

**HURRICANE LAURA:**  
**TRANSACTION GUIDANCE AFTER A NATURAL DISASTER**  
**FOR RESIDENTIAL AND COMMERCIAL REALTORS®**

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When a natural disaster like Hurricane Laura strikes, health and safety concerns are paramount. If a natural disaster strikes during a pending residential or commercial real estate transaction, there are numerous important issues to consider as buyers and sellers navigate completion of the transaction. This article addresses some questions raised regarding residential and commercial transactions after a natural disaster.

**1. Have closing deadlines in Purchase Agreements been suspended?**

**Short Answer:** Generally, no. Timelines and closing deadlines contained may be amended by agreement of the parties. However, the failure of parties to perform within such timeframes, or agree to amended timelines, may result in the default of a purchase agreement.

*Residential and Commercial Real Estate:*

Generally, no. Governor Edwards issued Proclamation Number 108 JBE 2020<sup>1</sup> on August 21, 2020 (the “**Governor’s Order**”). The Governor’s Order declared a statewide state of emergency due to Hurricanes Laura and Marco.<sup>2</sup> On August 28, 2020, the Louisiana Supreme Court issued an emergency order suspending all prescriptive, peremptive, and abandonment periods statewide for a period of thirty (30) days commencing from the Governor’s August 21, 2020 Order declaring a state of emergency<sup>3</sup> (the “**LASC Order**”). However, neither the Governor’s Order nor the LASC Order appear to specifically encompass closing deadlines contained in private contracts between private parties, such as purchase agreements.

Timelines and closing deadlines contained in purchase agreements represent terms of contracts negotiable between the parties to such contracts and may be amended by agreement of the parties. The failure of parties to perform within such timeframes, or agree to amended timelines, may result in the default of a purchase agreement, if not amended.<sup>4</sup>  
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<sup>1</sup> See [Proclamation Number 108 JBE 2020](#)

<sup>2</sup> These hurricanes were classified as Tropical Storm Laura and Tropical Depression 14 at the time the Governor’s Order was issued.

<sup>3</sup> See LASC Order

<sup>4</sup> See Louisiana Civil Code Article 2017.

<sup>5</sup> See also discussion of “Fortuitous Events” in Question 3.

**2. What happens to my pending purchase agreement when a natural disaster like Hurricane Laura causes damage to the property being sold?**

*Residential Real Estate:*

**Short Answer:** It largely depends upon the damage, timing and the will of the buyers and sellers. There is no “fortuitous event” paragraph in the RPA, but sometimes a Court will relieve a party of liability if a fortuitous event makes contract performance truly impossible.

The state mandated Louisiana Residential Purchase Agreement (RPA) states that the sale price of the property for sale was negotiated based on the property’s “apparent current condition.” That is, the condition of the property on the Purchase Agreement date.<sup>6</sup> Per the terms of the RPA form, the seller is responsible for maintaining the property in substantially the same or better condition as it was when the RPA was executed. Further the RPA provides for a final walkthrough before closing to insure the property is in the same or better condition as it was at the initial inspection.<sup>7 8</sup>

Therefore, the seller may be required to repair the property, depending upon the severity of the damage. Further, if the damage to the property occurs during the due diligence period, the buyer has two options: (1) terminating the Purchase Agreement, or (2) notify the seller of the desired remedies to repair the property if repairable.

If the damage occurs after the due diligence period and one party still wishes to go forward with the transaction, the considerations include:

- a. How substantially is the property damaged? If it is completely destroyed, the object of the sale may be gone, possibly giving the seller the right to withdraw from the contract.
- b. Will the legal concept of a “Fortuitous Event” or “Act of God” give either the buyer or seller the right to withdraw?
- c. Is there property insurance to repair the property? How long will the sale be delayed for repair to the property?

Louisiana courts have held that a party may be relieved of liability if a fortuitous event makes contract performance truly impossible. There is no “fortuitous event” paragraph in the RPA. However, sometimes, a Court will apply fortuitous event concepts without a specific contract provision.<sup>9</sup>

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<sup>6</sup> See RPA, lines 161-166.

<sup>7</sup> See RPA, lines 252-258.

<sup>8</sup> See RPA, lines 161-200.

<sup>9</sup> See Question 3.

*Commercial Real Estate:*

**Short Answer:** It depends.

Commercial purchase agreements often contain a “casualty” or risk of loss or damage to the property clause. This can include damage to the property caused by a flood or wind. Generally, risk of loss is placed on by the seller. The seller is often required to give notice to the buyer, and the buyer shall have the option of requiring repair of the property or terminating the contract.

