



2018 Construction Conference  
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## **Catastrophic Construction Failure: What's Next? Discussion of Both Bodily Injury and Property Damage Claims**

### **I. Background**

A pedestrian bridge collapses in Miami, Florida. The bridge is constructed of concrete reinforced with conventional steel and post-tension cables. The construction method is referred to as Accelerated Bridge Construction (“ABC”). The method allows for artistic, concrete structures to be built in less time and for less money than traditional span bridge construction. Though the claimants generally contend that the methodology is new and untested, media publications include reports that ABC has been used approximately eight-hundred (800) times across the United States before this bridge, suggesting that the methodology is not novel and has a considerable, successful history.

### **II. Immediate Response – Gathering Evidence and Preservation**

The first course of business after a bridge collapse 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 collapse and its aftermath, including the owner, construction workers, and any third-party eyewitness. All 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 bridge collapse happens, OSHA should be notified. Regarding 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, a bridge collapse 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 Building Departments as quickly as possible. It is very likely that a contract addendum is required to address payment terms and schedule.

The contractors and those allegedly responsible for the collapse will be very concerned about delays to the construction. To combat this, strategies will have to be implemented 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 collapse.

### **V. Defenses**

#### **Sovereign Immunity**

Potential sovereign immunity defenses may arise for those agents of the owner, a government entity. If an entity was under direct contract with FDOT, the defense would be statutory under Florida Statute § 768.28(9)(a) and (10)(e) because agents are statutorily defined as agents of the state and its political subdivisions when providing construction monitoring and inspection services under direct contract with FDOT.

The immunity defense will likely turn on the factual issue of how much control the owner exercised, or retained the right to exercise, over an agent. Given the nature of the claims, it is very likely that "control" will be a genuine issue of material fact precluding summary judgment and requiring one or more jury trials.

Exceptions to the immunity defense are that the agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton or willful disregard of human rights, safety or property. Something more than gross negligence is required. Immunity can also be circumvented by proof that the agent acted outside the scope of its agency, and that conduct caused, or contributed to cause, the injuries and damages.

## **Workers Compensation Immunity**

For the claims of the deceased and injured construction-related employees, a worker's compensation immunity defense may exist under Florida Statute § 440.09(6) which provides that:

a construction design professional who is retained to perform professional services on a construction project . . . is not liable for any injuries resulting from the employer's failure to comply with safety standards on the construction project for which compensation is recoverable under this chapter, unless responsibly for safety practices is specifically assumed by contracts.

Immunity provided by the subsection to a construction design professional does not apply to the negligent preparation of design plans or specifications. This workers compensation immunity defense is not available for the claims of the deceased and injured passersby.

For any claims of its injured employees, a separate workers compensation immunity defense may exist, as an employer. The standard to circumvent the defense is very high, virtually requiring evidence of intentional conduct.

## **Causation and Comparative Fault**

The lack of causation is always a defense available, as is the comparative fault of others, both parties and non-parties. Both of these defenses are factual in nature and not amenable to successful summary judgment motions.

## **VI. Addressing Owner's Claims**

An owner'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.

## **VIII. Owner's Carrier's Subrogation Claim**

Seeing as the collapse took place during the construction of a bridge, one can expect a lawsuit from the Owner's insurance carrier ("Owner's Insurer"). One can expect the Owner's Insurer to make a request for insurance information, followed by a notice and interim demand by Owner's Insurer.

In turn, the GC will submit the Owner'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 Owner'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. The builders risk carriers may subsequently deny the Owner's Insurer claim submitted by the GC.