THEORIES OF OWNER LIABILITY FOR EARTHQUAKE LOSSES: A DEBATE BY LAWYERS FOR NON-LAWYERS

David Bonowitz, S.E.,1 moderator

ABSTRACT

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These questions are increasingly important as seismic evaluation and retrofit programs proliferate around California. The City of Los Angeles, for example, has mandated retrofit of about 13,500 “soft story” woodframe buildings but requires only minimal work that some engineers would call inadequate to its safety-based purpose. Does such a retrofit remove liability? Los Angeles has also mandated checklist evaluations of about 1500 older concrete buildings, but retrofit is not required for another two decades. Myrick would seem to make the owners liable for any earthquake damage in the meantime, but did a notice from the city really change their liability? And what about owners of similar buildings outside Los Angeles – when does their liability begin, or has it begun already?

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The Acorn Building as Case Study

In the 2003 San Simeon earthquake, the Acorn Building, an unreinforced masonry (URM) structure in Paso Robles, California, collapsed, killing two women as they tried to flee. At the time, the building was subject to a mandatory retrofit ordinance, and the owners had received both a notice from the city and an evaluation report and retrofit plans from their engineer [1].

The victims’ relatives sued the building owners and were awarded $1.9 million dollars for the wrongful deaths resulting from the owners’ negligence.

The owners appealed, arguing that because the 2018 retrofit deadline was still years away, they were acting reasonably and could not be considered negligent. In 2010, California’s 2nd District Court of Appeal, in the case known as Myrick v. Mastagni, rejected their argument and affirmed the trial court decision. In its opinion, the court relied on the general rule that “statutory compliance is not a complete defense in a tort action,” concluding:

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A city ordinance requiring hazardous buildings to be retrofitted by a certain date does not insulate owners of unreinforced masonry buildings from negligence causing death or injuries prior to the compliance date [1].

Later in 2010, the California Supreme Court denied the owners’ further appeal, effectively affirming the Court of Appeal conclusion [2].

Parsing the court’s conclusion

Experts called Myrick a “profoundly important” decision [2]. As “the first unreinforced masonry case to be adjudicated” in California, it created new case law affirming civil liability for earthquake damage [2, 3]. Some officials said in 2010 that Myrick “clarifies for the first time the expectations on building owners throughout California” [4]. But does it?

The Acorn Building’s owners argued that with a retrofit ordinance in effect, their only duty was to avoid negligence per se, that is, negligence as a result of missing a deadline or otherwise failing to comply with a regulation. The court said no: even with an ordinance setting its own deadlines, owners can also be liable for foreseeable losses due to general negligence if they fail to take reasonable precautions. But the court stopped well short of clarifying what actions, or non-actions, constitute that negligence.

Even if we know what constitutes negligence, we might also ask when it becomes actionable. The owners argued that their liability, if they had any, would begin only when they missed an ordinance deadline. Again, the court said no: that is not when liability begins. But again, the court offered no insight into how the owners’ actions over at least the previous 14 years might have affected their liability. Indeed, it is likely that some or all of the following milestones [1] had some influence on the jury’s findings and awards:

1986 California passes the URM law (Government Code Section 8875), requiring local jurisdictions to create inventories and develop mitigation programs.
1989 Paso Robles lists the Acorn Building as “potentially hazardous” and notifies the owners.
1989 Loma Prieta earthquake damage includes URM damage and partial collapses.
1992 Paso Robles passes a mandatory URM retrofit ordinance.
1993 Paso Robles notifies the Acorn Building’s owners of their retrofit requirement with a 2008 deadline.
1994 Northridge earthquake damage includes URM damage and partial collapses.
1998 Paso Robles extends the retrofit deadline to 2018.
1998 The owners engage an engineer and receive an evaluation report and retrofit recommendations.
2003 The earthquake occurs on December 22.

That the owners had not started their retrofit five years after receiving their engineer’s report probably influenced the jury. If the earthquake had occurred in 1998, just days after the owners received that report, would they have seemed less negligent, having not had a chance to act on it? Maybe not; five years had already passed since they received their notice from the city.
If the earthquake had occurred in 1993, just days after they were notified, would that have changed their liability? Four years had already passed since their building was first listed by the city as “potentially hazardous.” So when exactly did their potential liability begin?

And if the owners had completed their retrofit before the earthquake, would that necessarily have removed their liability for any (hopefully smaller) losses? From an engineering perspective, it’s worth noting that URM retrofits, like practically all mandatory retrofits, require only the most basic and minimal improvements, almost always leaving the retrofitted building still more damage-prone than new construction. So if “built to code” is the standard, most mandatory retrofits don’t meet it. And from a legal perspective, Myrick made clear that even aside from the question of deadlines, an ordinance is not intended to shield an owner from negligence:

[A] statute, ordinance or regulation ordinarily defines a minimum standard of conduct. A minimum standard of conduct does not preclude a finding that a reasonable person would have taken additional precautions under the circumstances. ... [T]he overriding policy behind the seismic retrofit ordinance, taken as a whole, is not the promotion of the interests of building owners. [1]

In other words, Myrick suggests that owner liability with respect to general negligence can exist independent of any ordinance. If an ordinance does nothing to create owner liability, why would a selective or minimal ordinance necessarily do anything to remove that liability?

Remaining and New Questions

The milestones in the recent life of the Acorn Building, listed above, are not uncommon. One can imagine similar events in the life of any of the thousands of “soft story,” non-ductile concrete, tilt-up, and other structure types (including remaining URM buildings) now subject to mitigation programs of one sort or another.

