



**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**

Patrick O. Hayes
Andrews Myers P.C.
Houston, TX

Alexander L.W. Snyder
Simon Property Group
Indianapolis, IN

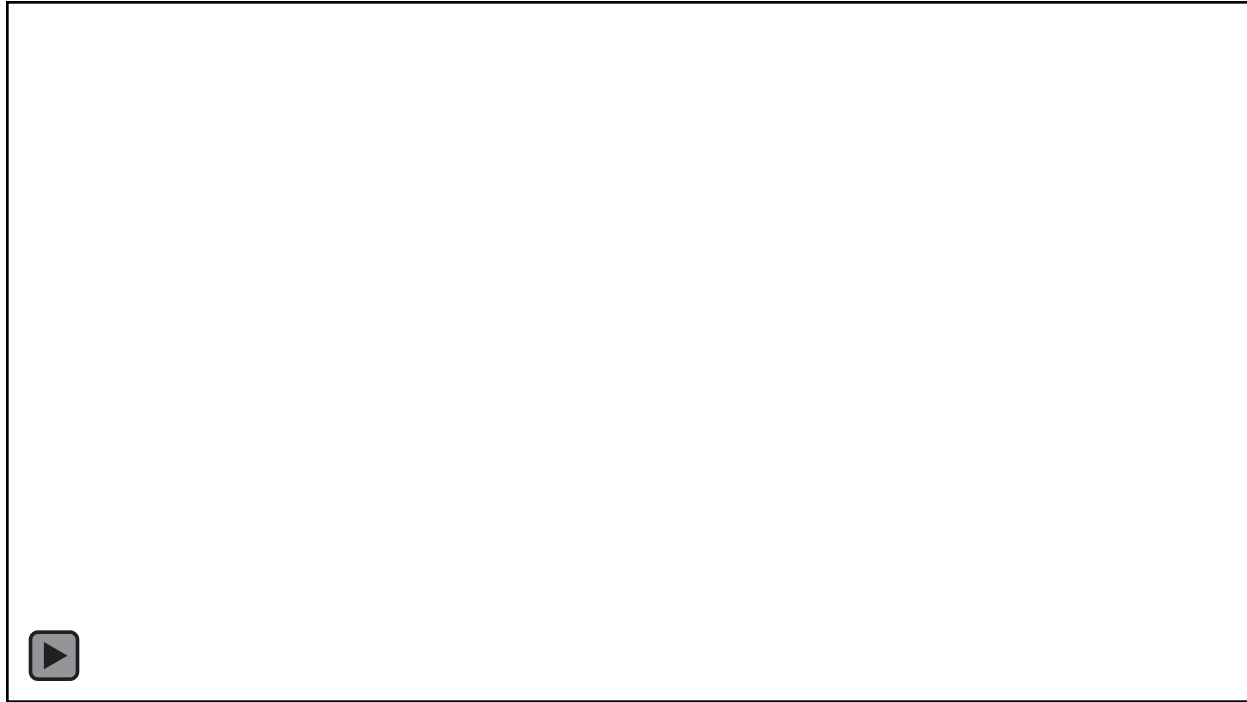
Part One: Hurricane Harvey

- I. **Introduction**
- I. **Hurricane Harvey - Scope of Damage**
- II. **Lease Provisions for Natural Disasters**
 - A. Casualty
 - B. Maintenance and Repair Obligations
 - C. Provision of Basic Services
 - D. Insurance
- III. **Applying the Typical Lease Provisions After a Storm**
- IV. **An Example**
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 - A. **Landlords**
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 - 2. Waive Liability for the Uncontrollable.
 - 3. Start Broad. Go Narrow.
 - 4. Define and Limit Access
 - B. **Tenants**
 - 1. Abatement Clause
 - 2. Termination Rights
 - 3. Limitations on Remedies
 - 4. Parking Exigencies



