# Construction Tool Box: Construction Laws, Cases, Notes and Alerts

**A Service of The Harmonie Group Construction Law Committee**

**Vol. I No. 1 (April 2012)**

## From The Editor:

This issue represents the first publication (Vol. I No. 1) of Harmonie's Construction Tool Box developed and produced by the Construction Law Committee of The Harmonie Group to advise clients, self-insureds, insurance companies, TPA's and other "friends of Harmonie" about recent cases, legislation, and other current events in the field of Construction Law in the various states and across the United States and Canada. We expect to publish three times a year (April, August, December) on the theory that is frequent enough to truly give advance notice and "alerts" about new legal developments, but not so frequent as to be overly repetitive or intrusive.

Of course, neither this nor subsequent communications can provide specific legal advice on a given case or issue, and any attempt to do so is specifically disclaimed. Rather, the purpose is educational of a general nature and, as always, specific inquiries should be made to Harmonie Group attorneys in a particular jurisdiction.

Each issue will discuss developments affecting Construction Law generally and across a broad spectrum of the United States and Canada, coupled with state-by-state developments.

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## National Focus

**Limits/Regulation of Certificates of Insurance**

Certificates of Insurance are used in the construction industry to reflect the identity of insurance carriers, types of coverage, policy numbers and policy limits. Certificates of Insurances are not policies of insurance. They do not amend, modify, endorse, constitute a rider, or grant insurance coverage not provided in the policies of insurance themselves. The 2010 form of ACORD Insurance Certificate (2010/05), explicitly states that Insurance Certificates do not amend, modify or add coverage not afforded by the polices:

> "This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend, or alter the coverage afforded by the polices below. This certificate of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder."

Additionally, the new ACORD form states the following on notice of cancellation:

> "Should any of the above described polices be canceled before the expiration date thereof, notice will be delivered in accordance with the policy provisions."

To address the use of Certificates of Insurance, four states recently enacted Certificate of Insurance statutes. Among other things, these statutes prohibit insurance agents from issuing, and prohibit owners or contractors from requiring, language on a Certificate of Insurance which represents that insurance policies identified conform to any contract or provide insurance required by a particular contract. The four states which recently enacted legislation are Louisiana and North Dakota in 2010, and Utah and Georgia in 2011. Such legislation is reflective of a national trend to restrict Insurance Certificates. These recent statutes address, among other things, advance notice of policy cancelation, references to compliance with contracts, providing false or misleading statements on Certificates and, in some instances, even impose fines and sanctions for violations of the statute(s).

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## National Focus

### Integrated Project Delivery

Integrated Project Delivery is a registered mark with the United States Patent and Trademark office (held by Integrated Project Delivery Inc., a Florida corporation), the subject of an August 2008 Colorado law, and now, two different types of Integrated Project Delivery (IPD) Agreements are being introduced by the AIA involving both "transitional" IPD documents and a full scale version. IPD in its purest form, brings the design team and contracting trades together to work as one cohesive unit, in effect one firm with a shared bottom line, whose sole purpose is delivery of a single project.

Unlike traditional construction process, IPD transforms what used to be a "design first, then seek bid" process with a "design assist" phase. In this design assist phase, a "Request for Qualification", is issued which will contain a brief project overview, project initiation dates, target completion dates, estimated construction costs, and will also identify which trades are requested to seek qualification (plumbing, HVAC, electric, glazing, etc.) A pure IPD would involve all trades, but most current projects only necessitate integration of the major trades. In an IPD project, "Qualification" drives the selection of contractors, not a bid. The trades are invited to become "Primary Team Members" or "IPD Team Members" who play a substantive role even at early design stage.

All Team Members, upon selection, take on joint responsibility for success of the project. Usually Team Members forego traditional subcontracts which force "risk" down the ladder and "indemnity" up the ladder and instead agree to one Team Member Agreement. The Agreement includes a consent to a joint Guaranteed Maximum Price, consent to share in project costs, and an accord to distribute profits based upon an accepted formula according to scope of project involvement (a "shared savings clause"). All Team Members also agree to share full responsibility and benefits of a single contract with the owner.

Under other construction models subcontractors have economic incentive to (1) perform work that adhered strictly to drawings even if they knew it was a less than optimal design; (2) request a change order when the work was complete and design proved, expectedly, less than optimal; (3) re-do work to achieve a satisfactory result; while (4) collecting an additional fee which serves their company's own bottom line. IPD refers to this as "local optimization" which results in sub-optimal "collective performance". Under IPD, all Team Members seek best design, planning, and "collective optimization" from day one. Team Members discuss what might impede efficiency and deal with it up front. The different expertise of all Team Members is integrated, shared, and tested. Project positions are selected from the ranks of Team Members with consent of the entire Team. Wages are paid by the Team, and everyone is responsible to the Team as a whole, not only to their individual companies.

Crucial to the success of the system is that IPD Team Members develop a group mentality early on. In an industry driven by contracts with strict parameters that define responsibility and risk, this is not an easy change. Another obstacle to implement IPD is to obtain owner buy-in. Clients who are more familiar with traditional project delivery methods may distrust a concept which fully aligns their bottom line with that of the contracting entities.

