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

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Construction Law Committee

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INTRODUCTION

Please accept our Harmonie best wishes for the New Year of 2013. This edition is the first issue of the year. There are many state-specific decisions reported, and several recurring topics appear such as differing site conditions, insurance coverage (or not) for construction defects, surety's rights of subrogation and enforcement, change orders and remedies for project delays and extensions, and spoliation of evidence.

- The Editor
April 2013

INDEX OF TOPICS COVERED

NATIONAL FOCUS

Building Additions – Costs to Connect and Join

Appeal of R.L. McDonnell Construction, 2012 ASBCA No. 56262 LEXIS 96 (October 22, 2012).

A contractor sought extra costs incurred in designing and installing concrete footings for two buildings at an army depot. The contractor assumed that it could install end walls on two buildings that were pre-engineered by the buildings' manufacturer, and then attach the end walls to the existing structure at the roof and at a relatively small foundation. Instead, the contractor had to design and construct free-standing end walls which required more work and material. The contractor claimed extra costs for increased concrete, reinforcing steel and labor costs. The Army denied the claim, which was upheld by the Armed Services Board of Contract Appeals.

The contractor first argued that the contract was "ambiguous" as to whether the existing structures were free-standing, but the contract made no representation of how the bidder should design and build the end walls. The contractor also argued that the contract drawings were defective, but the drawings did not necessarily indicate where or how the end walls would be structurally supported by the building. The contractor also argued there was a Type I differing site condition but, again, there was no clear contradiction inherent from the contract drawings.

Although the amount at issue in this case was relatively small, $50,000, it is a warning concerning contracts involving additions or upgrades to existing structures. The contractor should not make assumptions about how an addition is to be secured or connected, and then integrated into an existing building. For example, electrical connections and upgrades need to be clarified, site selection and drainage needs to be specified, and the contractor must beware of potential unexpected risks and costs of connecting a new build to an existing structure. The contract drawings should be closely scrutinized to determine what conditions they show (or do not show) concerning the existing structure and all the necessary and possible connections below and above ground.

-Contributor
Earl K. Cantwell
Hurwitz & Fine, PC
Buffalo, New York
ekc@hurwitzfine.com

NATIONAL FOCUS

Construction Defect Is Not a CGL "Occurrence"

Westfield Insurance Company v. Custom Agri Systems, Inc., 2012 Ohio LEXIS 2485 (2012).

The Ohio Supreme Court recently weighed in on the question whether construction defect claims constitute a CGL insurable "occurrence". The Ohio Supreme Court agreed with an apparent "majority" view that construction defect claims are not claims for "property damage" caused by an accidental "occurrence" for purposes of CGL insurance coverage. The Ohio Court reviewed prior cases in the Ohio federal courts, as well as other recent case holdings that "defective workmanship" standing alone resulting

in damage only to the work/work product itself is not a covered insurable "occurrence". The Court noted that the primary theory of these rulings is that a CGL occurrence must be accidental implicating the doctrine of fortuity. Accidental property damage may be covered by CGL policies, but faulty workmanship is not because it is not accidental or "fortuitous". In the view of the Ohio court, "fortuity" depends on whether the contractor controlled the process leading to the damage, and whether damage could be anticipated.

There was a dissenting opinion, essentially adopting the view of other courts which appear to be in a minority, that defective construction can be an occurrence under a CGL policy under a broader definition of "accidental" that defective workmanship was not intentional, but rather the result of mishap or accident.

This Ohio Supreme Court case is the latest in a long line of cases where state courts are ruling on whether and to what extent construction defects are, are not, or might be covered under CGL policies as property damage due to a covered "occurrence". There have been different and diverse holdings resulting in what currently appears to be a majority view of no coverage, and a minority view of coverage, or at least possible coverage. In addition, these cases can be differentiated and distinguished if property other than that constituting the actual construction work itself is damaged in the loss.

NATIONAL FOCUS

Differing Site Conditions Did Not Exist

Appeal of NDG Constructors, 2012 ASBCA No. 57328 LEXIS 85 (Aug. 21, 2012)

NDG Constructors (NDG) was hired to replace a waterline at Ellsworth Air Force Base in South Dakota. NDG and its excavation subcontractor alleged a Type I differing site condition: soil conditions wetter than contract documents indicated. NDG petitioned the U.S. Army Corps of Engineers (Corps) for a cost adjustment of $146,000 and a 9 day time extension to complete the project. The Corps refused, arguing no different type of soil other than as described in contract documents was encountered.

