

**Wednesday, October 23, 2019**

**2:00 PM – 3:15 PM**

**Workshop 1**

**Rock You Like A Hurricane?**

**Affirmative Steps You Can Take To Be Prepared For The Storm**

**Presented to**

**2019 U.S. Shopping Center Law Conference  
Marriott Marquis San Diego Marina**

**San Diego, CA**

**October 23-25, 2019**

**by:**

**Alexander L.W. Snyder**

Asst. General Counsel and Asst. Secretary  
Simon Property Group  
225 West Washington Street  
Indianapolis, IN 46204  
[Alex.Snyder@simon.com](mailto:Alex.Snyder@simon.com)

**Patrick O. Hayes**

Co-Managing Shareholder  
Andrews Myers, P.C.  
1885 St. James Place, 15<sup>th</sup> Floor  
Houston, Texas 77056  
[phayes@andrewsmyers.com](mailto:phayes@andrewsmyers.com)

## **ROCK YOU LIKE A HURRICANE**

### *Affirmative Steps You Can Take to be Prepared for the Storm*

Hurricanes have hit the United States more frequently and with greater levels of damage in the last few years. Hurricane Harvey hit the Texas Gulf Coast in 2017, and Hurricane Maria hit Puerto Rico approximately one month later. The following materials describe the experiences and lessons learned from two different practitioners, including updating lease provisions and providing direction to property management/operations moving forward as we prepare for future disasters.

## HURRICANE HARVEY EXPERIENCE

### **I. Introduction**

Hurricane Harvey hit the Texas Gulf Coast in August 2017, causing nearly unprecedented damage for such a storm.<sup>1</sup> By some reports, 70% of Harris County flooded,<sup>2</sup> causing many residents to lose their homes and rendering many businesses incapable of operating. Both landlords and tenants found themselves suddenly faced with a situation for which they were not prepared, and, once the waters subsided, disputes began to arise between the parties over who would shoulder the burdens associated with a wide-scale disaster like this one. As they started seeking advice from their respective legal advisors about where such burdens lay and what remedies were available, they became familiar with their lawyers' common reply of "What does the lease say?"

### **II. Typical Lease Provisions**

A typical commercial lease has several provisions that may be relevant in the event of a natural disaster, such as a hurricane and resultant flooding. Four such provisions, which will be the focus of this paper, are the following: (i) Casualty Damage; (ii) Maintenance and Repair Obligations; (iii) Basic Services; and (iv) Insurance.

**Casualty Damage.** The most obvious provision to approach first is the Casualty Damage provision in the lease, which provides the rights and obligations for each party when the leased premises are damaged by fire or other casualty. Below is an example of a typical Casualty Damage provision:

If the Leased Premises or any part thereof shall be damaged by fire or other casualty, Tenant shall give prompt written notice thereof to Landlord. In case the Project shall be so damaged that substantial alteration or reconstruction of the Project shall, in Landlord's sole opinion, be required (whether or not the Leased Premises shall have been damaged by such casualty) or in the event Landlord's mortgagee should require that the insurance proceeds payable as a result of a casualty be applied to the payment of the mortgage debt or in the event of any material uninsured loss to the Project, Landlord may, at its option, terminate this Lease by notifying Tenant in writing of such termination within 90 days after the date of such casualty. If Landlord does not thus elect to terminate this Lease, Landlord shall commence and proceed with reasonable diligence to restore the Project, and the improvements located within the Leased Premises to substantially the same condition in which it was immediately prior to the happening of the casualty. Notwithstanding the foregoing, Landlord's obligation to restore the Project, and the improvements located within the Leased Premises shall not require Landlord to expend for such repair and restoration work more than the insurance proceeds actually received by Landlord as a result of the casualty. Landlord shall not be liable for any inconvenience

---

<sup>1</sup> Damage estimated to be \$125,000,000,000 per the National Hurricane Center. <https://www.nhc.noaa.gov/news/UpdatedCostliest.pdf>

<sup>2</sup> Jeff Lindner, meteorologist for Harris County Flood Control District. <https://twitter.com/jefflindner1/status/903412604902760448>

or annoyance to Tenant or injury to the business of Tenant resulting in any way from such damage or the repair thereof, except that Rent shall be abated from the date of the damage or destruction for any portion of the Leased Premises that is unusable by Tenant, which abatement shall be in the same proportion that the Rentable Area of the Leased Premises that is unusable by Tenant bears to the total Rentable Area of the Leased Premises; provided that Tenant shall not be entitled to any abatement of Rent if (a) the damage or destruction in the Leased Premises is restored within 5 business days after Landlord's receipt of written notice from Tenant of the occurrence of the damage or destruction, or (b) the damage resulted from the negligence or misconduct of Tenant or any Tenant Party.

There are a few things to point out in the provision above. First, the landlord has a termination right based on its own assessment of the severity of the situation, but the tenant does not. And this termination right is tied to how the entire project was affected, not just the leased premises. Second, the landlord is not liable to the tenant for any inconvenience or loss of business as a result of the casualty. The tenant's only remedy is an abatement of rent, but this is only in proportion to the share of the leased premises that are unusable by the Tenant and may be unavailable to the tenant if the tenant was in any way responsible for the casualty damage. Third, the landlord's lender may end up having the last say in what happens to this lease and other leases within the project.