For example, consider any of the 1500 or so concrete buildings subject to the current City of Los Angeles ordinance [5]. What the responsible owner should know about the earthquake safety of that building comes from both the history of the building and events in the outside world since its construction 40, 50, or 60 years ago:

<table>
<thead>
<tr>
<th>Events in the building’s history</th>
<th>Events in the outside world</th>
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<tbody>
<tr>
<td>• Built in, say, 1960</td>
<td>• 1971: Similar buildings sustain damage or collapse in San Fernando earthquake.</td>
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<tr>
<td>• 1980: Owner buys the building, receiving no information about its performance in the 1971 San Fernando earthquake.</td>
<td>• 1976: Building code is substantially changed, making most existing concrete buildings “non-conforming,” if not seismically unsafe.</td>
</tr>
<tr>
<td>• 1994: Building sustains insignificant structural damage in Northridge earthquake.</td>
<td>• 1993 – 2011: Similar buildings sustain damage or collapse in</td>
</tr>
</tbody>
</table>
Events in the building’s history

improvements, none of which triggers a seismic evaluation by code.

- 2010: Owner refinances, provides lender with report of acceptable Scenario Expected Loss.
- 2014: Building appears on list of pre-1980 concrete buildings compiled by UC and published by the L.A. Times [6].
- 2018: Owner receives notification from the city requiring checklist evaluation by 2021 and (probably) retrofit by 2043.

Events in the outside world

Guam, Northridge, Chile, and Christchurch earthquakes.

- 1994: City revises its building codes and implements repair and mitigation programs in response to Northridge, especially for steel and woodframe structures.
- 2011: Concrete Coalition publishes report calling attention to about 17,000 pre-1980 concrete buildings throughout the state [7].
- 2014: Mayor calls for mandatory retrofit of non-ductile concrete buildings [8].
- 2015: City passes ordinance requiring checklist evaluation and retrofit [5].

At what point in that history does the owner’s liability begin? While the outside world was documenting the risks of non-ductile concrete, the building itself was in compliance the whole time. If a damaging earthquake occurs in 2019, is the owner more liable (or more likely to be found liable) than if it had occurred in 2014, before the ordinance? Myrick tells us the answer should be no: negligence per se is not the most important issue, so the fact that a retrofit ordinance is in effect should not reduce or increase owner liability for general negligence.

But that’s not how it feels. On the contrary, it seems to many that an ordinance, by targeting certain buildings and prompting action by owners, makes the case for liability stronger. Legally, ordinances might not matter. Practically, can their effects really be ignored?

Effects of an ordinance

Mandatory retrofit ordinances only happen after a hazard is already well recognized by the engineering community, by lenders and insurers, and even by owners. Owners are responsible for understanding their own risks, and all that general historical knowledge within the building community should be enough – for a truly damage-prone building – to establish liability.

But an ordinance generates a paper trail. The products of a typical ordinance – notices, submission forms, reports, plans, and expert opinions – increase an owner’s specific knowledge about her building. If that does not create potential liability, doesn’t it at least crystallize the liability already inherent in a damage-prone building, even if the actual risk hasn’t changed? Even in Myrick, the facts of the case are heavy with references to the Paso Robles ordinance and the records it produced. Further, as hundreds or thousands of owners subject to an ordinance take actions to comply, a de facto standard of owner reasonableness is likely to emerge.
One might have thought, as the Acorn Building owners did, that having an ordinance clarifies the owner’s responsibilities and, by establishing a standard of care, perhaps even makes her liable only for negligence *per se*. After all, that is how the building code for new construction works, and what is a retrofit ordinance if not a building code for certain existing buildings? The difference is that in new construction, the alternative to compliance is to build nothing; with existing buildings, the alternative to retrofit is to accept or ignore the existing risk. So rather than define and remove some liability, it seems likely that an ordinance, despite the apparent lessons of *Myrick*, might increase it.

This leaves us with the pre-*Myrick* question – what constitutes negligence? – and with new post-*Myrick* questions: Does listing a building as an example of a “potentially hazardous” type create or clarify the owner’s potential liability? Does implementing an ordinance do that?

These questions are obviously important to cities enforcing current ordinances or considering new ones, and to the affected building owners. But they should also be important to owners whose buildings are similar to those targeted by an ordinance or exempt for non-technical reasons. The current proliferation of ordinances around the state might be changing the standard for how reasonable owners should act. For example:

- If the Los Angeles concrete ordinance clarifies the risk or creates a standard of reasonableness for evaluating 1500 buildings in the city, can owners of similar concrete buildings in Pasadena or Long Beach ignore that?

- If 5000 San Francisco owners are complying with a mandatory “soft story” retrofit ordinance [9], can owners of similar buildings in Oakland still claim that voluntary retrofit is an unreasonable burden?

- Since the San Francisco ordinance applies only to three-story buildings with at least five residential units, can the owner of an exempt two-story, four-unit building claim she is acting responsibly? The Los Angeles “soft story” ordinance would include the smaller building.

- *Myrick* tells us that an ordinance does not create a standard of care with regard to the timing of a retrofit, so does an ordinance necessarily create a standard with regard to the retrofit design criteria or performance objective? That is, if a Los Angeles owner completes a minimal retrofit to comply with the ordinance, can she still be liable for losses the retrofit did not prevent?

- If different jurisdictions set different retrofit objectives, as San Francisco and Los Angeles do [9], does the tougher ordinance set the standard for everyone?
References


7. Comartin, C. et al. The Concrete Coalition and the California Inventory Project: An Estimate of the Number of Pre-1980 Concrete Buildings in the State. Concrete Coalition, September 2011.