IPD proponents boast of savings up to 10% off estimated project costs. Building Information Modeling (BIM-the use of electronic 3-D drawings) has proven to be a natural partner to IPD methods. Litigation issues and costs are reported to be virtually non-existent. When disputes arise, Team Members select an outside decision-maker to interpret the Team Member Agreement and arrive at a solution. Overall, IPD

has found acceptance with the AIA, major construction companies across the country, and is clearly an emerging trend in the industry.

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**National Focus**

**False Claims Act – Suit Dismissed For Lack of Specific Pleading of Fraud**

*U.S. ex Rel. Michael Ray Perry v. Hooker Creek Asphalt & Paving, LLC.,* 2011 U.S. Dist. Lexis 144522 (D. Ore. 12/13/11).
The suit claimant alleged false statements and fraudulent conduct by several contractors on highway construction projects. The complaint was dismissed for "woefully" deficient pleading that lacked specificity as required by federal pleading requirements such as FRCP 9(b) with respect to many "fraud" factors including:

1. Specific examples of fraudulent conduct;
2. Who committed fraudulent conduct;
3. Specific invoices or charges that were false;
4. When deficient work was done;
5. Where the defective construction took place;
6. What false claims were presented to the U.S. government for payment; and
7. What amounts or parts of falsified bills were paid by the federal government.

FCA claims will be subjected to the heightened particularity of "fraud" pleading standards under FRCP 9(b) and cases such as *Bell Atlantic Corp. v. Twombly* and its progeny.

**National Focus**

**"Green" Components Added to Far Regulations**

On May 31, 2011, the U.S. Department of Defense, the GSA, and NASA issued an interim rule amending the Federal Acquisition Regulations (FAR). It requires federal agencies, with certain exceptions, "to foster markers for sustainable technologies, materials, produces and services". The "Sustainable Acquisition Regulation" requires agencies to "ensur[e] that 95% of new contract actions (including those for construction) contain requirements for products that are designated as energy efficient, water efficient, biobased, environmentally preferable (e.g. EPEAT-registered, non-toxic or less toxic alternative), non-ozone depleting, or those that contacting recovered materials".

Federal agencies and contractors must implement high-performance sustainable building designing, construction, renovation, repair, operation, and management such as: (i) employ integrated design principles; (ii) measure energy efficiency at all new major installations using Energy Star Benchmarking; (iii) optimized energy performance; (iv) protect and conserve water; and (v) reduce environmental impact of materials.

Government contractors are required to make paper submissions to the government on double sided 30 percent post-consumer fiber paper whenever possible, unless they use electronic means.

The interim rule also states that contractors must comply with reporting required by existing or future statutes and regulations. However the rule deleted a requirement that contractors report their compliance with toxic chemical release reporting.

Finally, the Interim Regulation mandates compliance with it superior to government contracting polices whenever it may be inconsistent with other government contracting rules.

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**National Focus**

**Contractual Limitations on Liability**

Bill Thomas of the Harmonie Group Member Firm in St. Louis, Missouri of Pitzer, Snodgrass has developed a State by State review of the extent to which states will, will not, may or may not enforce limitation of liability clauses in Construction Contracts. Attached to this edition is a copy of Bill's breakdown which is intended to be informational and general. Further or more specific questions should be addressed to Harmonie attorneys in the particular state jurisdictions.

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**National Focus**

**Government Contracting: "Local Time" Governs Bid Receipt**

Matter of SBBI, Inc., U.S. Comp.
Gen. B-405754 Lexis 235 (11/23/11).

Federal Highway Administration (FHWA) required that bids be received 9/15/11 at 1:00 p.m. Mountain Time in Colorado. The location was changed to Phoenix, Arizona. Two bids were received before 12:00 p.m. in Arizona, and three bids were received before 1:00 p.m. in Arizona. FHWA accepted all five bids; one of the early bidders (SBBI) protested.

Arizona, like Colorado, is in the MST time zone, but Arizona does not observe daylight savings time. Therefore, 1:00 p.m. in Colorado was 12:00 p.m. in Arizona in September 2011. SBBI argued the time was never changed and bids received after 1:00 p.m. Colorado time should be rejected. The FHWA

countered that 1:00 MST on the solicitation meant the time where bids would be received which was ultimately Arizona.

The Comptroller General agreed with the FHWA and ruled that under the Uniform Time Act of 1996 (15 U.S.C. §262) there is one standard time for bid deadlines, and that is local time; SBBI's bid protest was denied.

**California**

**No Oral Change Orders on Public Contracts**

P&D Consultants, Inc. v. City of Carlsbad,
190 Cal. App. 4th 1332 (4th Dist. 12/10).

The Fourth District Court of Appeals ruled that a construction contract with a public agency cannot be modified orally, or by conduct of the parties, if the contract provides for no "non-written" modifications. P&D was redesigning the City's municipal golf course. The City typically took many weeks to sign amendments, so the City's project manager authorized P&D to perform work prior to a signed amendment. P&D ultimately won a jury award of $109,000 for breach of contract and money owed, which was reversed on appeal because, "…as a matter of law, it [P&D] cannot recover for extra work without a written change order… ." Oral authorization by the City's project manager was held to be negated by the contract language.