**Maintenance and Repair Obligations.** Under most every commercial lease, the tenant will have an explicit duty to maintain and repair the leased premises, but the landlord may or may not have any duty to maintain and repair anything outside of the leased premises. If the lease is silent to the landlord's responsibility to make repairs, then common law holds the landlord responsible for all portions of the property not included in the actual holding of any one tenant. A typical provision as to maintenance and repair is as follows:

Except to the extent such obligations are imposed upon Landlord hereinabove, Tenant shall, at its sole cost and expense, maintain the Leased Premises in good order, condition, and repair throughout the entire Term, ordinary wear and tear excepted. Tenant shall, within 30 days after Landlord's written demand therefor, reimburse Landlord for the cost of all repairs, replacements and alterations (collectively, "Repairs") in and to the Leased Premises, the Project, and the facilities and systems thereof, the need for which Repairs arises out of (i) Tenant's use or occupancy of the Leased Premises, (ii) the installation, removal, use, or operation of Tenant's Property, (iii) the moving of Tenant's Property into or out of the Project, or (iv) the act, omission, misuse, or negligence of Tenant or its agents, contractors, employees, or invitees. The foregoing obligations are subject to Section 24 hereof (Casualty Damage).

In the event of a casualty that affects the tenant's premises or the property in which the premises are located, a provision like the foregoing may come into effect in determining which party is responsible for the cleanup and repair of the premises, especially if such a provision does not have language making it subject to the lease's Casualty Damage provision.

**Basic Services.** Depending on the nature of the property and the leased premises, the landlord under a commercial lease may obligate itself to provide certain services to the leased premises, such as hot and cold water, heating and air-conditioning, electricity, janitorial service, and/or elevator service. A natural disaster such as a flood or hurricane may render the landlord unable to provide such services, and the lease should provide the tenant with some sort of remedy to mitigate the situation. Unfortunately for tenants, it is typical for leases to contain a clause similar to the following, which contains only a very limited remedy of rent abatement:

No alteration or interruption of any service to be furnished by Landlord will: (i) constitute an actual or constructive eviction, a disturbance of Tenant's use or occupancy of the Premises, or a breach of Landlord's obligations under this Lease; (ii) render Landlord liable or responsible for any loss or damage Tenant may sustain; (iii) relieve Tenant of

any obligation under this Lease (including, without limitation, the obligation to pay Rent); or (iv) entitle Tenant to any setoff, abatement, recoupment, or other reduction in Rent. Notwithstanding the foregoing: (a) Tenant, as its sole and exclusive remedy, shall be entitled to receive an abatement of Rent the period beginning on the 6<sup>th</sup> consecutive business day after Landlord receives the notice of any interruption of heating, air-conditioning, or electricity, if such interruption was within the reasonable control of Landlord, and ending on the day when the service in question has been restored; and (b) **TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW, TENANT WAIVES ALL OTHER CLAIMS AGAINST LANDLORD ARISING FROM ANY ALTERATION OR INTERRUPTION OF ANY SERVICE FURNISHED BY LANDLORD.**

As seen above, landlords understand that an abatement of rent may be equitable in the event that certain services like electricity or air-conditioning are not provided to the leased premises, but they also want to avoid incurring liability for something over which they do not have any control. As such, the preceding provision, as written, would not provide a tenant with the desired relief in the event of a Harvey-like natural disaster.

**Insurance.** Under the typical commercial lease, Tenants will also have an obligation to carry certain policies of insurance. Below is an example of a very comprehensive insurance provision:

Tenant shall procure and maintain throughout the term of this Lease, at its sole cost and expense, a special form property insurance policy or policies (including builder's risk for any construction at the Leased Premises, which may be carried by Tenant or Tenant's contractor) covering all of Tenant's leasehold improvements, trade fixtures, merchandise, and personal property from time to time in, on, or about the Leased Premises in an amount not less than their full replacement value from time to time, including replacement cost endorsement, not deleting any peril covered by a special form property insurance. Landlord's and Tenant's interest in improvements and betterments shall be insured to full value proportional basis to the term of the lease. Such property policy shall include business-interruption or loss-of-income insurance in an amount equal to the total rent and other charges payable under this Lease for a 12-month period. Tenant shall cause insurer to add Landlord as loss payee on the improvements and betterments and loss-of-income losses. In addition, Tenant shall procure and maintain throughout the term of this Lease, at its sole cost and expense, comprehensive boiler and machinery coverage on all heating, ventilating, and air conditioning equipment, electrical, mechanical, and other such systems serving the Leased Premises in amounts reasonably satisfactory to Landlord. Any proceeds from a special form property insurance policy and/or boiler and machinery insurance policy shall be used for the repair or replacement of the property damaged or destroyed. All such insurance shall be written by insurance companies authorized to issue such insurance coverage in the State of jurisdiction of this Lease. All insurers shall be AM Best A-VII or better. Tenant shall obtain a written obligation on the part of each insurance company to notify Landlord at least 30 days prior to any cancellation non-renewal of the respective policy. During the term of this Lease, Tenant agrees to maintain the insurance as required by the terms of this Lease and shall provide to Landlord evidence of such insurance. Tenant must, in advance of any work done on any Landlord related property, submit a certificate of insurance and a declaration of contractual commitment (the "Commitment Declaration") in accordance with the Landlord's instruction. The indemnification obligations set forth in the Commitment Declaration shall be in addition to and not in place of the indemnification obligations set forth in this Lease.