The Armed Services Board of Contract Appeals ruled in favor of the Corps. The contract documents did not precisely indicate where soil would transition from one type to another, which refuted NDG's claim that it was "surprised" to find shale rock at 100 feet rather than at 200 feet as expected. NDG's claim that the soil was "too moist" failed because the Board found no difference between the soil NDG found and soils described in contract materials which warned that "soft wet soils, along with groundwater, should be anticipated".

NATIONAL FOCUS

Differing Site Conditions - Engineer's Decision

Granite Construction Co. v. Texas Department of Transportation, 2012 Tex. App. LEXIS 9706 (November 20, 2012).

Granite Construction was working on a Texas DOT toll road construction project. Granite's subcontractor was performing foundation drilling work of boring shafts, inserting a cage of reinforcing steel bar in each, and then pouring concrete to fill the holes. The drilling subcontractor encountered groundwater and inconsistent and unstable surface conditions that led to concerns that the shafts would cave in. Granite filed a claim on behalf of the subcontractor asserting differing site conditions and seeking more than $800,000 in additional compensation. A district court agreed with the DOT Engineer's decision that the site conditions were not significantly different than as stated in the contract, and that it was the subcontractor's responsibility to prevent cave-ins and water intrusion by encasing the shafts by installing a steel tube in the shaft around the drilling equipment.

The Contract contained usual provisions about the bidder examining the worksite and satisfying itself as to the conditions, and the specifications also cautioned about the accuracy of the data. The court noted several legal precedents interpreting such contract conditions as making it difficult for a contractor to maintain a DSC claim. The DOT also argued that the soil boring samples had shown significant soil differentiation even in samples located in close proximity. The subcontractor's project manager also acknowledged that they expected there to be water on the project and they "weren't surprised" to find groundwater and wet soils.

The Contract specifications called for encasing the shafts when necessary to prevent cave-ins or to exclude underground water. The Contract also designated the DOT's Engineer as "referee" of any Contract dispute, and made his decisions final and binding. Plus, the subcontractor had the burden of showing that the Engineer's decisions were based on bias, fraud, misconduct, or gross error, similar to the heavy burden seeking to overturn an arbitration award. The Texas Appeals Court affirmed the ruling of the District Court denying the DSC claim.

NATIONAL FOCUS

Spoliation of Evidence

Miner Dederick Construction, LLP v. Gulf Chemical Metullurgical Corp., 2012 Tex. App. LEXIS 10129 (December 6, 2012).

Gulf Chemical hired Miner to pour a new concrete foundation for a building expansion which involved a 140 foot expansion joint between the new and original building foundations. After project completion, Gulf discovered a leak in the joint, and requested Miner to make repairs under its one year contractor's warranty. Miner said the leak was the result of faulty design and refused to do any further work without a new Contract and additional compensation. Gulf hired another contractor to perform the work, and then sued Miner for breach of contract and warranty. In its defense, Miner claimed that in performing the repairs, Gulf "spoliated" evidence and thwarted Miner's ability to defend itself. The Trial Court disagreed, and awarded Gulf $730,000 in damages, $80,000 in interest, and $970,000 in attorneys' fees. However, this verdict was reversed on appeal.

A spoliation claim depends on whether there was a duty to preserve evidence, breach of that duty, and prejudice to the other party's ability to present a case or defense. The Appeals Court noted that Gulf was well aware that the dispute would result in litigation and had been placed on notice by Miner requesting an opportunity to review the "as built" joint for purposes of inspection and testing. There was a substantial chance of litigation and Gulf had a duty to preserve the evidence. A custodial party who has a legitimate

need to destroy the evidence, may discharge its duty to preserve evidence by giving the opponent notice of the claim, and a full and fair opportunity to inspect and test before its destruction. By altering the joint's condition, Gulf deprived Miner of the chance to gather evidence and rebut the claim. Even photographs and video taken of the expansion joint and testing were not adequate substitutes for Miner's missed opportunity to inspect the pre-condition of the expansion joint.

