

LITIGATING HURRICANE KATRINA: THE ROLE AND IMPACT OF TRIAL LAWYERS AFTER DISASTER

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“Our problems are man-made. Therefore they can be solved by man.”¹

Not every home in New Orleans flooded after Hurricane Katrina. Many did not. Some who stayed dry digested the enormity of the loss through high-definition televisions powered by whole-home generators. Others took the opportunity to take a month’s vacation. Many of those left standing felt a tremendous sense of duty to assist their fellow citizens in need. In that number were lawyers who, understanding the scale of the suffering and economic loss, did what lawyers do: they set about the business of determining what legal remedies were available to the victims.

We revisit these events ten years later principally due to the scale of the devastation. Hurricane Katrina directly caused or contributed to approximately 1,800 deaths.² The storm affected 90,000 square miles of land.³ Aggregate property damage estimates range from \$108 billion to \$150 billion.⁴ At the time, Hurricane Katrina was, by a factor of five to six, the costliest hurricane in U.S. history.⁵ Despite the storm’s overwhelming strength, Hurricane Katrina victims would soon learn of the man-made causes of the flooding of New Orleans. At first, victims attempted to recover under their “all-risk” policies, only to learn that man-made flooding was excluded from coverage. Then, they sought to hold the organizations responsible for the faulty levee system liable, but these entities claimed various immunities that ultimately protected them from liability.

This Article reviews specific litigation efforts undertaken on

1. John F. Kennedy, President, United States of America, Address at American University Commencement (June 10, 1963), <http://www.pbs.org/wgbh/americanexperience/features/primary-resources/jfk-university/>.

2. John L. Blevin et al., *Annual Summary: Atlantic Hurricane Season of 2005*, 136 MONTHLY WEATHER REV. 1109, 1140 (2008).

3. U.S. SENATE COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322, at 37 (2006) [hereinafter SENATE REPORT].

4. *Id.*; see also ERIC S. BLAKE & ETHAN J. GIBNEY, NAT’L WEATHER SERV., NOAA TECH. MEMO. NWS NHC-6, THE DEADLIEST, COSTLIEST, AND MOST INTENSE UNITED STATES TROPICAL CYCLONES FROM 1851 TO 2010, at 9 (2011) (estimating at least \$108 billion in property damage due to Hurricane Katrina).

5. SENATE REPORT, *supra* note 3, at 37. Hurricane Ike in 2008 was less costly than Katrina by a factor of 3.7. See BLAKE & GIBNEY, *supra* note 4, at 9.

behalf of the damaged citizens of greater New Orleans. Section I addresses insurance exclusions applied against damaged property owners. Section II reviews third-party fault for Hurricane Katrina-related floods, including fault of the United States of America. Sections III and IV discuss the immunities from liability asserted by the federal government and its contractors. Throughout, this Article recounts how, for a brief moment, the citizens of greater New Orleans stood toe-to-toe with the federal government and its contractors in a David-versus-Goliath civil action and won.

I. INSURANCE COVERAGE “FLOOD” EXCLUSIONS

The common-sense reaction to a casualty loss is to seek recovery from property insurers. Yet, following Hurricane Katrina, homeowners, renters, and commercial property owners across the Gulf Coast noticed under-evaluations or even outright denials of coverage due to “flood” exclusions.⁶ The property owners filed suit against an array of property insurers to address the Katrina-related damages excluded under supposedly all-risk policies; consolidated, these suits became known as *In re Katrina Canal Breaches Consolidated Litigation*.⁷ The insured plaintiffs’ position sought to distinguish water intrusion from the failed levee walls from the excluded water damage inflicted on homes and property as a result of a natural floods.⁸ The plaintiffs also sought a judicial determination voiding the water damage exclusions in the insurers’ policies.⁹

Under Louisiana law, “once coverage has been extended . . .

6. See, e.g., Kathy Lohr, *Homeowners Sue Insurers for Denied Katrina Claims*, NPR (Nov. 7, 2006, 12:41 PM), <http://www.npr.org/templates/story/story.php?storyId=6368165> (describing these denials in coastal Mississippi).

7. *In re Katrina Canal Breaches Consol. Litig. (Vanderhook, Xavier Univ., Chehardy, Humphreys)*, 466 F. Supp. 2d 729, 733 (E.D. La. 2006), *aff’d in part, vacated in part sub nom. In re Katrina Canal Breaches Litig.*, 495 F.3d 191 (5th Cir. 2007). The United States Fifth Circuit Court of Appeals explained the all-risk concept:

A policy of insurance insuring against “all risks” creates a special type of coverage that extends to risks not usually covered under other insurance; recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage.

Alton Ochsner Med. Found. v. Allendale Mut. Ins. Co., 219 F.3d 501, 504 (5th Cir. 2000) (quoting *U.S. Indus., Inc. v. Aetna Cas. & Sur. Co.*, 690 F.2d 459, 461 (5th Cir. 1982)).

8. *Canal Breaches*, 466 F. Supp. 2d at 745–46.

9. *Id.* at 736.

it should be withdrawn only when exclusion is established with certainty.”¹⁰ In substance, billions of dollars of insurance liability turned on whether there were two interpretations of the term flood: one encompassing only naturally-caused water intrusion, and another comprising negligent or intentional acts of man.¹¹ The district court determined that the term flood was unequivocally contained in an exclusionary clause in the insurance policies at issue and that because the term was ambiguous, the flood exclusions did not apply to all risk policies.¹²

The plaintiffs’ historic victory was short lived. On appeal, the United States Fifth Circuit rendered an *Erie* guess as to the application of Louisiana law to the flood exclusions and overturned the district court, stating, “flood is unambiguously excluded from coverage under the plaintiffs’ all-risk policies, and the district court’s conclusion to the contrary was erroneous.”¹³ The Fifth Circuit further stated that “we do not believe that a distinction between natural and non-natural causes is applicable in this context.”¹⁴ In its reasoning, the court found the amount of water to be determinative; “it seems apparent that the greater the inundation involved in the event, the more clearly that event is a flood.”¹⁵ Further, “a reasonable policy holder would expect a massive inundation of water from a breached levee . . . to be excluded, notwithstanding the all-risk nature of the policy.”¹⁶ Portending future litigation regarding the “flood water” characteristic of the water at issue, the Fifth Circuit also ruled that “[a]ny time a flooded watercourse encounters a man-made levee, a non-natural component is injected into the flood, but that does not cause floodwaters to cease being floodwaters.”¹⁷

Ultimately, the insurance practice of adjusting damages only above the waterline on damaged properties became customary.¹⁸

10. Pullen v. Emp’rs’ Liab. Assurance Corp., 89 So. 2d 373, 377 (1956).

11. *In re Katrina Canal Breaches Consol. Litig.* (Vanderhook, Xavier Univ., Chehardy, Humphreys), 466 F. Supp. 2d 729, 747 (E.D. La. 2006), *aff’d in part, vacated in part sub nom.* *In re Katrina Canal Breaches Litig.*, 495 F.3d 191 (5th Cir. 2007).