The foregoing provision provides the tenant (and landlord) with rather expansive coverage, including: the full replacement value of all of Tenant's leasehold improvements, trade fixtures, merchandise, and personal property in the leased premises; comprehensive boiler and machinery coverage on all HVAC equipment, electrical, mechanical, and other such systems; and loss-of-income /

business-interruption insurance. It would seem that natural disasters such as hurricanes and severe flooding would seem certain to trigger many of these policies and provide tenants with the needed relief.

The above provisions purport to offer coverage and support to both landlord and tenant in the event of a natural disaster. Unfortunately, it was not uncommon in the aftermath of Hurricane Harvey for certain parties to discover that they were not, in fact, adequately protected by the terms of their leases or insurance policies. In other instances, it was also not uncommon to find that the language in the lease did not address each tenant's particular situation as will be discussed in greater detail, below.

### III. Hurricane Harvey

As mentioned above, Hurricane Harvey, which was classified as a Category 4 storm, paid an extended visit to Texas beginning August 25, 2017, making landfall three times in six days in both Texas and Louisiana. Two feet of rain fell in the first 24 hours, and, at its peak on September 1, 2017, one-third of Houston was underwater. The flooding forced 39,000 Houstonians out of their homes and into shelters and affected 13 million people from Texas through Louisiana, Mississippi, Tennessee, and Kentucky. An estimated 27% of Houston's commercial real estate was affected by flooding caused either directly or indirectly by the hurricane,<sup>3</sup> including 73 million square feet of retail space, 60 million square feet of office space, and 11 hospitals.<sup>4</sup>

In addition to the flooding caused directly by the storm, there was additional flooding that affected other, previously unflooded parts of Houston after certain reservoir dams, being far above their designed safety capacity, were drained by the U.S. Army Corps of Engineers to prevent them from bursting.<sup>5</sup>

Reports generally indicate that Houston's commercial real estate market escaped without too much damage. For the office market, the flooding was generally confined to the ground floor and did not penetrate actual office spaces above the ground floor,<sup>6</sup> with JLL noting that only a small percentage of its tracked office space inventory experienced flooding, which was confined to interior space like lobby areas, first-floor suites, grade-level building systems, and underground parking garages experienced flooding throughout the tracked market.<sup>7</sup> The industrial market and the retail market also fared similarly well. Geography and design proved crucial to protecting the industrial market: while a large portion of Houston's industrial inventory is located within the 100-year floodplain, the majority of business parks are in areas not immediately proximal to the bayou system, a main source of flooding during the storm.<sup>8</sup> The retail market mainly suffered due to dissipation of sales than actual flooding.<sup>9</sup>

Of course not everyone experienced such good fortune. Those commercial office properties with only one or two stories were hit particularly hard, as were some other larger companies, such as British Petroleum – BP's Houston corporate headquarters in the Energy Corridor saw its first floor and basement office spaces flood extensively, so much that the company was forced to have nearly 60% of its workforce conduct business from home for almost a year.<sup>10</sup>

---

<sup>3</sup> Konrad Putzier, Hurricane Harvey put as much as \$55 billion worth of Houston's commercial real estate underwater, Business Insider (Sep. 2, 2017), <https://www.businessinsider.com/hurricane-harvey-55-billion-houston-commercial-real-estate-underwater-2017-9> (substantial areas of commercial real estate were flooded due to a city decision to release waters held back by levies as the torrential downpour from Harvey threatened to cause the levies to burst).

<sup>4</sup> *Id.*

<sup>5</sup> <https://www.swg.usace.army.mil/Media/News-Releases/Article/1291369/corps-releases-at-addicks-and-barker-dams-to-begin/>

<sup>6</sup> A Comprehensive Review of Hurricane Harvey's impact on Commercial Property, JLL Houston Blog (Oct. 12, 2017), <http://houstonblog.jll.com/hurricane-harveys-impact-commercial-property>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Collin Eaton, BP, others wrestle with fallout from Harvey (Sep. 14, 2017), <https://www.houstonchronicle.com/business/article/Flooded-by-Harvey-BP-s-main-Houston-office-tower-12199318.php#photo-14111717>.

#### IV. Applying the Typical Lease Provisions

For those tenants affected directly by Harvey's flooding within their leased premises, the typical lease provisions discussed above should provide some measure of protection.

**Casualty Damage.** The standard Casualty Damage provision likely contained in the leases of such tenants should easily be applicable, though there are some specific matters that they would want to review in their respective leases:

- *Does the tenant have any termination rights, even after a certain number of days?*
- *Does the tenant have a right to abate rent? If so, when does it begin, and who determines how much rent is abated?*
- *Were the leased premises affected by any negligence on behalf of the landlord?*
- *What are the landlord's repair obligations?*
- *If the landlord has a termination right, what sort of notice must the landlord provide to the tenant?*

**Maintenance and Repair Obligations.** This section seems less likely to be very helpful to a tenant affected directly by such flooding, but it would nonetheless be advantageous to be familiar with the provisions contained therein, including the following:

- *Does the landlord have any specific repair obligations that it has failed to meet?*
- *Do any of those repair obligations apply to the leased premises, whether directly or indirectly?*
- *Was any damage to the leased premises caused by landlord's failure to make repairs prior to the flooding?*

