employee suffers an injury or illness arising out of and in the course of employment. In exchange for this automatic entitlement, the employee and/or his dependents give up the right to bring suit against the employer under common law for negligence. In some circumstances, more than one employer can be responsible for workers’ compensation as when an employee of one employer is loaned to or borrowed by another employer. This is known as the “borrowed servant principle.” In that situation, both employers may be liable for workers’ compensation claims. This should be drafted carefully to avoid a responder being denominated as an employee of his responder and not an employee of the jurisdiction to which he responded, which could be subject to a suit if the employee is injured.
2. Liability to third parties: Both requesting and responding jurisdictions may face liability concerns to third parties as a result of mutual aid agreements. Governmental immunity may provide local governments with some degree of protection. As later discussed, governmental immunity is subject to two separate tests typically to determine whether a government is immune from suit. The first is the “governmental function” test and the second is the “discretionary action test.” Under the governmental function test, many activities are immune from tort liability where they are “considered to be traditionally or inherently governmental in nature.” Under the discretionary function test, an act of a governmental official is immune if it “involves an element of choice and the choice involves applying judgment of a type deemed worthy of protection from

suit.” While emergency response efforts are generally considered exempt from tort claims, if a jurisdiction applies the discretionary function analysis, tort claims may ensue complaining of the methods by which emergency response activities are conducted.

3. General rule: Sovereign immunity offers governmental entities and their employees’ protection against suits for tort liability.
  - a. *Exceptions.* Acts outside the scope of employment, grossly negligent conduct, intentional torts or acts of bad faith.
  - b. *Emergency Responses.* “Good Samaritan” statutes provide immunity.

**B.** Federal/State Tort Claims Acts:

Waive immunity for tort claims based on negligence law. To apply, a claim:

1. Is for money damages;
2. Arises from damage to property, personal injuries or death;
3. Is caused by a negligent or wrongful act;
4. Conducted by a government employee;
5. Acting within the scope of his or her employment; and
6. In circumstances where a private person would be liable under state law.

**C.** Discretionary Function Exception

Tort claims acts contain an exception which bars claims “based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental agency or employee whether or not the discretion involved be abused.” 28 U.S.C. §2680(a).

1. A two-part test was established in *Berkowitz v. U.S.*, 486 U.S. 531, 536 (1988).
  - a. Does the challenged conduct “involve an element of judgment or choice”? *U.S. v. Gaubert*, 499 U.S. 315, 322 (1991).
  - b. Is that “judgment to be shielded by the discretionary function exception because it involves considerations of social, economic and political policy.”?
2. Restated test: “Decisions that involve policy judgments are discretionary, and therefore exempt from tort claims action. In contrast, decisions which simply put a policy into action are rote and mechanical, and fall within the tort claims act.”

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\*Discretionary Function Exception\*

3. Purpose:

- a. The discretionary function exception’s purpose is “to protect the ability of the government to proceed with decision making in carrying out its unique and vital functions without ‘second-guessing’ by the courts as to the appropriateness of its policy choices.” *U.S. v. S.A... Empresa de Viacaó Aerea Rio Grandonse* (Varig Airlines), 467 U.S. 797, 814 (1984).
- b. The discretionary function shielded the government from lawsuits associated with Hurricane Audrey in 1957. Plaintiffs sued claiming the Weather Bureau failed to give adequate warnings regarding the intensity and path of the storm. The Fifth circuit affirmed the lower court in *Bartie v. U.S.*, 216 F.Supp. 10, 19, saying weather bulletins and advisories involve judgment and discretion.