12. *Id.* at 747, 757.

13. *In re Katrina Canal Breaches Litig.* (Vanderhook, Xavier Univ., Chehardy, Humphreys), 495 F.3d 191, 221 (5th Cir. 2007).

14. *Id.* at 216.

15. *Id.* at 217.

16. *Id.* at 220.

17. *Id.* at 217 (citing Smith v. Union Auto. Indem. Co., 752 N.E.2d 1261, 1267 (2001)).

18. See, e.g., Jane Byrant Quinn, *Batten Down the Insurance*, NEWSWEEK (Jan.

Unable to recover adequate damages from their property insurers, homeowners commenced suits against third-parties liable for their flooded homes and businesses.

II. THIRD-PARTY NEGLIGENCE AS A CAUSE OF LOSS POST-HURRICANE KATRINA

A. THE LEVEE AND CANAL SYSTEM

The majority of New Orleans lies below sea level.¹⁹ Before the first earthen levee was constructed, the city was naturally protected from hurricanes by marsh land.²⁰ Every four miles of barrier marsh can absorb enough water to reduce a hurricane's storm surge by one foot.²¹ Due to its topography and steadily eroding wetlands, New Orleans is especially vulnerable to hurricanes and flooding.²² During the late summer and fall, the city is particularly susceptible to flooding from Lake Pontchartrain from the north and Lake Borgne and the Gulf of Mexico from the east.²³ Consequently, an interconnected system of levees designed by the United States Army Corps of Engineers surrounds New Orleans to protect it from flooding.²⁴

The New Orleans levee system is designed to separate the city into “polders,” large, natural bowls in the land where water

29, 2006, 7:00 PM), <http://www.newsweek.com/batten-down-insurance-108589>. The practice of utilizing a floodwater mark to determine covered losses without consideration of other evidence was made unlawful in February 2006 when the legislature approved a law providing that “[n]o insurer shall use the floodwater mark on a covered structure without considering other evidence, when determining whether a loss is covered or not covered under a homeowners’ insurance policy.” Act of Feb. 23, 2006, No. 12, § 1, 2006 La. Acts 3050, 3051 (codified at LA. STAT. ANN. § 22:1893 (2009)).

19. See Douglas A. Kysar & Thomas O. McGarity, *Did NEPA Drown New Orleans? The Levees, the Blame Game, and the Hazards of Hindsight*, 56 DUKE L.J. 179, 185 (2006); Richard Campanella, *New Orleans Was Once Above Sea Level, But Stormwater Drainage Has Caused It to Sink—With Deadly Consequences*, NOLA.COM: CITYSCAPES (Feb. 18, 2015, 10:21 PM, updated Jan. 28, 2016, 8:48 PM) http://www.nola.com/homegarden/index.ssf/2015/02/shifting_doorframes_cracking_d.html.

20. See Benjamin W. Janke, *Government Liability in Tort Under a Hundred Year Flood Plan*, 36 S.U. L. REV. 11, 13 (2008).

21. Mark Fischetti, *Drowning New Orleans*, SCI. AM., Oct. 2001, at 76, 79.

22. See Tarak Anada, Comment, *The Perfect Storm, an Imperfect Response, and a Sovereign Shield: Can Hurricane Katrina Victims Bring Negligence Claims Against the Government?*, 33 PEPP. L. REV. 279, 285–86 (2008).

23. Kysar & McGarity, *supra* note 19, at 184.

24. Anada, *supra* note 22, at 285–86.

collects.²⁵ By dividing the city into polders, a breach or flood of one polder should hypothetically not affect its neighboring polders.²⁶ The modern levee system arose after Hurricane Betsy devastated New Orleans in 1965.²⁷ In effort to improve New Orleans's defenses against hurricanes, Congress authorized the Lake Pontchartrain and Vicinity Hurricane Protection Project (LPVHPP).²⁸ The LPVHPP authorized studies of the storm susceptibility of areas along the eastern and southern coasts of Louisiana.²⁹ By 1966, studies conducted under the LPVHPP generated the "Barrier Plan", which conceptually endorsed several types of protective structures along the Mississippi River and lake shores of St. Charles, Jefferson, and Orleans Parishes.³⁰ The tidal gates at Chef Menteur Pass and the Rigolets were central to this protection.³¹

Because the polders do not naturally or effectively drain rain water, the Army Corps built a system of drainage pumps and canals to pump water into Lake Pontchartrain.³² The Corps also built three shipping canals through New Orleans.³³ Each drainage and shipping canal is lined with levees to prevent excess water from spilling back into the city.³⁴ The levees separate the greater New Orleans area into the East Bank, New Orleans East, and St. Bernard polders, with levees defending the polders on both sides of the Mississippi river, the Bonnet Carre Spillway, and Lake Pontchartrain from Jefferson and Orleans Parishes.³⁵ Upon completion of these projects, responsibility for operation,

25. Kysar & McGarity, *supra* note 19, at 185.

26. *Id.* at 185–86.

27. R.B. SEED ET AL., INDEP. LEVEE INVESTIGATION TEAM, INVESTIGATION OF THE PERFORMANCE OF THE NEW ORLEANS FLOOD PROTECTION SYSTEMS IN HURRICANE KATRINA ON AUGUST 29, 2005, ch. 2, at 1 (2006), http://www.ce.berkeley.edu/projects/neworleans/report/VOL_1.pdf.

28. Kysar & McGarity, *supra* note 19, at 186.

29. *Id.* at 186–88.

30. 3 INTERAGENCY PERFORMANCE EVALUATION TASK FORCE, PERFORMANCE EVALUATION OF THE NEW ORLEANS AND SOUTHEAST LOUISIANA HURRICANE PROTECTION SYSTEM 34–36 (2007), <http://biotech.law.lsu.edu/katrina/ipet/ipet.html>.

31. *Id.* at 34.

32. *See* SEED ET AL., *supra* note 27, ch. 2, at 2; Kysar & McGarity, *supra* note 19, at 185.

33. Kysar & McGarity, *supra* note 19, at 185.

34. *See* SEED ET AL., *supra* note 27, ch. 2, at 1; SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE, H. REP. NO. 109-377, at 88 (2006).

35. *See* 3 INTERAGENCY PERFORMANCE EVALUATION TASK FORCE, *supra* note 30, at 33 fig.5.

maintenance, repair, and rehabilitation of the levees was integrated into the duties of then-existing local, municipal, and administrative organizations such as parish levee boards and sewage and water boards.³⁶

B. REPORTS ASSIGN BLAME FOR POST-KATRINA FLOODING TO MAN-MADE CAUSES

Two major investigative reports produced after Hurricane Katrina assessed the engineering failures of the levee system—the Army Corps of Engineers Interagency Performance Evaluation Taskforce (IPET), and the Independent Levee Investigation Team (ILIT).³⁷ The IPET and ILIT conclusions are argued herein as indicative of man-made causes of the post-Katrina flooding.