**3. What about “Act of God” or “Fortuitous Events” provisions in contracts, including Purchase Agreements?**

*Residential Real Estate:*

**Short Answer:** The RPA does not contain these provisions, but courts sometimes apply the concepts.

The RPA does not include a specific contract provision requiring delay or suspension of deadlines for “Acts of God” or “Fortuitous Events.” However, in a closing, the Louisiana courts have applied these legal concepts to purchase agreements in some cases.

*Commercial Real Estate:*

**Short Answer:** It depends upon the contract language.

Many commercial purchase agreements do include specific contract provisions for a delay or suspension of deadlines for “Acts of God” or “Fortuitous Events”; however, each contract is different, and the language should be carefully examined to determine the rights and obligations of the parties.

Many contracts contain provisions specifying remedies or expanded timelines in the event that a natural disaster (or “Act of God” or “Fortuitous Event”) occurs which prohibits the parties from completing the transaction. The term “Fortuitous Event” is used interchangeably by Louisiana courts with the term “force majeure”, and is defined as an event that prevents someone from fulfilling a contract that, at the time the contract was made, could not have been reasonably foreseen. The Louisiana Civil Code articles addressing “Fortuitous Events” do not specifically suspend the performance of contracts upon the happening of a Fortuitous Event or disaster. In the absence of a specific provision in a contract changing deadlines or suspending delays for “Fortuitous Events” or “Acts of God”, deadlines generally continue to run; it is possible that the purchase agreement would be deemed expired upon the expiration of the deadline for closing, despite the occurrence of such disaster. Generally, Louisiana law does not grant purchasers in private contracts

an automatic extension of time to perform such obligations in the event of a flood or natural disaster.

**4. Are there any Louisiana cases addressing pending purchase agreements after a natural disaster?**

*Residential Real Estate:*

**Short Answer:** Yes. Below are two cases from Louisiana courts addressing the issue.

***Payne v. Hurwitz*, 978 So.2d 1000 (La. App. 1 Cir. 2008)**

In *Payne v. Hurwitz*, the plaintiffs and defendants signed a purchase agreement on August 22, 2005 for the price of \$241,500.00 that provided for a closing date of September 26, 2005, or sooner. On August 29, 2005, Hurricane Katrina made landfall, causing substantial roof damage from the hurricane winds and a fallen tree, as well as water damage to the sheetrock, windows, and other interior fixtures. The costs of repair were estimated at approximately \$60,000. After the storm, the seller refused to sell the home to the buyers, and the buyer's filed suit for specific performance of the purchase agreement. The seller alleged that the agreement was unenforceable due to the hurricane, and that his performance was impossible due to *force majeure*.

The court held in favor of the buyers and ordered the seller to sell the property for the price in the purchase agreement. The court stated that the seller bore the risk of any damage to the home pending the sale and had the legal duty to restore the home to its expected condition prior to delivery to the buyers. Although the court agreed that Hurricane Katrina was a *force majeure*, in order to relieve the seller of liability, a fortuitous event must make the performance truly impossible. The fact that performance has been made more difficult or more burdensome by a fortuitous event does not release parties to a contract from their duty to perform. The fortuitous event must pose an "insurmountable obstacle" in order to excuse nonperformance.

***Zeigler v. Pansano* (not designated for publication), No. 2008-CA-1495 (La. App. 1 Cir. 2009)**

In *Ziegler v. Pansano*, No. 2008-CA-1495 (La. App. 1 Cir. 2009), the buyer and seller entered into a purchase agreement on August 10, 2005 for the sum of \$158,000. The sale was contingent on the sale of the buyer's property, but the purchase agreement did not contain a contingency clause. The closing date was scheduled for September 12, 2005. In the meantime, Hurricane Katrina struck; neither property was damaged by the storm.

There were, however, other obstacles to closing on September 12, 2005: the home did not have a termite certificate (which was required by the purchase agreement), there were liens on the property, and the bank was still closed due to Hurricane Katrina. The buyer failed to appear for the closing on September 12, and the seller unilaterally cancelled the purchase

agreement the next day. The buyer then filed suit seeking specific performance; the seller filed a reconventional demand for breach of purchase agreement.

The buyer alleged that she was not in default of the purchase agreement because Hurricane Katrina made performance of the contract impossible. The court affirmed the reasoning in *Payne* that Hurricane Katrina was a *force majeure* but had not rendered performance of the purchase agreement impossible. The court held that what ultimately prevented the parties from closing was the failure to include a predication clause in the purchase agreement. The court found the buyer was in default of the purchase agreement, that the seller acted in good faith in cancelling the purchase agreement when the closing date came and went without the seller receiving anything in writing regarding extension of the closing date, and that the seller was entitled to retain the deposit and offer the property for sale to third parties. The seller was also awarded \$40,000.00 in attorneys' fees.

