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Deconstructing Explosive Issues

I. Background

Construction began at a beach front condominium project ("Project") under the direction of the general contractor ("GC"). Thereafter, the Project suffered a natural gas explosion on the 34th floor. The building had only recently obtained a Temporary Certificate of Occupancy (TCO). The explosion caused significant damage to the building and elevators, allegedly rendering it unsafe for use. The TCO was revoked for nearly nine months while the building was repaired.

Without consulting with the GC, the association's property carrier and GC's builder's risk carriers shared the $11,000,000 cost to repair the explosion damage to the building. The property carrier has subrogated against the GC, but the builder's risk carrier has not because subrogation was waived in the general contract.

The explosion also caused concrete and debris to fall on the adjacent motel, penetrating the roof in several different areas of the building and allegedly causing the owner to close its business entirely. That same owner claims to have suffered damage and business losses when the motel settled during dewatering and foundation work on the condominium before the WRAP policy on the condominium incepted.

Finally, the explosion gave rise to loss of use claims by nearly all unit owners in the condominium.

II. Immediate Response – Gathering Evidence and Preservation

The first course of business after a building explosion is gathering and preserving evidence. This includes retaining appropriate attorneys and experts, securing the scene with the local fire, police, and building departments, and securing video footage from the property and adjacent properties.

It is important to quickly interview witnesses to the explosion and its aftermath, including employees of the property manager, developer, construction workers, and any third-party eyewitness. All of these people can preserve a first-hand, recent, account into what happened and begin to frame the narrative that will drive litigation strategy.

When a workplace explosion occurs, OSHA should be notified. With regard to OSHA, Police, Fire, and Building Department investigations, it is important to advise management and the employees of their rights and duties relative to the investigation. At the same time, the developer, contractor and association will need legal guidance and will seek out the appropriate legal teams.

Finally, an explosion at a luxury high-rise will make headlines. Coordinating a press release with the local news outlets, and attempting to control the narrative at this early juncture should be considered.

III. Getting the Project Moving Again to Minimize Delay Claims

After gathering and preserving the evidence, the next step is getting the project moving again. This involves several important steps. For instance, permitting based on remedial plans will have to be negotiated with the local Fire and Building Departments as quickly as possible. It is very likely that a contract addendum is required to address payment terms and schedule.

The Developer and those allegedly responsible for the explosion will be very concerned about delays to occupancy by those unit owners who must vacate or have not moved in. The Developer will also have a particularly keen interest in getting the TCOs reissued to allow it to sell the remaining units? To combat this, strategies will have to be implemented to account for working around the explosion area, safely, and to minimize delays.

Insurance personnel will have to be notified. For instance, relevant commercial property, practice policy CGL, WRAP, and builder's risk carriers must be put on notice. Those respective carriers will evaluate their policies and seek coverage counsel, if needed, to analyze which coverages are on the risk.

IV. Common Legal and Evidentiary Issues

Typical legal issues to be encountered in claims resolution include: (a) admissibility of building code citations; (b) admissibility of OSHA findings and citations; (c) admissibility of expert opinions interpreting those regulations and ultimate opinions that the regulations have been violated; (d) under Florida law, the ability to add *Fabre,* non-party defendants to the verdict form for apportionment of liability; (e) the practical benefits and detriments of distributing fault to other parties to entities inside and outside of the WRAP program, and (f) reconstructing the cause of the explosion.

V. Addressing the Unit Owner Claims

After an explosion, unit owner claims can be expected. They may sue under a theory of breach of express warranty, breach of statutory warranty, and nuisance. Damage models may be based on alleged loss of beneficial use and enjoyment, stigma damages and "extreme loss of market value," cost to repair the unit, replacement housing costs, loss of rental value, furniture storage, and other damages. A nuisance theory may include punitive damages.