The IPET identified fifty major levee breaches in the hurricane protection system during and after Hurricane Katrina.³⁸ Four breaches were due to failure of soil and subsurface foundational stability of floodwalls, and forty-six were due to scour trenches along the bases of the levees dug out by overtopping floodwaters, compromising the floodwalls' stability.³⁹ The ILIT concluded that the Corps's choices of subsurface construction materials and soil compaction methods contributed to the failures.⁴⁰ In fact, the ILIT found a strong correlation

36. SELECT BIPARTISAN COMM., *supra* note 34, at 87.

37. The IPET Report was produced by the Interagency Performance Evaluation Taskforce convened by the U.S. Army Corps of Engineers. See *Performance Evaluation of the New Orleans and Southeast Louisiana Hurricane Protection System*, LAW, SCI., & PUB. HEALTH PROGRAM, <http://biotech.law.lsu.edu/katrina/ipet/ipet.html> (last visited Jan. 28, 2016). The ILIT Report is the Independent Levee Investigation Team's June 31, 2006 report, authored by thirty-five researchers, engineers, and forensic experts, including veterans of the investigative teams for the Challenger and Columbia space shuttles and the Exxon-Valdez. See SEED ET AL., *supra* note 27, at xxvi. Among the authors of the ILIT Report was Robert G. Bea, who testified extensively on behalf of the plaintiffs in numerous causes of action under the *In re Katrina Canal Breaches Consolidated Litigation* umbrella.

38. 1 INTERAGENCY PERFORMANCE EVALUATION TASK FORCE, *supra* note 30, at 3; see also John C. Culhane, *What Does Justice Require for the Victims of Katrina and September 11?*, 10 DEPAUL J. HEALTH CARE L. 177, 189–91 (2007) (summarizing the findings in the IPET report).

39. 1 INTERAGENCY PERFORMANCE EVALUATION TASK FORCE, *supra* note 30, at 41. "Scour trenches" are cavities at the base of floodwalls created by water running over the top of the floodwalls, which, as it falls to the ground, digs a trench at the floodwall's base. See NAT'L INST. OF STANDARDS & TECH., NIST TECH. NOTE 1476, PERFORMANCE OF PHYSICAL STRUCTURES IN HURRICANE KATRINA AND HURRICANE RITA: A RECONNAISSANCE REPORT 100–01 (2006).

40. SEED ET AL., *supra* note 27, ch. 15, at 1–2.

between breaches due to foundation failure and the use of erodible levee materials like hydraulic fill, instead of denser and less permeable clays.⁴¹ Hydraulic fill has a high sand and silt content, which leads to higher subsurface permeability, meaning that water flows through it more easily than it does through denser, less permeable clays.

The ILIT also reported that the 17th Street Canal sheet pilings were not driven deeply enough.⁴² The “I-wall” analysis of the structural fidelity of the metal and concrete canal walls at the 17th Street site did not consider the erosive effects of under-seepage from the bodies of water the walls were intended to enclose.⁴³ Further, erosion created gaps between the I-wall structures and the earth anchoring them, which reduced their expected resistance to lateral force from floodwater pressure by as much as twenty-five percent.⁴⁴ In addition, the ILIT found the Standard Project Hurricane (SPH), which the levee system was designed to protect against, to be an inadequate benchmark.⁴⁵ The SPH approximated a fast-moving Category 3 hurricane.⁴⁶ Katrina, which actually made landfall as a slow-moving Category 3 hurricane, created a storm surge and wave generation that far exceeded the SPH, greatly overwhelming the levee system.⁴⁷

41. SEED ET AL., *supra* note 27, ch. 15, at 2–3.

42. *Id.* at 5, 7; Culhane, *supra* note 38, at 191–92 (describing the findings of the ILIT and IPET reports). Sheet pilings are interlocking metal walls used to construct levees. They are typically buried below sea level, extend above the water line, and are usually encased in concrete. For a diagram of typical sheet-pilings in New Orleans area floodwalls, see NAT’L INST. OF STANDARDS & TECH., *supra* note 39, at 81.

43. SEED ET AL., *supra* note 27, ch. 15, at 7. Under-seepage is the process by which river water channels beneath the banks of a river, destabilizing the banks above. Under-seepage is among the oldest levee-construction hazards and is more prone to occur in soils with higher permeability. See 1 U.S. ARMY CORPS OF ENGRS, TECH. MEMO. NO. 3-424, INVESTIGATION OF UNDERSEEPAGE AND ITS CONTROL: LOWER MISSISSIPPI RIVER LEVEES 31–35 (1956), <http://cdm16021.contentdm.oclc.org/utis/getdownloaditem/collection/p266001coll1/id/2415/filename/2420.pdf>.

44. 5 INTERAGENCY PERFORMANCE EVALUATION TASK FORCE, *supra* note 30, at 26–28, 55 (2007); see also Culhane, *supra* note 38, at 192 (summarizing the IPET findings).

45. SEED ET AL., *supra* note 27, ch. 12, at 13; see also Culhane, *supra* note 38, at 192–93 (reporting the ILIT report finding).

46. SEED ET AL., *supra* note 27, ch. 2, at 3.

47. 1 INTERAGENCY PERFORMANCE EVALUATION TASK FORCE, *supra* note 30, at 34, 39; see SEED ET AL., *supra* note 27, ch. 12, at 11–13; see also Culhane, *supra* note 38, at 193 (summarizing the ILIT and IPET report findings).

C. PARTIES RESPONSIBLE FOR THE FLOOD CONTROL SYSTEM IN GREATER NEW ORLEANS

Identification of the parties responsible for the flood and drainage systems in greater New Orleans is necessary in order to apportion liability for their failures. Federal regulations governing the maintenance and inspection of flood protection works constructed by the federal government and turned over to local sponsors are set out in the Code of Federal Regulations.⁴⁸ The U.S. Army Corps of Engineers administers a national flood control policy and oversees construction of congressionally-authorized flood control projects and expenditures.⁴⁹ The Orleans Levee Board owns and maintains levees and floodwalls within Orleans Parish; the Jefferson Levee Board does the same for levees within Jefferson Parish.⁵⁰

