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Love Your Neighbor? Evaluating Construction Claims From Adjacent Property Owners

I. The Big Picture – Before, During, and After a Claim

Evaluating the potential for construction liability claims should start long before the first truck tire rolls onto a construction site or the first shovel blade hits the ground. And that evaluation should include potential issues from adjacent properties. Often the most contentious claims come from owners of properties adjacent to a construction site, which are not directly involved with the project. From allegations of vibration damage to undermining of adjacent foundations to encroachment onto neighboring properties, design and construction professionals have a myriad of things to account for that are tangentially related to the construction project at hand and often get overlooked. Best practices require that insurance, legal, and forensic experts be involved at every stage of a project and not just after a claim arises. How should risk managers, claims professionals, legal counsel, and forensic experts evaluate conditions prior to construction and what is the best course of action when such claims arise?

II. Duties and Responsibilities of the Claims Team Members

No person is an island, and no land exists in isolation. Landowners certainly have the right to use and enjoy their property with certain limitations; however, landowners are expected to undertake *reasonable* use of their property without unduly interfering with the rights of their neighbors. Accordingly, actions taken by a landowner may not substantially interfere with or disturb the rights of adjoining landowners. Owners (or their agents) can be held liable for damages arising from interference with adjacent property owners' enjoyment of their properties. This premise requires special consideration when an owner has contracted for construction activity on his or her property. Not only can construction give rise to immediate nuisance claims for noise and dust; it can also lead to more serious and expensive property damage claims by affecting water flow or compromising structural integrity of structures on adjacent property. When planning for construction, all involved parties must literally think outside the box of the structure or property lines within which the work takes place.

While landowners, design professionals, and construction professionals involved with the development of a property need to consider conditions beyond the boundaries of the specific building or property, the need to keep an eye on the bigger picture also applies to claims

professionals, legal counsel, and forensic experts when evaluating construction claims where the dispute arises between landowners from adjacent properties. And amongst these parties, each has a unique duty and responsibility that extends to their fellow members of the claims team. This requires that claims professionals, legal counsel, and forensic experts clearly understand their roles and responsibilities and communicate accurately and effectively with each other in a manner that meets the needs of the other members.

A. The Claims Side

The claims professional's perspective in allegations between landowners requires a heightened awareness both from the counsel retained for the insured and the forensic expert retained on behalf of the insured. The key element that claims professionals need both legal counsel and forensic experts to determine is causation. This is challenging enough when dealing with one building component allegedly damaging another building component within the same unit, building, property, or the like. However, when dealing with multiple properties and different owners, determining causation is even more challenging as the team will be dealing with a property that could be located next door, across the street, or in some cases some distance away from the claimant landowner's property. Additionally, the investigation and evaluation have the added complication of potential access constraints and the potential for adverse parties to attempt to limit the scope of the investigation. This will typically slow down the overall process leading to a slower resolution and increased costs.

When a claims professional is handling a claim from adjacent property owners, the typical challenges of handling a claim are exponentially compounded. The magnitude of the difficulties can be seen when considering one aspect of assessing a claim: access to the property. One of the first things that the claims professional needs to do when assessing a claim from an adjacent property owner is securing access to the site to allow for an evaluation of the alleged damage. However, when dealing with an understandably upset property owner, gaining access may not be as simple as asking for permission and scheduling an inspection. When the owner of the other property is not open to allowing the claims professional and their forensic experts to access the property, the only legal remedy would be to engage counsel to work through the legal process to secure access to the property against the owner's wishes. Additionally, it may be necessary to subpoena records from that property owner to allow for an assessment of conditions that existed prior to the incident that allegedly resulted in damage. None of which is likely to be well received by the non-party. As such, the claims professional needs to ensure that counsel defend the claims against the insured meaning that they will need to face the adjacent property owner's legal counsel increasing the fees that the carrier must expend to defend the overall matter.

In the example above, the added complexity that a claims professional must deal with when handling a claim against their insured from an adjacent property owner can be seen. However, the example above is just the tip of the iceberg when handling such claims. Thus, it is important that the claims professional not be hesitant to engage legal counsel or forensic experts in the process of handling such claims as such delays are unlikely to help bring the claim to a successful and equitable resolution.

B. The Legal Side

In the industry we know that even the best planned projects can result in claims. Theories of liability typically advanced by adjacent property owners include negligence, private nuisance, trespass, and sometimes, strict liability for ultra-hazardous activity (i.e., blasting). For negligence to prevail in a construction defect claim, the plaintiff must, of course, prove duty, breach, cause, and damages. Under private nuisance, a possessor of land must prove the defendant substantially and unreasonably interfered with the plaintiff's use and enjoyment of property. In terms of whether the interference is substantial, courts consider factors such as financial loss, physical change in property and whether the interference is continuous and ongoing, but the bar is low, and noise or fumes can qualify. To determine whether the interference is reasonable, courts sometimes look to the usefulness of the activity in question. Trespass will sometimes accompany a nuisance claim and is generally defined as an unlawful invasion of the property of another, resulting in damages. Lastly, some courts have permitted theories of strict liability to move forward in cases involving seismic movement caused by blasting.

