THIS PAPER WAS WRITTEN IN CONJUNCTION

Recent Construction Risk Issues and Cases and Common Sense Recommendations for 2021

Introduction

The apocryphal saying, ³P D\\R X O L Y H L Q L Q W H U H V W L Q J W L P H V´ the events and tenor of 2020. V X U H O \
The phrase ± seemingly a blessing on its face ±

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to directly file suit against its employer to recover unpaid wages and seek treble damages as to the DPRXQW RI ZDJHV RZHG SOXV revously Virginia employees were limited FRVW
to filing a claim with the Virginia Department of Labor and Industry. In Virginia, subcontractor employees now have a private cause of action against the subcontractor and the contractor with significant teeth.

Many states have had such laws for several years, including California, Maryland, Oregon, Massachusetts, and Colorado. These laws are intended to accomplish the imposition of liability on general contractors 0DU\ODQG¶V ODZ HQDFW General Contractor Liability FDOOHG IRU 8QSDLG :DJHV $F Since 2018, multiple enforcement actions of these laws have been engaged in by individuals and state labor authorities. As early as 2017, the California Labor Commissioner began issuing fines, starting with fining a general contractor almost $250,000 fine IRU D VXEFRQWUDFWRU¶V ZDJH DQG KRXU YLRODWLRQV RQ

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hour claims, typically excluding claims under the Fair Labor Standards Act, for unpaid wages, or employee misclassification. *See, e.g.*, Southern California Pizza Co. v. Certain Underwriters at Lloyd's, London Subscribing to Policy Number 11EPL-228, 252 Cal. Rptr. 3d 635, 645 (Cal. Ct. App. 2019). While there may be circumstances where such policies may cover defense costs, the damages that a claimant may seek in these cases include penalties, treble damages, and the HPSOR\HH¶V DWWRUQH\V¶ IHHV ZKLFK FRXOG EH VLJQLILF daily and even more so in a class action.

Common Sense Recommendations: Contractors need to take steps to avoid potential liability for ZDJH WKHIW IURP D VXEFRQWUDFWRU¶V HPSOR\HHV 9HWW remains critical, as well as identification and approval of sub-subcontractors regardless of tier. Strengthening and clarifying indemnification provisions in standard subcontract forms, and obligating flow downs to sub-subcontractors is also recommended. Contractors should implement procedures for ensuring subcontractor and sub-subcontractor compliance with employee pay requirements through reporting and certifications for every payroll period. Given the broader prevalence of these laws, general contractors should review existing EPLI policies and explore other options for coverage as needed.

2. Status of Business Interruption Insurance Claims for COVID-19

The global pandemic has placed heavily burdened U.S. businesses, forcing many to close or limit services to comply with government directives to prevent the spread of COVID-19. This has led to a growing number of lawsuits over whether temporary COVID-19 related closures and shutdowns of property are compensable under business interruption insurance. As of April 2021 in excess of 180 COVID-19 related insurance lawsuits have been filed, the majority of which are business interruption claims from COVID-19 closures. Results in most jurisdictions have been favorable for insurance carriers.

In an example of a typical case, Atma Beauty, Inc. v. HDI Global Specialty SE, 2020 WL 7770398 (S.D. Fla. Dec. 30, 2020), an insured filed a lawsuit seeking a declaratory judgment that government orders closing non-essential retail and commercial establishments triggered its

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business interruption insurance coverage.[14] The court J U D Q W H G W K H L Q V X U D Q F H F

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On June 29, 2020, Michigan joined this growing list when the Supreme Court of Michigan held in Skanska USA Building Inc. v. M.A.P. Construction Contractors, Inc., 952 N.W.2d 402 (Mich.
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coverage under a modern CGL insurance policy. See id. at 410; see also Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co., 661 F.3d 1272, 1289 (C.A. 2011); Sheehan Constr. Co., Inc. v. Continental Cas. Co., 935 N.E.2d 160, 171 (Ind. 2010); Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So.2d 1241 (Fla. 2008); &\SUHVV 3RLQW &RQGRPLQLXP $VV¶Q ,QF
143 A.3d 273 (N.J. 2016).

New York may become the next state to follow suit. Black & Veatch Corp. v. Aspen Ins. (Uk) Ltd.

