THE THREE KATRINAS: Hard Cases Make New Law

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Coastal Louisiana has become ground zero for disasters and disaster litigation in recent years, ushered in by the massive hurricanes Katrina and Rita in 2005, and again, as we speak, by the blowout of British Petroleum’s deepwater oil rig in the Gulf of Mexico. The hurricanes spawned a legal storm of their own over insurance claims, the evacuation of hospitals and old age homes and floodplain zoning requirements, but three major hurricane-based lawsuits have asserted civil liability for the human causes of the subsequent disaster. The legal and practical consequences of these cases could be enormous.

The first case, styled Katrina Canal Breaches Consolidated Litigation (Robinson v. United States), is a negligence claim against the U.S. Army Corps of Engineers (the Corps) for personal and property losses in New Orleans stemming from levee failures along the Mississippi River Gulf Outlet (MRGO), the Inner Harbor Navigation Canal, and New Orleans East. The second, St. Bernard Parish v. United States, presents similar damages as a Fifth Amendment takings claim stemming from land losses occasioned by the same Corps projects. In the third and most far reaching case, Comer v. Murphy Oil, plaintiff landowners along the Mississippi coast have sued major U.S. carbon-emitting industries for their contributions to climate change, rising sea levels, and storm surges that destroyed their properties.

Given the loss of life and extensive property damages experienced in this region, in the tens of billions of dollars, it is not surprising that such lawsuits would appear. What is more than surprising is that each of these actions have, to this point, succeeded. To the extent they ultimately prevail, beyond their damage awards, the collateral impact on public policy in flood control, land use and even climate change will be significant.

1. The Breaches

Back in the 1950’s, the Go-Go years of federal water projects, the U.S. Congress approved a Corps project below New Orleans to provide a navigation highway to the Gulf of Mexico as a magnet for industrial growth. The projected industrial development along the swampy and sinking soils of the southern parishes never materialized. The navigation channel, the MRGO, did materialize, however, and although it floated very few boats, less than one per day, it was used by hurricanes Katrina and Rita as a straight shot into the heart of the city.

Meanwhile, an early-warning hurricane, Betsy, struck New Orleans from the south in 1965 and gave the Corps a heads up call that it needed better protection from that
quarter. The result was a hurricane protection levee system that, in part, was overlaid on the MRGO navigation levees and it became a work in progress that continued right up to the fatal days of August 2005. What happened next is well known. Although Rita passed by laterally nearly 100 miles offshore, both storms sent huge surges into the city, swamping its levees, pushing some aside like ice cream, and leaving behind death and destruction without parallel in modern America.

The Robinson plaintiffs lived in the lower Ninth Ward and New Orleans East, where the butt end of the MRGO meets the city. They, like several hundred thousand others, were wiped out. Many lawsuits were filed against the Corps, on several theories ranging from public trust to admiralty. They were consolidated before Judge Stanley Duval of the federal Eastern District, who over time dismissed all claims but Robinson on various grounds. In the remaining case, plaintiffs’ threshold problems were twofold. The first was that the Flood Control Act of 1928, which put the Corps in the flood-control business for the first time, also provided it with immunity for these projects, lest claims break the federal fisc. If this defense were breached, there was another. While the Federal Tort Claims Act, on which the suit was based, waived governmental immunity generally, it provided an exception retaining immunity for “discretionary functions,” matters of policy and expert opinion as opposed to negligent execution of government functions. Both seemed insurmountable.

Not to judge Duval. In pre-trial rulings, and again in the opinion on the merits, he found that the MRGO had been authorized, constructed and initially maintained as a navigation, not a flood-control project, hence the Flood Act immunity did not obtain. To the government’s argument that MRGO had been subsumed into a bona fide flood control project, the court replied that its major impacts related to the hurricanes occurred early on in its history, and that the maintenance of the channel, which also led to hurricane damage, remained navigation pure. Parsing the facts in this 156-page opinion, fully 90 of which are devoted to the facts, witness by witness and document by document, the court found that the canal and its maintenance caused constant sloughing of the levees, lateral erosion to more than three times authorized channel size, the destruction of cypress swamps and other protective natural barriers, and the increase in “fetch” of any weather from the south, coming in now unimpeded by vegetation of any kind. By 2005, the canal had destroyed, beyond its own footprint, some 60,000 acres of largely forested wetlands. This was a navigation project gone awry.