The best defense is a good offense in any claim, especially when faced with a CD claim from a neighboring property owner. At the inception of a claim, it is important to have a good timeline from the contractor of all permits, work logs and inspections. Matching up the timeline of activity to the alleged damage can assist throughout the case in determining causation or which contractor may be responsible for the damage. It is also crucial to be familiar with your jurisdiction's statutes of limitations and statutes of repose as the possible first line of your defense, potentially saving hundreds of thousands in defense costs. Getting ahead of any building code issues is also key, as many states permit awards of attorney's fees for violations.

Overall, construction defect claims from adjacent property owners can raise multitudes of legal issues, and knowing the law of your venue before investigating and evaluating the claim can set your defense up for success.

C. The Expert Side

For forensic experts, the forensic aspect of handling these types of claims is not that different from handling any other type of forensic assessment. Forensic experts must often navigate contentious property owners, contractors, and public adjusters. However, when dealing with claims involving multiple property owners, the problems are compounded, and the forensic expert must remember to tread lightly with the involved parties while still performing a thorough investigation.

While the investigative process may not be that different, the care that must be taken when dealing with the involved parties working on behalf of the adjacent property owner is typically very different. It is critical that each member of the team remember the duties and responsibilities of the other members and not work in a way that compromises the ability of the members to perform their individual roles. It is the job of the forensic expert to provide accurate information to the claims professional and the legal counsel by whom they have been hired that is based on the facts and available information related to the claim. While

the forensic expert must be dedicated to accurately evaluating the claim based on the evidence, the forensic expert must remember that the adjuster and legal counsel are in the position of protecting the rights of carrier and the insured. When forensic experts communicate information to parties outside of the team by whom they've been retained, they can compromise the ability of those team members to perform their jobs. Thus, while good communication is a must for any forensic expert, the expert must remember that communication should be directed through the appropriate parties and information should never be provided to any party without the express direction of whomever retained the forensic expert. Such communications can often run contrary to the needs of the claims professional and legal counsel who are working to resolve the claim for the forensic expert to communicate directly with the parties working on behalf of the adjacent property owner.

Similarly, forensic experts must be sensitive to the fact that a written report (or communicating professional opinions in any written form) can run directly contrary to the needs of the adjuster and/or legal counsel. Thus, providing professional opinions in written form should only be done only when specifically requested by the claims professional and/or legal counsel. While it is the job of the forensic expert to provide accurate information to the rest of the claims team, such information must only be delivered in a manner that benefits the needs of the other members of the team. As such, it is also necessary for the forensic expert to be certain that everyone is aware of their professional opinions prior to providing those opinions in writing. Such is particularly important when preliminary opinions change over the course of the investigation due to additional analysis or the review of additional information. To put it simply, the professional opinions provided in any report should never come as a surprise to the adjuster or legal counsel.

III. Case Studies

A. Vibration Damage Claim

The insured is a general contractor for a construction project for a bank. The general contractor retained a subcontractor to furnish certain labor and materials in its scope of work for the bank. As part of the construction project, pile driving and earth removal at the bank site was required. One neighboring property includes a residence that sits immediately adjacent to the bank project site. After construction of the pile retaining wall and earth removal began, the homeowners claimed that the pile driving, and earth removal activities damaged their home. The homeowners alleged that damage exists throughout their house and that nearly every aspect of their property has some type of damage including settlement and disruption of plumbing and sewer systems. After multiple trips to the subject property, the insured's expert concluded that the pile driving and earth removal activities at the bank property did not cause vibration damage to the Plaintiff's property.

B. Drainage and Water Intrusion

The insured has owned a property for approximately 20 years that includes a commercial building that is rented to a local business. The property is situated in a flood plain because of its proximity to a nearby creek. Across the roadway from the insured's building is a quarry and mining facility that has been in operation for approximately 10

years. Prior to operation as a quarry, the State installed a culvert along the edge of the roadway with the culvert being in an easement along the edge of the quarry property. The culvert serves as a drain for water from the quarry property, the roadway, and serves to control localized flooding from the nearby creek. During the development of the quarry property, a gravel access road and gravel parking lot were constructed that sit at a higher elevation than the road and the insured's property. Additionally, the owner of the quarry constructed a berm along the side of the culvert to obscure the quarry operations from view of the roadway.

Shortly after construction of the gravel parking lot, roadway, and berm, the insured alleged that the newly constructed elements at the quarry property resulted in a change of surface drainage conditions resulting in water flowing across the Road and onto his property. Additionally, the insured noted that there was increased water flow through the culvert installed by the State. Multiple meetings occurred between the insured, the quarry owner, and State representatives. The State determined its culvert was properly designed and constructed and refused to make any changes to mitigate water runoff from the quarry property to alleviate the insured's concerns. The quarry owner made some changes to its access road to pacify the insured, which were initially successful in preventing water runoff on to the insured's property.

Recently, the insured again alleged that there was flooding and water damage to the commercial structure on his property. More conversations took place and the quarry owner agreed to make additional changes to the quarry property to prevent water run off toward the insured's property, despite the quarry owner's belief that such changes were unnecessary. However, the insured does not believe that latest changes corrected the issues as water damage has been alleged to be getting worse at the insured's property. At this point, the insured has made a claim to his carrier alleging water damage to the commercial property and resulting in physical damages and a loss of rental revenue amounting to hundreds of thousands of dollars.