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increased quantity requirements. Such clauses are typical in government contracting across project delivery methods. Typically such clauses will kick in after an agreed upon threshold increase in cost. Escalation clauses protect the contractor from price increases that could not have been predicted at the time of submitting a bid for the work. Without such a provision, the contractor typically bears the entire risk of material and labor price escalations, regardless of the cause.

Claims Clauses addressing shortages appear mainly in public works projects and provide contractors the opportunity for compensation and time in the event of unexpected shortages of material. See, e.g. FDOT Standard Specifications for Road and Bridge Construction, §8-7.3.2 (allowing consideration of "delays in delivery of materials or component equipment that affect progress on a controlling item of work as a basis for granting a time extension if such delays are beyond the control of the Contractor or supplier[,] whether based on area-wide shortages or other factors affecting feasible sources of supply"). Typical clauses require documentation of the efforts

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the supplier were used by the replacement subcontractor to complete the work, but the supplier was not paid for several months of materials furnished.

The supplier sued the drywall subcontractor, its principal (who had signed a guarantee), and the general contractor, asserting breach of contract, unjust enrichment, and enforcement of a mechanic's lien. The subcontractor and the principal were defaulted, but the trial court also entered judgment in favor of the supplier against the general contractor on the unjust enrichment claim. The Virginia Supreme Court affirmed the judgment in a 4-3 decision which arguably expands prior interpretations of unjust enrichment claims as well as upsets traditional contractual relationships that govern construction projects.

On appeal, the general contractor argued that it was not unjustly enriched as it had paid more than the subcontract price with the original subcontractor following termination. While the court acknowledged this general principle, but held that it did not apply because the general contractor had not ever paid anyone for the specific materials the supplier furnished. The court concluded that in this instance the general contractor "is not being forced to pay twice for supplies provided by [the supplier]. It is being asked to pay once." James G. Davis Constr. Corp. v. FTJ, Inc., 298 Va. 582, 596, 841 S.E.2d 642, 649 (2020). Further, the court observed that had the supplier not furnished the drywall, the replacement subcontractor would have had to purchase it, thereby

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6. Workers Compensation and COVID-19

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COVID-19. These actions vary in terms of applicability and the extent of the presumption, but generally the statutes provide that a presumption that contraction of COVID-19 arises in the course of and within the scope of employment and therefore is a compensable injury or disease.

This presumption was adopted by nine states in 2020 (Alaska, California, Illinois, Minnesota, New Jersey, Utah, Vermont, Wisconsin, and Wyoming), and most legislation has provided for retroactive applicability. Vermont¶V QHZ ODZ H[WHQGV the presumption to employees that had a positive test for COVID-19 starting in April 2020 through 30 days after the termination of the state of emergency. Illinois recently voted to extend the COVID-19 presumptions through June 30, 2021 (HB 4276). Other states (Alaska, Minnesota, and Wisconsin) may

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7. COVID-19 Vaccinations in the Workplace

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Common Sense Recommendations: Each employer must evaluate and determine what is best for its workplace and its employees. Given the potential minefields and problematic employment decisions that would very likely be required, employers may be better off strongly recommending vaccinations rather than requiring them as a condition of employment. Employers can implement policies that encourage vaccinations such as paid time off to get vaccinated, paying for the vaccine (if necessary) or providing financial incentives to employees to get vaccinated. Employers that want to require vaccinations should carefully plan the processes and procedures it will use to: implement the requirement, verify compliance, respect privacy issues and exemptions, and disciplinary actions for noncompliance.

8. Expanding Tort Liability to General Contractors and Construction Managers

Contractors and construction managers continue to face claims for tort liability from entities or persons with whom they lack contractual privity. These types of claims sound in negligence, and either for purely economic losses or for personal injury and property damage. In recent years more and more courts have adopted positions that increase the exposure of general contractor and construction managers for such claims.

In the past many of these claims would be considered barred by the economic loss rule, which prohibits third parties from claiming purely economic losses against parties to which they were not in privity of contract. However, the majority of jurisdictions now diminished the economic loss rule and instead adopted the approach in Restatement (Second) of Torts §552(a), entitled Information Negligently Supplied for the Guidance of Others, which provides in part:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552 (1977). For general contractors and construction managers this trend means that in many jurisdictions third parties may assert potential claims in negligence regardless of contractual privity.

