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PERSPECTIVE

Champlain Towers catastrophe: Who pays the victims?

By Tyler Berding

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Search teams at the site of the Champlain Tower South collapse in Surfside, Fla., June 29, 2021.

There's a legal maxim that says, "for every wrong there is a remedy." (The phrase in Latin is: "Ubi jus ibi remedium.") The catastrophic collapse of the Champlain Towers condominium building in Surfside, Florida may prove the exception. When 98 people lose their lives and millions of dollars in personal and real property are destroyed, that's certainly a "wrong." But was that fatal collapse the responsibility of any available defendant? And is there actually a remedy that will compensate the victims?

Defective building construction has been the subject of much litigation in the past 40 years, and frequently, the building owners have an avenue to compensation. Litigation provides the victims of building defects a procedural mechanism to recover, but whether they are adequately compensated depends first on there being defendants who can be reached and can pay, and second, that causation can be established which connects actions of the defendants to the resulting damage.

Establishing a party's liability requires a recognized cause of action. Generally, there are three types used in construction defect cases: breach of contract or warranty; negligence; and those based on statute.

Contract, negligence, and where applicable, statutory remedies, are the primary vehicles for construction defect recoveries. Most states also allow tort claims as remedies for construction-related personal injuries or death.

Cases against developers and contractors for construction defects in new buildings are more often settled than tried, due to the availability of insurance coverage. Without coverage, settlements of multi-million-dollar construction cases are difficult. Where personal money is the only option, judgments may not be collectible because the defendant entities can escape through bankruptcy, unless the veil can be pierced, and the financial backers reached. The same is true for claims against design professionals — architects and engineers — who typically carry much less insurance than those who hire them to design buildings.

But regardless of legal theories and insurance, proving causation can be a high hurdle. This is often true in soils cases — landslides and subsidence — for damage to buildings. The damage is obvious, but the cause is not. Is it gradual, decades- long damage that eventually overcomes the building's structural design? And if so, how does that start? On whose land did it start? And what contributions to the damage were made by the plaintiff's property? To adequately compensate victims of construction failures you must have viable causes of action and defendants and the claims must be "timely filed."

So how does that fit the circumstances at Champlain Towers? It was a 40-year-old, 12-story condominium building constructed of reinforced concrete on the beach. It collapsed with no warning, killing 98 residents and destroying one tower and requiring the implosion of the adjacent tower. The traditional defendants in a case of failed construction are the builder, the general contractor, subcontractors and design professionals. Lawsuits timely filed against such defendants are usually defended by their insurance carriers. But even if the original developer, general contractor, and design professionals can be identified, are they still alive or in business?

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Would insurance they had decades ago be available now? The answer is likely "no" to those questions. This means that everyone with anything to do with the original construction of the building is likely out of reach of the courts. Given that recent Surfside investigations suggest original construction defects may be partially to blame, a host of possible defendants are probably already eliminated.

More current actors who played a role in the management of Champlain Towers may have responsibility for what occurred, including the homeowner's association, and any professional management and consultants retained to assist the association in maintaining the building. Both contract and tort causes of action might apply if it were found that any of these parties were responsible for the ultimate loss of life and property.

In California, with similar statutes in Florida, a personal injury or wrongful death claim must be brought within two years of the injury or death. If a manager committed an error 15 years ago, could they be sued today? In California, an action for construction defects must be brought within 10 years, but there is no statute of repose on personal injury or wrongful death claims. So, theoretically, a prior manager or board member could be joined in litigation over an injury that occurred today.

But there are bigger problems proving fault for actions in the distant past that cause injury today. "Negligence in a vacuum is not actionable," or so goes another legal maxim. This refers to the need to prove that the defendant's negligence was the proximate cause of the damage sustained. A negligent failure to properly paint a building would not lead to liability for a collapsed balcony unless the paint was the only thing holding the balcony to the building!

Proving that someone's actions many years ago are the proximate cause of a serious injury or death today can be difficult, especially when the subject of the damage is destroyed. At Surfside, good engineers might relate an action occurring long ago to the collapse of the building today. But other than the original construction defects mentioned earlier, nothing reported to date definitively ties the collapse of the building and 98 deaths to an action or inaction by a manager or board member many years ago. This leaves only the homeowner's association and the more recent board members and manager as potential association-related defendants. But the insurance coverage available to defend those parties is very limited — almost certainly not enough for the losses sustained in Surfside.

From media reports, several engineering firms inspected the building and made recommendations. A major report issued in 2018 as part of the "recertification" of the building after 40 years, recommended repairs to components that in hindsight appear to have been among those linked to the failure of the building. Waterproofing of the podium deck, for example, was said to have failed and allowed water and salt air into the concrete, corroding the reinforcing steel. But should the reporting engineer have ordered evacuation of the building, based on what his investigation revealed? It is way too early to know that, but it will likely be litigated.

But even if the recommended repairs had been made, would that have prevented the eventual collapse? According to sources, the corrosion of steel in certain critical components was so advanced, that massive shoring would have been necessary to avert failure. Was that recommended?

Other potential defendants could be the city personnel who advised occupants that the building was safe notwithstanding the engineer's report. But cities and their staff are often immune from liability for statements like that. And what about the owners themselves for delaying approval of the expenditure to carry out the engineer's recommendations? Can other defendants offer this as an affirmative defense? Again, massive proof problems abound.

Finally, can insurance coverage or other assets adequately compensate the victims? So far, it seems unlikely that sufficient insurance coverage is available, and while the land has value, how much of that value will survive the lien claims of lenders? Will the victims be compensated? The litigation to establish that could take many years unless some very creative solution is found and even then, the resources available to adequately satisfy hundreds of claims for property loss, injury, and death may not be available from any source. So, for all these wrongs is there a remedy? ■