

Environmental damage from Superstorm Sandy

By Lilia Factor

October 29, 2012, a major storm, the worst in the past 40 years, hit the northeastern United States. Superstorm Sandy, as it came to be called, did not quite reach hurricane strength. Nevertheless, it caused great loss of life, 72 deaths in states from Maryland to New Hampshire. More than 650,000 homes were damaged or destroyed and more than eight million customers lost power, of them, over one million on Long Island. So far the damage estimates have come in at over \$70 billion, second only to Hurricane Katrina.

Spills

Besides the flooding caused by the storm surge, many property owners found themselves dealing with oil spills from uprooted or flooded tanks, unmoored vessels, vehicle maintenance facilities and electric transformers. In all, according to the New York State Department of Environmental Conservation ("DEC"), more than 4800 petroleum spills were reported in New York State, of them, over 2600 in Nassau and Suffolk Counties.

Pursuant to multiple federal and New York state regulations, petroleum spills must be promptly reported.¹ Anyone with knowledge of a petroleum discharge that may enter the groundwater or other waters of the state is required to report it within two hours of discovery to the DEC Spills Hotline (800-457-7362). This results in the assigning of a Spill Number and an administrative directive to remediate the discharge. The good news is that, due to the number of properties impacted, the DEC has announced that it will not send out individual notices or administrative orders to property owners or their insurers. Also, it does not intend to impose fines and penalties on people affected by the oil spills. Where the oil is the result of oily floodwaters that left a sheen or

film on the property, the DEC's recommendation has been to allow it to evaporate and attenuate naturally. Of course, if there is evidence that the contamination has seeped into the soil or has affected groundwater or neighboring properties, a cleanup must be conducted. Further, if the discharge or oily water occurs within the residence, most porous items, including structural building materials, may be damaged beyond repair. Even after the initial cleanup, noxious petroleum odors may persist and require treatment.

If a cleanup is required, the property owner will almost always be held liable if the source of the discharge was on his or her own property. This is because the Navigation Law § 181 imposes strict liability upon "the owner of a system from which a discharge occurred . . . , regardless of a lack of proof of any wrongful act or omission by such owner directly causing the discharge."² Liability can be predicated not only on the ability to control potential sources of contamination on the property, but also on the responsible party's capacity to affect the cleanup.³ There is no exception for owners of residential properties.⁴

Navigation Law §190 permits an injured party to recover its damages directly from the insurer of the property owner. In practice, the insurer usually disclaims first party coverage for the spill, citing an exclusion in the policy for environmental pollution. This common exclusion will often excuse the insurer from paying for the remediation of contaminated soil on the insured's own property. However, under the third party liability section of the policy, the carrier will still likely be responsible for any contamination of groundwater, which is considered the



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property of New York State, and any migration of the oil to a neighboring property. Some carriers have taken the position that no coverage is to be provided because of an "act of God" or "force majeure," which is excluded under the policy. This argument is specious because the only defenses permitted by the statute are that the discharge was caused solely by war, sabotage, governmental negligence or an act or omission of a third party.⁵ The third party defense rarely works for the property owner, who is still held liable as the person with the best ability to clean up the resulting contamination.⁶

In certain cases, where the property owner does not know where the oil on his or her property originated, or where the discharger is known, but refuses to pay for the cleanup costs, it may be advisable to file a claim with the New York Oil Spill Fund. This fund, established by the Navigation Law (§ 179), is authorized to reimburse innocent victims of petroleum spills. The claims process is rather cumbersome and long and should probably only be used in cases where the cleanup costs are substantial, there is no dispute over liability, and time is not of the essence. As of the date of this writing, the fund has received only about a dozen relating to Sandy.

Mold

Mold growth is a frequent corollary of flood damage. Sometimes, especially where cleanups are delayed, the contamination becomes so rampant and severe that the entire structure has to come down. That is why mold should be addressed early and thoroughly in the cleanup process. Care should be taken,

after stripping the affected drywall and applying a mold suppressant to let the areas dry thoroughly before rebuilding. The Federal Emergency Management Agency ("FEMA") website, among others, offers instructions on mold removal.⁷

Sometimes, the mold issue is presented as a claim by a tenant that the landlord has failed to remediate mold in its building and that this is causing health problems. Here, the main question is the one posed most often in the field of toxic torts: can you prove causation? To date, few doctors can definitively say that a certain medical condition or symptom has been caused by exposure to mold, to the exclusion of other possible factors. The case would require strong circumstantial evidence, expert testimony, and, clearly, a level of injury or other damages that would justify litigation.⁸ If the desired relief is simply breaking a lease or rent abatement, the attorney should see if the warranty of habitability (RPL §235-b(1)), which applies to all residential rentals, has been violated. Other legal issues that may be involved are pre-existing medical conditions and insurance coverage. Most modern insurance policies have an express exclusion for mold. Whether compensation or other redress is available should be analyzed on a case by case basis.