**Basic Services.** The landlord's failure to ensure that certain basic services are provided may give a tenant some leverage in seeking relief from the landlord for the leased premises becoming untenable from such flooding. But there are likely several caveats to triggering any of the landlord's liability in this situation, with which the tenant should familiarize itself by reviewing the lease:

- *Does the landlord's obligation depend on receiving any notice from tenant?*
- *Did the tenant give notice as properly required under the lease? Did the tenant in any way contribute to the cessation of services?*
- *Is the entirety of the leased premises untenable? Just a part?*
- *For how long must the basic services be unavailable before any rights of the tenant are available?*
- *Does the service interruption have to be within the landlord's reasonable control?*

**Insurance.** If the flooded tenant has maintained the insurance policies likely mandated by the lease, then such a tenant will likely be protected to a good degree by such insurance coverage. Nonetheless, a tenant may have negotiated for less stringent insurance requirements, while the lease nonetheless maintained the parties' respective obligations in light of what insurance should have been carried. This is a matter that the tenant needs to review in the lease, as well as contacting its insurance

carrier to determine what the actual protection to be provided will entail. A situation like flooding caused directly by Hurricane Harvey would seem to be clearly covered by a tenant's properly maintained insurance policy, but it may be a very different story if the flooding was caused by the Corps of Engineers' decision to release water from the dams.

## V. Typical Lease Provisions and Atypical Situations

Unfortunately for some other tenants, they discovered in the aftermath of the storm that none of the above provisions provided them with any protection. The reason for their misfortune was that their individual leased premises were not actually and directly affected by Hurricane Harvey and its floodwaters (though the buildings and surrounding access roads may have been severely affected), and neither their leases nor their insurance policies offered any protections or remedies for such a situation. This author assisted one particular client, who owned and operated several office buildings in the Energy Corridor of Houston, with such a situation. None of the office buildings in question suffered any flood damage from Hurricane Harvey, but the roads surrounding each of these buildings were flooded to the point that vehicular access to such buildings was virtually impossible for almost ten days. This very situation was not covered in the vast majority of the leases for this group of buildings, most of which leases were legacy leases from several different owners (in other words, most of the leases had completely different casualty provisions).

In this particular situation, the landlord reviewed the current, standard lease for each building, as well as many (but not all) of the leases then in effect, to determine what rights and obligations landlord and tenant were each afforded. While it was not practical to review each and every lease then in effect for each of the buildings (and pay the extensive legal fees to do so), it became readily apparent upon such initial review that the vast majority of such leases would not require the landlord to abate any obligation of the tenants. The landlord thereafter circulated a letter to each of the tenants explaining that, because none of the buildings nor the premises therein were actually damaged by the hurricane, there was nothing the landlord could do to offer any relief to the tenants, despite having access to the buildings completely cut off. As might be expected, the tenants were not pleased with this result, and some of them protested by sending demand letters in return.

Below was an effective argument made by an attorney for one of the tenants:

According to your correspondence, Landlord decided not to abate Seale's rent because "the flooding did not actually reach any of the buildings" and because "none of the buildings (nor any of the premises therein) actually suffered any casualty damage". Whether or not a casualty loss was suffered may very well be an issue to be resolved. At this point, however, Seale is not requesting abatement of rent because there was any casualty damage. Seale is requesting abatement of rent because its personnel did not have access to the building and was prohibited from entering the building in the aftermath of Hurricane Harvey for a period in excess of five (5) days.

Specifically, Landlord is required to furnish certain services to Seale in accordance to Section 7 of the written lease agreement between Landlord and Seale (the "Lease"). Section 7 of the Lease states that Landlord is required to provide services including, but not limited to, (i) hot and cold water; (ii) elevator for ingress and egress within the premises; (iii) access control to the building; and (iv) electricity service to the building, among other services. Landlord did not provide any of these services during the period of August 28, 2017, thru September 11, 2017 ("Abatement Period") as Seale was denied access the building during the Abatement Period.

This attorney and a few others all seized on one particular fact: **the Landlord notified all the tenants that the buildings would be closed while the flooding continued.** Although this was obviously a responsible and prudent thing to do, from a legal perspective it undercut subsequent arguments that the tenant were not entitled to rent abatement because neither the leased premises nor the buildings were damaged—they were simply inaccessible. For future storms, landlords might want to

consider not sending out any notices as to whether the buildings or the shopping centers are open or closed. If the buildings or centers are already inaccessible (other than by boat) it may not be necessary to send these notices.

Of course, other tenants tried to take advantage of the situation and unilaterally decided to stop paying rent without any justification under the lease. Below is a portion of our response to one such tenant that elected to stop paying rent months after the storm:

"We have received your email correspondence to Landlord dated November 7, 2017 and December 28, 2017 (the "**Emails**") asserting a right to abate rent and demanding reimbursement for certain "important documents." Landlord does not agree with your assessments.

You have asserted that Landlord "kept [you] out of business for three weeks" during the month of September, which is inaccurate. It is understood that in the immediate aftermath of Hurricane Harvey, the streets around the Building were flooded, as was the parking garage located beneath the Building. Additionally, Houston Mayor Sylvester Turner (i) issued mandatory evacuation orders for the area of the city where the Building is located, and (ii) ordered CenterPoint to disconnect electrical service to all homes and other buildings such area. In light of the dangerous conditions then affecting the Building, the mayor's evacuation orders, and the absence of any electrical service to the Building, Landlord took the necessary steps to secure the Building in order to protect the health and safety of those who may attempt to access the Building during such hazardous circumstances. But to contend that it was Landlord's fault and action that kept Tenant out of business during such time is both specious and careless.