Be on the lookout for improper attempts to blur the distinction between contract and tort law by pleading delay damages as nuisance damages in order to reach eligibility for punitive damages. This is logically analogous to the economic loss rule and no duty defenses in cases in which plaintiffs will plead negligence based on the defendant's contractual obligations. A GC may also argue that Plaintiff is not entitled to nuisance damages because GC's use of the adjacent property cannot be unreasonable where GC is lawfully present in the adjacent property to perform its contractual obligations for the Plaintiffs' benefit.

A plaintiff should not be entitled to stigma damages if the building is repaired under the watchful eyes of the local Building Department and the design and construction professionals involved with the repair. Stigma damages represent the diminution in value of the property caused by an ongoing defect.

Also, stigma damages are only available when the cost of repair would be economically wasteful. When the building has already been repaired at no expense to the unit owners, their cost of repair cannot possibly be economically wasteful because they haven't incurred any such cost.

Further, keep in mind that unit owners should not be entitled to their out-of-pocket expenses, including replacement housing costs, mortgage interest, real estate taxes, insurance, and condominium fees because they are all subsumed by the fair market rental value of the unit during the reasonable period of repair.

VI. Addressing Developer's Claims and Adjacent Property's Claims

A developer's insurer will file a subrogation demand against the GC, alleging two causes of action: contractual subrogation and equitable subrogation. GC will move to dismiss, attacking the entire Complaint for failure to plead ultimate facts and attacking the equitable subrogation claim because Insurer's could avail itself of an adequate remedy at law.

One of the elements of the equitable subrogation claim is that the subrogee must pay the entire debt. It needs to be determined if the insurer made Developer whole and if not, may not be entitled to equitable subrogation.

Another area to investigate is whether the Insurer overcompensated Developer. Florida law typically allows for two measures of structural damage: cost of repair or diminution in value. These measures are mutually exclusive, and where the repair or replacement cost of the building exceeds the diminution in value (i.e. constitutes economic waste), or where the building cannot be repaired, diminution in value is the proper damage model.

Also of relevance here is the so-called 50% rule which states that, "When repairs and alterations amounting to more than 50 percent of the value of the existing building are made during any 12-month period, the building or structure shall be made to conform to the requirements for a new building or structure or be entirely demolished." Any attempt to repair an Adjacent Property will require a complete tear-down of the building. Thus, the repair estimate not only exceeds the diminution in value of the building and is economically wasteful, but would result in a windfall for Developer, who should not be entitled to the cost of an entirely new building to replace the old one.

Finally, Developer may make a claim in lost business revenue. In response, the insurer will apply a "Revenue Make Up" deduction. The damage amount may include a claim for continuing business interruption damages.

Please keep in mind that if Developer did not declare a total loss to its insurer, it is likely that Developer was declaring a loss on its business taxes for its operations at Adjacent Property and is entitled to no compensation for lost revenues. Finally, Developer may have taken no steps to mitigate any of its alleged lost business revenues at the Adjacent Property, instead allowing it to remain derelict.

To the extent the Adjacent Property is asserting a continuing injury theory for damages incurred prior to the explosion, such a theory is not applicable here, but limited to unique contexts such as environmental contamination where there is a single, continuing cause of damage.

VII. Personal Injury Claims

It can be expected that whomever was injured during the explosion will file suit for negligence and seek maximum damages allowed by law.

VIII. Commercial Property Carrier's Subrogation Claim

Seeing as the explosion took place during the construction of a condominium involving a not-yet-formed Association, one can expect a lawsuit from the Association's Property insurance carrier ("Association's Insurer"). One can expect the Association's Insurer to make a request for insurance information, followed by a notice and interim demand by Association's Insurer.

In turn, the GC will submit the Association's Insurer claim to the builder's risk carriers as an additional insured under the owner's builder's risk policies, because the damages were a covered loss under the terms and declarations of those policies. Subsequently, GC may deny the Association's Insurer's demand because the terms of the construction agreement and Florida Law bar the subrogation claim, where the terms of the construction agreement contain a waiver of subrogation clause that is applicable to the Owner and its successors (the Association). The builders risk carriers may subsequently denied the Association's Insurer claim submitted by GC.