

TUNE IN TO THE
SOUND OF DEMOCRACY

Justice Talking Radio Transcript

Hurricane Katrina's Blow to the Justice System – Airdate Oct. 24, 2005

Every aspect of New Orleans life was affected by Hurricane Katrina, including the justice system. Evidence has been destroyed, legal documents have been damaged, courthouses were flooded and lawyers and judges have left the city. How can the justice system get back to normal when the city has been so profoundly devastated? And what lawsuits will result from the mayhem of this massive disaster?

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MARGOT ADLER: From NPR, this is Justice Talking.

UNIDENTIFIED MALE: It's quite unfortunate that litigation has become necessary here to enforce the contractual rights of these tens of thousands of homeowners in the Gulf Coast.

UNIDENTIFIED FEMALE: It's just shocking. I mean, it's horrible to see people who are either uninsured or underinsured. But it's important also to recognize that an insurance policy is a contract, and our companies will honor the contracts, but they cannot be forced to pay losses that those policies don't cover.

UNIDENTIFIED FEMALE: I have never even thought to imagine what it would be like to live somewhere where there is no criminal justice system. I don't have to imagine anymore.

MARGOT ADLER: Coming up, how Hurricane Katrina devastated the New Orleans legal system, and the wave of lawsuits that are in the making. I'm Margot Adler, stay tuned.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Every aspect of New Orleans life was affected by Hurricane Katrina, including its justice system. Courthouses were flooded; some may never open their doors again. Judges, lawyers, witnesses and defendants have fled the city. Files and evidence are missing or destroyed. For over a month, the New Orleans justice system took a back seat to the city's basic need for survival. But now that the city is trying to restore its infrastructure, the justice system is slowly beginning to come back to life. In the first part of our show, we'll look at how the justice system in New Orleans is getting back to normal after being so profoundly devastated. Then we'll look at the lawsuits that may result from the mayhem of Hurricane Katrina.

To get a picture of what happened to the criminal justice system when the storm hit, and where it stands now, I called Mike Perlstein. Mike is a reporter with the Times-Picayune, where he has covered the police and the criminal justice system in New Orleans for more than twelve years. I reached him in his office. The newsroom has just reopened after being closed since the hurricane hit in August.

Now, take us back to when the hurricane hit. What happened to the criminal justice system in New Orleans?

MIKE PERLSTEIN: Well the criminal justice system, like the rest of the city, was basically flooded and swept away by the storm. The criminal court building flooded. The all-important evidence room that was in the basement of that building was completely under water. The police department went into scramble mode, into a virtual communications blackout.

MARGOT ADLER: But some police left, right? I mean, there are all these stories of over 200. Was that true that 200 officers deserted the force?

MIKE PERLSTEIN: Right. The final tally on that is 249. Officers are going to have to go before a disciplinary panel on an allegation of deserting their posts. Now, what we are told is that a large number of these officers had justification, but of course they do need to sort it out.

MARGOT ADLER: In other words, that their homes were destroyed and their family...

MIKE PERLSTEIN: Their homes were destroyed. They might have been out of town and couldn't get back into the city. And then officers legitimately did turn tail and truly deserted. But the final tally on that is only—it's going to come about a month or so after these hearings.

MARGOT ADLER: Let's get back to the courts for a minute. How long did it take for the justice system to move from the chaos that you describe to whatever you call it now. I mean, what is it like now? Are courts back in session?

MIKE PERLSTEIN: Well it's actually been quite interesting. It took about a week for at least the most rudimentary of communications to get up and running. With the court system and jail system as we know it here demolished, state officials, the state Department of Corrections, and officials from various state prisons came down and set up a temporary jail and court facility in the Amtrak train station.

MARGOT ADLER: Now, besides court rooms you obviously need lawyers. You need evidence. You need police records. Is it feasible that state and local courts will have to throw out cases because they don't have what they need to make a case?

MIKE PERLSTEIN: Well, the cases that have been made since the storm—and a lot of those are fairly minor—they are able to, you know, at least keep a paper trail of those cases, post-Katrina. Pre-Katrina, there's going to be quite a few issues, and I had a chance to speak with some defense attorneys who are already filing motions. Some defendants had trial dates that have come and gone, washed out by the storm, and attorneys themselves who had to evacuate and scatter have now, you know, regrouped, recovered their case files, and have started filing motions to have their defendants released. So, some of these challenges are quite significant. You know, the laws don't change just because the city got wiped out by a hurricane.

MARGOT ADLER: Well, Mike, you've painted an incredibly vivid picture. Thank you so much for talking with me.

MIKE PERLSTEIN: Well thanks for having me.