The Sewage & Water Board of New Orleans (S&WB) is responsible for operating and maintaining the pumping systems in Orleans and Jefferson Parishes.⁵¹ The S&WB is also responsible for dredging the outfall canals.⁵² Over time, sediment buildup in the three main outfall canals—17th Street, Orleans, and London Avenue—reduced their overall drainage capacity.⁵³ In 1988, the Army Corps of Engineers authorized the S&WB to dredge and widen the 17th Street Canal.⁵⁴ At that time, the Corps warned the S&WB that dredging could destabilize the canal walls.⁵⁵ Sure enough, by 2005, 17th Street canal floodwalls had sunk 2.345 feet, leaving the top of the floodwalls 1.3–1.9 feet below design levels.⁵⁶ Likewise, the London Avenue floodwalls were 1.6–1.8 feet below

48. 33 C.F.R. § 208.10 (2015) (“The State, political subdivision thereof, or other responsible local agency, which furnished assurance that it will maintain and operate flood control works in accordance with regulations prescribed by the Secretary of the Army, as required by law, shall appoint a permanent committee consisting of or headed by an official hereinafter called the ‘Superintendent,’ who shall be responsible for the development and maintenance of, and directly in charge of, an organization responsible for the efficient operation and maintenance of all of the structures and facilities during flood periods and for continuous inspection and maintenance of the project works during periods of low water, all without cost to the United States.”).

49. SEED ET AL., *supra* note 27, ch. 4, at 8.

50. *Id.* at 22.

51. *Id.* at 17–18, 22.

52. *See id.* at 19; *id.* ch. 12, at 7.

53. *See id.* ch. 4, at 22.

54. *See id.* at 19.

55. SEED ET AL., *supra* note 27, ch. 4, at 19.

56. *Id.* at 29.

design level, and the Orleans Canal's walls were 0.8 feet below design level.⁵⁷

Further, in 1956 Congress authorized the U.S. Army Corps of Engineers to dredge the Mississippi River Gulf Outlet (MR-GO) connecting the Gulf of Mexico to the Mississippi River through New Orleans.⁵⁸ This shipping channel was intended to be 500 feet wide for seventy-five miles.⁵⁹ Soil erosion since the completion of the MR-GO has left it up to 2,000 feet wide in some places.⁶⁰ During Hurricane Katrina, water funneled from the Gulf of Mexico into the Industrial Canal, caused several breaches along the industrial canal levees, flooding St. Bernard Parish, New Orleans East, and the Ninth Ward.⁶¹

The end-product levees, canals, and MR-GO were the results of decades of choices made by engineers, contractors, administrators, and politicians. The safety and efficacy of the walls were weighed against practical concerns like costs and construction efficiency. Hurricane Katrina was a single event, but the floods that followed arose from a series of decisions that allowed the storm to become a disaster.

III. IMMUNITY OF THE ARMY CORPS OF ENGINEERS FOR NEGLIGENCE RESULTING IN THE FLOODS

The IPET and ILIT reports confirmed what many suspected—that the floods of Hurricane Katrina could be traced back to the acts and omissions of man. Thus, *In re Katrina Canal Breaches Consolidated Litigation* also included claims against the United States Army Corps of Engineers regarding the negligent acts that caused the levee failures. The Army Corps, however, asserted that it was immune from liability for damages caused by post-Katrina flooding under 33 U.S.C. § 702c, which provides that “[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.”⁶² Like the flood exclusion provisions in all-risk insurance policies, billions of dollars and the liability of the United States, turned on the interpretation a few words—in this case, a broad federal

57. SEED ET AL., *supra* note 27, ch. 4, at 29.

58. *Id.* at 27.

59. *See id.*

60. *Id.* at 28.

61. *See* Kysar & McGarity, *supra* note 19, at 196–98.

62. *In re Katrina Canal Breaches Consol. Litig. (Robinson)*, 471 F. Supp. 2d 684, 687 (E.D. La. 2007) (quoting 33 U.S.C. § 702c (2012)).

immunity precluding federal liability for floods.

A. FEDERAL IMMUNITY UNDER § 702C

Section 702c is a subsection of the Flood Control Act of 1928 (FCA).⁶³ Congress enacted the FCA following the Great Mississippi Flood of 1927.⁶⁴ During the spring of 1927, the river broke through its levee system in 246 places, flooding 27,000 square miles.⁶⁵ In response, Congress passed the FCA, consolidating all prior flood-control acts relating to the Mississippi River and authorizing the largest public works appropriation ever (at the time) for the construction of a comprehensive system of nationwide flood control projects and structures.⁶⁶ In exchange for the massive public undertaking, Congress relieved the United States of any liability for damage “from or by floods or flood waters at any place.”⁶⁷

In a case related to flooding caused by Hurricane Betsy in 1965, the Fifth Circuit explained that the FCA was passed in order to:

[P]lace a limit on the amount of money that Congress would spend in connection with flood control programs. Congress undoubtedly realized that the cost of extensive flood control projects would be great and determined that those costs should not have added to them the floodwater damages that might occur in spite of federal flood control efforts. . . .”[I]mmunity from liability for floodwater damage arising in connection with flood control works was the condition upon which the government decided to enter into the area of nationwide flood control programs.”⁶⁸

The Supreme Court tailored the standard for applying § 702c in *United States v. James*.⁶⁹ In *James*, suit was brought on behalf of three recreational users of a reservoir near the Millwood Dam

63. Flood Control Act of 1928, Pub. L. No. 70-391, § 3, 45 Stat. 534, 535–36 (codified at 33 U.S.C. § 702(c) (2012)).

64. *United States v. James*, 478 U.S. 597, 606 (1986), *abrogated in part by* Cent. Green Co. v. United States, 531 U.S. 425 (2001).

65. SEED ET AL., *supra* note 27, ch. 4, at 5.

66. *James*, 478 U.S. at 606; SEED ET AL., *supra* note 27, ch. 4, at 6–7.

67. Flood Control Act § 3.

68. *Graci v. United States*, 456 F.2d 20, 21, 25–26 (5th Cir. 1971) (citations omitted) (quoting *Graci v. United States*, 301 F. Supp. 947, 952 (E.D. La. 1969)).

69. *James*, 478 U.S. 597.

in Arkansas.⁷⁰ The Corps released reservoir water into the spilling basin below because the dam was overfull, having reached “flood stage.”⁷¹ Two of the victims, who were skiing at the time, fell and began drifting toward the spill gates; the husband of one of the skiers dove into the water in an attempt to rescue his wife.⁷² Due to the swift currents, all three victims were pulled through the spill gates, and the husband died.⁷³ The Supreme Court, with Justices Stevens, Marshall, and O’Connor dissenting, held that § 702c covered the accident because the waters at issue *were* “flood waters.”⁷⁴ Apparently regretting the outcome, the Court stated:

[O]ur role is to effectuate Congress’ intent, and Congress rarely speaks more plainly than it has in the provision we apply here. If that provision is to be changed, it should be by Congress and not by this Court. We therefore follow the plain language of § 702c, a section of the 1928 Act that received careful consideration by Congress and that has remained unchanged for nearly 60 years, and hold that the Federal Government is immune from suit in this type of case.⁷⁵

In dicta that were later refined, the *James* Court commented that “[i]t is thus clear from § 702c’s plain language that the terms ‘flood’ and ‘flood waters’ apply to all waters contained in or carried through federal flood control project for purposes of or related to flood control”⁷⁶

Fifteen years later, the Supreme Court modified *James* in a unanimous opinion in *Central Green Co. v. United States*.⁷⁷ In *Central Green*, plaintiffs 1,000-acre pistachio orchard was damaged by subsurface water from the Madera Canal, a project with flood control as one of its purposes.⁷⁸ Relying on § 702c, the United States moved for and was granted dismissal on the

70. *United States v. James*, 487 U.S. 597, 599–600 (1986), *abrogated in part by* *Cent. Green Co. v. United States*, 531 U.S. 425 (2001).