**California**

**Contractual Indemnity - Broad Duty to Defend**

In UDC – Universal Development v. CH2M Hill, 181 Cal. App 4th (2010), a California appellate court ruled that an asserted duty to defend under a construction contract indemnity clause was broader and more expansive than a duty to actually indemnify. The trial and the appeal courts both held that the duty to defend is SEPARATE from the duty to indemnify, and the duty to defend by its very nature occurs BEFORE a duty to actually indemnify arises and BEFORE ultimate determinations about the respective parties' negligence. The plaintiff's general allegations of deficient design services, together with the developer's cross-complaint for indemnity attributing responsibility to CH2M Hill, were held sufficient to at least give rise to CH2M Hill's contractual duty to defend.

**California**

**Errors & Omissions Coverage (Possible)**
**For Builder-Developer**

*Corky McMillin Construction Services, Inc. v. U.S. Specialty Insurance Co.*, 2012 WL 92346 (S.D. Cal. 2012).

Homeowners in a mixed community brought a class action against a developer about alleged misrepresentations about the nature, value and desirability of the community. They claimed the developer entered into a secret "deal" to allow a "mega-church" (called The Rock) into the neighborhood which meant a major Sunday impact of cars, traffic, etc. The developer had an E&O policy covering losses arising from the developer's "wrongful acts". However, the policy had an exclusion for "rendering or

failure to render services for others". The insurer moved for summary judgment arguing that "services" included the developer's alleged misrepresentations.

The insurer's motion to dismiss was denied. The judge accepted that the term "services" should be broadly construed, but found the policy language ambiguous. "Wrongful acts" could include "mis-statement, misleading statement, [or] omission" but it was unclear whether the term "services" was meant to include the "wrongful acts" identified in the grant of coverage. The ambiguity was enhanced by the facts that coverage clauses are to be interpreted broadly, but exclusions are to be construed narrowly.

**California**

**Indemnity and Statute of Repose**

*Centex Homes v. Financial Pacific Life Insurance Co.,* 2010 U.S. Dist. LEXIS 1995 (E.D. Cal. 2010)

After settling homeowners' construction defect claims, and more than ten years after the homes were substantially completed, a developer sued a concrete fabrication contractor seeking indemnity for amounts paid to the homeowners, and for breach of the subcontractor's duty to procure specific insurance and defend the developer against such homeowners' claims. The subcontractor made a motion for summary judgment based on the California ten year statute of repose.

The District Court agreed that the developer's claim for indemnity was time-barred. It also held that, since the damages recoverable for breach of the subcontractor's duty to purchase insurance were identical to damages recoverable in the indemnity claim, the breach of duty to procure insurance claim was also time-barred. The District Court, however, did allow the claim for breach of the duty to defend to proceed. Losses associated with that claim (attorneys' fees and other defense costs) are different and separate from general damages recoverable for property damage claims.

**Florida**

**HVAC Design Claim Dispute Dismissed Due to Late Notice**

*Jennings Construction Services. Corp. v Ace American Insurance Co.,* 2012 WL 85180 (M.D. Florida January 11, 2012).

The allegation was an allegedly defective HVAC system design at an apartment complex. The policy covered "claims made and reported" during the policy period 3/1/05 – 3/1/06. The claim was first reported to ACE in December 2006, and the insurer moved to dismiss for late notice. The motion was granted.

In a "claims made and reported" policy there is no coverage for claims reported outside of the policy period. The policyholder argued that ACE was precluded from raising the late notice defense because ACE itself had been late in disclaiming coverage. The Court rejected that argument under Florida Stat. §627.426 because late notice is not a defined "coverage defense". A "coverage defense" is a defense to coverage that does exist or could exist under the policy, but here there was no coverage from commencement of the claim based on the date of first report of the claim.

**Kansas**

**Economic Loss Doctrine May Not Apply to Residential Construction**

*David v. Hett,* 2011 Kan. LEXIS 657 (12/30/11). The Davids' acted as their own contractor in building their residence. Hett did the excavation, basement and concrete work. The garage and basement experienced settling and the homeowners sued on various theories including tort and contract breach. The trial court dismissed the action on summary judgment, which the intermediate appeals court affirmed. Based on the case of *Prendiville v Contemporary Homes, Inc.,* 32 Kan. App. 2d 435 (2004), the economic loss doctrine was held to have negated plaintiffs' negligence and tort claims.

The Kentucky Supreme Court overruled application of the economic loss doctrine to homeowners' claims against a residential contractor. The facts alleged and the pleadings determine whether a claim sounds in tort or contract. The existence of a contract does not necessarily close or control the issue. The case was remanded to the trial court to determine whether the Davids' claims were in the nature of tort or contract.

**Kentucky**

**Construction Defects Not Covered By CGL Policy**

*Cincinnati Insurance Co. v. Motorists Mutual Insurance Co.,* 306 S.W.3d 69 (Ky. Supreme Court 2010).

The buyers of a newly constructed home sued the homebuilder, claiming that the homeowner's work was so defective that the home was beyond repair and would need to be razed. The homebuilder sought coverage for that claim under its CGL policy. The CGL insurance carrier argued that claims for defective construction work were not covered under the policy. The policy required that "bodily injury" or "property damage" be caused by an "occurrence". The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same harmful conditions".

The Kentucky Supreme Court ruled that under the doctrine of fortuity, for there to be an "accident" for which there is coverage, it must be shown that the loss was "not intended" and that the loss was a "chance event" beyond the control of the insured. The Court found that defective work was not an "accident" even though the builder did not intend to build a defective house. Therefore, the Court concluded that defective work was not an "accident" because the homebuilder had control over the construction of the house, either directly or through its subcontractors.