MARGOT ADLER: Mike Perlstein covers courts for the Times-Picayune in New Orleans.

MARGOT ADLER: Orleans Parish Prison is made up of ten different buildings, and houses one of the largest inmate populations in the nation. It sits in a sunken area of New Orleans, about two miles from the 17th Street Canal, where the levee was breached after Hurricane Katrina. Up to seven feet of water surrounded parts of the prison after the storm, leaving more than 7,000 inmates, guards, and sheriff's deputies stranded. Rumors spread of riots, guards leaving their posts, and inmates escaping or drowning. Questions remain over what really happened in Orleans Parish Prison during and after Hurricane Katrina, from how inmates were handled to whether all of them have been tracked down. Eve Trough reports.

EVE TROUGH: The Broad Street overpass above Orleans Parish Prison is still littered with water bottles, soiled towels and empty pouches of military rations, traces of the thousands of male and female inmates who waited here to be bused out of the city to 38 prisons

around the state. The massive operation began Tuesday, August 30th. It took dozens of borrowed boats and 200 buses. Richard Stalder, secretary of the Louisiana Department of Public Safety and Corrections, directed the evacuation.

RICHARD STALDER: We mobilized a number of staff from around the state and began a very laborious process of actually moving the people from the ten different jail facilities that comprise the Orleans Parish Prison by boat, around to the interstate, where we were staged, and we actually built a fifty foot scaffold from the Broad Street overpass down to the interstate, and then our buses would come up to the edge of the water and park. We'd load 45 to 50 per bus, and continued until we were done with that process Thursday night, Friday morning.

EVE TROUGH: Prison guards stood watch as inmates spent the night on the overpass. From there, they could see fellow prisoners still waiting to be rescued, waving shirts set on fire and help signs from broken bulletproof windows. Orleans Parish Sheriff Marlon Gusman says he didn't empty the prisons sooner because the mayor's order to evacuate on Sunday, August 28th, came too late to move such a large group, which included elderly and disabled inmates. Instead, prison staff tested their generators and prepared to ride it out. Inmates say this is when neglect began.

JAMES WILSON: They took the TVs off. They took the telephones off because they didn't want us to call our people. And the water started rising and we was about to drown, 160 people in a forty-man dormitory. Waste everywhere, toilets running all over... It took us like three days to get food and water. They just like abandoned us, really.

EVE TROUGH: James Wilson, on the telephone from Rapides Parish Prison, where he's been held since the evacuation of Orleans Parish.

Cassandra Scott was in a women's unit in Orleans Parish for a missed court date. She was evacuated to Angola Men's Penitentiary, and later released to a Baton Rouge shelter.

CASSANDRA SCOTT: They said three days without any food or any water, any lights, no air, no nothing. Our deputies then, the ones that stayed with us, they had food and water, but would not share any. We were drinking water out of trash cans; any means of survival.

EVE TROUGH: Sheriff Gusman says prisoners were allowed access to phones and television until flood waters knocked out the generators, and that the prison had plenty of food and water. He admits some guards did walk off the job, but says others filled in, and that staff and prisoners alike had to use pipes and mop handles to break windows for fresh air. He says all inmates were taken to higher floors. None were left to rising waters, and none escaped.

MARLON GUSMAN: Let's get at the real issue. The real issue is whether or not there was anybody who didn't make it out, and that didn't happen. Everybody made it out.

EVE TROUGH: But the international humanitarian organization Human Rights Watch has compared a list nine inches thick of those booked in Orleans Parish Prison just before Katrina hit with lists of prisoners who were evacuated or later released by the Department of Corrections. Human Rights Watch investigator Corinne Carey.

CORINNE CAREY: At this point there are 329 inmates that are unaccounted for. 118 of those inmates were listed as being in a building called Templeman III. You know, people from facilities all over Louisiana who haven't had a chance to talk to each other after the storm say exactly the same things.

EVE TROUGH: Sheriff Marlon Gusman.

MARLON GUSMAN: Well I guess they got that from people who are criminals, and when you talk to criminals, I guess, that's part of what you get, some untruths.

EVE TROUGH: The issue of whether prisoners are really missing will take time to sort out. Sheriff Gusman says the allegedly 300-plus missing inmates could be due to prisoners making up lesser charges and using false names. Meanwhile, thousands of evacuated prisoners are being held almost two months later with no dates for formal hearings or trials. Many are in on minor charges, which would normally have kept them in jail just a few days. Corinne Carey.

CORINNE CAREY: So you've got people there for public drunkenness; sleeping on a park bench; disorderly conduct; traffic violations; technical, probation and parole violations; and one man was even in there for reading Tarot cards without a license.