71. *Id.* at 599.

72. *Id.*

73. *Id.* at 600.

74. *Id.* at 605, 612.

75. *Id.* at 612.

76. *United States v. James*, 487 U.S. 597, 605 (1986) (dicta), *abrogated in part by* *Cent. Green Co. v. United States*, 531 U.S. 425 (2001).

77. *Cent. Green*, 531 U.S. 425.

78. *Id.* at 427.

pleadings.⁷⁹ The Supreme Court reversed, finding that the mere fact that water moving through a flood control project caused damage did not necessarily render the water “flood waters” for § 702c purposes.⁸⁰ Instead, the Supreme Court advised future courts to “consider the character of the waters that cause the relevant damage rather than the relation between that damage and a flood control project;”⁸¹ hence, the mere fact that water *emanates* from a flood control project does not *prima facie* render it “flood water.”

B. APPLICATION OF § 702C IMMUNITY IN *IN RE KATRINA CANAL BREACHES*

In *In re Katrina Canal Breaches Consolidated Litigation*, part of which addressed the federal government’s liability for flooding emanating from the 17th Street and London Avenue Canals, the district court articulated the scope of § 702c immunity as “aris[ing] where damage is caused by flood waters emanating from a flood control project.”⁸² The United States moved for dismissal of claims arising from breaches in the 17th Street and London Avenue Canals, alleging that the canals were “flood control” projects.⁸³

The court observed that the canals, which were in operation as early as 1913, were designed to serve as conduits for drainage of rainwater from New Orleans into Lake Pontchartrain.⁸⁴ However, the LPVHPP—a project specifically designed for hurricane flood protection—included the outfall canals in its overall plan.⁸⁵ Further, by 1991, Congress had directed the Secretary of the Army to provide hurricane protection along the Orleans and London Avenue outfall canals by raising levees and *improving flood protection*.⁸⁶ The court found these facts sufficient to prove that the 17th Street and London Avenue Canals were “flood control projects.” Consequently, a “suit [against the government] for damages caused by failures of the

79. Cent. Green Co. v. United States, 531 U.S. 425, 427–28, 437 (2001).

80. *Id.* at 436–37.

81. *Id.* at 437.

82. *In re Katrina Canal Breaches Consol. Litig.*, 533 F. Supp. 2d 615, 637 (E.D. La. 2008), *aff’d sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

83. *See id.* at 618, 634.

84. *Id.* at 618–19.

85. *Id.* at 620–22, 625.

86. *Id.* at 637–38.

levees and/or floodwalls at 17th Street Canal and London Avenue Canal is barred by § 702c.”⁸⁷ This result meant that the “flood control” characteristic of a project was amorphous. Even though the canals were conceived, built, and operated as drainage avenues, the fact that they were modified under the umbrella of the LPVHPP rendered the Corps immune from liability for their failure.

C. APPLICATION OF § 702C IMMUNITY IN *MR-GO*

In contrast, the district court in *United States v. Robinson* disagreed with the U.S. government’s contention that it was not liable for flood damages emanating from the Mississippi River Gulf Outlet (MR-GO) during Hurricane Katrina.⁸⁸ The court ruled that “the Corps could be held liable for damages arising out of activities surrounding a navigation channel notwithstanding the fact that those actions cause[d] the failure of certain levees.”⁸⁹ In other words, since the court found that the MR-GO was a navigation project, as opposed to a flood control project, the government was unable to rely on § 702c immunity.⁹⁰ Following a nineteen-day bench trial, the district court concluded that U.S. Army Corps of Engineers negligently maintained and operated the MR-GO and awarded several plaintiffs a combined \$719,698 in damages.⁹¹

This verdict could have supported the claims of up to 100,000 residents of Southeast Louisiana.⁹² However, the U.S. government appealed the decision to the Fifth Circuit, maintaining that it was entitled to § 702c immunity. In March 2012, a three-judge panel at the United States Fifth Circuit

87. *In re Katrina Canal Breaches Consol. Litig.*, 533 F. Supp. 2d 615, 637 (E.D. La. 2008), *aff’d sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

88. *In re Katrina Canal Breaches Consol. Litig. (Robinson)*, 647 F. Supp. 2d 644 (E.D. La. 2009), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

89. *Id.* at 648 (discussing *Canal Breaches*, 471 F. Supp. 2d at 690–96 (E.D. La. 2007)); *see also id.* at 699 (discussing the inapplicability of immunity under the FCA to the MR-GO failures).

90. *Id.* at 648, 699.

91. *Id.* at 647, 697, 736.

92. See Mark Schleifstein, *Hurricane Katrina Damage Judgment Against Army Corps of Engineers Is Reversed by Federal Appeals Court*, NOLA.COM/TIMES-PICAYUNE (Sept. 25, 2012, 10:18 PM), http://www.nola.com/katrina/index.ssf/2012/09/katrina_damage_judgement_again.html.

affirmed the district court's opinion.⁹³ However, in September 2012, the same three-judge panel construed a request for hearing en banc as a request for rehearing and issued a new ruling *preserving* their previous findings regarding the inapplicability of § 702c immunity, but reversing the plaintiff's verdict based on the "discretionary function exception" discussed below.⁹⁴

Although it was procedurally unusual, the Fifth Circuit Court had the right and authority to withdraw and reverse its opinion. However, given the scope of impact of their actions, the plaintiff-class and public at large would have benefited, and perhaps even deserved, a more thorough explanation for why the court took this action.

