

3.0 FALLING TREES, FLYING LIMBS & LOUD NEIGHBORS

3.1 Overview

Disaster damage from the heavy rains, ferociously high winds, and flooding manifests in a number of ways. Not uncommonly, objects such as furniture or heavy tree limbs go flying, or trees are uprooted by the storm. This chapter addresses questions regarding those situations in which high winds, heavy rains, or flooding cause uprooted trees, tree limbs, and other like objects to damage persons or property.

3.2 Most Common Issues/Questions

- My neighbor's tree fell into my yard during the disaster. It smashed my fence and took out my landscaping. Can I make my neighbor pay for the fence repairs and landscaping?
- What if my neighbor's tree hits my house?
- No trees came down during the disaster, but I'm sick of picking up limbs out of my yard from my neighbor's tree. I'm worried about the next storm; that tree looks awful. What can I do?
- Can I make my neighbor trim the tree branches that hang onto my property?
- My neighbors are freaking out after the disaster and want to cut down all their trees. They provide the only shade in my yard. Can I stop my neighbors?
- My neighbors had a lot of trees fall on their property. They keep running a chainsaw long after I've put my kids to bed. Can I stop them?
- The fence between my property and my neighbor's property is down. Who has to pay to replace it?

3.3 Summary of the Law

As a general rule, compensation may not be obtained for losses, damage, or harm suffered as a result of an act of God, which means an occurrence due directly and exclusively to natural causes without human intervention and which no amount of foresight, pain, or care, reasonably exercised, could have prevented. This definition includes natural disasters. As one court put it, “[D]amages resulting from an act of God are not ordinarily chargeable to anyone.” *Hutchings v. Anderson*, 452 S.W.2d 10, 15 (Tex. Civ. App. 1970). There are however, at least two situations in which that general rule may not come into play.

First, damages suffered by a homeowner or tenant due to high winds or rain may be covered by an insurance policy. (Damage caused by flooding is covered by a separate flood insurance policy sold by your insurance agent and overseen by FEMA as part of the National Flood Insurance

Program.) The first question, then, is whether the homeowner or tenant has an insurance policy. If so, the critical inquiry is whether the policy covers losses due to high winds and rain. A policy may exclude coverage for any losses from disasters altogether or may cover only some types of losses and not others. In one case, the policy did not mention disasters specifically, but excluded from coverage losses caused by floods and high water, “whether driven by wind or not.” That language prompted arguments about which damages were caused by rising waters and which were caused by wind-driven rain. *National Union Fire Insurance Company v. Cox*, 393 S.W.2d 939 (Tex. Civ. App. 1965).

Second, the “act of God” doctrine applies only where the natural disaster or similar act of God is the sole or exclusive cause of the damages. See *Macedonia Baptist Church v. Gibson*, 833 S.W.2d 557, 560 (Tex. App.—Texarkana 1992, no writ) (“An accident is the result of an act of God when it is due directly and exclusively to natural causes without human intervention”). It does not apply to situations in which negligence has been a substantial contributing cause of the damages. This is so whether or not the person who is negligent could have reasonably foreseen the disaster or its force. As one Texas court stated, after a homeowner successfully sued to recover for damages due to a billboard sign that collapsed on her house during Hurricane Alicia in 1983:

[C]onditions created by the defendant’s initial negligence must not have run their course and must have actively contributed to the injuries . . . If an actor’s conduct is a “substantial factor” in causing harm to another, the fact that he did not foresee nor should have foreseen the extent of the harm or the manner in which it occurred does not preclude liability.

Gannett Outdoor Company of Texas v. Kubezcka, 710 S.W.2d 79, 85 (Tex. App.—Houston [14th Dist.] 1986, no writ) (citations omitted).

That court found that the billboard company’s failure to take “adequate precautionary measures” to secure the sign “actively contributed” to the sign’s falling on the house, regardless of whether the force of Hurricane Alicia had been foreseeable. In that regard, a failure to secure objects that can reasonably be expected to be swept up in a disaster is likely to give rise to liability. Similarly, the failure to take steps to remove, or at least secure, a diseased or dead tree may well make a homeowner liable for damages, if the tree is uprooted by a disaster and thereby damages neighboring property or persons.

3.4 Assistance Numbers

Federal:

Federal Emergency Management Agency (FEMA) www.fema.gov; 1-800-621-FEMA (3362). If your home was damaged during a disaster and repairs are not covered by insurance, you may qualify for a FEMA grant to make it safe and livable. Structural repairs (roof, foundation, etc.) may be covered but not cosmetic repairs (shutters, carpet, etc.). FEMA encourages homeowners with damage to register so that an agent can be sent to assess the damage and determine what

repairs will be covered. You can register online at www.DisasterAssistance.gov or by calling the FEMA number above.