EVE TROUGH: Phyllis Mann, a leader in the Louisiana Association of Criminal Defense Attorneys, has been working with a team of lawyers to interview more than 8,000 inmates evacuated from Orleans Parish and other prisons in the area.

PHYLLIS MANN: We then check that against the Sheriff's booking records to verify that, you know, this is the person we think they are, and this is what they're charged with, and this is what they told us about their case and it's matching up. You know, there are ten people here in my office who have just been doing data entry non-stop.

EVE TROUGH: Most prison records from Orleans Parish were lost. The Clerk of Courts building was flooded, and the prison's computer network largely destroyed. Secretary Stalder says getting evacuated inmates back into the system and providing for their needs has been a massive undertaking.

RICHARD STALDER: They did not come to us with their medical file in one hand and their classification file in the other hand. They did not come to us in many cases with any form of identification. The information that you ask about, I assume, was under several feet of water.

EVE TROUGH: Mann says she's been shocked at how long it's taken to get lawyers, judges, sheriffs and the Department of Corrections organized and moving.

PHYLLIS MANN: I'm really having trouble describing to people how destroyed our system is. I had never even thought to imagine what it would be like to live somewhere where there [is] no criminal justice system? I don't have to imagine anymore. We haven't had one for a month, and that, that is what we've got to have.

EVE TROUGH: As of mid-October, more than 700 evacuated prisoners charged with minor crimes have been released. Sheriff Gusman has cleaned up and re-opened the Orleans Parish Prison house of detention building to hold new arrests. The Louisiana State Supreme Court has rejected an emergency motion to begin hearings on evacuated inmates, and a number of organizations, including Human Rights Watch, the American Civil Liberties Union and the NAACP Legal Defense Fund are calling for a federal investigation into what happened at Orleans Parish Prison. For Justice Talking, I'm Eve Trough.

MARGOT ADLER: Coming up on Justice Talking, a federal judge tells us what it was like to move the U.S. Court of Appeals for the Fifth Circuit to Houston, Texas. And we'll talk to a lawyer who won big going after the tobacco industry. He is now planning to sue insurance companies on behalf of storm victims. Don't go away.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Today we're looking at what has become of the legal system of New Orleans post-Hurricane Katrina. The U.S. Court of Appeals for the Fifth Circuit used to be in New Orleans. The court was forced to relocate. It moved to Houston, Texas, where it is now up and running. I called Judge Carolyn King, who is the chief judge of the Fifth Circuit Court of Appeals, to find out what it's like to move the entire operations of a court to a new state. Welcome Judge King.

JUDGE CAROLYN KING: Thank you.

MARGOT ADLER: The Fifth Circuit's jurisdiction covers Texas, Louisiana and Mississippi. First of all, tell us what your court does.

JUDGE CAROLYN KING: We process appeals from the district courts in those three states, and administrative appeals from federal agencies.

MARGOT ADLER: So, it's a huge task, I would imagine, to relocate an entire appeals court to a new state. Why don't you describe what had to happen.

JUDGE CAROLYN KING: Well the first thing that had to happen is we had to plan for it. And you can plan for something like this.

MARGOT ADLER: You mean in advance, before you even knew the hurricane was coming?

JUDGE CAROLYN KING: Absolutely. Beginning shortly after 9/11, the federal court system developed a plan for each court to have in place a continuity of operations plan, which is known as a COOP in the lingo. And we drew on the experience, interestingly enough, of the state court system in Houston, when Tropical Storm Allison descended on the city and poured 36 inches of rain on Houston in 24 hours. The state court system here was severely flooded, flooded virtually out of existence. So the federal court system drew on the experience of the Texas State Court system, here in Houston, to formulate continuity of operations plans to put into effect in the federal courts all over the country. We in the Fifth Circuit took the lead in that because we are, of course, in a hurricane-prone area. The Court of Appeals had a COOP, a continuity of operations plan that we drafted more than two years ago, and that we have refined and that we had practiced, and we were in a position to execute when Hurricane Katrina hit New Orleans.

MARGOT ADLER: And all your files were alright? None of them got flooded? You got them all out in time?

JUDGE CAROLYN KING: Right. Actually, we were blessed in that our courthouse did not take on any ground water. We had roof leaks but it didn't take on any ground water. And we didn't get our files out in time; our files remained there, but they were not damaged. What we did do is we backed up our computer system. We did that every day to locations in Baton Rouge and Shreveport.

MARGOT ADLER: Now, as far as the staff, how many people work for the Fifth Circuit?

