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Criminal Culpability for Construction Casualty Claims: Consequences for Civil Claims and Coverage

On March 15, 2008, a bright Saturday afternoon, experienced workers at a construction site on East 51st Street in New York City were doing what they had done hundreds of times before – "jumping" the tower crane. This time, however, something went tragically wrong resulting in the collapse of the crane and seven deaths, four of whom were construction workers.

Less than two months later, on Friday, May 30, 2008, the unthinkable happened again, the crane at the construction site at East 91st Street in New York City collapsed, killing the operator and one worker on the ground.

In June 2013 an employee of J. McCullagh Roofing Inc. fell forty-five feet to his death while working on the roof of the Old Zion Lutheran Church located in North Philadelphia.

In June 2015 six people were killed and seven injured when a fifth floor balcony collapsed at the Library Gardens apartment complex located in Berkeley, California.

Most recently, on February 4, 2016 a 15-story crane being lowered because of gusty winds suddenly toppled over and plunged to the ground killing a pedestrian and injuring two others.

Several people involved in the East 51st Street and East 91Street crane collapses were criminally prosecuted, including for the East 51st Street collapse, the tower crane rigger and his company and for the East 91st Street collapse, the owner of the construction company that owned the crane. The owner of the Philadelphia roofing company was indicated by the U.S. Attorney's Office for the Eastern District of Pennsylvania on four counts of making false statements; one count of obstruction of justice and one count for willful violation of an OSHA regulation causing death to an employee. The Alameda County District Attorney is investigating the Library Gardens incident to determine whether the cause of the collapse was more than ordinary carelessness but was "aggravated", "culpable", "gross", or "reckless" to warrant a charge of involuntary manslaughter. Time will tell if anyone will face criminal charges with respect to the February 4, 2016 collapse – although the Manhattan District Attorney's Office and the New York City Department of Investigation are investigating the incident, and the wife of the

deceased pedestrian has notified the City of New York of her intention to sue, as has one of the two injured pedestrians.

Defense of a civil lawsuit where there is the potential for a criminal culpability presents unique challenges and requires an understanding of the criminal investigation process, prosecution and the impact a guilty plea or conviction will have on the defense of the civil lawsuit. As a general principle, criminal defense counsel should be consulted and retained at the earliest hint of potential criminal culpability and should be an active, but background, participant in crafting the defense of the civil lawsuit.

However, it is also critical that the criminal defense attorney and his client understand the insurance implications associated with a plea, and the allocution that will accompany it, or the potential impact of a jury's determination. That is because the majority of courts now hold that a criminal conviction will be afforded conclusive effect on the issue of intent and the necessary facts and issues decided in the criminal trial in a later civil proceeding. See, *Zinger v. Terrell*, 336 Ark. 423, 428, 985 S.W.2d 737, 740 (1999) (collecting authorities and overruling its prior precedent to allow estoppel effect to be accorded to criminal convictions). Commentators have observed for years that this practice has become increasingly accepted with the demise of the mutuality requirement. See, e.g., T. Sawaya, *Use of Criminal Convictions in Subsequent Civil Proceedings: Statutory Collateral Estoppel Under Florida and Federal Law and the Intentional Act Exclusion Clause*, 40 U.Fla.L.Rev. 479, 490-92 (1988); J. Thau, *Collateral Estoppel and the Reliability of Criminal Determinations: Theoretical, Practical, and Strategic Implications for Criminal and Civil Litigation*, 70 Geo.L.J. 1079, 1086-95 (1982). See also *50 C.J.S. Judgments §922* (1997); *47 Am.Jur.2d Judgments* §732 (1995). See *Restatement (Second) of Judgments §85(2)* (1982).

