

Terrorism: Legal Liability Beyond The Terrorist

▼ By Warren Lutz, Esq.
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The events of September 11 have generated renewed interest in examining who may be held legally liable for losses caused by terrorism. Clearly, the most obvious liable parties are the terrorists and their sponsors. Over several decades, however, the courts have expanded the universe of parties liable for injuries and damage caused by criminal acts. Now, given the predictions of increased terrorism, it is more likely that the persons targeted for liability lawsuits will also include those who should have known of a terrorist attack or of the reasonably foreseeable resulting losses, yet failed to take precautionary steps to prevent or minimize such damage.

In the construction industry the principal targets of such claims likely will be design professionals: architects and engineers who fail to design structures taking adequate account of predictable damage. To a lesser extent, contractors and suppliers may also be targeted. In the end, liability for terrorism damage may be based far more upon “who can pay,” rather than “who should pay.” Undoubtedly, this issue will be the subject of debate in the courts and legislatures for years to come.

Whether liability for terrorism damage will extend to non-terrorists involves review of how the law has resolved similar liability issues in the past. Historically, liability has been imposed for negligent building design and construction. Generally, such liability is based upon whether: (1) the defendant architect or contractor breached a duty of care; and (2) the

resulting damage was reasonably foreseeable.

Thus, for example, if a design professional developed plans for a structure located in a known earthquake zone, yet failed to design for additional structural support, he or she could be held liable for foreseeable earthquake-induced building damage.

In the context of crime-related injury and damages, liability also has been imposed on non-criminals. For example, landlords have been held liable in civil damages lawsuits for failing to install adequate crime control measures (e.g. additional lighting in public areas, window bars, reinforced doors, etc.) in apartment buildings located in neighborhoods with high crime rates.

Similarly, airlines have been routinely targeted in litigation following hijackings, based on claims that they failed to provide sufficient security screening procedures to prevent unauthorized persons from commandeering aircraft. The 1993 World Trade Center bombing generated hundreds of lawsuits against the landlord, the Port Authority, on the basis that it was allegedly negligent in its assessment of foreseeable harm due to the entry into the parking garage of a van containing explosives.

In the wake of September 11, the WTC design professionals may face claims that the Twin Towers’ steel structure, fire-retardant systems and evacuation design were lacking.

By contrast, the Oklahoma City Murrah Building architect has not faced claims of negligent design.

Expectations will heighten that **government** and the **private sector** should **increase** their **resources** to assess such **threats**, and take reasonable **measures** to **reduce** the resulting **damage**.

There, the bombing deaths and injuries were instantaneous, whereas many of the WTC losses occurred over the 60 to 90 minutes following the aircrafts’ impacts.

Several factors are typically cited to support liability in these civil damages cases. First, the defendant landlord, airline, or design professional is regarded as being in a better position to control access to its facility or otherwise take steps to prevent or minimize damage.

Second, these defendants are viewed as more financially able to compensate victims through insurance or other assets. While this factor is based far more on “who can pay,” rather than “who is directly responsible for the harm,” the law has increasingly adopted compensation programs imposing liability on those who are in a “better position” to pay. This factor, however, remains a hotly debated issue.

In light of September 11 it is likely that liability lawsuits will increase and target a broader universe of defendants, including members of the construction industry. The reasons are several.

First, terrorism is unfortunately predicted to increase. For months, federal law enforcement agencies have issued frequent alerts concerning possible attacks upon domestic facilities. In the words of many senior government officials, terrorism within the United States now is a matter of "when, not if." Given these predictions and the events of only the past decade—the 1993 WTC bombing, 1995 Oklahoma City bombing, 1997 Atlanta abortion clinic bombings, and the September 11 attacks on the Twin Towers and Pentagon—it is increasingly "foreseeable" that more terrorism will occur.

As such, expectations will heighten that government and the private sector should increase their resources to assess such threats, and take reason-

able measures to reduce the resulting damage. Such measures are seemingly futile in the context of preventing catastrophic damage from the collision of aircraft into skyscrapers; yet, subsequent liability lawsuits undoubtedly will examine in extraordinary detail whether reasonable measures could and should have been undertaken to prevent or at least minimize the damage to a site attacked by terrorists.