Although the appeals court held that Gulf's spoliation of evidence prejudiced Miner, the appellate court did not impose any sanction or remedy on its own, but rather remanded the case to the trial court for an "an appropriate remedy".

NATIONAL FOCUS

Surety's Right To Subrogation and Offset

Hartford Fire Insurance Company v. United States, 2012 Ct. Fed. Cl. (October 22, 2012).

Hartford was the surety for a contractor on two government projects, one in Savannah and one in Indiana. Hartford provided payment and performance bonds of approximately $4 Million. The Corps paid the contractor $700,000.00 in a settlement on the Savannah project which Hartford contested on the basis of equitable subrogation claiming that Hartford completed the Indiana project for over $1.6 Million, and as a result claimed that it, not the contractor, was entitled to the $700,000.00 government payment on the Savannah project.

Hartford argued that once the Corps knew that the contractor's default on the Indiana project was imminent, it became a "stakeholder" with a duty not just to the contractor, but also to Hartford, in administering contract funds. Hartford argued that the Corps should have exercised its right to offset to secure and protect Hartford's equitable subrogation rights to the $700,000.00 citing *Transamerica Insurance Co. v. U.S*. 989 F 2d 1188 (Fed. Cir. 1993) in which the court held that a surety stated a cause of action against the government for equitable subrogation when it sought funds payable by the government to the contractor on an equitable adjustment on a separate contract.

Note that this case arose at a pleadings – stage motion, and the Corps countered claiming that Hartford's recovery was limited to the funds retained on the Indiana project, if any, because that was the project that generated the claim. The Corps further argued that the Transamerica case was limited to cases where the government had no other competing claims or offsets, which was not the case here.

The Court of Federal Claims disagreed and held that Hartford at least stated a possible claim for relief, since the government owed an amount to the contractor under the separate contract. The Court noted that the Transamerica decision was based on the idea that a surety would not elect to complete a project if doing so would leave it worse off than if the government had undertaken completion of the project. The Court held that Hartford was potentially subrogated to the Corps' right of offset regarding the $700,000.00 payment to the contractor, and denied the motion to dismiss.

However, additional proceedings would be necessary in the case because there were further questions about whether and to what extent Hartford could actually prove its right to recover. For example, there were issues about Hartford's notice to the contractor, and to the contracting officer on the Indiana project, of any subrogation rights concerning payments or projected payments on the Savannah contract.

There were also questions concerning timing of the payment since the government contended that, when it paid out on the Savannah contract to the contractor, there had not yet been any default or termination on the Indiana project.

NATIONAL FOCUS

RFP Compliance

Matter of Alares, LLC, 2012 U.S. Comp. Gen. B-407124 (November 7, 2012). Alares submitted a proposal to replace HVAC units at a VA Medical Center in Rhode Island. The RFP established three evaluation factors: price, past performance, and management approach. The VA actually awarded the project to a higher bidder because Alares scored lower on the past performance and management approach factors. Alares protested, but the Comptroller General ruled that the VA reasonably evaluated the proposal consistent with the RFP requirements. The RFP instructed offerors to provide a construction safety plan and address detailed compliance with the medical center's infection-control procedures. Alares conceded its proposal omitted such details, but argued that its past performance at other VA Medical Centers indicated it could satisfy the safety and infection-control criteria.

The bid was properly rejected because it did not demonstrate a "complete understanding of the work" and did not address the construction safety and infection-control requirements. It was the bidder's responsibility to submit an adequately-detailed proposal in compliance with the RFP. RFP technical requirements are considered material to the government's needs, and a proposal that fails to conform is technically unacceptable. The VA was not required to "infer" or find information about a bidder not provided in the RFP response.

ALABAMA

Construction Defect Not a Covered CGL Occurrence

Town & Country Property LLC v. Amerisure Insurance Co., 2012 WL 5374160 (November 2, 2012).

The case involved alleged defective construction of T&C's Ford dealership. Jones-Williams Construction Co., which built the facility, was insured under a CGL policy with Amerisure. T&C obtained a $650,100 jury verdict against the contractor and then sued Amerisure seeking payment of the judgment. The essential nature of the jury verdict was for repair and replacement of defective construction. The trial court ruled for Amerisure finding that faulty construction was not a "covered occurrence" under its CGL policy. On appeal, this decision was essentially affirmed.