Many jurisdictions hold that a guilty plea is equivalent to a conviction after trial for collateral estoppel purposes and precludes litigation in a subsequent civil action of all issues that would necessarily have been determined by the conviction, including intent. *State Farm Fire & Cas. Co. v. Fullerton,* 118 F.3d 374 (5th Cir. 1995); *Colorado Farm Bureau Mut. Ins. Co. v. Snowbarger,* 934 P.2d 909 (Colo. Ct. App. 1997); *State Farm Fire & Cas. Co. v. Sallak*, 140 Ore. App. 89, 914 P.2d 697 (Or. Ct. App. 1996); *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35 (Me. 1991); *State Farm Fire & Cas. Co. v. Groshek*, 161 Mich. App. 703, 411 N.W.2d 480 (Mich. Ct. App. 1987); *Merchants Mutual Ins. Co. v. Arzillo*, 98 A.D.2d 495, 472 N.Y.S.2d 97 (N.Y. App. Div. 1984); *Ideal Mut. Ins. Co. v. Winker,* 319 N.W.2d 289 (Iowa 1982).

Often, criminal counsel for the insured/defendant will not allow the insured to provide a statement to the insurer or their counsel citing Fifth Amendment rights. However, criminal defense counsel need to be mindful of the cooperation clause in the Commercial General Liability ("CGL") policy, which is a condition to coverage. Breach of the cooperation clause may result in a disclaimer of coverage and the ultimate loss of same, although demonstrating breach of the cooperation condition sufficient to allow an insurer to walk away from their coverage obligations is no easy task.

In a trial court decision, a New York court, addressing an insurer's disclaimer of coverage issues as a result of the insured's refusal, on the advice of counsel, to provide a statement during the pendency of the criminal case against him held:

> "While Plaintiff's refusal to provide her insurer with a statement regarding the accident was clearly a breach of the cooperation provision of the insurance policy, the court finds that her reason for refusing to provide such a statement prior to the disposition of the criminal charges pending against her in conjunction with the impact of a disclaimer upon the estate of Ronald M. George (see *Thrasher v. U.S. Liability Ins. Co.,* 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503) excuses and absolves Plaintiff from the effect of such breach." *Wojna v Merchants Insurance Group*, 464 N.Y.S.2d 664 (Sup. Ct. 1983)[1]

The Criminal Perspective

The criminalization of construction and workplace accidents, particularly in the instance of a fatality, is becoming increasingly more common. The defense of criminalized construction accidents present challenges that are often unique from traditional criminal cases and often represent the confluence of sensationalism and detailed science. Often, the public outcry for accountability overweighs standard prosecutorial discretion and has even lead to significant policy changes which call for increasing review of construction accidents by law enforcement.

The Civil Perspective

District Attorney Interview

As part of the investigatory process in advance of a potential indictment, the District Attorney may seek to interview employees/owners of the construction company. Criminal counsel that has previously been retained, and remained in the background, should come to the fore for the interview. However, as the commencement of civil litigation usually precedes the District Attorney interview process, civil counsel should also attend any meetings in order to contribute information obtained during the civil proceeding as relates to documents produced and depositions conducted. However, the decision making concerning the scope of the interview and potential responses should be controlled by criminal defense counsel.

Providing Civil Discovery

Civil litigation counsel should be a source of information for criminal defense counsel. Documents produced and deposition testimony given in the civil litigation can be the source of information that criminal defense counsel may not initially receive from the District Attorney in the context of the criminal discovery process. Additionally, theories of liability of co-defendants, and the discovery obtained to support such theories, can provide criminal defense counsel with

[1] However New York courts have held that a neither an individual insured nor the principals of a corporate insured may invoke the Fifth Amendment privilege against self-incrimination to frustrate their carrier's efforts to investigate their claims. *Dyno-Bite, Inc. v. Travelers Cos.*, 80 A.D.2d 471, 476, 439 N.Y.S.2d 588 (4th Dep't 1981). The United States Court of Appeals for the Second Circuit has affirmed an order of contempt entered against an individual who, while acting in his capacity as an agent of a corporation, claimed a Fifth Amendment privilege against producing corporate documents pursuant to a court order. *United States S.E.C. v. First Jersey Securities, Inc.*, 843 F.2d 74 (2d Cir. 1988).

information that can be utilized to contest the District Attorney's investigation and the grounds for criminal counts. Often civil litigation counsel has retained experts shortly after the incident, and before the potential for a criminal proceeding becomes apparent, that have performed an investigation that provides the basis for both a civil and criminal defense. This information is often available before the District Attorney is required, if at all, to disclose material to the defense in the criminal proceeding.

