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An earthquake's secret unintended consequences

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I lived through the 1994 Northridge Earthquake, suffered severe material losses, negotiated with our insurance carrier to attempt to replace those losses, represented clients, and arbitrated disputes in the millions of dollars arising out of the earthquake. From this wealth of experience, I became aware of, but never anticipated, the unintended consequences such natural disasters could create for all involved, especially for the owners of the buildings or properties hit the hardest.

Theories of owner legal liability

After any type of natural disaster, creative theories of legal liability and creative lawyering in order to best replace what has been lost, or to simply benefit financially from the event, often become as damaging to the parties from whom recovery is sought as the disaster itself. Property owners must be particularly careful, lest some or all of the examples below plague them for years to come. Here are some of the circumstances to be aware of and the consequences that arose following the Northridge Earthquake:

> "Insert in your rental agreement or lease a provision which states that you do not maintain earthquake insurance, but that even if you do, it is not for the benefit of the tenant or his/her assets, business, or personal safety, but only for the benefit of the owner in the event of damage to the building by an earthquake."

1. Recovery for claims, demands, and even litigation was initiated by both commercial and residential tenants of proper- ties who suffered losses from the earthquake. In some instances, while legal theories of liability may have been weak or nonexistent, settlements were made because the cost to the property owner of litigation by the recipient of the claim, demand, or litigation may have cost more than resolving the issue through any legal process, and would not have been covered by the property owner's insurance.

2. In some instances, commercial and residential tenants sued their own insurance carriers for damages suffered, attempted to make their claim, demand, or threat of litigation against the property owner's insurance carrier, and simply looked around for a person or entity that might have some viable means of liability.

3. Claim, demands, and/or litigation arose out of a number of theories of liability, including:

a. The property owner, who may have been obligated under the Los Angeles Municipal Code for earthquake retrofitting or other construction requirements that were not grandfathered in (meaning not having to comply), did not retrofit the property. The legal reasoning goes that the damage sustained by the residential or commercial tenant from loss of use, loss of revenue, loss of property, and/or personal injury would and could have been avoided had such compliance been completed prior to the earthquake. Not a bad theory of liability, provided one can prove that the failure that caused the damage would likely have been avoided had the new standards been complied with and the property brought up to code.

b. The property owner, who may have been obligated under the L.A. Municipal Code for earthquake retrofitting or other construction requirements undertook to meet the new code requirements, but did so in an incomplete or negligent manner. This contributed to the loss of use, loss of revenue, loss of property, and/or personal injury, which would not have occurred but for the negligent attempts at compliance by the owner, which could in theory have been the cause of the damages as set forth above. A somewhat viable theory.

c. The insurance carrier of the property owner who had coverage acted in an unreasonable manner in delaying the repair or providing the funds for other matters covered, which caused greater harm in many respects to the tenant, who was the third party beneficiary of the insurance coverage. The carrier knew or should have known of that damage to the non-insured tenant and therefore under a third-party beneficiary contract was liable to the tenant as the third party beneficiary of the insurance. Not a great or viable theory.

d. The property owner, who may have been obligated under the L.A. Municipal Code for earthquake retrofitting or other construction requirements, but was grandfathered under the law and therefore not obligated to retrofit the property, knew or should have known that the property was in structurally poor condition, making it especially susceptible to earthquakes, and thus had a special duty to the tenant to disclose this fact. Not a bad theory.

e. The property owner, who committed in his lease to maintain earthquake insurance for the benefit of the tenant, did not do so and was therefore liable for that damage which would have been covered. A very viable legal basis of liability. (see point **b.** below)

f. The property owner had been advised, either before, during, or after the tenant leased or rented the building, was aware, either by a soil, geological report, or other means that the property stood on or in very close proximity to a significant earthquake fault or liquifaction zone, and did not disclose this fact to the tenant in writing and did not obtain the appropriate waiver. Questionable liability if the property is located in a properly zoned area and otherwise code- and permit-compliant.

Protecting yourself

The real question arising from these examples, which are far from exhaustive, is what should property owners do to protect themselves from some or all of this liability and risk? There *are* answers, but some may not be practical, clear, or fully protective, even if undertaken. Here are some things property owners may or should do to protect themselves from liability:

a. Consider maintaining an earthquake policy on your property that is reasonable and hopefully affordable, that will at least protect you and your property from catastrophic damage.

b. Insert in your rental agreement or lease a provision stating that you do not maintain earthquake insurance, but that even if you do, it is not for the benefit of the tenant or his/her assets, business, or personal safety, but ***only*** for the benefit of the owner in the event of damage to the building by an earthquake. It should further state that the property is located in an area prone to earthquakes, and that by initialing, the tenant waives all claims, demands, and liability against the owner that he/she may suffer as a consequence of an earthquake. Such a clause should be drafted by an attorney experienced in this aspect of the law.

The apartment building on the left, severely damaged in the 1994 Northridge Earthquake, looks almost normal, until you look closer and realize that the entire first (soft) floor collapsed, reducing it to a two-story building.

c. Ensure that the retrofit work is done by a licensed contractor and is fully compliant with all earthquake *and* other construction codes and requirements, and fully permitted where required by law.

Measuring cost against risk of ownership

While the above comments and suggestions can be beneficial to you in the event a property you own is involved in an earthquake, you must measure the *risk* against the *cost* of ownership and the protection that you can and cannot provide for yourself. Realize, too, that there is always the likelihood of a claim, demand, or lawsuit being filed against you, whether it has merit or not. **A lawsuit, won or lost, or even the threat of a lawsuit, can cost you dearly in money, time, and stress.** So, when acquiring properties for yourself or for lease or rental, do so cautiously and with full knowledge of the risks that flow therefrom. And protect yourself as best you can from known hazards, uncertain but likely hazards, keep your building in a viable and code-compliant manner, *and pray!*

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