The Alabama Supreme Court had earlier sent the case back to the trial court with instructions to determine if any portion of the award was payable because the faulty construction caused damage to other property. The trial court awarded T&C $392,600.00 for damages said to be resulting from the faulty construction. On appeal, Alabama Supreme Court said the trial court was wrong again.

Most if not all the damage was for the faulty workmanship itself which the insurance company is not obligated to indemnify. Ultimately, T&C was entitled to only $600.00 spent on ceiling tiles that were damaged because faulty construction resulted in roof leaks. Once again, the case was sent back to the

lower court for a final judgment in that amount. Essentially, this case stands for the proposition that, in Alabama, a construction defect claim that results exclusively or primarily to damage to the construction work/project itself, will not be a considered, a covered occurrence under a CGL policy.

ARKANSAS

Contactor's Lien for Profits and Unused Materials Unenforceable

Erdman Co. v. Phoenix Land & Acquisition, LLC, 2012 U.S. Dist. LEXIS 125018 (W.D. Ark. Sept. 4, 2012)

Phoenix Health, LLC (Phoenix) hired Erdman Company to design and build a hospital addition under a fixed-price contract. After a dispute arose over who was liable for damage that resulted from drilling an elevator shaft, Phoenix stopped paying Erdman. Erdman stopped work on the project but left unused materials at the jobsite. Erdman filed suit against Phoenix seeking foreclosure of its contractor's lien on the project. The lien included amounts for profit and materials not incorporated into the project. Phoenix moved to declare those parts of the lien unenforceable as a matter of law.

The Court held that, under Arkansas law, liens on completed fixed-price contract projects may include lost profit. However, the project must be completed for such a lien to be enforceable. Since this project was not completed, the part of the lien that included lost profit could not be enforced. Additionally, under Arkansas law a lien for unused materials actually used in the construction are enforceable, but not for unused materials. Since Erdman admitted that some materials were not used on the project, that part of the lien was also held unenforceable.

CALIFORNIA

Contractor Right to Control Defense

Travelers Property Casualty Company of America v. Centex Homes, 2012 WL 1657121 (N.D. California, May 10, 2012).

Centex Homes was sued for alleged construction defects and tendered defense to Travelers. When Travelers denied the tender, Centex hired a law firm to defend it. Eventually, Travelers changed its mind and agreed to defend Centex and sought to assign the homebuilder new legal counsel. Centex refused to allow the new counsel to take over. Travelers sued Centex for breach of contract, bad faith, and attorneys' fees, and sought a declaration that it had the right to control its policyholder's defense. Centex in turn filed a counterclaim against Travelers for breach of contract, bad faith, and a declaration that it was in charge of its own defense.

The Federal Court ruled that Travelers waived its right to control Centex's defense when it made the initial decision not to defend the builder. An insurance company's "duty to defend" is an immediate one. Furthermore, Travelers' reservation of rights was irrelevant, since the duty to defend was immediate. The court also ruled that Travelers' claims for bad faith and attorneys' fees failed since they were duplicative of the contract claim. Travelers' claims were predicated on the rejected notion that Centex breached the cooperation clauses in the policies in refusing to allow Travelers to control defense of the underlying construction defect actions.

CALIFORNIA

Insurance Claims - Inconsistent Pleadings

Insurance disputes often result in many different legal actions such as third party liability claims, first party claims, coverage litigation, and subrogation suits. This multiplicity of lawsuits can lead to a party, either a claimant or insurance carrier, becoming embroiled in different lawsuits, often in different forums, where they must submit pleadings with respect to their respective positions. Inconsistencies, and even opposite positions, asserted in those pleadings may defeat a claim or defense in another case. *O & S Holdings, LLC v. The Fireman's Fund Insurance Co.*, 2012 WL 5193783 (Cal. Ct. App. October 22, 2012.)

O&S was a real estate developer who built a hotel-office tower project in Huntsville, Alabama. O&S later alleged there were problems with the project, including leaking windows, bad millwork, and leakage from a pond. O&S sued the contractors in 2009 in Alabama state court alleging the problems at the Huntsville complex were due to defective work and materials. O&S also made claim against several insurers, including Fireman's Fund, to cover losses due to the project problems. The insurers denied coverage based, at least in part, upon construction defect exclusions. The next step in line was, of course, O&S's coverage lawsuit. The trial court granted summary judgment to the insurers in the coverage lawsuit ruling that O&S was bound by the "construction defect" allegations in its pleadings in the Alabama lawsuit.