IV. IMMUNITY OF GOVERNMENT CONTRACTORS OF ARMY CORPS OF ENGINEERS FOR FLOOD DAMAGE

In addition to § 702c immunity, the United States asserted that it was not liable for flood damage following Hurricane Katrina because the allegedly breached duties were discretionary in nature, and therefore the Government was immune for its failure to perform those duties.⁹⁵ This immunity, known as the discretionary function exception (DFE), can also apply to government contractors.⁹⁶

A. THE DISCRETIONARY FUNCTION EXCEPTION

The DFE is an exception to the Federal Tort Claims Act, which is itself an exception to the broad concept of sovereign immunity.⁹⁷ Derived from English Common Law, the "sovereign immunity" doctrine developed during the Tudor period (1485–1603) and was articulated by Blackstone, who wrote: "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him."⁹⁸ Sovereign immunity exists because it is "necessarily a contradiction of the

93. *In re Katrina Canal Breaches Litig. (Robinson)*, 673 F.3d 381, 385 (5th Cir.), *withdrawn on reh'g*, 696 F.3d 436 (5th Cir. 2012).

94. *In re Katrina Canal Breaches Litig. (Robinson)*, 696 F.3d 436, 454 (5th Cir. 2012).

95. *See id.* at 443, 448–49.

96. *See* Andrew Finkleman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 *BROOK. J. INT'L L.* 395, 405–10 (2009).

97. 28 U.S.C. § 2680(a) (2012); Finkleman, *supra* note 96, at 404.

98. Finkleman, *supra* note 96, at 404 (quoting WILLIAM BLACKSTONE, *COMMENTARIES* *235).

King's sovereignty to allow him to be sued in his own courts."⁹⁹ In the early English case *Russell v. Men of Devon*, the court discussed the policy behind sovereign immunity, noting that "it is better tha[t] an individual should sustain an injury than that the public should suffer a [monetary] inconvenience."¹⁰⁰

The sovereign immunity doctrine has been accepted in American jurisprudence for a significant period of time. In *Kawananakoa v. Polybank*, Justice Holmes wrote that a "sovereign is exempt from suit, not because [of] any formal conception or obsolete theory, but on logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."¹⁰¹

Nonetheless, the federal government may be sued where it waives its sovereign immunity.¹⁰² In 1946, the U.S. government waived immunity to a wide-range of tort actions by enacting the Federal Tort Claims Act (FTCA).¹⁰³ Congress enacted the FTCA, in part, as a response to a catastrophic plane crash where a B-25 bomber crashed into the side of the Empire State Building, killing fourteen people and causing extensive damage to the building and surrounding properties.¹⁰⁴ Eight months after the crash (and after the cessation of the Second World War in the Pacific), the U.S. Government offered money to the families of the victims.¹⁰⁵ While some accepted the money, others brought suit against the federal government.¹⁰⁶

The FTCA was enacted in 1946 and made retroactive to 1945

99. Anada, *supra* note 22, at 306 (citing VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 130 (10th ed. 2000)).

100. *Russell v. Men of Devon* (1788), 100 Eng. Rep. 359, 362; 2 Term Rep. 667, 673; see *Ayala v. Phila. Bd. of Pub. Educ.*, 305 A.2d 877, 879 (Pa. 1973), *superseded by statute*, Pennsylvania Political Subdivision Tort Claims Act, 42 PA. CONS. STAT. ANN. §§ 8541–8564 (West 2007).

101. *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907).

102. See, e.g., *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

103. Federal Tort Claims Act, §§ 401–424, Pub. L. No. 79-601, 60 Stat. 812, 842–47 (1946) (codified as amended in scattered sections of 28 U.S.C. (2012)). The FTCA was not the first waiver of sovereign immunity by the United States. For instance, the Suits in Admiralty Act of 1920 authorized suit against the United States for injuries on or by vessels of the United States. Pub. L. No. 66-156, § 2, 41 Stat. 525, 525–26 (1920).

104. See Joe Richman, *The Day a Bomber Hit the Empire State Building*, NPR (July 28, 2008, 6:19 PM), <http://www.npr.org/templates/story/story.php?storyId=92987873>.

105. *Id.*

106. *Id.*

to apply to suits relative to the Empire State Building crash.¹⁰⁷ It permits suits against the government for tortious acts, but is subject to several exceptions, including the DFE.¹⁰⁸ This exception provides that the FTCA shall not apply to “[a]ny claim . . . based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”¹⁰⁹

B. EVOLUTION OF THE DISCRETIONARY FUNCTION EXCEPTION

Incidentally, the first major U.S. Supreme Court opinion addressing a government contractor’s defense from civil liability for performance of a government contract involved a construction project analogous to a levee.¹¹⁰ The case involved a contractor’s construction of a dike along the Missouri River.¹¹¹ When the construction of the dike caused a diversion of the river that washed away a portion of the plaintiff’s land, the landowner sued both the government and the contractor.¹¹² The Court held the contractor immune from suit based on the basic principles of agency: “if [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will.”¹¹³ Stated differently, where an agency relationship exists, a contractor is immune from tort liability where the United States government itself could claim immunity.¹¹⁴

Subsequently, in *Feres v. United States*, the Supreme Court applied the FTCA to a claim for damages against the government for negligent quartering of soldiers on active duty, resulting in death by fire.¹¹⁵ The Supreme Court concluded the FTCA was not intended to create a new right of action for serviceman against

107. Federal Tort Claims Act, Pub. L. No. 79-601, § 403(a), 60 Stat. 812, 843 (1946) (codified at 28 U.S.C. § 1346(b)(1) (2012)).

108. 28 U.S.C. §§ 2674, 2680 (2012).

109. *Id.* § 2680(a).

110. *Yearsley v. W.A. Ross Constr.*, 309 U.S. 18 (1940); *see also* Finkelman, *supra* note 96, at 405–06 (discussing the early history of the FTCA).

111. *See Yearsley*, 309 U.S. at 19.

112. *Id.*

113. *Id.* at 20–21.

114. Finkelman, *supra* note 96, at 406.

115. *Feres v. United States*, 340 U.S. 135, 136–37 (1950); *see also* Finkelman, *supra* note 96, at 406–07 (discussing *Feres*).

the federal government relative to injuries sustained in the course of duty.¹¹⁶ The Fifth, Seventh, and Ninth Circuits drew upon *Feres's* limited view of the FTCA to create a broad “government contractor defense.”¹¹⁷ Essentially, “[c]ourts found that where the government mandated and approved specifications for a product, and had special knowledge of the dangers of the product, a contractor manufacturing it would share in the government’s *Feres* immunity.”¹¹⁸

The Supreme Court modified the “government contractor defense” in *Boyle v. United Technologies Corp.*¹¹⁹ Instead of applying the broad immunity grant in *Feres*, the *Boyle* Court set forth a three-part test to determine whether a government contractor is eligible to share in the government’s discretionary function immunity under the FTCA: (1) the government approved reasonably “precise specifications”; (2) “the equipment conformed to those specifications;” and (3) the contractor or supplier must have “warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.”¹²⁰

The same year that *Boyle* was decided, the Supreme Court decided *Berkovitz ex rel. Berkovitz v. United States*, which provided a workable standard for the threshold question of whether or not the DFE *even applies* to an act or omission by the United States government or a government contractor.¹²¹ Under *Berkovitz*, immunity will attach if (1) “the challenged conduct involves an element of judgement”; and (2) the judgement was “based on considerations of public policy.”¹²²

C. APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION IN *CANAL BREACHES*

In *In re Hurricane Katrina Canal Breaches*, the plaintiffs sued the United States for damages caused by the Corps’s

116. *Feres v. United States*, 340 U.S. 135, 146 (1950).