Wetlands Permitting

Due to the storm surge and coastal flooding, the majority of Sandy's victims have been those with property on or close to the water. Many bulkheads were damaged, and erosion caused by the high tides and heavy winds have caused actual loss of land. An attorney advising the owner must be aware that all construction at or within a certain distance from the water is subject to both local zoning codes, which often have specific requirements, and to

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the wetlands' regulations of the DEC. In addition, many activities in coastal areas also require a permit from the U.S. Army Corps of Engineers and a Coastal Consistency Certification from the New York Department of State.

In the wake of Sandy, on October 31, 2012, the DEC issued a "general permit," which covers several counties, including Nassau and Suffolk. The permit authorizes certain activities within New York's Coastal Erosion Hazard Area. These include, but are not limited to, stabilization of existing functional storm-damaged dwellings, decks and walkways with temporary bracing and pilings; re-grading of eroded dunes; reconstruction of existing functional bulkheads and shoreline erosion structures in-kind/in place; and repair and placement of sand and/or material equivalent to existing material at the toe of eroded escarpments.

A property owner only needs to file a "Notice of Intent" to notify the DEC of work to be done under the general permit. This notice may be filed electronically.⁹ A client should be advised to photograph and document all relevant structures and site conditions prior to performing any work and then immediately after completion.¹⁰

The owner should also contact the Building Department of the town or village that has jurisdiction over the property to inquire about the permitting process for wetlands activities. While many local municipalities have waived certain permit fees, a permit must still be obtained and closely followed to avoid violations and penalties.

FEMA and the National Flood Insurance Program ("NFIP")

FEMA administers the NFIP through private insurance companies. People who have not purchased flood insurance may get emergency disaster assistance grants to help with alternative housing and immediate needs. Such grants are capped at \$31,900. Many people have complained that their uninsured neighbors received FEMA assistance quickly while they, the ones who ostensibly "did the right thing" by purchasing flood insurance,¹¹ are still waiting for the processing of their claim. Often, the payout is held up because the NFIP requires the claimant to first settle with her homeowner's insurer. As the "insurer of last resort," NFIP will not cover items covered by private insurance. Another problem that has affected many families is that insurance adjusters are deeming any living space below ground level to be basement. As a result, flood damaged furniture, rugs and other personal property in finished basements, garden apartments and even regular rooms in split level homes are not being covered. In New Jersey, a class action suit in federal court seeks to challenge FEMA's definition of "basement," as applied in Hurricane Irene and Sandy claims.¹²

Flood insurance is capped at \$250,000 for a single family home. Obviously, this amount is woefully inadequate to rebuild a severely damaged home. Low interest SBA loans are supposed to help fill the gap for property and business owners. They offer up to \$200,000 to homeowner to repair or replace disaster damaged real estate and up to \$40,000 for personal property. Businesses may borrow up to \$2 million to repair or replace real estate, machinery, equipment, inventory and other assets.¹³ However, SBA loans will not be available to the extent that the damaged property can be repaired or replaced with the proceeds of insurance, gifts, or other compensation, including condemnation awards.¹⁴

Many coastal residents, whose homes were "substantially damaged" by Sandy are required to elevating the new structure above the Base Flood Elevation.¹⁵ Most

NFIP policies include increased Cost of Compliance ("ICC") which provides up to \$30,000 to elevate, demolish or relocate the home. Significantly, this coverage is subsumed within the building property coverage limit of \$250,000. Thus, depending on the damage award for the structure, the amount of the ICC may be small.

Private Insurance

Most people, including attorneys, will probably admit that they do not read their insurance policies. However, when an event like Sandy occurs, that small print suddenly becomes all important. One common problem faced by victims of the storm is that, in trying to save on premium payments, they opted for very high deductibles. Now that the house requires a new roof, whose cost will range from \$5,000 to \$10,000, they regret that \$10,000 deductible, which makes the claim futile. Some find fault with their insurance brokers for either misleading them about the coverage they have or not procuring the coverage they requested. Can a broker be held liable for losses which the insurer declines to cover?¹⁶ The general rule in New York is that "[i]nsurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage."¹⁷ Further, an insured who receives the policy is presumed to have read and understood it.