On appeal, O&S argued that the Alabama state court pleadings were not determinative to the California coverage litigation because those claims had not been proven in Alabama, and the various contractor defendants were denying them. The California appeals court disagreed, arguing that admissions and facts alleged in a pleading are binding as admissions, and O&S was bound by those admissions in its complaint in the Alabama lawsuit. The appellate court affirmed dismissal of the coverage action because O&S admitted, through its pleadings in the Alabama lawsuit, that its claims were (essentially) based on construction defects which were excluded from coverage.

The lesson of the O&S case is that both claimants and insurers need to closely scrutinize pleadings, discovery responses, responses to notices to admit, and other court filings for consistency. To the extent possible, make sure that statements, claims, and defenses are not pleaded, particularly under oath or with verification, which are at odds with or defeat other claims and defenses. Allegations and statements in pleadings are juridical admissions of a party which bind that party in that litigation, and later or parallel litigation.

CONNECTICUT

State Immunity - Time Bar Not Applicable Against State

State of Connecticut v. Lombardo Bros. Mason Contractors, Inc., 2012 Conn. LEXIS 443 (November 13, 2012). The State of Connecticut sought damages for defective design and construction of a law school library project. Defendants asserted statute of limitations and statutes of repose defenses. They also argued that contractually the State had to agree to be bound to a seven year period of repose.

The project began in 1992 and was completed in 1996. Post-construction, the State performed corrective work to remedy water intrusion and other defects in the amount of $15 Million and was seeking reimbursement for those costs. The State claimed that under the doctrine of "Nullum Tempus" its claims were immune to any governing time limit. The trial court disagreed, finding that this doctrine was never

really part of the Connecticut common law, and that the State and waived any such rights. However, that ruling was reversed on appeal.

The State Supreme Court ruled that the "Nullum Tempus" doctrine was indeed part of the State common law, and if there was to be any revision, this was a matter for legislative action. The court noted that this doctrine served a "public policy" in this case the financial benefit of the State.

The defendants next argued that the statutes of repose apply to the State, but the Supreme Court ruled that those statutes have not expressly overruled the doctrine of "Nullum Tempus".

The Court also rejected claims that the State had contractually waived such defenses because the State statute authorizing the Commissioner to enter into contracts did not authorize him to waive the State's immunity.

Therefore, the State's lawsuit seeking some $15 Million in restoration costs was allowed to proceed.

ILLINOIS

Project Delays and Extensions

Asset Recovery Contracting, LLC v Walsh Construction Company of Illinois, 2012 Ill. App. LEXIS 892 (November 1, 2012).

Asset Recovery Contracting ("ARC") was the demolition contractor on a redevelopment project to convert an office building in Chicago to residential and retail condominiums. Most of ARC's work was to be completed in four months, but significant delays extended the work to more than 14 months. The reasons for the delays included a Fire Department Order that halted demolition, restrictions on certain demolition work, and continued occupancy by some tenants. ARC sought over $2 Million as an equitable cost adjustment for increased costs but the trial court ruled that ARC waived its claims for additional compensation primarily because it raised no objection or late objection to the revised project schedules.

ARC first argued that the Trial Court should not have considered extrinsic evidence regarding revisions to the project schedule. However, the subcontract did allow for changes in the work schedule. The appeals court also concluded that ARC had not objected to the numerous revised schedules and had not requested contract modifications to provide for or incorporate delayed damages. ARC also argued that the trial court failed to apply exceptions to the "no damages for delay" provisions of the contract which made time extensions ARC's only remedy for delays. However, the appeals court found the exceptions applicable. Lastly, ARC argued that the trial court should have made an exception to the "no delay damages" rule because the parties did not contemplate such unreasonable and substantial delays. However, the length of the delay did not strike the appeals court as unreasonable, and in fact ARC had some notice of some of the delays even before it signed the Contract. In short, ARC's claim was denied because it had not timely objected to the revised schedules, had not asserted delay damages claims until well after work was finished, and was generally held to have waived or acquiesced in the delays.