It was also, he found, a project that in fact undermined the flood control functions of the hurricane levees, which tended to sink into muddy soils and spread laterally into the holes dug to provide fill material to top them, a never ending process similar to the myth of Sisyphus, in the court’s words. The weakened levees were over-topped, undercut and pushed aside. He also found the Corps’ narrative on the causes of the flood “skewed,” its witnesses “evasive,” and that one had “prevaricated and was less than candid on several occasions.” This was an agency gone awry.

But, were not these actions protected as “discretionary functions” of the nation’s water-engineering experts, the Corps? Duval found otherwise. In a legal analysis
spanning 60 pages and touching on every related FTCA case, Duval found that the
decisions and mis-decisions made here were not of policies, but of plain failure to do
what any reasonable person would do. The court documented that the Corps knew of the
sloughing, the widening and the surrounding land loss, and the vulnerability of the levees
themselves, but did little to arrest them. They did not even flag them to Congress.
Further, he concluded, just such information was required of the Corps by the National
Environmental Policy Act (NEPA), whose mandate for a supplemental environmental
impact statement the Corps avoided by issuing piecemeal findings of no significant
impact on its successive, partial, and palliative measures. In the judge’s mind, the Corps
had put navigation interests ahead of public safety, time and again. He concluded, and
one can sense the anger:

In the event the Corps’ monumental negligence here would somehow be
regarded as “policy” then the exception would be an amorphous
incomprehensible defense without any discernable contours.6

The awards in Robinson were relatively small, averaging less than $200,000 per
individual plaintiff. The awards to all similarly situated New Orleanians, however, were
this decision to hold up on appeal, will run into the billions of dollars. While flooding of
only a portion of the city was attributable to the MRGO—other, non-navigational canals
breached seriously along Lake Pontchartrain—it is hard to imagine Congress accepting a
decision to compensate some, but not all, residents for federal negligence that clearly
affected them all. Depending on the legal outcome here, large monies are at stake. Also
at stake are the future liability of the Corps and other federal agencies for negligence
leading to catastrophic harm. Furthermore, Robinson raises the possibility that bald
NEPA violations, usually thought of as leading to public law remedies, could also
constitute liability for federal tort claim purposes. NEPA may have more teeth than
anyone suspected.

2. The Takings

The parish of St. Bernard sits immediately below New Orleans and was in the
unfortunate predicament of a neighborhood bisected by a major highway: all of the pain
and none of the gain, as the ships passed by on a canal that was turning its lands to open
water. The parish had objected to the construction of the MRGO almost from the start
and remained in protest since.7 The parish itself owned nearly 90 separate properties
affected by the canal and by Katrina and Rita. Other plaintiffs owned personal and
commercial real estate and operated seafood, shipping and other businesses in the parish
with similar injuries. Basically, their lands had been sinking ever since the canal was
constructed, and they were devastated by the hurricanes.

The lawsuit they brought on similar facts to Robinson invoked an entirely
different theory, a takings requiring compensation under the Fifth Amendment to the U.S.
Constitution. First of all, there was no immunity for a takings claim; the right was
constitutional. As importantly, it was not predicated on the Tort Claims Act and so did
not have to surmount the “discretionary function” exception. This fact allowed plaintiffs
to paint a broader picture of Corps incompetence, including design flaws in the canal and levee systems that, while more discretionary, created an obvious “funnel” effect for the storm surge, raising its height and velocity. Importantly, however, the claims were not simply Katrina and Rita; they were about a history of MRGO et al. damage to real property, foreseeable beforehand and now demonstrable.

The government offered two defenses based on the statute of limitations, and on what amounted to a lack of mens rea. In the first instance, it argued that the Parish and other petitioners long knew of these damages to their property, well past the statutory six-year term. Judge Braden of the Court of Federal Claims found that this allegation, while true, overlooked the fact that the trespass by project-induced waters was a continuing one, it had not in the words of the trade become “stabilized,” starting the meter ticking. It was not just Katrina and Rita. They were simply worst-case pieces of the process.

The second defense was that flooding of this type, the unintended consequence of a congressionally authorized project, was not the sort of damage implicated in a Fifth Amendment takings. The court took this argument in stages, first finding that, in fact, floodwaters that substantially destroy interests in property constitute a taking, and second, that the government need not intend the flooding to occur in order to be liable for its consequences. The Corps here, it found, relying on much the same evidence as the Robinson case, “acted with disregard for the consequences to Plaintiffs’ properties,” from which it would “infer the government’s intent” to invade a private interest, finding a supporting cite from Justice Stewart that the constitutional measure of a taking is not what the government “says,” or what it “intends,” but what it “does.”

Liability established, the case awaits the appeal in Robinson before further proceedings.