**5. What are the buyer's and seller's obligations if there are no utilities to the property being sold?**

*Residential Real Estate:*

The RPA provides the seller must provide utilities for the due diligence period and the final walkthrough of the property. The seller must also provide immediate access to the property.<sup>10</sup> If the utilities are not provided or available the deadline for the due diligence period is extended until the utilities are provided.

*Commercial Real Estate:*

For commercial properties, this will be very contract specific as to whether loss of utilities will allow for any delay under the circumstances. The specific contract should be examined carefully.

**6. Will a natural disaster like Hurricane Laura, if it temporarily prevents performance of contract (for example if the Courthouses are closed, the Act of Sale cannot be recorded, or the title review cannot be conducted) extend the deadlines in the contract?**

*Residential and Commercial Real Estate:*

**Short Answer:** Maybe. Some buyers and sellers may be able to close in some Parishes. In other Parishes, if for example the Clerk of Court is closed for an extended period of time, this may not be possible.

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<sup>10</sup> See RPA, lines 175-180.

The Civil Code does not directly address when a “fortuitous events” suspends the performance of contracts, but the Attorney General, following Hurricanes Katrina and Rita, issued an opinion to the effect that:

"As a general rule when fortuitous events ... prevent timely performance of an obligation but do not make that performance impossible in an absolute sense, performance may be suspended for as long as the fortuitous event prevents it; an obligee must give reasonable written notice of the intention to demand performance after the fortuitous event to trigger abatement of the suspensive period."<sup>11</sup>

Thus, the argument is that the natural disaster constitutes a fortuitous event sufficient to temporarily suspend a buyer’s performance under the terms of an otherwise valid purchase agreement. Upon the termination of the impediment, it is arguable the law would require the obligation to be satisfied as originally contemplated by the parties. This analysis and outcome of the delay requested will depend upon the facts of each transaction. Some buyers and sellers may be able to close in some Parishes. In other Parishes, if for example the Clerk of Court is closed for an extended period of time, this may not be possible.

Further, Louisiana law contains provisions such as Louisiana Civil Code Articles 2054 and 2055 that address “equity” in contracts, which is based on the principles “that no one is allowed to enrich himself unjustly at the expense of another.” These types of principles might also be applied by a Court in determining whether the performance of a contract is due, suspended, or impossible.

**7. If Hurricane Laura destroyed my property, does my lender still have a mortgage?**

*Residential and Commercial Real Estate:*

**Short Answer:** Generally, yes.

Louisiana Civil Code Article 3319 states that a “mortgage is extinguished ..., [by] the extinction or destruction of the thing mortgaged.” However, a mortgage constitutes a secured interest in all immovable property which it describes. Mortgaged property usually consists of not only one’s property and other related structures, but also the land beneath them. In such cases, the destruction of one’s property has no effect upon the mortgage over the land upon which the home was formerly located. The mortgage or security interest may also encumber the insurance proceeds of the destroyed or damaged property.

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<sup>11</sup> See Op. Atty. Gen., No. 05-0359 (November 10, 2005).

**8. Do I have to continue paying my mortgage note if my property is destroyed or if I am temporarily displaced from my property due to Hurricane Laura?**

*Residential and Commercial Real Estate:*

**Short Answer:** Generally, yes.

The fact that you have been temporarily displaced from your property does not generally release you from making mortgage payments. Destruction of the residential or commercial property would generally have no effect upon the owner's underlying debt to its mortgage holder nor the promissory note evidencing its debt, and thus payments to the mortgage holder would still be due.

**9. Do I have a right to suspend or delay my mortgage payments temporarily if my property has become uninhabitable due to Hurricane Laura?**

*Residential and Commercial Real Estate:*

**Short Answer:** Generally, no.

While mortgage payments must technically be made during the time which your home is either uninhabitable or during the time which you have been forced to evacuate your home, many mortgage companies have begun granting temporary suspensions or moratoriums on mortgage payments to those facing such difficult circumstances.

Any individual who is confronted with such hardships should contact his or her mortgage company directly to inquire into the possibility that the mortgage payments be temporarily suspended.

Any suspension agreed to by one's mortgage company will likely mean that the suspended payments will simply have to be paid back at a later date, either once the individual is permitted to return to his or her home, or possibly in a lump sum payment at the end of the loan.