**D. Basis for Claims:**

1. Negligent failure to plan: Knowing conditions exist or could exist and not planning for their occurrence.
2. Failure to implement the plan: Having a plan to address an emerging (disaster) but failing to implement the plan or failing to follow the appropriate timing of its implementation.
3. Acts of third parties operating under mutual aid agreements: Is the act or government function or a discretionary function where the methods of emergency response activities are conducted can be challenged?
4. Acts of port employees outside their jurisdiction: Is the port’s enabling act, state statutes or laws sufficient to protect the port and its employees outside its primary jurisdiction? Please refer to the section dealing with mutual aid agreements for a possible resolution of issues related to employees working outside their primary jurisdiction.
5. Failure to secure cargo or third-party assets: While most port tariffs or rules may disclaim the liability of the port as a warehouse operator and may provide that the port does not provide warehouse receipts, nonetheless, liability claims could arise. While customarily “acts of God” are exclusions from liability for a warehouse operator because a warehouse operator or bailee (later discussed) cannot control such forces of nature. There may, however, be circumstances wherein liability may be imposed if a port had warning of an impending loss and could have taken reasonable steps to avoid it, then they may be found liable.

An illustration would be where a warehouse is located along a river area prone to flooding from hurricanes and the ground floor has been flooded previously, causing damage to cargo stored there. A port may be negligent if it does not move the cargo to a higher floor or alternate location when warned of an approaching hurricane.

Alternately, a claim could be asserted against the port as a bailee as opposed to a warehouseman and do not confuse the terms. A bailee is

charged with different responsibilities for property it holds than a warehouseman. Both terms and the responsibilities should be clearly identified in port tariffs and in the port emergency management plan. Further, separate and distinct insurance coverage is needed for each. A bailee is one to whom another entrusts property for a purpose, which may include storage. While bailees are typically in the common carrier category that most ports disclaim liability through their tariffs or rules, a claim may still be asserted.

For example, the port makes available its facilities for storage of vessels in the face of a hurricane (i.e., allowing shrimp boats or other small craft to moor in the port during a hurricane with whom the port has no regular working relationship, and their owners are not made aware of the port's tariff or rules).

Disclaimers are not normally available to a bailee to deny their liability and some courts have even found disclaimers by bailees to be not valid or binding. A careful reading of insurance policies would be important to make certain whether bailee coverage is available to a port. Further, it is important to review the policies to make certain that defense costs, which could be a substantial cost in such a claim, is included as a part of the port's insurance coverage.

6. Some disasters are not unforeseen and cannot be clothed with the "Act of God" defense.

## **V. Other Tariff/Emergency Plan Issues.**

### **A. Force Majeure.**

1. Is it adequately defined?
2. Does it specify notice?
3. What is the term of excused performance?
4. Who can terminate performance?
5. What performance is excused?

**B. Environmental Claims.**

1. Strict liability for environmental contamination has become the standard since the 1980 enactment of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and similar state laws dealing with the release of hazardous substances. This strict liability for environmental contamination can run to both an entity in its capacity as an owner but also in fiduciary capacities where, for example, an entity assumes care, custody, and control of an asset that may become damaged and cause an environmental disaster. If case law develops that challenges the notion that disasters are acts of God and are not reasonably foreseeable and heightens the level of responsibility for governmental entities to address these “events”, then it is surely to follow that strict liability claims are less likely to be waived or defenses provided as exist under current case law.
2. Defenses: A defense against an enforcement action can arise where the regulated entity can establish the violation was caused solely by an act of God, war, strike, riot or other catastrophe.
3. Waivers v. defenses: Is a defense to an environmental claim the same as an environmental waiver? No. A waiver is an authorization through the United States Environmental Protection Agency, often acting in concert with state commissions on environmental quality to provide an emergency waiver of standards, is granted following the proclamation of a state of emergency. These waivers do not cover the entire spectrum of environmental contamination and responses and often deal with solid waste issues dealing with post-disaster debris and matters outside a regulated facility’s permit. They may also be granted to allow more liberal response to environmental cleanup efforts.
4. Employee exposures: What duty is owed to returning employees and workers who may be exposed to environmental risks after a disaster, e.g. water pollutants, air contamination, water borne pathogens from sewage, petroleum products and other toxins in cleanup and debris removal efforts? Are these addressed in your emergency plan? Does the Port provide protective clothing or gear?

**D. Personnel Claims.**

The following are elements that should be considered for inclusion within a port emergency (disaster) response plan.