117. Finkelman, *supra* note 96, at 407 (citing *Bynum v. FMC Corp.* 770 F.2d 556 (5th Cir. 1985); *Tillet v. J.L. Case Co.*, 756 F.2d 591, 597–98 (7th Cir. 1985); *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983)).

118. *Id.*

119. *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988); *see also* Finkelman, *supra* note 96, at 407–10 (discussing *Boyle*).

120. *Boyle*, 487 U.S. at 512; *see also* *Kerstetter v. Pac. Sci. Co.*, 210 F.2d 431, 435 (5th Cir. 2000) (discussing *Boyle*).

121. *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988).

122. *Id.*; *Anada*, *supra* note 22, at 307–08.

negligent granting of a permit to dredge the 17th Street Canal.¹²³ The district court held that the issuance of the permit to dredge and the means utilized to protect the canal were informed by the regulations implementing the River and Harbors Act.¹²⁴ According to the court, this statute demonstrates that the “decision [to issue a dredging permit] was grounded in a policy-based judgment” and left the Corps free to balance myriad factors, weighting flood hazards against the needs and welfare of the people.¹²⁵

The court further found that the DFE, coupled with other valid defenses, relieved the Corps of liability for damages caused by breaches in the 17th Street, London Avenue, and Orleans Avenue Canals.¹²⁶ In a grave warning, the court wrote: “It is not within this Court’s power to address the wrongs committed. It is hopefully within the citizens of the United States’ power to address the failures of our laws and agencies. If not, it is certain that another tragedy such as this will occur again.”¹²⁷

D. APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION IN *MR-GO*

In the *MR-GO* litigation, the district court considered the applicability of the DFE to damage caused by floodwaters related to the MR-GO.¹²⁸ The United States argued that its “failure to warn Congress” to armor the MR-GO’s banks and its “failure to implement mitigation measures” for the widening channel were “matter[s] of judgment and choice grounded in considerations of policy.”¹²⁹ The United States further argued that it cannot be liable for failure to adopt specific mitigation procedures because such measures would require additional funding from Congress, and “Congress’s failure to appropriate funds is protect[ed] by the discretionary function exception.”¹³⁰ In contrast, the plaintiffs

123. *In re Katrina Canal Breaches Consol. Litig.*, 533 F. Supp. 2d 615, 628 (E.D. La. 2008), *aff’d sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

124. *Id.* at 641–42 (citing Rivers and Harbors Act, 33 U.S.C. § 403 (2012); 33 C.F.R. § 320.4 (2015)).

125. *Id.* at 642.

126. *Id.* at 638–39, 642.

127. *Id.* at 643.

128. *In re Katrina Canal Breaches Consol. Litig. (Robinson)*, 647 F. Supp. 2d 644, 703–17 (E.D. La. 2009), *aff’d in part, rev’d in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

129. *Id.* at 704.

130. *Id.* (citing *Cato v. United States*, 70 F.3d 1103, 1110 (9th Cir. 1995)).

argued that the Corps's errors "with respect to maintenance and operation of the MR-GO were in direct contravention of professional engineering and safety standards;" therefore, no "element of judgment" existed to trigger the DFE.¹³¹

First, the court found that "the Corps' failure to provide foreshore protection and [to] address the effects of salt water intrusion were non-policy decisions."¹³² Further, the "Corps violated a mandatory duty in its preparation of various statements required under" the National Environmental Protection Act of 1969 (NEPA).¹³³ According to the court, the Corps's failure to comply with the NEPA rendered the DFE inapplicable.¹³⁴

The court concluded its analysis by stating that:

[T]he negligence of the Corps, in this instance by failing to maintain the MRGO properly, was not policy, but insouciance, myopia and shortsightedness. *For over forty years, the Corps was aware that the Reach II levee protecting Chalmette and the Lower Ninth Ward was going to be compromised by the continued deterioration of the MRGO, as has been exhaustively discussed in this opinion. The Corps had an opportunity to take a myriad of actions to alleviate this deterioration or rehabilitate this deterioration and failed to do so In the event the gross negligence of the Corps in maintaining the MRGO would be regarded as policy, then the discretionary function exception would swallow the Federal Torts Claim Act*¹³⁵

The United States appealed the decision to the Fifth Circuit.¹³⁶ As alluded to above,¹³⁷ *United States v. Robinson* was initially upheld by the Fifth Circuit, then reversed six months later.¹³⁸ On rehearing, the Fifth Circuit concluded that the

131. *In re Katrina Canal Breaches Consol. Litig. (Robinson)*, 647 F. Supp. 2d 644, 705 (E.D. La. 2009), *aff'd in part, rev'd in part sub nom. In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012).

132. *Id.* at 705, 714–15.

133. *Id.* at 717–31.

134. *Id.* at 717–18, 725, 730–31.

135. *Id.* at 732 (emphasis added).

136. *In re Katrina Canal Breaches Litig. (Robinson)*, 696 F.3d 436, 443 (5th Cir. 2012).

137. *See supra* Section III.C.

138. *Canal Breaches*, 696 F.3d at 441; *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 385 (5th Cir.), *withdrawn on reh'g*, 696 F.3d 436 (5th Cir. 2012).

Corps's duty to armor the banks of the MR-GO was a discretionary function and that therefore its failure to do so was immunized.¹³⁹ The Fifth Circuit further found that there was "ample record evidence indicating the public-policy character of the Corps' various decisions contributing to the delay in armoring" vital sections of the MR-GO.¹⁴⁰ Ultimately, the DFE insulated the United States from liability for damages caused by the flooding of the MR-GO during Hurricane Katrina. The Corps never contested that its neglect of the MR-GO caused the flooding.

The application of the DFE in MR-GO erased the line between policy considerations and consideration for safety and preservation of human lives and property. When the Fifth Circuit ruled that policy considerations influenced the Corps's decision not to armor the MR-GO, it functionally endorsed the Corps's position that policy considerations can justify conscious neglect for human safety. As warned by Judge Duval,¹⁴¹ in doing so the DFE swallowed the Federal Tort Claims Act.

E. APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION IN *I.H.N.C.*

In the *Inner Harbor Navigation Canal* (I.H.N.C.) litigation, a component of the *MR-GO* litigation, a government contractor was hired "to clear abandoned industrial facilities . . . from the East Bank Industrial Area (EBIA)."¹⁴² "The EBIA is a 32-acre site located between Florida Avenue and Claiborne Avenue extending from the Industrial Canal to the floodwall at the Lower Ninth Ward."¹⁴³ A major component of the EBIA project was the deep excavation of underground debris and structures in order to

139. *In re Katrina Canal Breaches Litig. (Robinson)*, 696 F.3d 436, 450 (5th Cir. 2012).

