



THE STORM
after **THE STORM**

What Cleaning and Restoration Professionals Can Do
to Minimize Damage and Avoid Delays in Payment

by J.P. Vogel, Russell Jumper and Tim Fandrey

PAID



Just as the Texas coast assessed the magnitude of Hurricane Harvey's damage, Hurricane Irma was taking shape in the Atlantic. Fewer than two weeks later, Irma would crash into the Florida Keys. Estimates put Harvey and Irma's combined impact in excess of \$275 billion. No small part of that amount will be required for cleaning and restoration services. Before Irma made landfall, even as Harvey hovered over the Houston area, restoration professionals from around the country arrived along the Texas coast to kick-start Texas' recovery. For the people who lost their homes, possessions, and even family or friends, the focus turned to recovery. For some of the restoration professionals who helped, and continue to help, a second storm is forming: owner and insurer payment disputes. Like boarding up windows and setting out sandbags, there are some steps cleaning and restoration professionals can take in an effort to minimize the damage from the approaching payment dispute storm.

STORMS ARE A CERTAINTY. RESTORATION PROFESSIONALS' MISERY IS OPTIONAL.



One of the best ways cleaning and restoration professionals can avoid fights with insurers and owners is to ensure their contractual agreements provide the greatest protections possible. Restoration professionals familiar with the disorganized, chaotic scenes in the days following a natural disaster know that taking the time to sit down to negotiate terms of a services agreement is a luxury the owner and the contractor do not have. By preparing a form agreement that is specific to natural disaster mitigation and remediation ahead of time, restoration professionals can dictate the most important terms when it comes time to enter an agreement in the chaotic days after the natural disaster strikes. To be sure, many professionals regularly use form agreements. But few of those agreements are truly tailored to address the unique circumstances that follow a natural disaster.

IS YOUR SCOPE DOING ENOUGH FOR YOU?



The scope of an agreement can create substantial issues if improperly stated. Even if the owner and the restoration professional agreed on the scope of the professional's emergency work, failing to adequately document the scope in the parties' agreement creates an opportunity for owners and insurers to delay or withhold payment, or to obtain more work than was bargained for. In fact, the concept for this article was born from the authors' experience with those very types of issues. An ambiguous scope can become an avenue for the owner's insurer to withhold payment for work it argues was not within the scope of the parties' agreement. In some cases, an owner may conveniently recall a different agreed-upon scope of work, often when the insurance proceeds arrive. This is, of course, after the emergency or remedial work has been fully performed. Conversely, an ambiguous scope may be interpreted broadly, requiring more work than the restoration contractor anticipated for the same agreed-upon price. Restoration professionals should consider the general scope of work they provide after natural disasters and be prepared to tailor the scope to the terms they choose. The agreement's scope is particularly significant when the agreement is priced with a stipulated sum. While the risk of an ambiguous scope is relatively small on a time and materials basis, by carefully tailoring the scope, restoration professionals can be sure that all of their work will benefit from the terms of the form agreement they worked to develop.

MAKE SURE INSURANCE PROCEEDS WILL GET TO YOU!

Perhaps the most important area for cleaning and restoration professionals to address in their contracts relates to payment. It is no secret that insurance proceeds make up the vast majority

“ Restoration professionals should consider the general scope of work they provide after natural disasters and be prepared to tailor the scope to the terms they choose. ”

of the funds paid to cleaning and restoration professionals post-natural disasters. Yet many professionals' agreements do very little to ensure payment. Most agreements, for example, simply obligate the owner to pay the professional for the agreed-upon services. Any cleaning or restoration professional forced to pursue payment through litigation knows that such an obligation does little to encourage a resistant payer.

Specific contractual provisions can do more to encourage the owner by imposing greater duties and risk on the owner. Texas law, for instance, makes certain construction-related payments trust funds. Including provisions that help establish insurance proceeds paid to the owner as trust funds can add an extra weapon to a professional's collections arsenal. In addition to the usual demand for payment, the professional can put the owner at risk of violating fiduciary duties if it fails to make timely payment.

PROTECT YOUR ESTIMATE

After the initial rush to stop water intrusion and begin the drying process, owners and restoration professionals turn their focus to the long-term damage repair process. Owners and insurers begin evaluating the extent of the damage suffered, and they both want to know what it will cost to fix. Restoration professionals frequently spend many hours assessing damage, evaluating the scope of restoration, and preparing detailed estimates and proposals. Restoration professionals' frustration is understandable when the owner or an insurance adjuster takes the detailed proposal to the professional's competitor in an effort to secure the work for what is an all-too-often nominal discount. In the meantime, the professional has foregone other opportunities while inspecting, estimating and preparing the proposal.

To protect themselves from this scheme, restoration professionals can enter into a construction services agreement. A typical agreement obligates the owner to pay the restoration professional

for the work it puts into developing a proposal.

In most circumstances, if the owner hires the restoration professional to perform the work in the proposal, the proposal is free. But if the owner uses the proposal to hire another professional to perform the work, the owner will be required to compensate the first restoration professional for its work in developing the proposal.

BE PREPARED

The unique scope of work, services contract's terms and even the location of the work all inform the best strategy for protecting a restoration professional. Working with a legal professional experienced with restoration contractors and who has expertise in the laws of the state where mitigation and damage repair work is to be performed is essential to securing the best protection. In spite of taking every precaution available, though, a direct hit from the storm is sometimes unavoidable. When best-laid plans go awry, litigation may be similarly unavoidable. Even when litigation becomes necessary, though, restoration professionals who have focused on their contracts frequently find more success and lower litigation costs as a result. So board up the windows, ensure your contract does all it can to protect you, and you just might find clear skies after the storm. **RIA**



(Top to bottom) **J. P. B. Vogel** – Partner, Construction Law; **Russell Jumper** – Partner-Elect, Construction Litigation; and **Tim Fandrey** – Associate, Construction Law, are trusted advisors and litigators for businesses and individuals involved in the construction industry throughout Texas and the United States. The firm's clientele includes owners, general contractors, specialty sub-contractors, suppliers and manufacturers seeking counsel on a wide variety of construction matters, including construction claims and litigation, lien and bond claims, giving of real-time project advice, and contract negotiation. For more information, please contact Vogel at jpvogel@grayreed.com.