1. Who stays? Who can a Port emergency plan direct to stay through a disaster? An employer cannot jeopardize the health and safety of an employee. Therefore, emergency plans may identify key employees but they may not be able to require them to stay during a disaster their rights to discharge may be limited as well.
2. Who is responsible to employees? What are the responsibilities to employees’ and responders’ health and safety? On the Occupational

Safety and Health Administration (OSHA) “workers” page in its website, OSHA expressly instructs employees to approach their employer first when they believe working conditions are unsafe or unhealthy. OSHA states, “Refusing to do a job because of potentially unsafe workplace conditions is not ordinarily an employee right under the OSHA act.” However, OSHA goes on to state that “employees do have the right to refuse to do a job if they believe in good faith that they are exposed to imminent danger and good faith means that even if an imminent danger is not found to exist, the worker had reasonable grounds to believe that it did exist.”

3. **Rate of Pay:** What is the rate of pay/overtime due to remaining or returning employees? There are a number of issues including unemployment law that are too numerous to address that may affect how an employee is paid or not paid through and following a disaster; the following, however, are general rules under the Fair Labor Standards Act (FLSA). With respect to non-exempt employees, such employees are covered by the FLSA’s overtime requirement and must receive 1.5 times his or her regular work rate for all time worked over 40 hours during a “work week.” Further, employees cannot “volunteer” to work off the clock performing services where an employee’s time benefits the employer. Matters such as even setting up a hotline or making arrangements to assist other port employees with job-related benefits or information or engaging in “hours worked” for FLSA purposes because the work involved is providing services of benefit to an employer. Employers may suspend pay to employees upon the suspension of operations due to emergency orders on a disaster or its aftermath, but must continue to pay exempt status employees if such exempt employee works at some point during a work week. Depending on state laws, it may be possible to require employees to use vacation or leave balances for days not worked. This should be checked carefully as the U.S. Department of Labor has previously disapproved employers forcing salaried-exempt employees using vacation or sick leave balances for days not worked because of employer operations. Finally, issues arise as to whether an employer may charge vacation or sick leave balances of an employee if they are continued to be paid during the period when they are out of work. Again, unless a vacation or leave policy allows for such a practice, it may lead to a contract claim.
4. **Discharge:** Can an employee be discharged for failure to return after a disaster? When does the obligation to return to work arise? This will be dictated by state employment laws and personnel policies but it is difficult to discharge an employee if their reason for not returning to work arises out of health or safety issues.
5. **Workmen’s Comp:** Are employees covered by Workmen’s compensation laws when performing emergency respond duties outside the Port or under



a mutual aid agreement while in another jurisdiction? See the above section addressing mutual aid agreements.

## **VI. Lessons Learned.**

The lessons learned from recent hurricane disasters along the Texas Gulf Coast include the following.

- A.** Prepare your emergency (disaster) response plan and execute any mutual aid agreement necessary to ensure the effectiveness of the response, giving careful consideration to appropriations laws and governmental immunity clauses.
- B.** Once a natural disaster is imminent or occurs, implement your port plan timely and in accordance with the plan.
- C.** Write the plan in such a manner as to give clear direction to port staff work responsibilities that will maintain the highest level of governmental immunity for actions taken.
- D.** Review your plan thoroughly with your insurance consultants and legal advisors to minimize the likelihood of claims.
- E.** Ensure that your emergency response plan and port tariff or rules are consistent in dealing with issues affecting emergency (disaster) response efforts.
- F.** Ensure that your tariff adequately address conditions of force majeure.
- G.** In the face of a disaster, make sure that all third parties using port facilities, including shippers, vendors, rail and transportation companies, as well as third parties availing themselves of port docks and berths, are familiar with the port's tariffs and its limitation of liabilities and attempt, if possible, to secure written liability waivers.
- H.** Review all potential sources of environmental claims and attempt to mitigate those losses through planning and insurance coverages.
- I.** Review your plan with all employees and give them clear understanding of their responsibilities through a disaster and the responsibilities upon returning to work, rates of pay, use of vacation and sick leave and possible discharge for failing to return to work after a disaster.