**10. With respect to property damaged by Hurricane Laura, is a disclosure required before those properties can be sold?**

*Residential:*

**Short Answer:** If the property was flooded during the Hurricane, yes.

The state mandated Residential Property Disclosure form provides for disclosure regarding whether any structure on the property has ever flooded. Further, the Residential Property

Disclosure form also requires disclosures regarding “mold/mildew” and “toxic mold” in Section 6.

Homeowners are required to update the Residential Property Disclosure form if the owner subsequently learns of any “known defects”. The Louisiana Residential Property Disclosure Act defines a “known defect” as a “condition found within the property that was actually known by the seller” and that has a substantial adverse effect on the value of the property, significantly impairs the health or safety of future occupants of the property, or, if not repaired, significantly shortens the expected normal life of the premises. La. R.S. § 9:3196(1). Homeowners will be required to disclose the flooding and any mold on the Residential Property Disclosure.

*Commercial Real Estate:*

There is no state mandated commercial real estate disclosure form. However, most commercial real estate contracts require due diligence disclosure which will include disclosure of this information.

Some state and federal programs and agencies may have requirements or recommendations regarding disclosure, remediation and mitigating flood risks.

**11. Do property owners need a mold remediation certificate and/or pest inspection certificate?**

*Residential and Commercial Real Estate:*

**Short Answer:** No, but some insurance companies or legal services may require sampling for evidence, and it is recommended to check with your insurance policy and/or consult with your adjuster to determine what is necessary.

No. There are no state or federal mandated limits have been set for mold or mold spores, so sampling cannot be used to check a home’s compliance with state or federal mold standards. The United States Environmental Protection Agency (EPA) recommends that homeowners consider surface sampling to determine if an area has been adequately cleaned or remediated of any possible mold after a flood.<sup>12</sup>

However, the United States Department of Housing and Urban Development (HUD) has indicated that mold testing is not usually needed, even for a flood-damaged home.<sup>13</sup> Some insurance companies and legal services, however, may require sampling for evidence. It is recommended that you review your insurance policy and/or consult with your adjuster to determine whether to conduct mold sampling. HUD recommends that if a homeowner

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<sup>12</sup> “A Brief Guide to Mold, Moisture, and Your Home”, U.S. Environmental Protection Agency, Office of Air and Radiation, Indoor Environments Division, EPA 402-K-02-003 (Sept. 2010).

<sup>13</sup> Claudette Hanks Reichel, Ed.D., “Disaster Recovery: Mold Removal Guidelines For Your Flooded Home”, Louisiana State University Agricultural Center.



must test for mold, to seek a licensed mold remediation contractor with special training and equipment.<sup>14</sup> A licensed mold remediation contractor should provide the homeowner with certification of remediation.

Additionally, Louisiana law requires licensees to deliver a mold informational pamphlet to buyers.<sup>15</sup> The EPA is the source of the mold informational pamphlet.

**12. Will the parties be excused from performing their obligations set forth in a lease due to a natural disaster like Hurricane Laura, if they are unable to occupy the property?**

*Residential and Commercial Real Estate:*

**Short Answer:** This depends on the lease contract.

Generally, the landlord warrants that the tenant will be able to occupy the property. If this property is destroyed or uninhabitable, the tenant does not have to pay rent; however, this is specific to each lease. The lease should be carefully reviewed, including the Force Majeure, Casualty, and Condemnation/Eminent Domain provisions. A force majeure clause generally permits parties to suspend or terminate their obligations due to certain circumstances beyond their reasonable control. A casualty clause usually covers fire, flood, explosions or other similar occurrences that degrade the physical or structural integrity of the building. Also, the lease may address condemnation or eminent domain and may provide termination or rent abatement rights. Depending on the language, these provisions can give the landlord or tenant certain rights to excuse, suspend or terminate obligations or services.

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<sup>14</sup> *Id.*

<sup>15</sup> La. R.S. § 37:1470.

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This article provides some additional information regarding handling security deposits after a natural disaster like Hurricane Laura.

**1. I am managing property that was damaged by Hurricane Laura. What steps must I take for settling security deposits for tenants?**

**Short Answer:** The contract language of each lease is different and will determine what happens to the security deposit under the circumstances. Louisiana law sets forth the general rules on security deposits explained below.