Generally, FEMA requires private property owners to use their own resources to clean up debris from their property. Local government officials may set up various options to assist residents in collecting and disposing of debris after a disaster, including providing drop off sites or a curbside collection program. There must be an immediate threat to life, public health, and safety to justify the removal of debris by a public entity, and this must be expressly authorized by state or local authorities. Private land owners should call 3-1-1 if they believe the city of Houston should authorize the debris removal as part of the public interest. Outside Houston, contact your local government. FEMA's policy on removal of debris from private property is available online at <https://www.fema.gov/media-library-data/1505410429104-0f5a4bb391550eb55a4176233050e411/PublicAssistancePPDRFFaceSheet.pdf>.

State of Texas:

Texas Department of Insurance (TDI). Offers numerous services for consumers and insurers. TDI helps with locating insurance carriers, monitoring insurance fraud, and offering answers to Frequently Asked Questions. In addition, the Department of Insurance will issue important bulletins relating to disasters and postdisaster claims handling. Insurance-related complaints can be made to TDI via their website at <http://www.tdi.texas.gov/consumer/complfrm.html> or by emailing the PDF form provided at their website to: ConsumerProtection@tdi.texas.gov. For questions or assistance, contact the consumer helpline: 1-800-252-3439. See TDI's website for various disaster resources: <http://www.tdi.texas.gov/consumer/storms/> and <http://www.tdi.texas.gov/consumer/storms/helpafterharvey.html>.

Harris County/Houston:

City of Houston. It is suggested that all citizens clean up their own yards and help their neighbors. Check <http://www.houstontx.gov> for updated information on storm clean up and call 3-1-1 with questions.

Harris County. Check <http://harrisrecovery.org/> for the latest information on this and other topics.

Solid Waste Management Department. Solid Waste Management is responsible for storm debris collection in the city of Houston. Visit <http://www.houstontx.gov/solidwaste/> or call 3-1-1 for debris drop-off locations and pick-up information. For instructions on separating your debris for removal, see http://www.houstontx.gov/solidwaste/debris_08302017.html.

3.5 FAQs

Q. 3-1 My neighbor's tree fell into my yard during the disaster. It smashed my fence and took out my landscaping. Can I make my neighbor pay for the fence repairs and landscaping?

If the tree was healthy before the disaster and the storm's high winds caused the tree to fall over and damage your property, you cannot hold your neighbor liable. This was an "Act of God." However, if the tree was decayed, diseased, dead, or in an otherwise dangerous condition before the disaster, you can hold him liable for damages. In this case, your neighbor was negligent in maintaining the tree. The tree posed an unreasonable risk of harm and your neighbor had a duty to trim the branches or remove the tree before the storm to prevent it from falling over. "It is established in our law that damages resulting from an act of God are not ordinarily chargeable to anyone. However, for a defendant to be relieved of liability for an unprecedented flood, there must be no negligence on his part concurring with the acts of God to cause the damage." *Luther Transfer & Storage, Inc. v. Walton*, 296 S.W.2d 750, 753–754 (Tex. 1957) and cases cited therein; *Hutchings v. Anderson*, 452 S.W.2d 10, 15 (Tex. Civ. App. 1970). Home insurance generally covers this type of damage.

Q. 3-2 What if my neighbor's tree hits my house?

Same as above. If the tree was healthy and it fell due to high winds during the disaster, your neighbor is not responsible. If the tree was in poor condition prior to the disaster, your neighbor should have had the tree removed or taken other reasonable measures prior to the storm. The dispute is likely one over home insurance—if your neighbor is not responsible, your insurance should cover; if it was your neighbor's responsibility, your neighbor's insurance should cover you. As a practical matter, it may be easier to claim on your insurance and let your insurance company pursue any claim that may exist against your neighbor.

Q. 3-3 No trees came down during the disaster, but I'm sick of picking up limbs out of my yard from my neighbor's tree. And I'm worried about the next storm; that tree looks awful. What can I do?

You can cut the limbs that grow onto your property, but you cannot kill the tree. The tree owner may have the responsibility for removing a dead or diseased tree prior to a storm, but you cannot take on that job yourself. Rather, you should inform your neighbor of the dangerous condition of the tree and request that they address the problem. If they fail to do so and you end up with damage (like the examples above), you will be able to recover damages from the tree owner.

If you live in the city of Houston, call 3-1-1 if your neighbor refuses to remove a dead or damaged tree. 3-1-1 is the number for Houston's Service Helpline. The Inspections & Public Service (IPS) Division of the Department of Neighborhoods is responsible for cleaning up neighborhoods using building codes, sign codes, nuisance violations, and beautification projects. If the city determines that the tree is dangerous, they will issue a notice requiring removal. If the tree is not removed, the neighbor can be fined between \$200 and \$2,000. See http://www.houstontx.gov/ips/avoid_common_violations.html. If you live outside of Houston, you should check with your local city government to determine if there is a tree ordinance that applies to your situation.