JUDGE CAROLYN KING: About 225, two hundred of them being in New Orleans, and the others being librarians that are scattered throughout the circuit.

MARGOT ADLER: And the two hundred, have they all relocated to Houston?

JUDGE CAROLYN KING: About 120 of them have relocated to Houston, and many of the others are operating from their homes with laptop computers.

MARGOT ADLER: Mm-hmm. So, in the future, is the court planning to move back to New Orleans?

JUDGE CAROLYN KING: Oh yes, absolutely. When the city is fully habitable we will move back. We are hopeful that we will be able to move at least part of our operations back there at the end of December.

MARGOT ADLER: Now, how did the relocation to Houston affect your ability to hear cases?

JUDGE CAROLYN KING: We had to cancel the cases that we were scheduled to hear right after the storm. But since then we have maintained our regular schedule by hearing cases here in Houston and in Austin.

MARGOT ADLER: Are things back to normal now, so to speak?

JUDGE CAROLYN KING: Well I wouldn't say they were back to normal but I would say that we are...our efficiency is improving daily. Don't forget we had to shut down here in Houston for Hurricane Rita. One thing you find out in something like this is that you have some real heroes and heroines on your staff. People who just go the extra mile to make things work, and we've really got a lot of them, for which I'm just very grateful. All of us are grateful.

MARGOT ADLER: Judge King, thank you for taking the time to talk with me today from Houston, and good luck in getting things back on track.

JUDGE CAROLYN KING: Well thank you.

MARGOT ADLER: Judge Carolyn King is the chief judge of the U.S. Court of Appeals for the Fifth Circuit, which has relocated from New Orleans to Houston.

MARGOT ADLER: All of the legal implications of Hurricane Katrina are not yet clear. But one thing is certain: lawsuits are coming. Joining me to talk about the first of many lawsuits against the insurance industry is Richard Scruggs, an attorney who went after the tobacco industry and helped win a 250 billion dollar settlement a few years ago. He is also one of the victims of Hurricane Katrina. His house in Pascagoula, Mississippi was destroyed by the hurricane. His new target is the insurance companies who say they aren't responsible for paying policy holders for water damage caused by the hurricane. They say insurance policies don't cover flood damage, and it's up to homeowners to buy additional flood insurance offered by the federal government. Also with me is Julie Rochman, senior vice president for public affairs at the American Insurance Association, a national organization that represents over 435 major insurance companies. Welcome both of you.

JULIE ROCHMAN: Thank you.

RICHARD SCRUGGS: Hey, thank you.

MARGOT ADLER: Dick, you've recently filed a lawsuit on behalf of Paul and Julie Leonard, a family in your hometown of Pascagoula. Tell us about the case and what they're facing.

RICHARD SCRUGGS: It's quite unfortunate that litigation has become necessary here to enforce the contractual rights of these tens of thousands of homeowners on the Gulf

Coast, who are being unjustly denied coverage for special hurricane coverage that they bought and paid for and were led to believe that they had. Paul and Julie Leonard, Paul is a police lieutenant there who was on duty throughout the storm. They're long-time residents of the Gulf Coast, and their home was devastated by Hurricane Katrina and they were denied coverage without even the benefit of an adjustor coming by. Apparently it was a drive-through or satellite adjustment that completely denied coverage to them. And it's only as a last resort that I'm recommending that anybody resort to litigation—only when it becomes absolutely necessary, as it seems to be here.

MARGOT ADLER: But, but let me ask you, this is one case. You've been retained by thousands of other people. Is this a class action lawsuit in the making?

RICHARD SCRUGGS: We do not intend to bring this as a class action at the present time, although our thinking may change. We are going to try to be creative, inventive, and successful in our approach to this litigation in ways that Ms. Rochman's client has not yet appreciated or anticipated.

MARGOT ADLER: Julie, what do you think of this lawsuit?

JULIE ROCHMAN: Well, I think inventive and creative are two very important words, because what Mr. Scruggs is doing is he's looking very creatively to invent coverage where there is none. I think it's important for people to understand that an insurance policy's a contract. And while everybody believes what happened to the individuals that lost their homes and/or their businesses along the Gulf Coast is, it's just shocking... I mean, it's horrible to see people who are either uninsured or underinsured, but it's important also to recognize that an insurance policy is a contract. And our companies will honor the contracts, but they cannot be forced to pay, especially not by litigation that rewrites contracts wholly, cannot be forced to pay losses that those policies don't cover.