The Court opined that construction defects do not present the degree of fortuity or "chance" contemplated under the ordinary definition of "accident". The Court noted that to hold otherwise would essentially convert the CGL policy into a construction performance bond.

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**Louisiana**

**Design Defect Issues Require Expert Witness Review**

*City of Alexandria v Ratcliffe Construction Co., LLC,* 2012 La. App. LEXIS 176 (2/15/12). Architects designed a performing arts center for the City which developed severe leaking. At trial and on appeal, the City claimed that the architects were negligent but did not provide supporting expert testimony or reports. This was a major omission because unless a layperson can impute professional negligence by "common sense", expert testimony is necessary to prove deviation from the standard of care.

The appellate court concluded that the City's discovery responses and affidavit of counsel were insufficient to establish negligence on the part of the architects.

**Maine**

**Forum Selection Clauses and Jurisdiction**

*Blue Tarp Financial Inc. v Matrix Construction Co.,* 2012 U.S. Dis. Lexis 22199 (D. Maine 2/22/12) A construction contractor, Matrix, was sued in Maine by BlueTarp Financial which had extended a line of credit to Matrix while it performed three school construction projects. Matrix was located in South Carolina, and the school projects were also located in South Carolina. The credit agreement stated that BlueTarp "may institute suit against you [Matrix] in the courts of the State of Maine". BlueTarp ultimately sued to collect over $100,000 from Matrix in United States District Court.

Matrix alleged that the clause only conferred jurisdiction in Maine state courts and therefore limited the jurisdiction of the Federal District Court. BlueTarp contended that by agreeing to suit in Maine state courts, Matrix had also consented to suit in Federal Court. The Court ruled initially that this was a "permissive" forum selection clause which permitted but did not require jurisdiction in the Maine state court system.

However, because BlueTarp had sued in Federal Court, the next question was whether there was personal jurisdiction over Matrix, and the Court ruled that there were few voluntary contacts between Matrix and the State of Maine. The Federal Court dismissed the case for lack of personal jurisdiction since Matrix and the projects in question were located in South Carolina.

If parties are going to agree upon a forum selection clause, it should be mandatory in establishing where suit can be brought, and specific with respect to both geographic location and court system to offer better guidance and forestall such procedural disputes.

**Michigan**

**Statute of Limitations Restored For Construction Industry 1/1/12 - SB 77**

In the *Ostroth* decision in 2006, the Michigan Supreme Court separated the construction industry from general limitations law, and realistically lengthened statute of limitations periods in Michigan pertinent to the design and construction industry. A new law (SB 77) passed and signed by Gov. Rick Snyder took

effect on January 1, 2012 and reverses the import of _Ostroth_ and restores the limitations period to prior durations, generally 6 years after completion.

Personal injury and property damage claims, including contribution and indemnity claims, against design professionals (Architects, Engineers, Surveyors) must be commenced within either of the following time periods:

(a) 6 years after occupancy or completion; or

(b) if there is "gross negligence", 1 year after the defect is discovered or should have been discovered, but not beyond 10 years post- occupancy or completion.

## Missouri

### Highway Construction

_David Harlan v APAC-Missouri, Inc., et al. No. WD 73637 (Mo. Ct. App. W.D. 2011)_

Plaintiff Harlan brought suit against the Missouri Highway and Transportation Commission (MHTC) and re-surfacing contractor APAC-Missouri, Inc. (APAC) following a motorcycle accident due to uneven pavement between two lanes in which he sustained serious physical injuries. Harlan alleged that both MHTC and APAC were negligent in failing to warn drivers of the uneven lane condition. At trial, the failure to warn claim was the only claim submitted against APAC, resulting in a jury finding APAC 25% at fault. APAC appealed the trial court's denial of a directed verdict and judgment notwithstanding the verdict claiming the evidence established that APAC had followed the traffic control plan created by MHTC, and that APAC did not know that the uneven pavement was a "dangerous condition" likely to cause injury.

The Court determined that MHTC did all of the design work for the project and contracted with APAC to execute its plan. The Court held that highway contractors have a continuing and non-delegable duty to exercise reasonable care for the safety of the traveling public, and therefore the fact that a contractor performed construction work in compliance with MHTC's plans and specifications did not insulate the contractor from liability. Further, based upon this duty, the contractor may be liable even though it acted without negligence in creating the dangerous situation. This liability exists regardless of the requirements of the contract with the highway authorities, and irrespective of any liability on the part of the government body employing the contractor.

Based on the fact that APAC knew, pursuant to MHTC's plans, that there were going to be uneven lanes on the project and this condition could exist for an extended period of time, and that APAC could have suggested to MHTC that additional signs needed to be added, the Court found that a contractor would have sufficient information and knowledge to know that the uneven lane condition was dangerous. The Court held that there was sufficient evidence to establish that the contractor should have called attention to the dangerous condition and requested additional signs and warnings. The Court indicated further that there was sufficient evidence to establish proximate cause between APAC's alleged negligence and Harlan's accident.

