

## Legal Sidebar

# Insurance and Climate Change: Do Governments Have a Duty to Protect Property Owners?

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Federal and private insurers are well aware that if the scientific consensus is correct that climate change will cause more frequent extreme weather events, they may be making substantially increased payments in the future. Commentary on the link between climate change and insurance has become voluminous.

One of the many insurance company concerns was recently in the news: whether government can be held liable for not putting in place adequate infrastructure—or maintaining existing infrastructure—to protect against property damage from climate-change-related extreme weather. The headline-garnering event, this past May, was the filing by Illinois insurance companies of nine proposed class actions against almost 200 Illinois municipalities. The suits alleged the municipalities' failure to improve the capacity of their storm water sewer systems and provide adequate barriers such as levees, in the face of knowledge that climate change had resulted in greater rainfall volume, intensity, and duration in Illinois than in the pre-1970 period. The particular event triggering the suits was an unusually heavy rainfall in April, 2013, alleged by the insurance companies to be reasonably foreseeable and thus not an "act of God" (for which government would have an absolute defense). As a result of the storm water systems' inability to handle the runoff, widespread property damage occurred through sewer water intrusion. The plaintiff insurance companies paid claims based on these injuries and then filed these proposed class actions as "subrogees" of the insured real property owners (allowing the insurers to assert claims for damages that their insureds could have asserted to pay for the same property injuries).

The implications of the Illinois litigation were lost on no one. If governments can be held liable for failure to adequately prepare for climate-change-caused weather events, or at least those that cause property damage, then major increases in government budgets obviously will be needed. Anticlimactically, however, the Illinois insurance companies abandoned the lawsuits two weeks after they were filed, taking a voluntary dismissal. An insurance company spokesman said only: "We believe our lawsuit brought important issues to the attention of the respective cities and counties and that our policyholders' interests will be protected by the local governments going forward."

Broadly speaking, leaving aside state law idiosyncracies, two legal theories likely to be used in seeking to impose government liability for failure to protect against climate change adequately are negligence and property rights "takings" (under federal or state constitutions). Both these theories, however, make establishing liability based on government *failure to act* an uphill climb.

Regarding negligence, a leading tort law treatise notes that "a governmental entity is less likely to be liable for nonfeasance [failure to act] than for misfeasance [acting improperly]." (Citation available from author on request.) In the takings realm, a recent decision is illustrative. In *Fromm v. Village of Lake Delton*, a city's failure to act on information that a city-owned dam was not high enough to protect plaintiff's land, leading to damage after an unusually heavy rain, was held not to state a taking claim. The court noted that it was unaware of any case where a government agency's failure to act or to perform its duties correctly had been deemed a taking.