You have also asserted that Landlord has "thrown away [your] important documents without [your] consent" and claimed that Landlord owes you at least \$100,000 for the same. Such documents were stored in certain storage space in the basement garage of the Building (pursuant to Section 35 of the Lease and that certain Storage Agreement between Tenant and Landlord's predecessor-in-interest) and were damaged by the floodwaters from Hurricane Harvey, but neither the Lease nor the Storage Agreement obligate Landlord to compensate Tenant for any such damage. Section 35 of the Lease states: "If Landlord makes available to Tenant any storage space outside the Premises, anything stored therein shall be wholly at the risk of Tenant, and Landlord shall have no responsibility or liability for the items stored therein." Further, the Storage Space was leased to Tenant in an AS-IS condition, and the Storage Agreement, *inter alia*, specifically warns Tenant of the possibility of floodwaters affecting the contents kept in the storage space, stating that Tenant "is aware that certain weather conditions could produce rising water risks in the storage space." The Storage Agreement also requires Tenant to provide proof of insurance for the contents kept in the Storage Space, which Tenant has not done.

Regarding the documents in question, Tenant itself did not deem them recoverable. After the hurricane floodwaters subsided, Tenant inspected the storage space and did remove some items that it deemed to be salvageable, but Tenant chose not to remove any of the "important documents." Landlord's environmental clean-up crew subsequently removed and disposed of the documents, agreeing with Tenant's prior assessment that they were not salvageable, having been reduced to mere pulp."

Of the tenants that sent demand letters to the landlord for rent abatement, there were four that made valid points based on their unique leases (whether such leases were negotiated by the current landlord or inherited by the previous landlord):

- One tenant received an abatement of base rent for 11 days, based on the landlord's failure to provide certain "essential" services to the tenant, as provided in the tenant's lease. This particular lease contained strong abatement language that a previous Landlord granted and was clear and unequivocal that the tenant was entitled to rent abatement.



- Two other tenants received abatements of both base rent and additional rent for 11 days, under the same premise, according to their respective leases.
- Another tenant received an abatement of base rent for 7 days, under the same premise, after initially demanding a 15-day abatement.

In each of the situations above, the tenant was able to rely on the landlord's failure to provide certain "essential" services to the tenant pursuant to the lease. In none of them was the tenant protected by the Casualty Damage provision, the Maintenance and Repair provisions, or the Insurance provision. The tenant's insurance carriers likely also took note of the same unique situation that the landlord did, namely, that the leased premises were unaffected by the flooding.

It is worth noting that the landlord for these buildings made a claim under its business interruption insurance policy. Ironically, the claim was denied because the buildings were not damaged by the storm and the flooding, they were simply inaccessible!

## VI. How to Adjust Post-Harvey

**Landlords.** There are most certainly lessons to be learned for landlords after experiencing a storm like Hurricane Harvey. Below are a few suggestions:

- (1) Adequate Time to Cure. Given the often arduous task of getting a building up and running again after a major storm the landlord will want to ensure that it has allowed itself an adequate time frame in which to repair damages and remedy any "essential" services that have ceased. Along the same lines, if the landlord gives a tenant a right to terminate as a result of damages or cessation of services a safe practice is to ensure that right triggers substantially down the road, i.e., 120 or 180 days from the time of notice.<sup>11</sup>
- (2) Waive Liability for the Uncontrollable. Only assume liability for a failure to provide "essential" services when the cause of disruption of such services is under the reasonable control of the landlord. This is especially important after storms or natural disasters where damaged utility infrastructure may cause a cessation of services that the landlord has no way of remedying.
- (3) Start Broad, Go Narrow. The practice of having a clause that gives no rent abatement under any circumstances is good policy and can carry the day in some disputes. It is good practice to include such a sweeping provision and then carve out exceptions to it as needed. This helps to avoid situations in which a single rent adjustment provision might be read into another provision of the lease.
- (4) Define and Limit Access. Take diligent care in addressing how much access to provide, what facilities to include as part of the leased premises, and in what situations the landlord will not be liable, such as in the event of an occurrence beyond the landlord's control. The landlord should consider expressly including or excluding access to parking facilities to avoid ambiguity.

**Tenants.** Likewise, Tenants must also learn to adjust as applicable in the aftermath of such a wide-spread natural disaster:

- (1) Abatement Clauses. Tenants should, where possible, advocate for an abatement of rent given certain circumstances like those discussed above (i.e. cessation of services, premises untenable, denial of access, etc.). This helps to offset costs before insurance has to get involved. Tenants should beware of

---

<sup>11</sup> A requirement of notice to landlord of an event that might trigger termination or liability for suit should always be included as well.

lease agreements in which no abatement is possible under any circumstances. Below is a lease provision that includes abatement for interruption of services (including inability to access the premises) and a termination right:

“Notwithstanding the foregoing, Landlord will use reasonable diligence to promptly restore any essential service to the Demised Premises for which Landlord is responsible. Notwithstanding anything contained herein to the contrary, in the event of an interruption of an essential service to the Demised Premises (including utilities and electricity) or in the event Tenant is unable to gain access to or utilize the Demised Premises for the conduct of Tenant's business and such condition continues for more than forty-eight (48) hours after Landlord's receipt of written notice of such condition, Tenant will be entitled to a fair and reasonable abatement of the Monthly Payment hereafter until either such essential service to the Demised Premises is restored or such portion of the Premises is again usable for the conduct of Tenant's business. Such abatement will constitute Tenant's sole and exclusive remedy in the event of any such occurrence; however, Tenant may, upon written notice to Landlord, terminate this Lease if such Landlord caused interrupted or terminated services are not restored after sixty (60) consecutive days (provided notice of termination is received by Landlord prior to the restoration of such services and Tenant's ability to use and occupy the Demised Premises for the Permitted Use is materially and adversely impaired during the entirety of such period).”

Although that provision is very favorable for the Tenant, it is not effective unless Tenant gives notice. Speaking from experience, after a devastating storm and after assisting family, friends, neighbors and co-workers trying to salvage their homes and personal possessions, remembering to give notice to your landlord is not something that is high on your priority list at the time.

- (2) Termination Rights. Most landlords are leery of giving the tenant any termination rights. However, tenants should advocate to have at least some option to terminate in the event that: (a) landlord does perform their obligations pursuant to the agreement and/or (b) the premises is untenable.
- (3) Limitations on Remedies. Many leases will attempt to limit the remedies available to the tenant in the event something with the lease goes awry. This should not always be a red flag but these provisions can have impactful consequences in the event of a flood or hurricane that shuts businesses for extended periods of time. As such, tenants should exercise diligence when reviewing these provisions.
- (4) Parking Exigencies. Especially for tenants in downtown and other population-dense areas where parking is at a premium, should address in the lease the procedure for dealing with a loss of parking availability as a result of a natural disaster. If the tenant's employees cannot get to work, then the tenant cannot get the business up and running again.

## **VII. Conclusion**

In the aftermath of Hurricane Harvey, many landlords and tenants discovered that their lease agreements were not up to par when it comes to wide-spread natural disasters. The discussion above is intended to point out some of the issues to consider when negotiating and drafting a lease. Many tenants were left without any feasible remedies once the storm's floodwaters subsided, but that was not the case for all of them. Likewise, many landlords felt similar burdens from inadequate lease agreements with their tenants. It is this author's hope that the experience in Houston in the aftermath of Hurricane Harvey can

highlight certain provisions that parties to a lease agreement, whether landlord or tenant, will pay closer attention to, and that, after doing so, they will not fear their attorney's inevitable question, "What does the lease say?"

## HURRICANE MARIA EXPERIENCE

### **I. Introduction**

Natural disasters are part of the world in which we live. There is nothing we can do to stop them as individuals or as lawyers. Notwithstanding this, as lawyers there are actions that we can take in advance of such events occurring to help mitigate the impact of these events on our clients' businesses.

Natural disasters come in many shapes and sizes, including, tornadoes, floods, hail storms, hurricanes, and earthquakes. Not only does each type have a very different impact on the location where it strikes, but even a single category of natural disaster (e.g. hurricanes) can have dramatically different effects on the location where it strikes. Hurricanes Harvey and Maria illustrate this point well. Most of the damage caused by Hurricane Harvey on Texas gulf coast was caused by the tremendous rainfall (over 60 inches in places) and the flooding which resulted due to the area's low-lying flat land, clay soil and inadequate drainage. In contrast, Hurricane Maria dumped fewer than 24 inches of rain on Puerto Rico (I admit that phrase sounds very odd). Another distinguishing characteristic of Hurricane Maria was that its winds, which were approximately 20% stronger than Harvey's, destroyed Puerto Rico's already substandard power infrastructure. Finally, Puerto Rico's geography, as an island, created accessibility challenges that southern Texas did not have when it came to recovery, remediation and reconstruction efforts.

Set forth below are various situations you may confront when facing a natural disaster and actions you may want to consider to address them.

### **II. Hurricane Maria**

Hurricane Maria hit Puerto Rico on September 20, 2017 as a Category 4 Hurricane. The storm caused the worst electrical blackout in U.S. history. The hurricane completely destroyed the island's power grid, leaving all 3.4 million residents without electricity. Communication networks were crippled across the island. Ninety-five percent of cell networks were down. Eighty-five percent of above-ground phone and internet cables were knocked out. Ports and the airport were closed. Once they reopened their use was initially reserved for military and humanitarian transportation. Even after these facilities were made more broadly accessible to individuals and commercial enterprises people faced logistical nightmares trying to get to their destinations around the island due to lack of fuel and impassable roadways. One week after the storm hit, lines for gasoline were two miles long in some instances and bottlenecks at the ports resulted in 2000 containers having been unloaded but not being distributed due to lack of fuel and intended destinations being inaccessible as a result of downed poles and electrical wires.

### **III. Policies and Procedures**

You must have pre-established policies and procedures in place to deal with crises. One of these should be customized for natural disasters. It should not only include a protocol to follow after a natural disaster has struck but also pre-disaster components. On-site supplies and equipment are a key component of such a protocol. For example, you should consider whether at each property you want to have a satellite phone available for the team. This resource proved invaluable when Maria hit. You may also want to consider having a back-up generator available and some fuel stored for it. While this will not power an entire property, it will power the nerve center necessary to coordinate recovery efforts. Once again, organizations that had this equipment in place in Puerto Rico were able to coordinate recovery

efforts more quickly. Having a supply of food and water is also prudent. Such equipment on site at all times is also valuable when natural disasters such as earthquakes strike without warning.