Sharing Experts

The same expert should be used in both the civil litigation and the criminal proceeding. At the outset, experts are normally retained soon after the incident in the civil litigation context, which is far in advance of the completion of the District Attorney's investigation and issuance of indictments. Therefore, the expert has a liability defense plan in place, supported by the expert's investigation, documents and testimony obtained in the civil litigation, which is readily available for criminal defense counsel. Utilization of the same expert also avoids the potential for inconsistent opinions from separate experts in the criminal and civil litigation. An added benefit from sharing experts is that the expert testimony in the criminal proceeding can be provided in a manner that is supportive of the civil litigation defense to avoid impeachment of the expert during the civil litigation based on prior testimony.

Civil Deposition/ Criminal Trial Testimony

Criminal defense counsel and civil litigation defense should coordinate in the preparation of civil deposition witnesses to avoid testimony that is adverse to the interest of the construction company/officers. Civil deposition testimony can be utilized to impeach witnesses at the trial of the criminal action and criminal trial testimony can be used to impeach witnesses in a subsequent civil trial. Although a corporation/its officers/employees may not be defendants in the criminal proceeding and thus shape the testimony, the criminal testimony may adversely impact the civil litigation wherein the corporation/officers/employees can be a defendant. This is particularly important where corporation/officers/employees are called as prosecution witnesses by the District Attorney and are prepared by the District Attorney without consideration to the pending civil litigation. Accordingly, the criminal trial testimony could undermine a civil litigation expert's theory as well as the defense strategy in the civil litigation.

Stay of the Civil Litigation

Due to the potential impact on Fifth Amendment rights in the criminal proceeding, a stay should be obtained of the civil deposition testimony of any criminal defendant, individually and on a corporate basis, until the criminal proceeding has concluded *S.E.C. v. Saad*, 229 F.R.D. 90 (S.D.N.Y. 2005) "there is a high likelihood that invocations of the Fifth Amendment privilege will play havoc with the orderly conduct of. . . depositions," *Britt v. International Bus Services, Inc.*, 255 A.D.2d 143, 679 N.Y.S.2d 616 (1st Dep't 1998), to avoid delay, prejudice and expense by invoking the Fifth Amendment. This judicial precedent is equally applicable to the stay of a civil trial, even unrelated to the incident giving rise to the criminal trial, if the witness in the civil trial is also a defendant in the criminal proceeding such that the Fifth Amendment privilege will be asserted.

The Coverage Perspective

Coverage for intentional acts cuts against the very heart of the insurance scheme, which requires fortuity, and violates the public policy against allowing someone to purchase an insurance policy and then to commit acts with the intent to cause injuries which are then indemnified by the policy. In the case of criminal conduct, reference to the public policy of the state must be made to determine if the jurisdiction permits insurance for criminal conduct.