3. Storm Surge

Comer takes a yet different tack, for an entirely different class of plaintiffs. These are residents of coastal Mississippi, behind narrow beaches fronting the Gulf of Mexico. This was the hit zone for Hurricane Katrina, which crossed south Louisiana as a huge, Category III storm, gave New Orleans a glancing blow, and ploughed right into small communities across the Mississippi border with such violence it threw brick buildings a quarter mile inland and left waterside casinos on the far side of the coastal road. Storm surge wave heights reached 20 feet and more. Private homes were reduced to sticks. Private landowners sued, not the Corps, but the nation’s largest oil, gas, and coal industries, indicting their contributions to climate change.

The federal district court in Comer was not unsympathetic. These were landowners, not environmentalists, and they had suffered large losses through no fault of their own. Doubtless, he continued, the defendant companies had contributed to the problem. The legal claims themselves, further, were standard fare: nuisance, negligence, trespass, even conspiracy, courts dealt with these issues on a daily basis. This said, the court could not find its way to a legal solution, characterizing the question as political...
rather than juridical, and finding further, rather oddly given the obvious injuries that they
had suffered, that plaintiffs had no “standing” to raise their claims. The plaintiffs
appealed.

The U.S. Court of Appeals for the Fifth Circuit which is usually a graveyard for
plaintiff claims in any form, and particularly hostile to claims that, like climate change,
smack of environmental law. Plaintiffs faced two challenges on appeal, the Baker v.
Carr political question issue, and more diaphanously the claim that, although injured,
they had to surmount a standing bar showing an implied proof of causation and
foreseeability.

The Fifth Circuit panel reversed, finding for plaintiffs on all counts. It disposed
of the political question issue with some ease. This doctrine had been found to bar very
few claims in recent years and was not to be confused with an argument that an issue
involved politics. No issue material to a tort case was “exclusively committed” to the
political branches by the constitution or any federal law. The carbons emitted by the
defendants and alleged to be the source of the nuisance and trespass were not regulated
by the Clean Air Act at all (which could be seen as a delicious irony, these same
defendants having spent the past several years resisting all attempts by Congress or the
EPA to control carbons). The panel went on to criticize a contrary holding by a district
court in California as, politely put, mistaken; that holding is now on appeal to the Ninth
Circuit.

The question remaining was “standing,” which the panel found to have been
misapplied by the court below. A concept born of administrative law in order to control
the flow of plaintiffs seeking to overturn federal decisions, standing served as a surrogate
for allegations of injury normally found in civil tort claims. This so, a standing-like
requirement for tort cases took, the standing test out of its legitimate context, and would
illogically require plaintiffs to prove their cases in advance. Even were one to apply a
public law standing test to the case at hand, the court continued, the pleadings would pass
muster given the similar fact pattern approved by the U.S. Supreme Court in
Massachusetts v EPA. Indeed, the Comer case was more solid than that before the
Supreme Court because the injuries here were concrete and realized, not predicted for a
future time. They were more than foreseeable—they happened. Whether defendant’s
conduct caused them to happen was a matter for trial.

Predictably, the carbon industry defendants petitioned for review by the full court
which, not surprisingly, given the overall predilections of this appellate bench, was
granted. Then a remarkable coincidence struck. While the briefs were being prepared for
en banc review, seven of the 16 judges of the Fifth Circuit recused themselves apparently
for investments with the carbon defendants (which some may see as another delicious
irony). This left a bare majority to rule. Then, in May, an eighth judge recused, leaving
the remaining members without a quorum. As we write, the panel and parties are
struggling with a method to go forward.
The outcome in *Comer* will in all likelihood be decided in conjunction with cases in other circuits treating climate change-based tort claims. The second circuit has already sided with the *Comer* plaintiffs. The Ninth Circuit may well reverse *Kivalina* and join the majority. At which point, there is always the Supreme Court, which has its own axe to grind with plaintiffs in general and environmental issues in particular. This, though, is a private property case. Will that make a difference?

Perhaps the most significant aspect of all of these cases is the pressure they put on a more permanent solution to climate change. Resolutions like these usually come about only when the consequences of not resolving become too painful, and if these cases serve to apply a certain measure of unease to the backers of carbon industries, inducing them to come to the table, they will have done worthy service indeed.

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3. *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009), *reh’g en banc granted*, 598 F.3d 208 (5th Cir. 2010).
4. The public trust doctrine imposes duties on government to protect aquatic resources; admiralty is a special branch of law dealing with maritime commerce and injury.
6. Id. at 717.
8. See *Comer*, supra note 3.
9. See *Comer*, supra note 3.