For those natural disasters that strike where there is lead time to prepare, such as hurricanes, there should be many other components to the applicable policy and procedure. Most importantly, you need a cross functional team. This should include employees in the following areas: Operations, Facilities, Public Relations, Security, Risk Management, Legal, Leasing, and Property Management. In the context of an approaching hurricane this team should begin coordinating at least three days in advance of the potential strike.

When a hurricane is approaching, a priority should be staging a relief team. This involves assembling a team that can be positioned in what is reasonably believed to be in a safe location, outside the storm's direct path, but that can reach the site with personnel and supplies fairly quickly after the storm has passed. Sometimes this is easier said than done as hurricane paths can shift suddenly. Flexibility is key. In the case of Hurricane Maria's strike on Puerto Rico, commercial flights were unavailable for some time and airport usage was reserved for military and humanitarian relief. Simon Property Group, with two centers on the island, needed to pivot and chartered an airplane with 30 volunteers to fly to Puerto Rico to provide relief to our employees and begin to assess damage and commence remediation. While insurance will be discussed further below, a significant expense was associated with this action and we aggressively communicated with our insurance providers and leveraged our broker's assistance to get comfort that these costs would be covered by our policy as the action would ultimately help mitigate damage to our properties.

#### **IV. On-Site Employees**

Having eyes and ears on the ground during a hurricane is extremely valuable; however, an employer should never compromise the safety of its employees. Many on-site employees may volunteer to stay at the property. Senior management must make a judgement call on this. Remember, these employees who you are leaning on to help you may have a home at risk and family they need to protect. After any natural disaster a priority must be to confirm all of your employees are safe and accounted for. It is worth noting that in the case of Hurricane Maria this took several days due to the devastating impact the storm had on the communications network on the island.

#### **V. Communication**

It is amazing how quickly after a storm passes questions come in. They are always the same: "Are you open?" If the answer to that question is "No" the next question is "When will you be open?" These questions may come from one or more of a variety of sources, including: tenants; the public; insurance adjustors; insurers; lenders; employees; the media; and government officials. Consistency of communication is key. Until any damage can be properly assessed and the full team can confer employees should be instructed in advance that such questions must be answered generically with a statement such as:

**"This was an incredibly powerful hurricane. Like many other businesses here in [LOCATION] we are in the process of assessing the damage caused by the storm. At this point that is all I can tell you."**

All communications must be cleared by Legal. This includes public statements, messages on phone numbers for the property, website postings and social media postings to name a few. What should be communicated? "JUST THE FACTS". Optimistic speculation, while tempting, is not your friend in these circumstances. Any such statements will more often than not, "bite" you later, particularly when it comes to submitting any insurance claims you may have.

Over the course of time, as more information is known, communications will evolve, particularly as it relates to tenants and their obligations under their leases. Although the legal and leasing functions should have used this time to get a handle on the terms of each lease, including, tenant termination rights, allocation of remediation and restoration obligations, access rights, and force majeure provisions, it is most efficient for the initial communication to tenants to be generic with respect to their obligations.

In the aftermath of Hurricane Maria, because we had well equipped employees who had stayed on-site and we invested in chartering an airplane to get a team on-site we were able to make an initial damage assessment before most of our tenants. We quickly realized that there was extensive water damage inside many tenant spaces; this included flooding, soaked inventory and wet dry-wall. In fewer than ten days we were able to make an assessment and contact tenants regarding their obligations to get people on site to make their own assessment of the damage to their space and their property. We communicated both via letter and through postings on our websites. We also made clear that we had the right to access their spaces under their leases based on the emergency nature of the situation.

The pace at which tenants responded varied widely. In some instances the response time was based on genuine access issues and difficulty getting employees, insurance adjustors and remediation experts to the property, but not in all circumstances. In these situations, when tenants are not satisfying their obligations it is important to undertake a deliberate process of escalation and to control the messaging regarding what is required of them under their leases. These communications often starts at the local level with the mall manager, next moving to broader leasing relationships, and ultimately to legal.

To recover from a disaster like Hurricane Maria, landlords have a myriad of issues with which to deal. To most efficiently remediate and reconstruct landlords need to create a detailed, space by space schedule. Communications with tenants with respect to these steps and the schedule must become more detailed as time progresses so it is very clear to the tenants by what date they need to have emptied their space and made it available to the landlord to perform its work. In addition, the tenants should be reminded of their obligations to perform their required work and reopen.

## **VI. Property Access**

In order for a landlord to begin remediation and restoration work in tenant spaces it is necessary for tenants to remove their inventory. Delays impact the ability of a landlord to satisfy its obligations under the lease and its ability to get the property open as quickly as possible. In addition, imagine soaking wet clothing and sneakers surrounded by standing water in a space with no air conditioning (no power). As time passes mold growth is inevitable. Once this happens, mold spores can get into air vents and spread to other portions of the property. At some point, in certain circumstances, a landlord may need to exercise self-help and remove tenant property. This should be done as a last resort and the landlord should give formal notice of any such action. A landlord should also thoroughly photograph all tenant spaces when entering to demonstrate the need for entry and the condition of the property at that time. If possible, the landlord should try to secure temporary storage space for the merchandise so it can demonstrate to the tenant the condition of the merchandise.