KANSAS

Change Orders - Written Approval Required

Central States Mechanical v. Agra Industries, Inc., 2012 U.S. Dist. LEXIS 127123 (D. Kansas September 7, 2012).

The claimant, Central States Mechanical, sought upwards of $13 Million for unpaid work, extra work, and impact damages due to work acceleration. A bankruptcy court determined that Central failed to demonstrate timely notice as to the increase costs, and the federal district court agreed. The subcontract provided for a change order procedure with respect to delays and increased costs of work, which were to be submitted "promptly" and prior to commencement of revised work. The court agreed that Central States had agreed to present timely notice of delays and increased cost claims as a claim condition precedent.

The court ruled that the change order process was the proper means by which Central States could change compensation or time of performance. The District Court did find that one item of the claim involving unpaid piping work on a water treatment plant might be recoverable because it was outside of the scope of the original subcontract and therefore not as strictly governed by the change order process, and as to which the court believed the contractor had approved the work which might entitle Central States to compensation.

This case presents another example where following the formal change order process was deemed a condition precedent to contractor or subcontractor recovery, particularly in this context where the bankruptcy court was clearly trying to protect the interest of the contractor who was in bankruptcy.

MISSISSIPPI

Liquidated Damage Provision May Be Enforced, Even Absent Actual Damages

Hovas Construction, Inc. v. Board of Trustees of Western Line Consolidated School District, 2012 Miss. App. LEXIS 556 (Sept. 4, 2012)

Hovas Construction Inc. (Hovas) contracted to perform work on a high school construction project. The work was completed 39 days late, but 20 days before the start of the school year. The contract stated that in the event the project was completed late, Hovas would be charged liquidated damages of $500/day. Hovas objected, arguing the charge of liquidated damages was improper because the school district had not suffered any real damage.

The Court of Appeals of Mississippi disagreed and ruled that the issue of actual damage was not really relevant to the question of liquidated damages. The contract provision at issue was held by the court to be one for liquidated damages, and not an unenforceable penalty, because judging from the time the contract was made it would have been difficult to predict actual damages in the event of a breach. In the light of these circumstances, the Court considered $500/day to be a reasonable liquidated damages provision and not an invalid penalty.

NEVADA

Contractor's Contractual Duty of Implied Fair Dealing

Road & Highway Builders, LLC Northern v. Nevada Rebar, Inc., 2012 Nev. LEXIS 81 (Nevada August 9, 2012).

A contractor, Road & Highway Builders, entered into a subcontract with Northern Nevada Rebar ("NNR") for a substantial amount of rebar and re-enforced concrete boxes on a road construction project. However, at the same time it was subcontracting with NNR, it was also obtaining approval and submitting a purchase order to another subcontractor for the precast RCB's. Ultimately, the contractor got approval to use approximately 80% of the alternative poured and placed RCB's, but the contractor did not disclose this information to NNR. The eventual subcontract with NNR even included the full amount of rebar and RCB's. The subcontract did say that the contractor could (at any time) order additions, deletions, or revisions in the work.

Eventually, the contractor sued NNR for breach of contract, and NNR asserted a counterclaim alleging fraud in the inducement, breach of contract, and breach of the implied covenant of good faith and fair dealing. A jury awarded NNR $700,000.00 in compensatory damage and $300,000.00 in punitive damages.

On appeal, the fraudulent inducement claim was held invalid as a matter of law. The court ruled that claim amounted to breach of contract, not fraud. However, the appeals court ruled that the jury verdict could be sustained based upon the breach of contract claim and breach of the implied covenant of good faith and fair dealing. Since the fraudulent inducement claim failed as a matter of law, the punitive damages award was set aside. The punitive damages award was reversed, but the award for compensatory damages was affirmed and upheld.

NEW YORK

Excavation Damage - Coverage Now Excluded

Bentoria Holdings, Inc. v. Travelers Indemnity Co., 20 N.Y. 3d 65 (October 25, 2012). In prior New York State cases, damage to a building caused by an adjacent excavation was deemed covered, or at least not excluded, because typical exclusionary language only excluded damage from natural, not man-made causes. In *Bentoria,* the result is the opposite because of new, additional policy language. Damage to a building caused by an adjacent excavation is deemed excluded because the "earth movement" exclusion applied whether the loss event was naturally occurring or due to man-made or other artificial causes. Due to this new, improved exclusionary language, the insurer obtained summary judgment dismissing the insured's complaint seeking coverage.

