More than just a storm: It's preparing for ill effects further down the road

by **Laurel Lockett**
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Think your company has implemented a comprehensive disaster preparedness program? Think again.

While most businesses have undertaken some disaster planning, few have fully evaluated the impact that a regional disaster may have on business operations — or changed their standard contract documents to protect against likely problems that would flow from a disaster.

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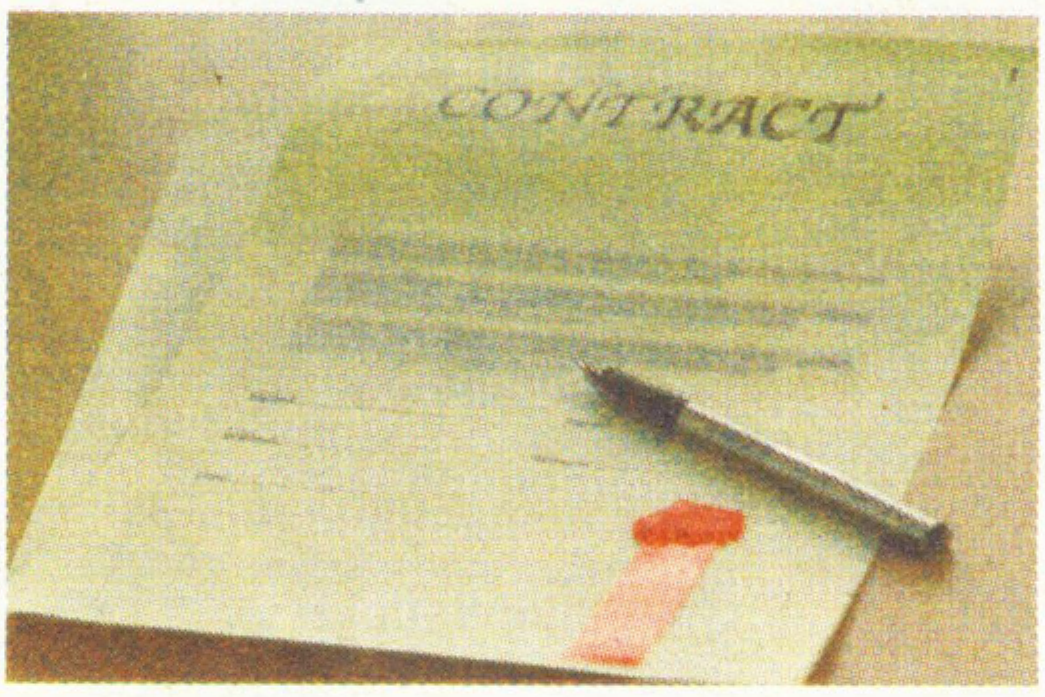
When it comes to contract issues, most businesses seem to be content to assume that the boilerplate "act of God/force majeure" provisions in their contracts will provide adequate protection if a disaster contributes to an inability to perform under a contract. That is rarely the case.

Each business reflects a unique network of relationships with customers, suppliers, agents and regulators that are memorialized in a supporting web of contracts.



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While many of the relationships are interdependent, we often take the status quo for granted, and our contract documents rarely express the complexity of the business situation or guard against a chain of events that may flow from a disaster.

Whether it's a contract for an annual meeting, a construction contract, supply agreement or an environmental discharge permit, the standard clause that excuses nonperformance in the event of a disaster rarely protects against a wide range of consequences flowing from a hurricane or other disaster. Worse yet, few companies have carefully considered all the ways that a disaster, particularly one that doesn't shut down the home office, can disrupt or prevent performance under routine contractual relationships.

The problems that devastated the construction industry after the 2004 hurricane season illustrate the point. Skyrocketing building costs, unanticipated construction delays, and unavailable labor and building products set in motion a chain of events that were damaging to the construction trades and their customers.

While most construction contracts contained "force majeure" provisions that extended the time to perform in the event of disaster, the agreements did not address who was responsible for the increased costs of labor and materials. Provisions governing damages and remedies were inadequate to fairly allocate the risk of loss between the parties. This type of problem can be avoided by more thorough analysis of the challenges and risks that a business faces and a careful redrafting of contracts. In some cases, insurance products may be available to cover risks that are outside the comfort zone.

Consider the contract you signed in February for this year's corporate meeting to be held on the Gulf Coast in September. You have offices statewide. Three days before the meeting, a hurricane watch is posted for the Atlantic Coast, but it's too early to predict landfall with accuracy.

While employees in the West Coast offices will have no problem attending, the East Coast offices need to prepare, and those employees are not willing to travel given the storm threat.

You review the contract you signed with the resort to evaluate your options. Unfortunately, you find that unless the resort itself shuts down, you have no right to cancel and, worse yet, you signed room guarantees, placed deposits for banquets and other special arrangements, and those are nonrefundable. Not a good situation, but it could have been avoided.

Most resorts are willing to tailor cancellation provisions to accommodate this type of possibility, particularly if you are willing to commit to reschedule.

In the absence of express contract provisions, for example, supply agreements for the sale of crops are governed by the Uniform Commercial Code and common law principles.

If a crop is destroyed by storm, drought or other disaster, the grower or seller remains obligated to fulfill the contract by providing goods from an alternative source unless the contract indicates the specific source of the crop to be provided. In that case, the disaster can form the basis of nonperformance.

Other relief under the UCC is dependent on whether loss in a disaster was reasonably foreseeable under the circumstances. Careful and thorough contract drafting can eliminate the uncertainty and business risk of a poorly drafted contract that may leave a grower obligated to supply product from a devastated farm.

In the wake of the 2004 hurricane season as well as Hurricanes Andrew and Katrina, it may be hard to argue that major disasters are not a foreseeable risk of doing business in Florida. Nonetheless, it can be difficult to anticipate the chain of events and resulting damage that may flow from a disaster. Should an industrial facility that operates wastewater treatment ponds keep pond levels artificially low during hurricane season to avoid an overflow in the unlikely event of unprecedented rainfall? In the 2004 storms, there were situations where the state maintained industrial plant operators should have foreseen all the risks — the inordinate amounts of rainfall from back-to-back storms, extended periods without power, lack of labor and equipment — that led to an inability to keep ponds within the banks.

In hindsight, what should have been reasonably foreseeable or under the owner's control was the subject of great debate. Under those circumstances, the regulated entity rarely wins, and even the cost of the argument can be substantial.

Whatever your business or location, a disaster is likely to have an impact on your ability to provide goods and services as usual.

Evaluation and reworking of standard contract documents during the driest months of the year can provide some peace of mind as the rainy season approaches and it's too late to effectively manage storm-related risks. ■

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