Mr. Scruggs mentioned a special hurricane coverage. We've talked to the insurance regulators, who by the way in every state approve our policy forms for homeowners, and not one of them is aware of any special hurricane endorsement or whatever Mr. Scruggs has called them. They just don't exist. What there is, in each policy, is a very clear set of exclusions for what we call perils or risks that aren't covered, and flood is one of those things.

MARGOT ADLER: And why don't they cover floods?

JULIE ROCHMAN: Well, again, generally, historically we don't because the only people who buy flood insurance are the people who live in flood plains, and an important underlying factor for insurance is you have to be able to spread risk, and if you can't spread the risk, you can't insure it.

MARGOT ADLER: Dick, many of our listeners have never faced any kind of insurance dilemma. So, does this come down to a fight over what kind of water caused property damage, flood or storm surge, and, and can you explain the difference here?

RICHARD SCRUGGS: I'll do my best. Noah had a flood. This was not Flood Katrina, this was Hurricane Katrina. Perhaps Ms. Rochman is not familiar with the policy endorsements that are required on all coastal residents' homeowners' policies that are called hurricane endorsement or hurricane deductible endorsement, which define hurricane by referring you to the National Weather Service's definition of hurricane. That definition, interestingly, defines it by examples, and one of the leading examples, the first or second one, is what's called storm surge. Storm surge is what hurricanes have. Flood is what Noah had. And quite interestingly, the National Flood Insurance Program, that is administered interestingly by FEMA and sold by Ms. Rochman's members, defines flood that way as well.

MARGOT ADLER: Now Julie, I assume you don't agree, but, if there wasn't a hurricane, there wouldn't have been a storm surge, right?

JULIE ROCHMAN: That's true, but what Mr. Scruggs is neglecting to mention is the two policies that we're selling. One is written by the National Flood Insurance Program. Their language is their language and we have no control over that because it's not our coverage. And yes, our language differs from place to place, but a hurricane deductible is not about coverage. It is about how much loss you would retain in the event of damage to your home. But the way I like to think about it, and I'm not an attorney, is that water from the ground is not covered. That's flood, and I don't know, I can't argue Biblical history, but rising water is rising water. Wind-driven rain, in other words, if the corner of your roof blows off and rain gets in to your attic or your second floor, that's what homeowners' insurance covers. It covers water that essentially comes from the sky. And water that's on the ground, surface water, which I think is the term that's used a lot in these policies, is not covered, and that's very clear, and it is written in big, bold print in all these policies. Unfortunately, the real problem is that a lot of people, and I'm going to guess most of your listeners, do not read their insurance policies until they have to file a claim. We always urge people to ask questions when they buy an insurance policy to make sure they are very clear on the terms and conditions, and if they're not clear, to keep asking questions until they're satisfied, because this language is very plain. We don't cover flood.

MARGOT ADLER: You both mentioned that flood insurance was only available through the Federal Emergency Management Agency, or FEMA. First of all, Julie, why is the federal government in the insurance business to begin with?

JULIE ROCHMAN: It's a good question. The reason is because when we have uninsurable risks in the private marketplace, and that could include things like flood or war, the government often steps in. We have a Federal Riot Reinsurance Act that covers civil unrest. We have crop insurance. There are actually several federal government programs that touch on insurance for things that are really wholly uninsurable in the private marketplace, and flood is one, again, because we can't really spread the risk. Floods are predictable and there is a federal government role in preventing floods, because of the Corps of Engineers and other things that the government does that can influence flood.

There's a strong mitigation aspect or loss control aspect to the flood program, which I think is a wonderful thing. But, the federal government is involved because, again, the people who buy flood insurance are the ones who have regular flooding.

MARGOT ADLER: Going on, Mississippi's Attorney General Jim Hood has also filed a lawsuit against a number of big insurance companies. Dick, what's the difference between your case and what the Attorney General is doing?

RICHARD SCRUGGS: The Attorney General is seeking to get more or less a declaratory judgment, that is a judicial declaration that the policies that Ms. Rochman, Julie, if I might, are defending now, are ambiguous and/or clear to the extent that they do indeed, because the special hurricane deductible endorsement is extracted from coastal homeowners is a condition of getting their homeowners' policy, gives them hurricane coverage. He's not seeking money. He's seeking just a court order saying that these contracts should be interpreted favorably to the homeowners for various reasons. That's one of the elements of our case. But we're also seeking to recover the face amount, the full amount, of the policies that should apply here to cover the losses that these tens of thousands of people, who will otherwise be forced to file bankruptcy who never would've considered even thinking about bankruptcy, will have to file.

MARGOT ADLER: So Julie, you're going to have to, or your industry is going to have to fight an attorney general and individual lawyers. How are you going to do both?