In New York, for example, while public policy does not prohibit coverage for liability arising from criminal acts, neither does it require such coverage. *Slayko v. Security Mutual Ins. Co.*, 98 N.Y.2d 289, 774 N.E.2d 708, 746 N.Y.S.2d 444 (2002). In fact, there is support for the concept that public policy discourages insurance coverages for intentional conduct. *Massachusetts Bay Ins. Co. v. National Surety Corp.*, 215 A.D.2d 456 (2nd Dept. 1995) citing *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 589 N.E.2d 365, 581 N.Y.S.2d 142 (1992). It is contrary to public policy to require insurers to pay for losses occasioned by willful acts. *St. Paul Fire & Marine Ins. Co. v. Briggs,* 464 N.W.2d 535, 539 (Minn.Ct.App.1990). "It is axiomatic in the insurance industry that one should not be able to insure against one's own intentional misconduct." *Decorative Ctr. of Houston v. Employers Cas. Co.,* 833 S.W.2d 257, 260 (Tex.Ct.App.1992); *see also St. Paul Fire & Marine Ins. Co. v. Jacobson,* 826 F.Supp. 155, 162-63 (E.D.Va.1993); *Restatement (Second) of Contracts* § 195(1), p. 65 (1981)(A contract provision exempting a party for tort liability for harm intentionally caused by the party is unenforceable on public policy grounds).

To address coverage under a CGL policy for intentional conduct, consideration must be given to whether the claim is outside the scope of the insuring agreement; or precluded by a policy exclusion; if a disclaimer of coverage is required and/or has been issued; and whether criminal charges were filed and if so, the status.

The review must begin with the insuring agreement of the policy. Typically, the insuring agreement will provide that the policy will afford coverage for those damages which the insured becomes legally obligated to pay as the result of a covered "occurrence." An "occurrence" is usually defined as an accident, including continuous or repeated exposure to the same general harmful conditions. Accident may be a defined term in the policy. If not, it will be construed pursuant to its usual meaning.[2]

Assuming the facts presented fall within the definition of an "occurrence", consideration must be given to whether the conduct at issue falls within a policy exclusion. The specific wording of the policy at issue must be carefully analyzed, as there are many variations of the exclusionary language. In addition, case law must be analyzed in accordance with the particular policy exclusion.

For instance, the CGL policy may include a criminal act exclusion.

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2 **Miriam Webster Definition of ACCIDENT**

1. ***1a*** : an unforeseen and unplanned event or circumstance
2. ***b*** : lack of intention or necessity : chance <*met by accident rather than by design*>
3. ***2a*** : an unfortunate event resulting especially from carelessness or ignorance ***b*** : an unexpected and medically important bodily event especially when injurious <*a cerebrovascular accident*>***c*** : an unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured but for which legal relief may be sought.

In *McNamara v. Agostino Brothers*, 13 So.3d 736 (La. App. 4th Cir. 2003), the court found the criminal act exclusion in an Essex Surplus Lines Policy precluded coverage where two temporary workers of the insured broke into the house where they were installing a roof and stole priceless artifacts, family and historic memorabilia, and valuable possessions. The Criminal Act Exclusion in the Essex policy precluded coverage for "property damage ... or any injury, loss or damages including consequential injury ... arising from criminal acts from any insured, and employee of any insured or anyone from which you may be held liable...."

Noting that it is well-settled in Louisiana jurisprudence that clear and unambiguous language limiting liability in insurance contracts should be enforced as written, provided that the language is not overly broad or against public policy, the court found the exclusion enforceable and ultimately held that Essex had no duty to defend or indemnify the insured.

In *Wilshire Ins. Co. v. S.A.,* 224 Ariz. 97, 227 P.3d 504 (Ct. App. 2010), a business owner, insured under a CGL policy sexually assaulted a 15-year-old in the company's basement. He pled guilty to one count of sexual assault and two counts of attempted sexual assault and was sentenced to fourteen years in prison. She subsequently brought suit and the company's insurer disclaimed, citing the criminal act exclusion to the policy.

The policy afforded coverage for personal injury, but included an exclusion for injury "[a]rising out of a criminal act committed by or at the direction of any insured."

While the victim argued the exclusion did not preclude coverage for her injuries, noting that Arizona has established a public policy in favor of protecting the rights of victims of criminal wrongdoing to receive compensation for their injuries. *See, e.g.,* Ariz. Const. art. 2, § 2.1 (Victims' Bill of Rights); *State v. Draper,* 162 Ariz. 433, 440, 784 P.2d 259, 266 (1989), the court nonetheless found the exclusion did apply, barring coverage for the injuries alleged.