140. *Id.*

141. *See In re Katrina Canal Breaches Consol. Litig. (Robinson)*, 647 F. Supp. 2d 644, 704–17 (2009), *aff'd in part, rev'd in part*, *Canal Breaches*, 696 F.3d 436.

142. *In re Katrina Canal Breaches Consol. Litig. (MR-GO: I.H.N.C.)*, No. 05-4182, 2008 WL 5234369, at *1 (E.D. La. Dec. 15, 2008), *rev'd sub nom. In re Katrina Canal Breaches Litig.*, 620 F.3d 455 (5th Cir. 2010). Although the I.H.N.C. litigation was consolidated with the MR-GO litigation under the umbrella caption of *In re Katrina Canal Breaches*, it pertained to flood damage emanating from entirely different sources. The MR-GO litigation addressed flooding caused by the overtopped levee banks of the MR-GO. *See Canal Breaches*, 696 F.3d 436. The I.H.N.C. litigation addressed flooding caused by the failure of floodwalls along the EBIA. *Canal Breaches*, 2008 WL 5234369, at *1.

143. *Canal Breaches*, 2008 WL 5234369, at *1.

replace a lock at the I.H.N.C.¹⁴⁴ The I.H.N.C. plaintiffs argued that the government contractor failed “to use its geotechnical expertise to evaluate the potential for under-seepage caused by the [I.H.N.C.] excavation” and the resultant underseepage caused two catastrophic breaches in the I.N.H.C.¹⁴⁵

The district court found that the plans for the EBIA project were “confected in tandem” with the government and that there was “substantive review” of the plans to the extent they were produced by the contractor.¹⁴⁶ The court further found that the EBIA project “by its very nature is one in which the Corps is intimately involved at all stages of the planning.”¹⁴⁷ Thus, the government contractor satisfied the first prong of the *Boyle* test.¹⁴⁸ Next, the court found that there was no evidence of deficiencies in the contractor’s performance, and the Corps accepted the project in its entirety, thereby satisfying the second prong of the *Boyle* test.¹⁴⁹ Finally, the court found that the contractor was performing a remediation project outside of the purview of flood control structures, and therefore the Corps retained responsibility to monitor “the integrity of the levee system.”¹⁵⁰ The contractor “received no letters of objection to its proposed excavation work from the engineers at the Corps” or the Louisiana Department of Transportation and Development.¹⁵¹ Therefore, because the Contractor demonstrated that it did not “know” of unreported dangers, the final prong was satisfied,¹⁵² and so the court found that government contractor immunity applied.¹⁵³ Accordingly, the district court granted summary judgment in favor of the contractor.¹⁵⁴

144. *In re Katrina Canal Breaches Consol. Litig. (MR-GO: I.H.N.C.)*, No. 05-4182, 2008 WL 5234369, at *1 (E.D. La. Dec. 15, 2008), *rev’d sub nom. In re Katrina Canal Breaches Litig.*, 620 F.3d 455 (5th Cir. 2010). “Locks” are large encasements with gates that operate as water level regulators permitting the passage of maritime traffic through canals between bodies of water with “sea level” height differentials.

145. *Id.*

146. *Id.* at *17.

147. *Id.* at *18.

148. *Id.*; see *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).

149. *Canal Breaches*, 2008 WL 5234369, at *18; see *Boyle*, 487 U.S. at 512.

150. *In re Katrina Canal Breaches Consol. Litig. (MR-GO: I.H.N.C.)*, No. 05-4182, 2008 WL 5234369, at *19 (E.D. La. Dec. 15, 2008), *rev’d sub nom. In re Katrina Canal Breaches Litig.*, 620 F.3d 455 (5th Cir. 2010).

151. *Id.*

152. See *Boyle*, 487 U.S. at 512.

153. *Canal Breaches*, 2008 WL 5234369, at *20.

154. *Id.*

On appeal, the U.S. Fifth Circuit overturned the district court's grant of summary judgment, principally due to the imprecise specification of the compositions of the off-site backfill material and the method of compaction.¹⁵⁵ The backfill material was allegedly of porous quality and poorly compacted, causing the underseepage resulting in the failure of the levee walls.¹⁵⁶ Because the contractor exercised discretion in the contents of backfill and method of compaction, the Fifth Circuit found that the government contractor defense could not be invoked.¹⁵⁷ The Fifth Circuit commented that the government contractor defense is essentially a claim that "the Government made me do it."¹⁵⁸ Since the contractor exercised discretion over important design choices, it was not entitled to the defense.¹⁵⁹ The case was remanded for a trial on the merits.¹⁶⁰ Following a three-week trial, the district court found that the I.H.N.C. levee collapsed due to overtopping and scour-destabilizing, not underseepage, resulting in the application of the DFE and a defense judgment.¹⁶¹ Therefore, the Army Corps of Engineers and its contractor were once again found immune for damages caused by a failed flood control project. The Corps never contested that they built a defective wall—only that overtopping caused its failure.

V. CONCLUSION

Even in legal defeat come small victories. The cause of the Hurricane Katrina plaintiff-class brought together twenty law firms—competitors—who put up over \$15 million for litigation costs to fight for justice in our community. Every lawyer involved knew how difficult the cases would be, and knew the stakes for victory or defeat. Despite the results, we would do it again.

While the proof of man-made causes of the levee failures did not result in judgments against the federal government, it has improved the allocation of resources and planning for New

155. *In re Katrina Canal Breaches Litig. (MR-GO: I.H.N.C.)*, 620 F.3d 455, 465 (5th Cir. 2010).

156. *Id.* at 459.

157. *Id.* at 463–64.

158. *Id.* at 465 (quoting *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990)).

159. *Id.*

160. *Id.*

161. *In re Katrina Canal Breaches Consol. Litig. (Armstrong)*, No. 05-4182, 2013 WL 1562765, at *20 (E.D. La. Apr. 12, 2013), *appeal filed sub nom. Armstrong v. United States*, 13-30581 (5th Cir. May 20, 2013). The case was dismissed by the clerk when the appellants failed to file the trial court transcript.

Orleans's flood protections systems post-Katrina. Hurricane Katrina's storm surge was the inciting event causing breaches in the 17th Street and London Avenue Canals, and at the MR-GO and Inner-Harbor Navigation Canal, but the acts of the U.S. Army Corps of Engineers and its local sponsors made their collapse inevitable. Armed with the knowledge that our worst flood problems are man-made, and that their solutions are within our capacity for reason and understanding, we may confidently embark on the journey towards solving them.