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## Missouri

### Demolition- Policy Exclusion Negated Coverage

*Clarinet LLC v Essex Insurance Co., 2012 WL182529 (E.D. Missouri MO. 1/23/12)*

Insured's building was destroyed by a storm. The property damage policy contained an exclusion for maintenance of the insured's owned property, including "…prevention of injury to person or damage to another's property". Portions of the building were falling onto a city bridge and other property; efforts to correct and stabilize the building were not successful, and it was condemned in 2007 and had to be demolished at a cost of more than $650,000.00. The city sued to recover its property damage and the insured also sought to recoup its repairs, stabilization and demotions costs. Essex agreed to defend and indemnify against the city's third party suit, but denied coverage for the other costs. The insurer removed the case to federal court and moved for summary judgment on the basis that the exclusion barred recovery for damages to the insured's owned property and property it rented. The U.S. Magistrate Judge ruled in favor of Essex.

The court ruled that the policy exclusion "unambiguously" negated coverage for the insured's costs in attempting to avoid damage to the city's structures nearby. The court also noted that the insured was required to get Essex's permission before incurring such costs or expenses.

## New Jersey

### Remedies for Spoliation

*Robertet Flavors, Inc. v Tri-Form Construction, Inc.,* (N.J. Supreme Court, August 3, 2010).

In considering spoliation issues in commercial construction litigation, according to the New Jersey Supreme Court the following factors should be addressed and balanced by the courts in determining any necessary or appropriate remedies or sanctions:

1. How and when did the spoliation occur;
2. Who did the spoliation, and who knew about the spoliation;
3. Harm or prejudice resulting;
4. Did the party allegedly harmed have any role or involvement in the spoliation; and
5. Alternate or substitute sources of available information and documents.

## New York

### Duty to Preserve ESI - Important N.Y. Case on Trigger of ESI Holds in Litigation

*Voom HD Holdings, LLC v EchoStar Satellite, LLC,* (1st Dept. 1/31/12). This matter arises out of contractual dispute between a media company (Voom) and the entity contractually obligated to distribute the product. Essentially, EchoStar had agreed to distribute Voom's programming over a period of 15 years.

During the time leading up to commencement of the suit, EchoStar destroyed all e-mails not otherwise preserved within seven days. Shortly after commencement of the lawsuit, EchoStar slightly altered its plan to require each employee to make a judgment as to the content of each particular e-mail and its possible relevance to the lawsuit.

In following the majority of courts around the country, the First Department noted that a "litigation hold" was required as soon as EchoStar reasonably could have anticipated litigation. In applying this standard, the Court determined that EchoStar should have anticipated litigation when EchoStar itself began threatening litigation in July 2007. Notably this was the same time period when Voom instituted its own "litigation hold."

In addition, the Court also rejected EchoStar's position that it should be able to rely upon its employees' individual discretion to set and enforce a "litigation hold."

After determining that EchoStar failed to enact a proper "litigation hold" when it became required to do so, the Court next focused on the appropriate remedy. The First Department established the following burdens of proof for ESI spoliation cases:

- Intentional or willful destruction is sufficient to presume relevance;
- Gross negligence is sufficient to presume relevance;
- Mere negligence does not give rise to a presumption, but rather relevance must be proved by the party seeking sanctions.

Importantly, any presumption of relevance may be rebutted by a demonstration that:

- The information sought is already in the possession of the moving party; or
- The evidence sought would not support the moving party's claims.

As a result of EchoStar's conduct, the Court ruled that Voom would be entitled to an "adverse inference" against EchoStar at the time of trial. However, the Court did stop short of striking EchoStar's Answer.
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## New York

**Labor Law 240 - Court of Appeals Case**
*Salazar v Novalex Contracting Corp.,* 18 N.Y.3d 134 (2011).

In this decision from the Court of Appeals, the plaintiff was injured in the basement of a building which was being renovated. Novalex was the general contractor of the project. The plaintiff was working in the basement where the concrete for the floor was being fed through a window and into wheelbarrows to be spread or "raked" over the entire floor of the building. The basement floor had a trench system for piping, all of which was to be filled with concrete creating a level and smooth floor with the pipes under the concrete. The wet concrete, when poured into the basement, would fill the trenches. As the plaintiff was "raking" the wet concrete to level the floor, he was looking ahead at what he was "raking" and stepped backwards into a trench partially filled with wet concrete. His foot hit the bottom of the trench and as he attempted to pull his leg out he injured himself.
The trench the plaintiff stepped into was about two-feet wide and three- to four- feet deep. The trench had no railings, barricades or cover around or over it. Plaintiff sued, claiming a violation of Labor Law §§ 240(1) and 241(6).

The trial court granted Summary Judgment to the defendants, dismissing the plaintiff's complaint in its entirety, and the First Department reversed, denying the defendants' motion for Summary Judgment on Sections 240(1) and 241(6) and reinstating claims with one dissent. The Appellate Division granted leave to the defendant, certifying the issue to the Court of Appeals.

The Court finds that, as a liability under Section 240(1) depends on whether the plaintiff's task creates an elevation-related risk of the type that the enumerated safety devices protect against, in order for Section 240(1) to be triggered, the plaintiff would have to be able to be protected from injury flowing from the application of gravity by the use of an adequate scaffold, hoist, stay, ladder, or other protective device. What the Court in *Salazar* decides is that, in this case, installation of a protective device would be "contrary to the objectives of the work plan". The Court holds that, "Put simply, it would be illogical to require an owner or general contractor to place a protective cover over, or otherwise barricade, a three- or four-foot deep hole when the very goal of the work is to fill that hole with concrete".

