ALFA International
THE GLOBAL LEGAL NETWORK

2022 Construction Seminar

July 27-29, 2022

"DID I DO THAT?"

LIABILITY TO ADJOINING LANDOWNERS

Eric M. Leppo
Moderator
SEMMES, BOWEN & SEMMES
Baltimore, Maryland
eleppo@semmes.com

Jonathan M. Lieb
MCDOWELL KNIGHT
Mobile, Alabama
jlieb@mcdowellknight.com

"DID I DO THAT?": ADJOINING LANDOWNER LIABILITY

A. INTRODUCTION

"When crews began demolishing the back of the former Grand Central nightclub for a planned eight-story office redevelopment in Mount Vernon, residents of the historic building next door noticed loud construction noise and, then, something more surprising:
Large cracks appeared under the windows and at one corner of the ornate Italianate structure dating back to the 1860s.
In one of the apartments, ceiling plaster came crashing down. The large marble doorstep at the building's front entrance cracked in two."[1]

Historic Mt. Vernon building, damaged by construction project next door, likely to be demolished. Fern Shen, Baltimore Brew, Sept. 14, 2021.

Photos: Mark Reutter, Sept. 20, 2021[2]

[1] https://baltimorebrew.com/2021/09/14/historic-mt-vernon-building-damaged-by-construction-project-next-door-must-likely-be-demolished/
[2] https://www.baltimorebrew.com/2021/09/20/saving-the-front-facade-of-mt-vernon-townhouse-ruled-too-dangerous-by-chap/

Regardless of your role within the industry, potential damage or potential *claimed* damage to the structure or to the real property of adjacent landowners is an issue that should be at the forefront of any new undertaking. Frequently, however, it is not addressed or only partially addressed in the pre-construction phase, giving rise to claims that can be difficult and costly to investigate and defend without having established baseline conditions of the adjacent properties or sufficient monitoring of ongoing activity.

, Owners, design professionals and contractors must be cognizant of the potential liability to neighbors or risk putting their carriers on notice later on, particularly in conjunction with development and new construction in dense urban environments.

Below are some of the most common types of claims from adjoining landowners, potential strategies for mitigation and some noteworthy law from select jurisdictions.

B. NOTABLE CLAIM TYPES

a. Vibration

i. Excavation, pile driving and demolition can be dirty, expensive and noisy operations associated with various stages of any project. Such activities are also capable of causing significant vibrations that can cause both direct and indirect effects to a neighboring structure, its foundation and/or its supporting soils.

b. Trespass or Nuisance

i. Direct contact with equipment, workers or materials or indirect contact via excessive weight of stockpiling material can cause damage to adjoining landowners via trespass or nuisance actions.

c. Loss of Sub-Lateral Support

i. Most jurisdictions recognize a claim for loss of lateral support or sub-lateral support, frequently due to excavation work on the neighboring property. The Second Restatement of Torts provides:

"One who withdraws the naturally necessary lateral support of land in another's possession or support that has been substituted for the naturally necessary support, is subject to liability for a subsidence of the land of the other that was naturally dependent upon the support withdrawn."[3]

[3] REST 2d TORTS § 817.

The Restatement and many jurisdictions support strict liability for such damages because liability can lie without regard to foreseeability and even if the utmost care and skill are used.[4]

Notably, however, the right of lateral support and the strict liability associated therewith address only the soil/land in its natural state without structures or improvements.[5]

C. CLAIM PREVENTION AND MITIGATION STRATEGIES

a. Agreement (license) with Neighboring Landowners

i. Talk to those potentially affected parties early on about the scope and nature of the project and potential issues.

ii. Anticipate a timeframe.

iii. Address the need for airspace, ingress/egress, access for surveys and monitoring.

iv. Include a claim notice/submission procedure.

v. Provide for indemnificantion.

b. Preconstruction Surveys

i. Conduct thorough surveys of structures and geotechnical conditions to establish the baseline prior to work.

ii. Avoid fraudulent claims for pre-existing damage.

iii. Maintain the ability to observe potential alternative causes or contributing factors of later damage.

c. Monitoring

i. Monitor the activity consistently and professionally.

ii. Monitor vibration.

iii. Know when work activity type and location was capable of causing alleged damage.

d. Appropriate and Sufficient Insurance Coverage

[4] *Id*. at Comment (b).
[5] *Id*. at Comment (c).