Scope of Damage

- Hurricane Harvey was classified as a Category 4 storm, making landfall three times in six days in both Texas and Louisiana
- Two feet of water fell in the first 24 hours, and at its peak, one-third of Houston was underwater including 71% of Harris County
- An estimated **27% of Houston's commercial real estate** was affected by flooding caused directly or indirectly by hurricane, including **73 million square feet of retail space, 60 million square feet of office space, and 11 hospitals**
- Example: Commercial office properties with only one or two stories were hit particularly hard. British Petroleum's Houston office was flooded so extensively that nearly 60% of its workforce had to conduct business from home for almost a year



Video Source: U.S. Army Corps of Engineers, Galveston District







Lease Provisions for Natural Disasters

Casualty Damage

Example

“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 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.”

Casualty Damage

Tenant Considerations

- *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

Example

“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).”

Maintenance and Repair

Tenant Considerations

- *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 Clause

Example

“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 6th 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.”**

Basic Services Clause

Tenant Considerations

- *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?*

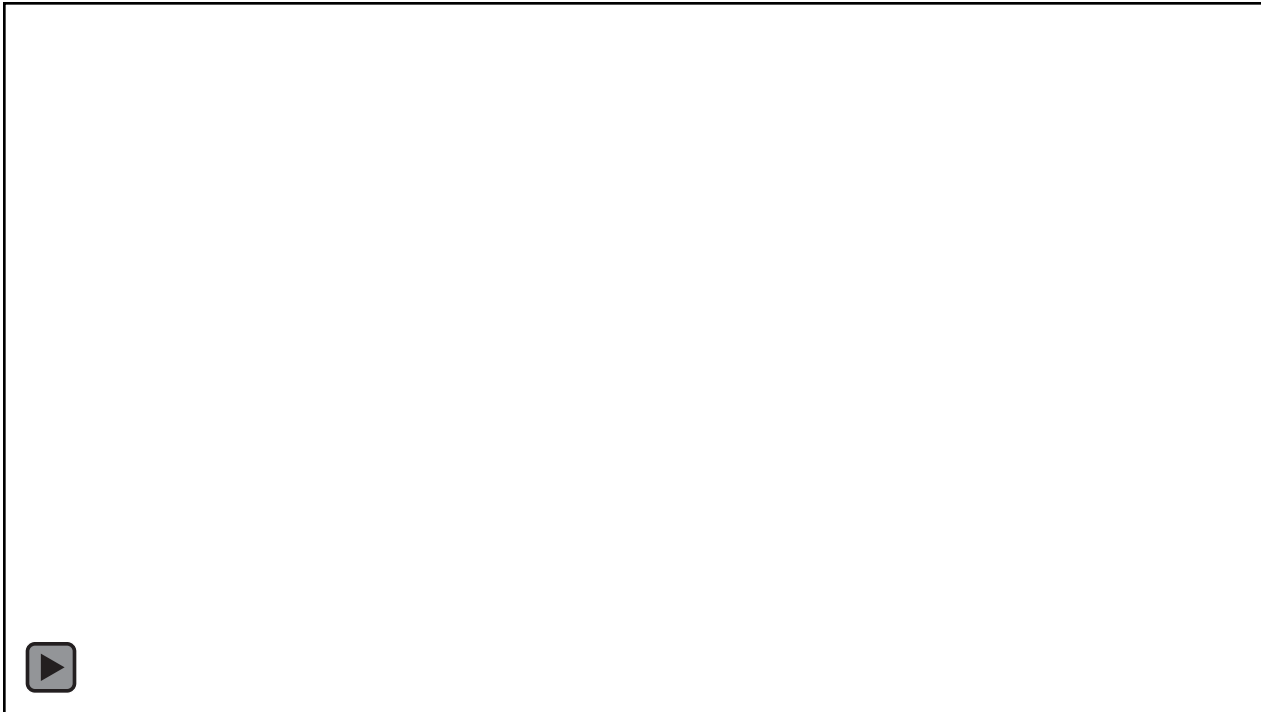


Common Comprehensive Insurance Provision in Commercial Lease

“Tenant shall also 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 Demised Premises, which may be carried by Tenant or Tenant's contractor) covering all of Tenant's Work, Tenant's leasehold improvements, trade fixtures, merchandise and personal property from time to time in, on or about the Demised 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 twelve (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 Demised 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 thirty (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.”