JULIE ROCHMAN: Well they're working very closely. I think that Attorney General Hood and Mr. Scruggs—or, if you're going to call me Julie, I'm going to call you Dickie—but Attorney General Hood and Dickie are working very closely together. Obviously these suits have a lot in common. The language is very similar, and basically what they amount to is an attempt to wholesale rewrite insurance policies to force us to pay for billions of dollars of losses that are not ours to pay. And while insurers are extremely sympathetic to people who've lost their homes, people who are underinsured or uninsured, we are paying out billions of dollars to people who did purchase flood insurance coverage on their commercial properties or excess flood coverage, which I believe, I believe Mr. Scruggs has on his home that was destroyed.

So we are paying out claims and we are living up to our contracts. It really isn't fair to the people who did purchase coverage to pay those who didn't retroactively. And the other thing is if we retroactively rewrite all of these contracts, it will destroy the insurance system in this country. It would be like picking the lottery numbers the day after they're announced. It's just not the way things are done. Insurance is bought and it is, it is priced, and the contracts are signed in advance of something bad happening. You can't go back with hindsight, no matter how tragic, what it is you're looking at now is, you can't go back with hindsight and reopen contracts and rewrite them in wholesale.

MARGOT ADLER: Julie Rochman and Richard Scruggs. Coming up, will the insurance industry be crippled by lawsuits resulting from Hurricane Katrina? Will it turn to the government for a bail-out? Stay with us.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Hurricane Katrina affected thousands of families along the Gulf Coast. Many who've lost their homes are trying to figure out what their insurance policies will cover. To talk with me about what could end up being a major challenge to the insurance industry is Julie Rochman, Senior Vice President for Public Affairs at the American Insurance Association. Also joining me is Richard Scruggs, a trial lawyer who is preparing to take on insurance companies on behalf of thousands of families in Mississippi whose homes were damaged by Hurricane Katrina. Now Julie, has the industry, has the insurance industry ever seen a disaster of this magnitude?

JULIE ROCHMAN: Well Hurricane Katrina will be the single most expensive insured event in U.S. history. It will surpass Hurricane Andrew, which in today's dollars would be about \$21 billion in insured losses. It will surpass the attack on 9/11, for which insurers paid out about \$32.5 billion dollars.

MARGOT ADLER: Dick, it's estimated that insurance companies may have to pay as much as \$40 billion to cover the damage from Hurricane Katrina. That's more than the gross domestic product of Bulgaria. If insurance companies really paid policy holders that much money, wouldn't they go bankrupt?

RICHARD SCRUGGS: You know, \$40 billion dollars sounds like a lot of money. The tobacco industry alone, which is much smaller than the insurance industry, agreed to pay the states \$368 billion dollars, so that puts some scale to that. \$40 billion dollars, sure, is a lot of money, but that's chump change given the fact that this industry has diversified this risk throughout the world, and you know, there may be some English baron who bought into this, or some Swiss gentleman in Zurich who's going to be a little bit uncomfortable having to reach into his wallet. But I just, you know, I hate it for him, but I'd rather see that than tens of thousands of American families having to file bankruptcy or the American taxpayers [having] to pay all these guys out.

MARGOT ADLER: Julie, how will that affect the insurance industry in the future? I mean, are insurance companies, if they have to pay out this much money, you know, are they going to refuse insurance to certain people because of where they live? I've heard stories that maybe insurance companies would leave Mississippi?

JULIE ROCHMAN: If insurers are forced to pick up, in addition to the 40 or so billion dollars of losses that fall within our contracts—the claims that we are aware that we are going to pay, if Mr. Scruggs and his cohorts are successful in rewriting our policies and destroying any sense of predictability and certainty going forward in those insurance markets, I would say it's very probable they will destroy the insurance markets in those states. I mean, you can't—we are a nation built on law, and thankfully there are a lot of lawyers to make sure people abide by the rule of law. But contracts have to be contracts. You can't go back. I mean it would be as though your mortgage company called you, you

know, in the middle of your mortgage term and said “Oh, remember we said six point six and a quarter? Well we decided to make it 10 percent.” I mean you just can’t do that any more than Mr. Scruggs would like it if plaintiffs decided to change the amount of his contingent fee after he’d won a verdict. I mean, there’s a larger issue here than just the tragedy that has occurred and is still occurring, unfortunately, for many people along the Gulf. What will happen if these contracts are rewritten is it will undermine fundamentally our American system of justice.

MARGOT ADLER: Now, one other thing that I’ve heard is that the insurance companies might have to pay out so much that they’ll have to ask the government for a bail-out. What do you think Julie? Are you going to lobby the government for that kind of relief?