D. RELEVANT LAW AND LEGAL DECISIONS

a. New York City – Strict Liability for Damage Caused by Excavation

i. The New York City Building Code contains regulations designed to protect adjoining property from damage during construction or demolition work.[6]

ii. Section BC 3309.4 (formerly Administrative Code of the City of New York §27-1031 (b)(1)) imposes strict liability for excavation work that causes damage to adjoining property stating:

> Whenever soil or foundation work occurs, regardless of the depth of such, the person who causes such to be made shall, at all times during the course of such work and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property and to perform such work thereon as may be necessary for such purpose. If the person who causes the soil or foundation work is not afforded a license, such duty to preserve and protect the adjacent property shall devolve to the owner of such adjoining property, who shall be afforded a similar license with respect to the property where the soil or foundation work is to be made.

iii. This provision of the building code incetivizes the adjacent landowner to provide the owner/developer of the project the necessary license to inspect and perform work there. Any damage to the neighboring property will result in strict liability.

iv. In the 2020 case *211-12 N. Blvd. Corp. v LIC Contr., Inc.*, the appellate court held that the damaged adajacent property owner could prevail on its motion for summary judgment on its strict liability claim without establishing the efforts it took to preserve and protect its property if the it established the owner/developer/contractor performing excacation never made a request for a licensey.[7]

v. In the 2014 case *87 Chambers, LLC v 77 Reade, LLC*, the adjacent property owner pursued claims under this strict liability section against the owner, general contractor, architect, engineer and subcontractors due to a partial building collapse caused by excavation activities.[8]

The Court held that the architect could not be liable to the adjacent property owner under the provision (or a negligence theory) but that there was a material dispute

[6] NY City Building Code [Administrative Code of City of NY, title 28, ch 7] § BC 3309 *et seq*.
[7] 186 A.D.3d 69 (2nd Dep't 2020).
[8] 122 A.D.3d 540, 998 N.Y.S.2d 15 (1st Dep't 2014).

of fact as to whether the engineer could be so liable: "Plaintiffs' section 3309.4 claim against [the architect] should have been dismissed because [it] was not 'the person who cause[d] an excavation or fill to be made' within the meaning of that provision (§ 3309.4). Indeed, [the archtitect] was neither the owner of the 77 Reade Street property nor the contractor who performed the excavation."[9]

Conversely, as to the Engineer, the Court held: "[The Project Engineer] was not entitled to summary judgment dismissing plaintiffs' Administrative Code section 3309.4 claim as asserted against it, since there is an issue of fact as to whether [it] substantially contributed to the design and methodology employed during the excavation process and therefore was a 'person' who 'cause[d] an excavation' within the meaning of section 3309.4 (§ 3309.4)."[10]

vi. Shortly thereafter, in *American Sec. Ins. Co. v Church of God of St. Albans*, the appellate court addressed the issue of potential liability to an architect for damage to the adjacent landowner.[11] The Church of God of St. Albans was conducting demolition of a portion of a structure the church owned with plans for building a new two-story building. During excavation, the neighboring building sustained damage significant enough to render it unstable and on the verge of collapse.

Plaintiff pursued claims against the architect based on negligence and an alleged violation of the Building Code provision. The trial court found the architect strictly liable, but on appeal, the Court — echoing the language of *87 Chambers, LLC* — stated: "[W]e agree with [the architect] that the Supreme Court erred in finding him absolutely liable pursuant to section 3309.4. [He] made a *prima facie* showing that he could not be held liable pursuant to that section by establishing that he was neither the person who made the decision to excavate nor the contractor who carried out the physical excavation work."[12]

b. Maryland

i. In Maryland, as well as many other jurisdictions, the right to lateral support does not extend to buildings on the land. As such, Maryland has recognized that where an excavation is made by a landowner "on his land for a proper purpose and it is not done negligently, unskillfully, or with improper motives, any damage occasioned to a building on adjoining land is *damnum absque injuria*."[13]

ii. Additionally, a Maryland landowner has no imperative obligation to give an adjoining owner notice of his or her intention to excavate in close proximity to the

[9] *87 Chambers, LLC*, 122 A.D.3d at 541.
[10] *Id*.
[11] 131 A.D.3d 903, 16 N.Y.S.3d 247 (2nd Dep't 2015).
[12] *Id*. at 905.
[13] *Mullen v. Hacker*, 187 Md. 261, 287 (1946).

adjoining owner's building.[14] Maryland courts, however, have held that a landowner has a duty of due care to notify his or her neighbor of his intended improvement and afford them an opportunity to take precautions to protect their building when he might endanger an adjoining building. Such notice is a reasonable precaution, especially in a large city, where improvements, however skillfully they may be conducted, made by one landownermay be attended with accidental and disastrous results to his neighbors.