Still, in a recent case, the Court of Appeals reversed the grant of summary judgment and reinstated plaintiff's negligence claims against its insurance broker who was expressly asked to procure a certain type of coverage and did not do so.¹⁸ The court held that "The failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker." Even assuming that coverage exists, there is often confusion about insurance carriers' "depreciated" versus "replacement" cost reimbursement. Typically, private insurance policies will pay for the depreciated value of an item (i.e. its actual cash value, considering its age and condition) and then, if the item is replaced and the insured has this additional coverage, it will pay an additional amount to reflect the difference between the depreciated cost and the cost of the new item. Flood insurance provided by the NFIP pays out only actual cash value for personal property. For real property, the NFIP does pay replacement cost value, but only for a single family principal residence whose building coverage was at least 80 percent of the full replacement cost of the building or is the maximum available for the property under the policy.

Many Sandy victims have been surprised to find that their mortgage bank is holding up their receipt of insurance proceeds. As the holder of the collateral, the mortgagee is often listed as payee on the checks issued by the carrier. It is then supposed to endorse the check and disburse the funds to the homeowner for the repairs and rebuilding. In practice, banks have been found to delay or condition the transfer of funds. An egregious example of this practice recently prompted Nassau County judge to award legal costs to the homeowner and assess a daily fine of \$2,500 for the bank's failure to endorse the check.¹⁹

Finally, many business owners, including law firms, who had the foresight of obtaining business interruption coverage, are now dealing with the hurdles of proving their losses due to the storm. The key to most such claims is documentation. While the actual amount of lost profit is necessarily speculative, good bookkeeping should help

the insured prove what the past income and expenses were over a similar time period and, therefore, what they would have expected to earn, but for the business interruption. Also, there may be questions if, depending on the type of coverage, as to how long it would take a "reasonable businessperson" to return to pre-loss operations or how long utility service was suspended.²⁰

Tax Relief

The tax consequences of the storm are an issue that many clients may overlook. Home and business owners should be aware that they may be eligible for a reduction in their property tax assessments as a result of the damage to their properties. In Suffolk County, it appears that only the Town of Babylon had a specific procedure for applying for a Sandy-related reduction in assessment, but the completed damage forms were due by March 15, 2013. However, Suffolk taxpayers can still take advantage of the tax grievance procedure and file a complaint with the New York Board of Real Property Services in May 2013.²¹ Some of the town assessors' offices provide instructions.

On the federal level, the Internal Revenue Service allows certain property damage from storms, fire and theft to be deducted from taxes. The loss is based on the change in fair-market value immediately before and after the storm, determined by either an appraisal or a tally of actual repair costs.

Obviously, this article only scratches the surface of the legal issues being faced by those affected by this storm. What is clear is that those who learn the lessons of Sandy will be better prepared to face the next disaster.

Note: Lilita Factor, practices civil litigation and environmental law at the Law Office of Frederick Eisenbud in Commack, NY. She is the Chair of the Environmental Law Committee of the Nassau County Bar Association and Co-Chair of the HIA Environmental and Green Industries Committee.

1 17 NYCRR 32.3, 32.4; ECL 17-1007; 6

NYCRR 613.8; ECL 17-1749; 40 CFR 110.10.
2 *Matter of White v. Regan*, 171 A.D.2d 197, 199-200, 575 N.Y.S.2d 375 [1991], lv. denied 79 N.Y.2d 754, 581 N.Y.S.2d 282, 589 N.E.2d 1264 [1992].

3 *State of New York v. Green*, 96 NY2d 403 (2001); *State v. Spencor Fuel Inc.*, 3 N.Y.3d 720 (2004).

4 See e.g., *State of New York v. New York Central Fire Ins. Co.*, 147 A.D.2d 77 (3d Dept. 1989).

5 Navigation Law §181(4)(a).

6 See, e.g., *Kramer v. Oil Services, Inc.*, 56 A.D.3d 730 (2d Dept. 2008).

7 http://www.fema.gov/pdf/rebuild/recover/fema_mold_brochure_english.pdf; <http://www.fema.gov/news-release/2013/02/26/seek-and-destroy-mold-spoil-er-fact>. See also, Center for Disease Control and Prevention posting at: <http://www.bt.cdc.gov/diseases/mold/protect.asp>

8 See, e.g., *Cornell v. 360 W. 51st St. Realty, LLC*, 95 A.D.3d 50 (1st Dept. 2012).

9 http://www.dec.ny.gov/docs/permits_ej_operations_pdf/gp012006eandjpermit.pdf

10 "Legal Hurdles for Coastal Residents Rebuilding After Sandy", by Anthony S. Guardino, New York Law Journal, Jan. 23, 2013, p. 5.