JULIE ROCHMAN: Absolutely not. Whoever told you that is 100 percent wrong.

MARGOT ADLER: And Dick, do you think that that’s what they’re going to do?

RICHARD SCRUGGS: I know for a fact that’s what they’re already doing, and they’re trying to use these types of scare tactics, like we’ll go out of business. Even if Julie were right, which she’s not because the quote was this quarter alone, and if you check Reuters you’ll see one of her colleagues said, \$400 billion-plus for this quarter alone in reserves for this disaster. But nevertheless, I know for a fact that they are trying to get a bail-out from the federal government, some sort of backstop. And indeed the National Flood Insurance Program is federally funded. They just collect a premium on it, and this isn’t coming out of their pockets. That’s one of the reasons the first adjuster that you see down here, Julie if you’ll come down and check things out, is a flood adjuster from one of these companies, trying to foist the cost off to the federal government as a so-called flood when FEMA says there wasn’t one.

MARGOT ADLER: Julie, you have the last word.

JULIE ROCHMAN: Okay, thank you. Okay, first of all, I don’t know who Mr. Scruggs is talking to, but I can tell you, I am a lobbyist for the insurance industry, and we are not, repeat, not looking for any bail-out with respect to Hurricane Katrina claims. Not. 100 percent not. Second, the 400 billion dollars is not a quarterly number, it is the entire capital base underlying property casualty insurers. It may have been discussed as a quarterly figure because it changes from time to time, it goes up and down, but that’s the whole capital base. You know, I wish I could get Mr. Scruggs and give him a quick insurance 101 and maybe this would go a little bit easier on him and his clients.

RICHARD SCRUGGS: Julie, look, I’ll take your insurance 101 if you’ll let me give you a little legal 101 down here.

JULIE ROCHMAN: Anytime.

MARGOT ADLER: Thank you both for joining me on Justice Talking.

JULIE ROCHMAN: Thank you Margot.

RICHARD SCRUGGS: Thank you.

MARGOT ADLER: Julie Rochman is senior vice president for public affairs at the American Insurance Association. Richard Scruggs is a lawyer in Mississippi who has filed a lawsuit against an insurance company on behalf of a family whose house was damaged by the effects of Hurricane Katrina.

MARGOT ADLER: While some see post-hurricane lawsuits as a way to compensate and protect victims, others, like the Washington Legal Foundation's Richard Samp, think they will be just another feeding frenzy for greedy trial lawyers.

RICHARD SAMP: Americans have been heartsick as they have watched the scenes of death and destruction in the wake of Hurricane Katrina. Two thoughts keep crossing through our minds. First, do all we can to ease the suffering of survivors and help them rebuild their lives. Second, make sure that in future storms, governments at all levels do a better job of providing emergency aid in the immediate aftermath. But one group that apparently does not share that agenda is America's trial lawyers.

While others are working to rebuild the Gulf Coast, trial lawyers are focusing on ways to cash in on the suffering of Katrina's victims. Their search for deep-pocketed defendants has led them to target those who worked most heroically to aid hurricane victims, America's caregivers. According to newspaper accounts, lawsuits are in the works against hospitals caught up in the floods. Although the hospitals had equipped themselves with emergency generators and supplies, dozens of seriously ill patients in New Orleans died after the hurricane because their hospitals were surrounded by fifteen feet of water. This tragedy was an act of nature compounded by bad government planning, not medical negligence. What would the lawyers themselves have done? Expected government assistance never showed up in many cases. For five days doctors, nurses and other hospital workers labored without sleep, keeping the hospitals open while braving heat, disease, snipers, and roving gangs.

Some hospitals now facing litigation even hired fleets of private helicopters, boats and buses to evacuate as many of the sick as possible. Supplies headed to one hospital were actually confiscated by FEMA. Suing government officials for their mistakes can be a very iffy proposition, so the plaintiffs' bar is going after targets whose assets are more tempting. For the brave medical professionals on the scene, the only gratitude they will get from the plaintiffs' bar is lawsuits that could cost them their jobs and their savings. While others are focused on helping the victims recover with jobs, housing and schools, some plaintiffs' attorneys are focused on profiteering from tragedy.

Ironically, although these lawyers claim to be assisting some of those injured by Katrina, there is little doubt that their suits will end up hurting the Gulf region. Lawyers preparing

to sue hospitals will thwart the rebuilding of the Gulf Coast's healthcare infrastructure. Not only will they suck money out of the vital and difficult rebuilding effort, they're going to discourage hospitals and caregivers from coming back or even volunteering in future catastrophes. The U.S. healthcare system can no longer afford the excesses of the lawyer-driven civil litigation lottery. But in the crisis-stricken Gulf Coast region, those excesses can only be catastrophic. In other regions of the country, the price of unchecked litigation has been skyrocketing healthcare costs. In the Gulf Coast, the price may well be the disappearance of adequate healthcare altogether.