**A. General Rules for Residential Deposits**

Under Louisiana law, a tenant has a general obligation to return the leased property at the end of the lease in a condition that is the same as it was when leased property was delivered to the tenant, except for normal wear and tear. Louisiana law allows a landlord to keep all or any portion of a security deposit reasonably necessary to remedy “unreasonable wear” to the leased property.<sup>1</sup>

Louisiana law requires the landlord to return deposits within one month after the end of the lease, provided the tenant has fulfilled the lease obligations and left a forwarding address.<sup>2</sup> If any part of the deposit is retained, the landlord must send the tenant an itemized list of deductions and any remaining balance within one month.<sup>3</sup> However, this obligation does not apply when the tenant abandons the premises, either without giving notice as required or prior to the termination of the lease.<sup>4</sup>

If the tenant is in compliance with the lease agreement, and has not improperly abandoned the premises, then if the landlord retains any portion of the security deposit, the landlord is required by law to forward to the tenant the itemized list of deductions including the reasons the amount(s) are retained. The landlord is required to forward this itemized statement within one month after the date the tenancy terminates.<sup>5</sup> If the landlord does not

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<sup>1</sup> La. R.S. § 9:3251.

<sup>2</sup> La. R.S. § 9:3251(A).

<sup>3</sup> *Id.*

<sup>4</sup> La. R.S. § 9:3251.

<sup>5</sup> La. R.S. § 9:3251.

provide the itemized statement within the thirty-day timeframe, the tenant by law has the right to recover actual damages or \$200, whichever is greater plus attorney fees and costs.<sup>6</sup>

Practically speaking, it will likely be difficult for a landlord or property manager to distinguish between any damage caused by the tenant, if the property has been substantially damaged by a natural disaster like Hurricane Laura.

Further, the lease may contain a Force Majeure, Casualty, or Condemnation/Eminent Domain provision which may give the landlord or tenant certain rights to excuse, suspend or terminate obligations or services. The consequences of total or partial destruction of the leased premises will vary depending on the lease agreement terms. The requirement to return the tenant's deposit may be included if the property is totally or partially destroyed. Each lease is different and will have to be reviewed to determine the rights and obligations of the parties.

## **B. Commercial Deposits**

The state law deposit requirements cited above do not apply to commercial property. Some commercial leases include requirements for return of deposit similar to the rules cited above for residential property. The lease itself may also be terminated upon partial destruction of the leased premises and therefor the deposit would be required to be returned to the tenant. Each lease is different and will have to be reviewed to determine the rights and obligations of the parties.

### **2. What must I do with a buyer's deposit being held in escrow?**

**Short Answer:** It depends on the specific circumstances, but the Louisiana Real Estate Commission (LREC) Rules and Regulations will apply.

#### *Residential and Commercial*

The LREC Rules and Regulations require funds received in real estate sales be deposited in a sales escrow checking account of the listing or managing broker, unless all parties having an interest in the funds have agreed otherwise in writing. The LREC Rules and Regulations authorize disbursement of funds held in a sales escrow checking account under the following circumstances:

1. upon the mutual written consent of all parties having an interest in the funds;
2. upon court order;
3. to deposit funds into the registry of the court in a concursus proceeding;

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<sup>6</sup> La. R.S. § 9:3252.

4. to disburse funds upon a reasonable interpretation of the contract that authorizes the broker to hold such funds, provided that the disbursement is not made until 10 days after the broker has notified all parties and licensees in writing;
5. to return the funds to a buyer at the time of closing;
6. to cover the payment of service charges on sales escrow checking accounts, rental trust checking accounts, and security deposit trust checking accounts;
7. upon approval by the commission in connection with the sale or acquisition of a licensed entity;
8. to comply with the provisions of R.S. 9:3251 or any other state or federal statute governing the transfer of rents, security deposits or other escrow funds.

LREC Rules and Regulations, § 2715.

If a dispute exists as to the return of the deposit, LREC Rules and Regulations, § 2901 applies. This rule provides that when a dispute exists in a real estate transaction regarding the ownership or entitlement to funds held in a sales escrow checking account, the broker holding the funds shall send written notice to all parties and licensees involved in the transaction. Within 60 days of the scheduled closing date or knowledge that a dispute exists, whichever occurs first, the broker shall do one of the following:

1. disburse the funds upon the written and mutual consent of all of the parties involved;
2. disburse the funds upon a reasonable interpretation of the contract that authorizes the broker to hold the funds. Disbursement may not occur until 10 days after the broker has sent written notice to all parties and licensees;
3. place the funds into the registry of any court of competent jurisdiction and proper venue through a concursus proceeding;
4. disburse the funds upon the order of a court of competent jurisdiction.

LREC Rules and Regulations, § 2901.

If you cannot locate the buyer, you could still place the deposit into the registry of the court in a concursus proceeding to let the court address the return of the deposit. However,

access to the courthouse may be difficult and this procedure may be very delayed after a natural disaster like Hurricane Laura.

Otherwise, LREC Rules and Regulations, § 2901 applies, which will require the broker to hold the deposit funds in the sales escrow checking account. The broker is also generally required to notify all parties and licensees in writing prior to disbursement of the funds.

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