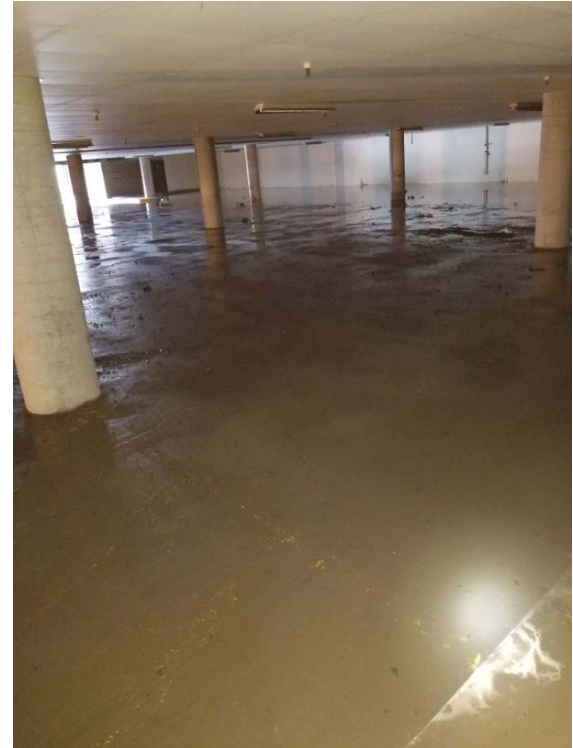
An Example

- Client owned and operated several office buildings in the Energy Corridor of Houston
- None of the office buildings suffered any flood damage during Hurricane Harvey, but the roads surrounding each of buildings were flooded to the point that vehicular access to such buildings was impossible for nearly 10 days



Drone Footage of Energy Corridor Area
Video Source: YouTube





- Tenants requested rent abatement due to lack of access to the buildings
- Upon review of the leases in effect, vast majority of the leases in the commercial building did **not** require landlord to abate any obligations to tenants
- Landlord notified all tenants that the buildings would be closed while the flooding continued
 - This was a mistake
 - It undercuts the argument that tenants are not entitled to rent abatement because leased premises nor buildings were damaged – they were simply inaccessible

- Of the tenants that made demands for rent abatement, only 4 were successful based on their unique leases
 - One tenant received abatement for 11 days based on landlord’s failure to provide certain “essential” services as provided by the tenants lease. This particular lease had strong abatement language that was clear and unequivocal. Two other tenants received the same abatements on both base rent and additional rent for 11 days under the same premise.
 - Another tenant received abatement for 7 days, after initially demanding a 15-day abatement.
- Tenant was able to rely on landlord’s failure to provide certain “essential services to the tenant” pursuant to the lease. In none of them was tenant protected by Casualty Damage provision, Maintenance and Repair provisions, or the Insurance provision.



Adjusting Post-Storm: Lessons for Landlords

- (1) Adequate Time to Cure**
- (2) Waive Liability for the Uncontrollable**
- (3) Start Broad, Go Narrow**
- (4) Define and Limit Access**

Adjusting Post-Storm: Lessons for Tenants

- (1) Abatement Clause**
- (2) Termination Rights**
- (3) Limitation on Remedies**
- (4) Parking Exigencies**

Adjusting Post-Storm: Lessons for Tenants

Example of Abatement Clause

“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).”



Part Two: Hurricane Maria

- I. Introduction
- II. Hurricane Maria
- III. Policies and Procedures
- IV. On-Site Employees
- V. Communication
- VI. Property Access
- VII. Insurance
- VIII. Lenders
- IX. Key Lease Provisions and Managing the Process
- X. Conclusion



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