NEW YORK

Labor Law 240

Rosier v Stoeckeler, 2012 WL 6199850 (3d Dept. 2012)

Plaintiff was employed by a company that contracted to replace two garage doors at an automobile repair shop in a building owned by Defendant. Plaintiff was at the site working about 3 feet above the garage floor on a five or six foot ladder disassembling a door when he fell, allegedly ending up in a four to five-foot deep pit in the garage.

Third Department stated that "…not every fall from a ladder establishes that the ladder did not provide appropriate protection." Further, "…a prima facie case is established by proof that the ladder collapsed, slipped or adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his injuries." Although, Plaintiff submitted an affidavit indicated that his fall occurred when the ladder "shifted and began tipping", Defendant countered with deposition testimony of Plaintiff in which he testified he simply lost his balance, and "did not know" what caused him to lose his balance. Plaintiff also testified that the ladder was in good condition, he had no problems with it, and he had used this same type of ladder many times performing similar jobs.

Third Department determined there was also conflicting evidence whether Plaintiff fell onto the floor of the garage or into the garage pit, and it was not clear from his deposition the role, if any, his handling of a door section had in his fall. Construing proof most favorably to the non-moving party and noting that an unexplained conflict between deposition testimony and a subsequent submission by the deposed party generally will not support summary judgment, Third Department agreed that factual issues for trial exist regarding Plaintiff's Labor Law §240(1) claim.

Practice Point: The importance of locating and obtaining every statement of the plaintiff, and all witnesses for that matter, is here evident. A description of how the accident happened factually different from plaintiff's testimony or affidavit can help create questions of fact precluding summary judgment for the plaintiff.

-Contributor
David R. Adams, Esq.
Hurwitz & Fine, P.C.
Buffalo, New York
"Labor Law Pointers"
dra@hurwitzfine.com

OHIO

Performance Constitutes Acceptance of Contract Offer

Jatsek Construction Co., Inc. v. Burton Scot Contractors, LLC, et al, 2012 Ohio App. LEXIS 3489 (Aug. 30, 2012)

Subcontractor Jatsek Construction Co., Inc. (Jatsek) submitted a bid to Burton Scot Contractors, LLC (Burton Scot) for work on a public improvement project. Burton Scot submitted a proposed subcontract to Jatsek. Jatsek made handwritten modifications to the subcontract and signed it. Even though Burton

Scot never signed the subcontract, Jatsek performed all the work outlined in the modified subcontract. The subcontract contained a provision requiring the parties to pursue arbitration for dispute resolution. Jatsek later sued Burton Scot, alleging that Burton Scot failed to pay for work Jatsek performed. Burton Scot argued that the subcontract required mandatory arbitration. Jatsek disagreed, arguing that since only Jatsek signed the subcontract the parties never agreed to arbitrate.

The trial court ruled in favor of Jatsek, but the Ohio appeals court reversed, holding that conduct sufficient to show agreement, including performance of contractual obligations as if the contract were in effect, constituted acceptance of an offer. Here, both parties acted as if the contract was in effect, so the court ruled it was in effect. Therefore, the parties were required to submit to arbitration.

OREGON

Insurance Coverage Determined By Complaint Allegations

Bresee Homes Inc. v. Farmers Insurance Exchange, 2012 WL 6737791 (December 31, 2012). A party to a residential building contract sued Bresee alleging that the contractor improperly installed exterior stucco resulting in leaking and water damage to the property. The suit asked for $52,600.00 in damages for repairing the siding and fixing damage by the leaks. Bresee forwarded the complaint to Farmers with which it had a CGL policy. Farmers denied coverage, citing a "products-completed operations hazard" policy exclusion. Such exclusions typically rule out coverage for damage or incidents that ocurr after completion of a construction project. Bresee then brought the declaratory judgment action seeking to compel coverage.

The trial clerk granted summary judgment for Farmers on the basis that the products-completed exclusion defeated the coverage claim. The State Court of Appeals affirmed. But the Oregon Supreme Court granted Bresee's petition for review and reversed the lower courts.