11 Over 41,000 homes covered by the NFIP were damaged in Nassau and Suffolk Counties alone.

12 *Donnelly v. New Jersey Re-Insurance Co. et al.*, U.S. District Ct., N.J., complaint dated Dec. 11, 2012.

13 <http://www.sba.gov/content/2012-hurricane-and-tropical-storm-recovery-assistance-information>

14 13 C.F.R. §§ 123.101(c), 123.201(a), 123.301 (2004).

15 See <http://www.fema.gov/pdf/rebuild/mw/see5.pdf> for elevation guidelines. See also, "Land Use Implications From Hurricane Sandy, Levine, Rossi and Bolin, NYLJ, March 11, 2013.

16 See "After the Storm: An Overview of Insurance Issues" by Gary Petropoulos, Esq., presented Feb. 15, 2013 at NCBA Dean's Hour.

17 *Murphy v. Kulan*, 90 N.Y.2d 266, 270 (1997)

18 American Building Supply Corp. v. Petrocilli Group, Inc. 19 N.Y. 3d 730, 955 N.Y.S.2d 854 (2012).

19 *JPMorgan Chase Bank, N.A. v. Eisenberg et al.*, N.Y.Sup., Nassau Cty. Index No. 382/11, Short Form Order dated January 14, 2012.

20 See note 16, *supra*.

21 <http://www.tax.ny.gov/pdf/publications/oprts/grievancebooklet.pdf>.

NOTICE – AFFINITY FUNDS

at the time such funds were distributed. Upon receipt, the Board of Directors established a segregated investment account at Oppenheimer Funds to hold these funds.

On March 31, 2010, US Life elected to terminate the US Life Agreement effective April 1, 2010, and, incident thereto, on May 31, 2010 the SCBA received a check for \$267,409 drawn upon US Life. These funds were added to the funds received in February 2009 and maintained at Oppenheimer Funds, and presently there is a total of \$833,231 in the Oppenheimer account.

After receipt of notification that US Life had elected to terminate the US Life Agreement, the Board of Directors requested Affinity to assist the Board in determining how the SCBA might distribute these funds. After researching the matter, Affinity advised us that they were unable to provide information that could be used to determine the names of the prior insured parties or any methodology by which such names could be determined. Accordingly, there appears to be no way to construct any accurate accounting concerning the returned funds, who was covered during the specific months or years in question, and what portion, if any, of such funds may apply to the previously insured parties.

The Suffolk County Bar Association (SCBA) seeks to utilize the CSR funds in the Oppenheimer Account for the use and benefit of our general membership.

The funds the SCBA seeks to use will be applied only to uses that are intended to benefit the general membership of the Suffolk County Bar Association. Should you have any comment, please submit your comments in writing to: The Board of Directors Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, New York 11788.

The Suffolk County Bar Association (SCBA) is in possession of funds that it received pursuant to the termination of a Retention Agreement dated as of December 1, 2003 among US Life Insurance Company, JLT Services Corp. (JLT) and seven bar associations, including the SCBA. The Retention Agreement called for JLT, the serving agent for a Group Term Life Insurance Program (Program) in which the seven bar associations participated, to establish a "Claim Stabilization Reserve" (CSR) as required by statute.

The purpose of the Retention Agreement and the CSR was to protect the program from adverse experiences and to allow individual participating bar association members to receive the benefit of favorable experiences on a year-to-year basis. US Life agreed to limit rate increases and benefit changes unless the CSR was insufficient and further agreed that no insured member, as long as otherwise eligible under applicable policy terms and conditions, and as long as a member of a participating bar association, would be non-renewed for any reason except for non-payment of premium.

Upon termination of the Retention Agreement, any remaining funds in the CSR were to be held for 18 months to allow for claim run-off, and then returned by US Life to the participating bar associations as an "experience refund" for which each participating bar association agreed to indemnify the others from any liability.

On February 19, 2009, the SCBA received from AON Affinity Insurance Services (Affinity), which had assumed responsibility for servicing the Program from JLT, a check drawn upon US Life for \$381,484 representing the entire CSR balance that Affinity was required to return to the SCBA