iii. Adjoining landowners may seek equitable relief for equitable damages an adjoining landowner causes.[15]

c. California

i. California applies the doctrine of strict liability to "ultrahazardous actives" (i.e., "abnormally dangerous" under the Restatement of Torts terminology) but, has not determined pile driving or excavation to be ultrahazardous activities (nor have other jurisdictions). California follows the Restatement (Second) of Torts when determining if an activity is abnormally dangerous.[16] Activities that have been deemed "ultrahazardous" include: fumigating buildings with hydrocyanic acid gas, use of "high" explosives, and removing oil from natural reservoirs. California has refused to apply strict liability when the "matter is one of common usage."[17]

d. Texas

i. Texas has generally not recognized the doctrine of strict liability for abnormally dangerous activities.[18] In a 2016 decision, Texas did not deny that a plaintiff could recover under a strict liability claim in a nuisance case but, rather, disposed of this issue on other grounds.[19] However, Texas has regularly declined to apply the doctrine of strict liability to cases within the nexus of construction work.[20]

e. Florida

[14] *See id*. at 264.
[15] *See Anne Arundel County Fish & Game Conservation Ass'n, Inc. v. Carlucci*, 83 Md. App. 121 (1990).
[16] *See Edwards v. Post Transp. Co.*, 228 Cal. App. 3d 980, 984-85 (Cal. Ct. App. 1991).
[17] *See Clark v. Di Prima*, 241 Cal.2d 823, 8239 (1966)(holding that erecting irrigation ditches for water to escape did not warrant application strict liability (i.e., ultrahazardous activity) because irrigation was a matter of common usage).
[18] *See Hicks v. Humble Oil & Refining Co.*, 970 S.W.2d. 90 (1998).
[19] *See Crosstex North Texas Pipeline, L.P.*, v. Gardiner, 505 S.W.3d 580, 617 (2016)(citing Turner v. Big Lake Oil Co., 96 S.W.2d 221, 222 (1936)).
[20] *Agric Warehouse, Inc. v. Uvalle*, 759 S.W.2d 691, 695–96 (Tex.App.—Dallas 1988), writ denied, 779 S.W.2d 68 (Tex.1989) (*per curiam*); *Gessell v. Traweek*, 628 S.W.2d 479, 482 (Tex.App.—Texarkana 1982); *Gray v. Baker & Taylor Drilling Co.*, 602 S.W.2d 64, 67 (Tex.Civ.App.—Amarillo 1980); *Goolsby v. Kenney*, 545 S.W.2d 591, 595 (Tex.Civ.App.—Tyler 1976); *See, e.g., MBank*, 836 S.W.2d 151, 159 (1992) (Hecht, J., dissenting) (citing Texas courts that have refused to characterize use of heavy equipment, inflammable materials, electrical work, blasting, and refinery operations as "inherently dangerous" activities).

i. Florida applies § 520 of the Restatement (Second) Torts in order to determine if activities are inherently dangerous.[21] Similar to Texas, when Florida has applied the doctrine of strict liability, they have done so narrowly.[22] In *Great Lakes Dredging and Dock Co*., a hotel owner filed suit against the owner of a large rock crushing machine when he used the machine to restore a public beach near the hotel.[23] The hotel owner tried to recover, in part, under the assertion that the drilling was an "abnormal danger" and thus, the company should be strictly liable.[24] The District Court of Appeal of Florida denied that this type of machine, and use thereof, constituted an abnormally dangerous activity because there was no "physical danger" presented by the use of the machine (compared to solely economic danger).[25] Florida courts will apply the doctrine of abnormally dangerous activities but strictly construe this doctrine to activities that present physical dangers (e.g. blasting rock).[26]

f. Illinois

i. Illinois, similarly, applies the Restatement (Second) of Torts, § 519-20, to determine if an activity is abnormally dangerous.[27] The court in *In Re Chicago Flood Litigation* refused to classify pile driving as an abnormally dangerous activity.[28] The plaintiffs argued that pile driving under a riverbed was an abnormally dangerous (or "ultrahazardous") activity.[29] The court — relying on § 520 factors — determined that pile driving did not: (1) create a high degree of risk to person, land, or chattel; (2) present a likelihood that the harm would be great; or (3) create a risk that could not be eliminated by the exercise of reasonable care.[30] The court explained that the doctrine of abnormally dangerous activity "more concisely" applies to activities that are dangerous "in [their] normal or nondefective state."[31] Moreover, the court expressed that the common factors associated with operating machinery (e.g., vibrations) do not place a case under considerations in the same category as blasting.[32] Subsequent cases have distinguished *In Re Chicago Flood Litigation* on other grounds, but the

[21] *See supra*, N. 7.
[22] *See, e.g., Great Lakes Dredging and Dock Co. v. Sea Gull Operating Corp.*, 460 So.2d 510, 512-14 (Fla. Dist. Ct. App. 1984)(declining to apply the doctrine of abnormally dangerous activity because the harm was not the kind that is "within the scope of the abnormal risk posed by blasting activity.").
[23] 460 So.2d at 510.
[24] *Id*.
[25] *Id*. at 513.
[26] *Id*.
[27] *See In Re Chicago Flood Litigation*, 175 Ill.2d 179, 207-09 (1997).
[28] *Id*. at 211.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*. (citing *Trull v. Caolina-Virginia Well Co*., 346 N.C. 687, 691-92 (1965)).

determination on abnormally dangerous activity has remained intact with respect to pile driving.[33]

[33] *See, e.g., Andrews v. Metropolitan Water Reclamation District of Greater Chicago*, 2019 IL 124283 (2019).