Second, such liability lawsuits will likely increase due to the difficulty victims face recovering damages from the terrorists. In virtually every major domestic terrorist event, the terrorist either died or was a person of modest wealth. By contrast, those who design, build or own targeted structures will be perceived as possessing adequate insurance or other assets to pay damages. These assets will tend to "refocus" the aim of victim lawsuits toward developing claims that a structure's designer, builder or owner should have done more under the circum-

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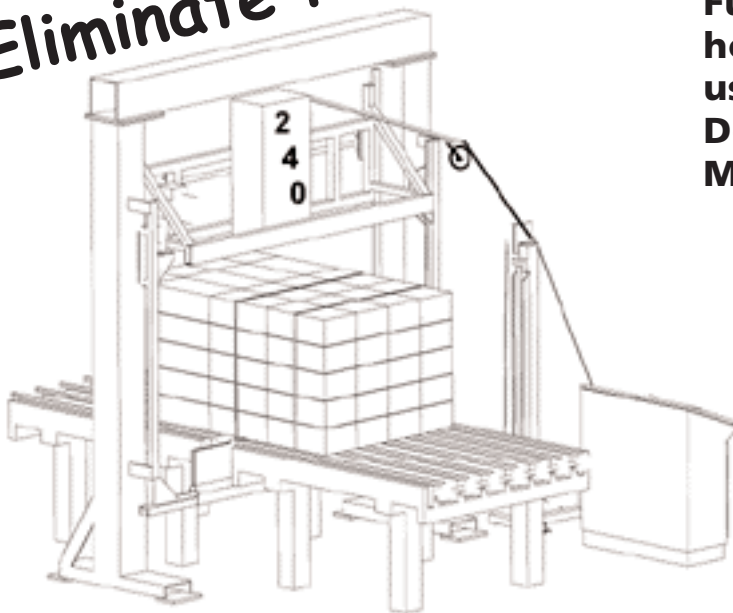
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The most **pressing** need may well concern **re-examination** of building **design** as to structural **integrity** and **survivability**.

stances to provide greater safety, and thus, they are at least partially liable for the harm caused by a terrorist act.

Third, the trend is toward a willingness by some courts and legislatures to shift the risk of loss to those who can pay and were in some position to take earlier steps to prevent or minimize the loss. Examples of this are found the area of products liability, where courts have shown greater willingness to hold man-

ufacturers liable despite adequate product warnings. Courts impose liability there, in part, because the manufacturers profit from their sales and are considered to be in a better position to prevent injury through product design, as well as pay for injuries caused by the product.

In light of these factors, what should a prudent member of the construction industry do? First, heed the warnings of future terrorism. Although so many of the government's warnings are overly generalized, the fact remains that future attacks are deemed likely.


Second, the industry should consider increasing resource to assess risk and identify methods to eliminate or at least reduce risk and resulting damage. The most pressing need may well concern re-examination of building design as to structural integrity and survivability (e.g. reinforcement of structural elements, window blast protection, fire suppres-

sion, building evacuation, ventilation safeguards and internal communication systems).

Third, document efforts made to examine security issues and to reasonably address safety in light of the threats posed by terrorism. Such documentation will aid in the defense against future liability lawsuits based on claims that the construction-industry defendant failed to undertake reasonable steps to reduce harm.


Fourth, scrutinize insurance coverage. Does your business maintain adequate insurance with sufficient policy limits? Do the policies contain exclusions (e.g. "war risk" and "terrorism") that could enable an insurer to deny coverage? Seek the guidance of insurance professionals or counsel to review the policy and determine the scope of coverage in light of potential future claims for damages related to terrorist acts.

Fourth, lobby for changes in existing law. In the wake of September 11, legislation passed to benefit the beleaguered airlines. Victim-compensation statutes have also been enacted to address some financial needs of victims and their families. Similar statutory protection may be sought for other segments of society affected either by increased liability or inability to obtain insurance. The latter may be particularly important as various insurers, with the reported support of many state insurance commissioners, may increasingly exclude policy coverage for damage caused by terrorism.

In short, the post-September 11 world will require some changes in the way in which everyone thinks about and deals with many issues. Prudence dictates that thought be devoted to whether safety can and should be improved. 

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