



2020 Construction Conference  
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## **Construction Accident Litigation: Pitfalls, Perils and Trends in the Southeast**

### **I. Construction Accidents - Current State of Affairs**

#### **A. Common Types of Construction Accidents**

While construction accidents come in all shapes and sizes, some of the more common accidents involve some form of collapse (crane, building structure, trench failure, demolition exceeding the splash zone), equipment injuries (forklifts, buck hoists, nail guns), falls and explosions/burns. Unfortunately, many construction accidents result in significant injuries or death. And some accidents, such as the collapse of the Miami Dade College Parking Garage in 2012, the Florida International University Pedestrian Bridge collapse in 2018, and the crane collapse at the Hard Rock Hotel in New Orleans in 2019, involve multiple fatalities and injuries.

#### **B. Inherent problems in Construction which gives rise to accidents**

By its nature, construction is dangerous. Construction workplaces workers in close contact with heavy machinery, at great heights, and requires workers to work with very large/unstable elements of construction where it is the workers' job to transport/direct those elements into their proper place. Most construction sites are littered with debris, making falls more likely. Additionally, cost constraints often times conflicts with safety. Construction projects are generally on accelerated schedules. Contractors usually face financial consequences (including penalties such as liquidated damages) when projects are not completed on time. This can result in fewer safety meetings

(which take time out of building) and cutting corners on safety. Lower cost labor is often sought out by contractors trying to maximize profit, which can result in a higher risk of accidents due to having fewer experienced construction workers on site.

## **II. Notable Trends in the Themes by which these Claims are Prosecuted**

### *A. Common Themes/Reptilian tactics*

Many plaintiffs' attorneys have little difficulty in establishing that any particular construction site was fraught with danger and lacked sufficient safety protections/protocols. After a bad accident, this is almost always the case for at least some element of any given project. Instilling a notion that a construction professional's actions (or omissions) represented a "danger to the community" and that the jury has the power to remedy this, can be a powerful prosecution tactic. "Profits over people" is a common theme that can be established by showing profit maximization at the expense of safety. Value engineering, insufficient safety meetings, inadequate PPE, and accelerated schedules can all be established as possible causes of construction accidents where "safety was sacrificed in the name of profit."

### *B. Unfair targeting of Defendants with deep pockets/financial responsibility*

Construction accident litigation often involves naming many different contractors, design professionals, and suppliers as defendants in any given lawsuit (particularly when the injuries are significant). Oftentimes, there are few (one or two) clearly liable defendants. And, the clearly liable defendants oftentimes do not have sufficient insurance coverage (or deep pockets). This forces plaintiffs' attorneys to focus on the defendants that have the deep pockets, even if they lack any fault.

Contractors, subcontractors, suppliers, and design professionals all have distinct and particular roles on projects. One common prosecution tactic is to blur those lines of responsibility and try to make all parties involved in a project responsible for the accident. Some examples of this include blaming contractors and subcontractors for failing to appreciate or discover design errors (even latent ones), or attempting to blame a subcontractor for not addressing or discovering a condition caused by another subcontractor whose work had

nothing to do with the targeted subcontractor. These tactics often require plaintiffs' attorneys (and their experts) to attempt to place duties on construction professionals that do not exist in their contracts and, oftentimes, to place duties on construction professionals that are completely outside their expertise.

### **III. Common Defenses that are Asserted in Construction Accident Litigation**

#### *A. Design v. Construction defect disputes*

Many design professionals (engineers/architects) do not carry as much insurance as contractors and subcontractors. Moreover, their policies are sometimes cost erosive. This reality can force plaintiffs attorneys to try and blame contractors for design errors that are truly the fault of the design professionals.

Generally speaking, contractors are not responsible for design defects. Contractors build what is designed and engineered by the design professionals. However, when a design error is obvious, and is not called into question by a contractor, this can serve as a basis for some fault allocation on a contractor. Additionally, some contracts for general contractors and subcontractors contain provisions wherein the contractors are required to provide at least some review of the design plans and point out errors.

It is critical for attorneys representing a contractor to fully understand what the contractor's contractual obligations are, and what the contractor's area of expertise is. Motions for summary judgment and motions *in limine* can be utilized to narrow the scope of the legal theories asserted against contractors that go beyond their contractual duties and/or their expertise. Fault theories can be asserted against a contractor or subcontractor that may sound reasonable to a lay person, but in reality, go completely beyond that party's duties and experience.