The Supreme Court said Farmers had a duty to defend if the complaint allegations provided "any basis" for coverage. Here the question of timing was both critical and ambiguous. The complaint allegations did not state whether the claimed damages occurred before or after completion of the contractor's work. Because the central question of when the alleged damages occurred, before or after construction, was not definitively addressed or recited in the complaint, there might be coverage based on conduct covered by the policy.

While theoretically, most if not all of the damage would seem to have occurred after construction, and while Bresee may have a difficult time proving at trial the nature and extent of any damage that occurred during actual construction, the Supreme Court reversed and remanded the case to the trial court for further proceedings focusing, presumably, on the key question of what damages occurred at what point in time- pre or post construction.

This case stands for the proposition that coverage is largely determined by the allegations of the underlying complaint. Sometimes, if the underlying complaint allegations are not specific or ambiguous, that can be a basis for denial of coverage. However, in this case, the ambiguity with respect to the time frame of the loss at least allowed the contractor/insured to prevail at a motion stage.

SOUTH CAROLINA

Construction Defect May Be a CGL Occurrence

In the State of South Carolina, the "Crossmann" saga continues on the subject of whether construction defects are "occurrences" for purposes of commercial general liability insurance. Act Number 26, passed in South Carolina in January 2011, defined a CGL occurrence as including both an "accident" and property damage or bodily injury resulting from faulty workmanship exclusive of the faulty workmanship itself. In effect, South Carolina attempted to impose a statutory solution to the ongoing debate in controversy on this subject. In the first Crossmann decision in 2011, South Carolina had ruled that construction defects were not covered "occurrences" for purposes of CGL coverage where the damages were the natural and probable consequence of faulty workmanship. The second Crossmann ruling also in 2011, which occurred after the passage of Act Number 26, held that negligent or defective construction resulting in damage to otherwise non-defective components could constitute property damage. An "occurrence" traditionally means an accident. But the court also ruled that the statutory definition of "occurrence", which now "mandates the inclusion of faulty workmanship" was ambiguous and therefore (like a term in an insurance policy) had to be construed in the insured's favor for coverage.

The retroactive portion of Act Number 26 which applies to all CGL policies issued in the past, currently in existence, or in the future, has also been declared unconstitutional. *See,* *Harleysville Insurance Company v. The State of South Carolina,* 2012 S. Car. No. 27189 (November 12, 2012).

TEXAS

Indemnity Clause V. Limitation of Liability

Tippman Construction, Inc. v. Professional Service Industries, Inc., 2012 U.S. Dist. LEXIS 152018 (N.D. Texas October 23, 2012).

Tippman contracted with PSI for various engineering tests. Post-construction, Tippman repaired certain problems and sought reimbursement from PSI. PSI argued that any damages incurred as a result of PSI' s work were limited to $25,000.00. PSI's General Conditions contained a limitation of liability clause of $25,000, but the general contract also contained an indemnity provision that PSI would hold Tippman harmless from "any and all claims" arising from PSI's negligence.

The court concluded that the three separate subcontracts stood alone as separate agreements for engineering services by PSI. It read all the contracts together to give effect to all the provisions holding that PSI was required to indemnify Tippman for claims arising out of PSI's performance, but only up to the $25,000 contractual limitation of liability. However, potentially, since there were three separate contracts under the court's analysis, the total liability cap might be up to $75,000 ($25,000 x 3) in the aggregate.

VERMONT

Economic Loss Doctrine Precludes Claim

Long Trail House Condominium Association v. Engelberth Construction, Inc., 2012 Vt. LEXIS 76 (September 28, 2012).

A condominium association sued the contractor alleging negligent construction and breach of express and implied warranties. The trial court granted the contractor summary judgment which was affirmed. The negligence claim was barred by the economic loss doctrine. The court rejected a claim that the economic loss doctrine did not apply because there was a "threat of imminent harm". The court required actual injury, not simply a risk of harm, before there could be a recovery in negligence. The association also failed to show that any implied warranties passed from the developer to the subsequent purchasers in the absence of contractual privity. The court stated that the Association's remedy was against the developer and seller of the condominium units who implicitly warranted through the sale that the housing units were in good condition and suitable for habitation.