Q. 3-4 Can I make my neighbor trim the tree branches that hang onto my property?

No. You can trim them, but you cannot make your neighbor trim them. And if you trim them, it needs to be in such a way that it won't kill the tree. Otherwise, if the tree dies, your neighbor could attempt to recover damages from you for trespass. This presumes the tree is healthy. Also, you can only trim the branches up to the boundary line. If the tree is dangerous, then you can call 3-1-1 if you live in the city of Houston and see if the city agrees, it may require your neighbor to remove the tree. The Inspections & Public Service (IPS) Division of the Department of Neighborhoods is responsible for cleaning up neighborhoods using building codes, sign codes, nuisance violations, and beautification projects. If you live outside of Houston, you should check with your local city government to determine if there is a tree ordinance that applies to your situation.

Q. 3-5 My neighbors are freaking out after the disaster and want to cut down all of their trees. They provide the only shade in my yard. Can I stop my neighbors?

Not under common law. The trees belong to your neighbors and thus are their property to do with as they wish. It does not matter if the trees are your shade or if the trees' branches go over into your yard. Although, if the tree is on the property line, you may have an ownership interest. Additionally, there may be restrictive covenants or a tree ordinance pertaining to your subdivision that protects the trees if they are a certain size. Check with your homeowner's association for any applicable restrictive covenants. If you live in the city of Houston, check and see if your neighborhood has an applicable ordinance. If you are outside the city of Houston, check with your local city government.

Q. 3-6 My neighbors had a lot of trees fall on their property. They keep running a chain saw long after I've put my kids to bed. Can I stop them?

It depends. Houston does have a noise ordinance. A typical chain saw has a volume of around 100 adjusted decibels (dB(A)). The Houston Noise Ordinance (Section 30-5) limits noise to 65 dB(A) during daytime hours and 58 dB(A) at night. Daytime hours are defined as between the hours of 8 a.m. and 10 p.m. Nighttime hours are defined as 10:01 p.m. to 7:59 a.m. the following day. Houston, Tex., Code of Ordinances, Ch. 30, §§ 30.1, 30.5(a)(1)(2017). But there is an exception for "emergency work," which is defined as "any work performed for the purpose of

- (i) preventing or alleviating the physical trauma or property damage threatened or caused by an emergency,
- (ii) restoring property to a safe condition following a fire, accident, or natural disaster,
- (iii) protecting persons or property from exposure to danger, or
- (iv) restoring public utilities."

Houston, Tex., Code of Ordinances, Ch. 30, §§ 30-1, 30-16(3)(2017).

While this exception is probably intended for the city and its contractors, it is not clear and it is possible that your neighbor could successfully argue that he is performing emergency work in cutting the trees. There is also an exception for “the operation of any mechanically powered saw, drill, sander, router, grinder, lawn or garden tool, lawnmower, or any other similar device used between the hours of 7:00 a.m. and 8:00 p.m., provided the device does not produce a sound exceeding 85 dB(A) when measured from the property line.” *See* Houston, Tex., Code of Ordinances, Ch. 30, § 30-16(7). The equipment must be used for the maintenance or upkeep of the property on which the equipment is being operated.

So if you live in Houston and your neighbor is using the chain saw after 8 p.m., your neighbor may be violating the noise ordinance. The analysis is the same if your neighbor is starting a new business selling firewood from all the downed trees brought to the property. That said, you are probably best served by talking to your neighbors and asking them to limit the hours they are cutting rather than trying to take them to court for the noise. You can call 3-1-1 to see if the Department of Neighborhoods can provide assistance. If you live outside of Houston, you can check to see if your local government has a similar noise ordinance.

Q. 3-7 The fence between my property and my neighbor’s property is down. Who has to pay to replace it?

If a fence is located entirely on your neighbor’s property, the fence is considered to be the exclusive property of your neighbor. Consequently, unless you have entered into an enforceable agreement with your neighbor or there are certain deed restrictions mandating fences to be erected and which spell out responsibilities among neighbors, you are not obligated to fix the fence if it is on your neighbor’s property. Nor can you compel your neighbors to fix the fence if it is on their property. On the other hand, if the fence is on your property, it is your responsibility, though your neighbor cannot compel you to replace the fence. If the fence was originally installed on your neighbor’s property but fell on to your property as a result of the storm, you can remove the fence from your property in the same way you can move trees and limbs from your property.

If the fence is on the boundary line between both properties, both property owners own the fence if they both use it and thus would share the cost of repairing and replacing the fence. Every state interprets “use” differently, but there are three main definitions:

- Occupancy – use of the land up to the fence.
- “Join” for use – the attachment of another fence to the boundary fence.
- Entire enclosure – the property owner’s entire property is enclosed by the attachment of other fencing to the boundary fence.

Most state laws or local ordinances place responsibility for the maintenance of the boundary fences on the owners that use the fence unless an agreement indicates otherwise.