MARGOT ADLER: Richard Samp is General Counsel for the Washington Legal Foundation, a public interest law and policy center in Washington, D.C.

MARGOT ADLER: Let us know what you think of the lawsuits that are resulting from Hurricane Katrina. Who do you think should pay to repair New Orleans and the Gulf Coast? Visit our online bulletin board at justicetalking.org to share your thoughts, and find out what other listeners are thinking.

MARGOT ADLER: Ken Feinberg was the special master of the September 11th Victim Compensation Fund. He's one of the nation's leading experts in mediation and alternative dispute resolution, and is the managing partner and founder of the Feinberg Group. Thanks for talking with me, Ken.

KENNETH FEINBERG: Thank you.

MARGOT ADLER: Ken, in your role as special master of the September 11th Victim Compensation Fund, your job was to decide the monetary worth of individuals who were killed in the 9/11 terrorist attacks. What do you see as the government's role in compensating victims of hurricane Katrina?

KENNETH FEINBERG: Well that's a very complicated question. First, in the 9/11 Fund, that was a very unprecedented, unique statute that delegated to me the authority to calculate not what a life was worth, but what a victim of 9/11 would have earned over a lifetime but for the tragedy. That's what juries do every day. Now in the Katrina disaster, the question becomes whether or not the 9/11 program is some sort of precedent to be replicated. I see very, very little groundswell of support in Congress, in Washington, for doing something like that, although I must say, Congress has been very, very generous in providing other forms of compensation.

MARGOT ADLER: Now, do you think that this is so different than 9/11 because, I don't know, it's an act of nature? You could argue that the effects of a natural disaster are equally as devastating, in fact, in this case, perhaps even more so.

KENNETH FEINBERG: Oh, I don't think there's any question about that from the perspective of the victims in New Orleans or Alabama or Mississippi. From their perspective, I see no real distinction between the 9/11 compensation program and a unique disaster in New Orleans and in the Gulf. I think from the nation's perspective, however, there is a huge difference.

MARGOT ADLER: Mm-hmm. And how would you describe that difference?

KENNETH FEINBERG: I believe that the nation, the American people, rallied around the 9/11 victims following this foreign attack on domestic shores, rather unique in American history, probably rivaled only by Pearl Harbor and the American Civil War. And the nation responded in a way, both with private charity as well as this 9/11 program, in a manner rather unprecedented. I don't believe the nation's reaction to Katrina is the same, and that's witnessed by the fact that I see no legislation pending in Congress to set up a 9/11 compensation fund.

MARGOT ADLER: Now have there been other times in our nation's history when the government has assessed the value of an individual's worth and given money to their families for that loss in the way that the 9/11 commission did?

KENNETH FEINBERG: Oh yes. There have been rather modest programs in the history of the United States. For example, after the internment of Japanese American citizens during World War II, some forty years later, Congress provided \$20,000 per family of those who had been interned, following Pearl Harbor. There are programs on the books today that compensate uranium miners and other rather carefully circumscribed professions that came to the aid of the United States in terms of national security. There are very modest programs. But the 9/11 Fund, with its two million dollar average, tax free—I think there is no precedent. Nothing like it. And I don't think there'll ever be anything like it again. It was a unique response to a very unique horror.

MARGOT ADLER: Do you think there have been times in our history when the government should have compensated people but didn't?

KENNETH FEINBERG: Oh I don't know; that's a question for Congress. I do recall when I was administering the 9/11 Fund, legislation was introduced to expand my fund to include Oklahoma City, the U.S.S. Cole, anthrax, the African Embassy bombings, and even the 1993 World Trade Center attack committed by the very same people. That effort in Congress to expand the 9/11 Fund came to naught. There was no interest in Congress to do it, and I think that's because Congress saw the 9/11 Fund as a very emotional response. The 9/11 Fund was established just 11 days after 9/11. I think if Congress had waited another month or so we probably wouldn't have even done it for the 9/11 families.

MARGOT ADLER: Ken Feinberg, thanks so much for talking with me.

KENNETH FEINBERG: And thank you.

MARGOT ADLER: Ken Feinberg was the special master of the September 11th Victim Compensation Fund. He is managing partner and founder of the Feinberg Group. I'm Margot Adler. Thanks for listening to Justice Talking.