Recent cases have confirmed this trend. In several cases out of Louisiana, courts there have held that a construction manager hired by the owner may be sued by a general contractor for negligent professional undertakings despite a lack of privity, and the fact that the construction manager was not a design professional. See Lathan Co., Inc. v. State, Dep't of Educ., Recovery Sch. Dist., 237 So. 3d 1 (La. Ct. App. 2017) (owner's construction manager owed duty to general contractor such that negligence claim could be sustained); see also McDonnel Group, LLC v. DFC Group, Inc., CV 19-9391, 2020 WL 871201, at *8 (E.D. La. Feb] TJ p$, 0.000001 72.s 1 72.024 199.49 Tm 0 g 0 G

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Conversely, contractors have used the same arguments to forward negligence claims against design professionals. In a recent Florida case, a general contractor sued architectural firm and architect for professional malpractice, alleging that contractor suffered economic losses from defective plans. The trial court granted the design professionals' motion to dismiss but the appellate court reversed. The appellate court held that a special relationship existed between the general contractor and the design professionals, due to the knowledge of the design professionals that the general contractor would rely on the erroneous documents and could be injured as a result. See Hewett-Kier Construction, Inc. v. Lemuel Ramos and Associates, Inc., 775 So.2d 373, 375 (Fla. 4th DCA 2000); see also Russell v. Sherwin-Williams Co., 767 So.2d 592, 593-95 (Fla. 4th DCA 2000) (permitting painter's claim for negligence and fraudulent inducement against paint manufacturer associated with product application instructions; economic loss rule did not bar recovery where manufacturer supplied plaintiff with false information in the course of its business on which it

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scope of work. Consideration should be given to disclaimers regarding the extent of reliance that nonparties may place on the contractor's work product. Express statements disclaiming third party beneficiary status should likewise be included. Insurance coverage for potential liability exposure should also be investigated.

9. Legal Impacts of New Developments in Safety

The construction industry has made huge gains in safety and reducing overall injuries and the severity of injuries in the workplace. According to the U.S. Bureau of Labor Statistics (BLS) the total number of employer-related workplace injuries (all industries) remained the same for 2018 at 2.8 injuries per 100 full-time workers.

This immediate trend is disconcerting for a number of reasons. The construction industry has invested huge resources and time dealing with safety. Every contractor focuses on safety. It is not only concern for the health and welfare of each worker but every injury, even a non-recordable one, has an economic and morale impact. Safety also has an impact on overall profitability and obtaining new work. In every negotiated procurement, the owner wants to know the Experience Modification Rate (EMR). Also, the EMR directly affects workers compensation rates. Everyone wants a safe workplace and safe employees. Why has the recent investments, including in worker protection and technology, not generated corresponding improvements in preventing workplace injuries?

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Some in the industry say the increase is driven by a large increase in falls from heights.

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When we think of risk compensation, think of seatbelts, antilock brakes, adaptive cruise control, road safety and lighting and ask why has the level of crash injuries and fatalities not decreased? Think child-resistant caps on medicine and ask why has the poisoning of children not decreased?

This study in the ASCE Journal of Construction Engineering and Management focused on the

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front technology and training costs and legal risk. Delegation of BIM responsibilities to subcontractors must be carefully crafted and subcontractors must have staffing and technological capability to perform. Allocation of responsibility for design and potential errors when using BIM collaboratively remains challenging. BIM can impose unintended quasi-design obligations on participants who may not have the appropriate training, licensing or insurance. BIM models provide a wealth of information, but careful contractual language should be considered to limit the extent of reliance on the model by others.

Common Sense Recommendations: Users of new and emerging technologies must consider not only the benefits of using the technology but the potential risks. Some technologies, such as drones, may pose risks to employees, other project participants, and the public at large. Contractors should insure proper training and compliance with regulations as well as insurance considerations. Other technologies, such as BIM, can pose contractual risks when obligations are not fully passed on to project participants and use of model information is not appropriately limited. Contractors must adapt contractual terms and disclaimers to protect against improper use of modeling information and the potential limits of subcontractor participation in the model.

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