Additionally, even where a construction accident involves a construction defect caused by a contractor, there can still be exposure (generally via fault allocation) to design professionals whose job it was to review and approve the staged work of the contractor.

## *B. Indemnity/Additional Insured obligations*

Contractual indemnity and additional insured obligations generally flow “downstream” on construction projects and can become critically important in multiparty construction accident litigation. On many projects, general contractors contractually agree to defend and indemnify developers, owners, and even sometimes certain design professionals. Subcontractors, almost always, contractually agree to defend and indemnify general contractors (and owners as well). Additional insured obligations are very common in construction contracts.

Indemnification and additional insured tenders are often ignored in construction litigation. Some parties, who clearly owed indemnity, but did not pick it up (or whose carrier clearly owed additional insured coverage and did not provide it), will find in some cases that their exposure to indemnity (and/or their carrier’s exposure to additional insured coverage) to a co-defendant becomes more significant than the direct claims asserted by the plaintiff. If the defendant fails to pay attention to these exposures, even a successful defense of the underlying claims by the plaintiff will not get that party (or its carrier) out of the case. Therefore, it is critical for defendants to assess, early on, the indemnity exposure and be sure to have a good handle on the law that will apply (many states have anti-indemnity statutes that can effect indemnity exposure).

Insurance professionals must ensure that additional insured obligations are addressed early on. And, if it is decided that an additional insured tender should be denied, the professional should consider how contractual indemnification claims (and/or claims that the wrong type of additional insured protections were secured by the insured) may keep their insureds in a case, even when the underlying claims are successfully defended or called into question.

## *C. Workers Compensation Immunity*

Many states have some form of workers compensation immunity that is afforded to employers of construction workers that are injured on a work site. Some states even provide protections to subcontractors who are sued by workers employed by another subcontractor. It is critical to address these defenses early on. Workers compensation immunity defenses can be a big driver in claim valuation since these defenses can oftentimes result in summary judgments in favor of the contractor.

## **IV. Valuation Concerns/Settlement Strategies**

### *A. Valuing Construction Accident Claims*

On the onset, a defendant to a construction accident claim needs to get a handle on the exposure that the case presents. Generally, this requires an understanding of the damages exposure, as well as an understanding of the duties the defendant had on the project vis-à-vis the other defendants. Targeted discovery is oftentimes needed to assess the viability of comparative fault, workers compensation immunity, and contractual duty defenses. A construction accident defendant and its carrier must carefully assess not only the merits of the claim presented by a plaintiff, but also any indemnification/additional insured exposures that exist. Far too often litigants do not appreciate the indemnification/additional insured exposure, and this can result in protracted litigation. In many cases, the indemnity/additional insured exposure for a particular defendant can ultimately become greater than the exposure presented by the plaintiff's direct claim.

Of course, coverage considerations come into play with indemnity/additional insured claims, and this can often further complicate insurance company valuation of a claim.

#### *B. Settling multiparty claims*

The more parties involved in a case, the more complicated settlement becomes. Plaintiffs typically prefer global settlements in large construction accident cases (at least early on) due to fears that individual settlements will result in remaining defendants "pointing the finger" at the settled defendants. This fear is justified since this is generally what occurs.

Even where a defendant has an opportunity to settle a case on an individual basis, that defendant (and/or its carrier) can find themselves right back in the case if release protections are not provided for indemnity/additional insured exposures. This is often seen where a carrier settles a claim on behalf of its insured presuit, but then later finds themselves brought into a case by way of a third-party complaint. Careful attention is needed in crafting releases for individual settlements.

Global settlement resolution can be very challenging in complex construction litigation. Defendants can become adverse with one another due to fault allocation, indemnity, and/or additional insured disputes. Moreover, coverage considerations can greatly impact valuation. It is critical for defendants to keep a dialogue with one another, even when they are extremely adverse.

Joint efforts in minimizing damages and liability exposures can greatly assist claim resolution.

These cases can result in years of litigation where defendants (and their carriers) do not have a working relationship and joint settlement strategies. Protracted litigation increased costs and further drives indemnity and additional insured exposures. This can result in further complicating claim resolution.

Out-of-the-box thinking is often required in order to effectuate global resolution. For example, the Florida International University pedestrian bridge collapse case was resolved, with most defendants, through a complex settlement process in the bankruptcy court even though just one defendant had declared bankruptcy. Defense litigants need to always be creative in assessing and implementing claim resolution strategies.