The Court held that the Labor Law "should be constructed with a common sense approach to the realities of the workplace at issue". This would appear to signal an acceptance by the Court of the fact that certain functions or tasks simply cannot be accomplished as contemplated by the contract with any type of protective device in place. The Court also dismissed the Section 241(6) claims applying the same rationale, that "covering the opening in question would have been inconsistent with filling it, an integral part of the job".

It is important to note that this was a 4-3 decision, and in fact the second recent 4-3 decision in a New York Labor Law case coming on the heels of the *Wilinski* decision. The *Salazar* decision was authored by Judge Pigott, the author of the dissent in *Wilinski.* In fact, the *Salazar* majority refers to the *Wilinski* decision as the basis for the "contrary to the work plan" principle. In *Wilinski,* the majority found that securing pipes would not have been contrary to the work plan and, thus, failure to do so was a violation of the Labor Law.

The point to be taken from this case is that the retention of an expert to explore the propriety of utilizing protective devices to perform certain tasks may provide the defendant, and the plaintiff for that matter, with the necessary ammunition to swing a dispositive motion in their favor.

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**South Carolina**

**Important New Ruling on Construction Defects**

On August 22, 2011, the South Carolina Supreme Court announced its much awaited decision in the re-hearing of Crossman Communities of North Carolina, Inc., et al. v Harleysville Mutual Insurance Company et al. (Crossman II). The Court reversed its previous holding in Crossman I (issued January 7, 2011) where it found no insurance coverage existed under typical CGL policy language for progressive water intrusion damage. In Crossmann II, the Court reasoned that coverage existed because the definition of "occurrence" which includes "continuous or repeated exposure to substantially the same general harmful conditions" is ambiguous and must be construed against the insurance company.

In Crossmann II, the Court was consistent with its previous decisions in L-J, Inc. v. Bituminous Fire and Marine and Auto Owners, Inc. v. Newman where coverage is provided for continuous moisture damage resulting from negligent construction, but is not provided to cover the cost of repairing defective construction itself. The Court reasoned that a claim for the cost of repairing or removing defective work is not a claim for property damage, but a claim for the cost of repairing damage caused by the defective work is a claim for property damage.

In Crossmann II, the Court also overruled a previous decision, Century Indemnity Co. v. Golden Hills Builders, Inc. when it adopted a default "time on the risk" analysis for South Carolina courts to allocate the liability of multiple insurers in construction defect suits. The Court held that once a court determines that bodily injury or property damage caused by an occurrence has occurred, "each triggered insurer must indemnify only for the portion of the loss attributable to property damage that occurred during its policy period". This holding overturned the previous "joint and several" liability calculus from the Century Indemnity decision.

While it is still an unsettled question whether the Court will find constitutional the legislative response to Crossmann I decision which explicitly defined an "occurrence "in a typical CGL policy, in Crossmann II the Court did insure that the analysis of coverage for construction defect suits would be consistent with prior court precedent.

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## Virginia

### Written Change Orders are Essential

*Carolina Conduit Systems, Inc. v MasTec North America, Inc.,* No. 3:11CV133 (E.D. Va. 2011).

A Virginia utility retained MasTec, the general contractor, to relocate and improve underground conduit. MasTec and Carolina entered into a subcontract wherein Carolina agreed to perform underground construction. Carolina began work before signing the subcontract, and soon encountered subsurface field conditions not represented by the design. Extra "flowable fill" was needed to remedy the conditions. MasTec told Carolina "not to worry" about the excess fill costs, but at the close of the project MasTec refused to pay for excess fill.

The subcontract was for a fixed price and provided that "…any additional work outside the original scope of work shall be handled through a change order specifying pricing and/or unit prices approved by [the owner]." Relying on the verbal assurances, Carolina placed the additional fill without obtaining a written change order. Carolina's complaints about deficient design and arguments that the parties orally modified the subcontract were rejected. Summary judgment was entered in MasTec's favor, and Carolina's claims were dismissed without trial.

## Wisconsin

### Bad Faith Award Under Builder's Risk Policy Reversed

*Park Terrace LLC v. Transportation Insurance Co.,* 2011 WL 5984717 (Wis. Ct. App. 12/1/11).

Park Terrace bought a builder's risk policy from Transportation Insurance for condos being built along the Milwaukee River. A fire broke out during construction, a claim was made, and the insurer paid out for reconstruction and other costs, but denied the builder's lost income claim. Park Terrace sued for breach of contract, contract reformation and bad faith. A jury awarded $3 Million in bad faith damages, $4 Million in punitive damages, $370,000 in contract damages, and $1 Million in attorneys' fees for bad faith.

The appeals court upheld the $370,000 contract damages award, but struck down the rest of the "bad faith" verdict and award. Plaintiff was not entitled to bad faith damages since the fire, not the insurance company's failure to pay for lost income, caused the alleged damages. Without bad faith, the punitive damages and attorneys' fees claims were also dismissed. The insured's losses resulted from the fire and resultant problems and delays in its aftermath, not from the insurance company's failure to pay a lost income claim of some $370,000.