The extent of damage will impact the degree to which access to the site can be permitted. In the case of Hurricane Maria, with no stable power available for five weeks, access needed to be limited to daylight hours. In addition, due to safety concerns based on the extent of the damage access was limited to a single point of ingress and egress. When safety is a concern it is advisable to insist that tenants, employees and contractors sign waiver and release forms that include a list of rules that must be followed. This is essential for both safety reasons and liability management.

## **VII. Insurance**

You should have your policy in hand and know your retentions and limits. Do not rely on your broker and do not ask your insurer what your coverage is. You should make sure your risk management function is working directly with you legal department to confirm your coverage levels. To the extent

achievable you should get an adjustor with whom you have previously worked. This will make the process for getting responses much more efficient. Get those responses in writing.

There are different approaches that a company may take to address the impact of a natural disaster. In all your communications with your insurer (and internally) emphasize that what you are doing is with the goal of mitigating any damages and that all actions you are taking are being taken as though it was your own money being expended.

One example of an action we took where early communication with our adjustor was essential was securing his agreement that the costs to charter an aircraft to get to Puerto Rico as soon as possible was covered by our policy. The most important part of this discussion was making clear that every day we were delayed resulted in the risk of further damage to the property and an extended time period when the center would therefore be closed, which in each instance would lead to increased payment responsibilities for the insurer. Another example of a material expense that required discussion with our insurance adjustor was the decision to have generators delivered to the property to get power to the facilities. At the time it was clear that it would be a long time before power would be restored. We explained that without air conditioning the standing water and soaked merchandise would likely create mold which would increase remediation expense and delay reopening the center. All of these decisions required a cost benefit analysis. Being able to clearly explain that decision making process is vital when seeking coverage for what may be considered unusual or extraordinary expenses. Neither of these expenses would have been necessary if the same damage had taken place at a location that was not an island.

#### **VIII. Lenders**

If the impacted property is encumbered you will likely have an obligation to notify the lender of the event. Depending on the terms of the loan and the financial condition of the property, it may be required that any insurance proceeds first go to the lender to cover interest payments and property taxes before the balance is made available to cover property damage and remediation.

#### **IX. Key Lease Provisions and Managing the Process**

As so clearly stated above, what the lease says is what will govern the rights and obligations between the tenant and the landlord. While each tenant only has one lease to analyze, in a shopping center the landlord may have over 100 leases to analyze. As discussed above this must be done quickly and accurately. The most important provisions to attack first are those provisions that include specific time limits after which the tenant may have rights to rent abatement or termination. Typically there are two relevant time limits. The first is the time by which the landlord must commence its remediation work and the second is the time by which the landlord must complete its restoration work.<sup>12</sup> Whether these provisions have been triggered may be tied to conditions such as the portion of the center that was damaged and/or the portion of the tenant's premises that was damaged. Certain tenants may have additional, more generous, termination rights if they are near the end of their lease term.<sup>13</sup> Those termination options are typically based upon factors including: whether the tenant is within a year or so of the end of the lease term, the scope of damage to the tenant's space (e.g., some percentage of damage); the scope of damage to the shopping center; or other factors. In light of the fact that with respect to this latter category landlord may have less control over its ability to retain the tenant and the fact that landlord may have many other tenants at risk if it does not get their spaces remediated in a timely manner, it may choose to defer action on these spaces in connection with its global plan to restore the center. It goes without saying that the sooner a landlord knows the tenant's decision, the better off the landlord is.

Here is an example of such a provision.

---

<sup>12</sup> These time periods generally range between 30 and 365 days with the highest concentration being 180 or 270 days.

<sup>13</sup> Landlord will likely also have its own termination rights which it may in certain circumstances choose to exercise.

**In the case of damage during the last 2 years of the Term, if casualty results in the Premises being untenable, the Tenant has right to terminate on or before 30 days after damage.**

**If the Buildings in the Shopping Center are damaged to the extent of more than 50% of the cost to replace (whether or not the Premises is damaged), or the access to the Premises is destroyed, Tenant has right to terminate Lease within 60 days of event.**

The lease provision above is silent with respect to whether or not the landlord or the tenant has the burden to prove the extent of the damage or the cost of replacement. Such silence is common in most leases. These calculations and determinations are not *black and white*; therefore to the extent a landlord can draft this type of provision to put the burden of proof on the tenant may be very helpful.

In the context of a hurricane, when looking at any lease provision you must also review the Force Majeure provision to determine what impact it may have. Two events that are frequently (but not always) in the definition of force majeure are "failure of power" and "inability to procure material". In the case of recovery from Hurricane Maria these had a dramatic impact on the terms of the leases. The timing when particular landlords obtained electricity or had the ability to procure materials to remediate and restore their properties had a significant impact on the amount of time they had from the date of the hurricane to commence and complete their work.

#### **X. Conclusion**

A direct hit on a property by a powerful hurricane will always result in damage and disruption; however, as described above, there are many steps that a landlord can take to mitigate the disruption to its business. These efforts will help a landlord to get its center open more quickly for people in the community who need the goods and services provided by the tenants to help them recover from the damages the storm has inflicted on them.