## Wyoming

### Notice of Claim Must Minimally State a General Amount

The Wyoming Supreme Court recently reviewed the case of *Excel Construction Inc. v Town of Lovell, Wyoming, 2011 Wyo.Lexis 170 (December 20, 2011)* wherein a contractor filed a notice of claim against a municipality (for more than $2.6 Million). Interpreting the State Constitution and related legislation, the Wyoming

Supreme Court ruled that a statement of the dollar amount of damages demanded was sufficient in the notice of claim and did not need to be further itemized. It therefore reversed earlier court rulings and remanded the case for further proceedings, basically allowing the claim to proceed.

The contractor apparently had intended to attach an "Exhibit A" to the Notice of Claim with an itemized statement of damages, but it somehow got inadvertently deleted. Best practice suggests to not only assert the overall amount due, but to provide some degree of itemization. As a result of the "missing" Exhibit A, almost four years of non-substantive litigation ensued from the filing of the complaint in 2008 until the decision of the Wyoming Supreme Court in December 2011. Notices of Claim are generally jurisdictional and subject to strict statutory construction, so they should be double checked for accuracy as to dates, filing, service, arithmetic, attachments, etc. to avoid such procedural disputes.

**Table 1.0**

**Enforceability of Limitation of Liability Clauses**

| State | Enforceable | Leading Case | Statute | Note |
|---|---|---|---|---|
| AL | Yes | Robinson v. Sovran Acquisition Limited Partnership, 70 So. 3d 390 (Ala. 2011) | | |
| AK | No | City of Dillingham v. CH2M Hill N.W., Inc., 873 P.2d 1271 (Al. 1994) | Ak. Stat. 45.45.900 | Not generally enforced and disfavored. |
| AZ | Yes | 1800 Ocotillo, LLC v. WLB Group, Inc., 219 Ariz. 200 (Az. banc 2008) | | |
| AR | Yes | W. William Graham, Inc. v. City of Cave City, 709 S.W.2d 94 (Ark. 1986) | | They are strictly construed. |
| CA | Yes | Markborough California, Inc. v. Superior Court, 227 Cal. App. 3d 705 (Cal. App. 1991), *but compare* Greenwood v. Murphy, | Cal. Civil Code 2782.5 | But only if found to have been "negotiated and expressly |
| CO | Yes | U.S. Fire Ins. Co. v. Sonitrol Management Corp., 192 P.3d 543 (Colo. App. 2008) | | But not for willful or wanton conduct. |
| CT | Yes* | Shawmut Bank Conn. v. Connecticut Limousine Serv., Inc., 670 A.2d 880 (Conn. App. 1995) | Conn. Gen Stat. 10-290e(a) (2007) | * Per statute, not enforceable in contracts with towns or schools. |
| DE | Yes | J.A. Jones Constr. Co. v. City of Dover, 372 A.2d 540 (Del. Super. 1977) | | |
| FL | Questionable | Witt v. La Gorce Country Club, Inc., 35 So.3d 1033 (Fla. Ct. App. 2010) | Fla. Stat. 725.06 | Likely not in a case where there is a professional involved. |
| GA | Questionable | Lanier at McEver, L.P. v. Planners & Eng'rs Collaborative, Inc., 663 S.E.2d 240 (Ga. 2008), *and* Borg-Warner Ins. Finance Corp. v. Executive Park Ventures, 198 Ga. App. 70, 71, 400 S.E.2d 340 (Ga. Ct. App. 1990) | O.C.G.A. 13-8-2(b) | |
| HI | Yes | Leis Family Ltd. Partnership v. Silversword Engineering, 2012 WL 504184 (Hi. Ct. App. 2012), and City Express, Inc. v. Express Partners, 959 P.2d 836 (Hi. 1998) | | |
| ID | Yes | Idaho State University v. Mitchell, 552 P.2d 776 (Idaho 1976) | | They are strictly construed. |
| IL | Likely | Scott & Fetzer v. Montgomery Ward & Co., 493 N.E.2d 1022 (Ill. 1986) | | They are strictly construed. |
| IN | Yes | Orkin Exterminating Co. v. Walters, 466 N.E.2d 55 (Ind. Ct. App. 1984) | | They are strictly construed. |
| IA | Likely | Advance Elevator Co., Inc. v. Four State Supply Co., 572 N.W.2d 186 (Ia. Ct. App. 1997) | Iowa Code 554.2719 | |

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| KS | Yes | Santana v. Olguin, 208 P.3d 328 (Kan. App. 2009), and Wood River Pipeline Co. v. Willbros Energy Servs. Co., 738 P.2d | | |
| KY | Yes | Cumberland Valley Contractors, Inc. v. Bell County Coal Corp., 238 S.W.3d 644 (Ky. 2007) | | |
| LA | Likely | Isadore v. Interface Sec. Systems, 58 So.3d 1071 (La. App. 2011) | La. Civ. Code Ann. Art. 2004 | |
| ME | Likely | Lloyd v. Sugarloaf Mountain Corp., 833 A.2d 1 (Maine 2003) | | |
| MD | Likely | Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254 (Md. Ct. App. 1996) | | |
| MA | Yes | Zavras v. Capeway Rovers Motorcycle Club, Inc., 687 N.E.2d 1263 (Mass. Ct. App. 1997) | | |
| MI | Yes | Ohio Cas. Ins. Co. v. Oakland Plumbing Co., 2005 WL 544185 (Mi. Ct. App. 2005) | | Not for willful or wanton conduct. |
| MN | Questionable | Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783 (Minn. 2005) | | |
| MS | Unlikely | Turnbough v. Ladner, 754 So. 2d 467 (Miss. 1999) | Miss. Code Ann. 31-5-41 | |
| MO | Yes | Purcell Tire and Rubber Company, Inc. v. Executive Beechcraft, Inc., 59 S.W.3d 505 (Mo. 2001) | | |
| MT | Unlikely | State ex rel. Mountain States Tel. & Tel. Co. v. District Court In and For Silver Bow, 160 Mont. 443 (Mont. 1972) | Mont. Code Ann. 28-2-702, 30-2-719 | |
| NE | Yes | Ray Tucker & Sons, Inc. v. GTE Directories Sales Corp., 571 N.W.2d 64 (Neb. 1997) | | |
| NV | Likely | Obstetrics & Gynecologists v. Pepper, 693 P.2d 1259 (Nev. 1985) | | |
| NH | Likely | McGrath v. SNH Development, Inc., 969 A.2d 392 (N.H. 2009) | N.H. Rev. Stat. Ann. 339-A:1 | Statute may prohibit contract clauses that extends indemnification to design professionals. |
| NJ | Questionable | Stelluti v. Casapenn Enterprises, LLC, 1 A3d. 678 (N.J. 2010), Marboro, Inc. v. Borough of Tinton Falls, 297 N.J. Super. 411 (1996) | | |
| NM | Yes | Fort Knox Self Storage, Inc. v. Western Technologies, Inc., 142 P.3d 1 (N.M. Ct. App. 2006) | | |
| NY | Yes | Sommer v. Federal Signal Corp., 583 N.Y.S.2d 957 (Ct. App. 1992), Long Island Lighting Co. v. Imo Delaval, Inc., 668 F. Supp. 237 (S.D.N.Y. 1987) | | |

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| NC | Questionable | Schenkel & Shultz, Inc. v. Hermon F. Fox & Associates, P.C., 144 S.E.2d 393 (N.C. 2008) | N.C. Gen. Stat. 22B-1 | |
| ND | Questionable | Reed v. Univ. of N.D., 589 N.W.2d 880 (N.D. 1999), but compare Kondrad ex rel. McPhail v. Bismarck Park Dist., 655 N.W.2d 411 (N.D. 2003) | | |
| OH | Yes | Motorists Mut. Ins. Co. v. ADT Sec. Systems, 1995 WL 461316 (Oh. Ct. App. 1995) | | Strictly construed. |
| OK | Likely | Elsken v. Network Multi-Family Sec. Corp., 838 P.2d 1007 (Ok. 1992) | Okla. Stat. tit. 14-421-30; tit. 15-221 | |
| OR | Likely | Estey v. MacKenzie Eng'g Inc., 927 P.2d 86 (Or. 1996) | | |
| PA | Yes | Chepkevich v. Hidden Valley Resort, L.P., 2 A.3d 1174 (Pa. 2010), *see also* Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d | | |
| RI | Likely | Star-Shadow Prods., Inc. v. Super 8 Sync Sound Sys., 730 A.2d 1081 (R.I. 1999) | | |
| SC | Yes | Georgetown Steel Corp. v. Union Carbide Corp., 806 F. Supp. 74 (D.S.C. 1992) | | |
| SD | Likely | Rozeboom v. Northwestern Bell Telephone Co., 358 N.W.2d 241 (S.D. 1984) | | |
| TN | Questionable* | Houghland v. Security Alarms & Services, Inc., 755 S.W.2d 769 (Tenn. 1988) | T. C. A. § 62-6-123 | * If public interest involved. |
| TX | Yes | Mickens v. Longhorn DFW Moving, Inc., 264 S.W.3d 875 (Tex. App. 2008), CBI NA-CON, Inc. v. UOP Inc., 961 S.W.2d 336 (Tex. App. 1997) | V.T.C.A., Bus. & C. § 1.201 | |
| UT | Questionable | Russ v. Woodside Homes, Inc., 905 P.2d 901 (Utah Ct. App. 1995) | | |
| VT | Likely | Colgan v. Agway, Inc., 553 A.2d 143 (Vt. 1988), Hamelin v. Simpson Paper Co., 702 A.2d 86 (Vt. 1978) | 9A V.S.A. § 2-302 | |
| VA | Questionable | Pettit v. Chesapeake & Potomac Tel. Co. of VA, 1992 WL 884663 (Va. Cir. Ct. 1992) | Va. Code Ann. 11-4.1 | |
| WA | Likely | Markel American Ins. Co. v. Dagmar's Marina, L.L.C., 161 P.3d 1029 (Wa. Ct. App. 2007) | | |
| WV | Likely | Arts' Flower Shop, Inc. v. Chesapeake & Potomac Telephone Co. of West Virginia, Inc., 413 S.E.2d 670 (W. Va. 1991) | | |
| WI | Questionable | Atkins v. Swimwest Family Fitness Ctr., 691 N.W.2d 334 (Wis. 2005) | Wis. Stat. 895.447 | |
| WY | Yes | Massengill v. S.M.A.R.T. Sports Med. Clinic, 996 P.2d 1132 (Wyo. 2000) | | |