The standard CGL policy includes an assault and battery exclusion. The operative inquiry when considering whether the assault and battery exclusion precludes coverage is whether the cause of action would exist "but for" the assault or battery. Applying this concept, the exclusion will likely bar coverage for claims of negligent hiring, training or supervision. *US Underwriters Ins. v. Val-Blue, Corp.*, 85 N.Y.2d 821, 647 N.E.2d 1342, 623 N.Y.S.2d 834 (1995).

Other policy exclusions which may apply to a construction-related fatality claim are the expected or intended injury, contractual liability and employer's liability. The policy may also include endorsements which would preclude coverage such as the Employee Contractual Liability Exclusion Endorsement.

It is the insured's burden of proof to establish the existence of coverage in the first instance. Once the insured has done so, the burden shifts to the insurer to demonstrate the applicability of a policy exclusion. Most jurisdictions adhere to the principle of contract interpretation that exclusions are to be narrowly construed. Depending on the facts, there may be a proclivity by the court to find coverage for the "innocent" victim. If the insurer demonstrates an exclusion applies, and the policy includes an exception to the exclusion, the burden shifts to the insured to demonstrate the applicability of the exception.

Absent an exclusion or an endorsement which precludes coverage, it likely that the insurer will have an obligation to defend its insured in the civil litigation, even if the insured faces criminal culpability. That is because an insurer's duty to defend is exceedingly broad, and thus, assuming the allegations of the operative pleading include allegations of negligent conduct, while also including claims of intentional and/or criminal behavior, the duty to defend will likely be triggered. *Automobile Insurance Company of Harford v. Cook,* 7 N.Y.3d 131, 137, 850 N.E.2d 1152, 818 N.Y.S.2d 176 (2006) quoting *Continental Casualty Company v. Rapid-American Corp.,* 80 N.Y.2d 640, 648, 609 N.E.2d 506, 593 N.Y.S.2d 966 (1993); *Horace Mann Ins. Co. v. Barbara B*., 4 Cal. 4th 1076, 17 Cal. Rptr.2d 210, 846 P.2d 792 (Cal. 1993); *Montrose Chem. Co. v. Superior Court*, 6 Cal. 4th 287, 24 Cal. Rptr. 2d 467, 861 P.2d 1153 (Cal. 1993). The duty to defend is determined by the "eight corners rule," which requires that the court examine *solely* the allegations in the pleadings of the underlying lawsuit in light of the policy provisions, regardless of the truth of the allegations. *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church,* 197 S.W.3d 305, 308 (Tex. 2006);*Two Pesos, Inc. v. Gulf Ins. Co.,* 901 S.W.2d 495, 499 (Tex.App.1995, no writ); *Feed Store, Inc. v. Reliance Ins. Co.,* 774 S.W.2d 73, 74-75 (Tex.App.1989, writ denied)

Recall that if a partial denial or reservation of rights is issued (depending on the jurisdiction), a split between covered and non-covered claims may result in the obligation to allow the insured to retain personal counsel, i.e. *Cumis* [3] counsel, whose reasonable fees must be borne by the insurer, or according to the schedule imposed in the jurisdiction. That is, because of the perceived conflict between the interest of the insurer and insured, in that some claims are covered claims and other claims are not, the insured is entitled to a defense by counsel of his choosing, whose reasonable fees will be paid by the insurer. *Hartford Acc. & Ind. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 228 -229, 397 N.E.2d 871, 422 N.Y.S.2d 47 (1979); *Prashker v. United States Guar. Co.*, 1 N.Y.2d 584, 593, 136 N.E.2d 871, 154 N.Y.S.2d 910 (1956). However, an insured is entitled to Cumis counsel "if and only if a clear conflict of interest exists between the insured and the insurer, and the insured refuses to or withdraws its consent to the representation provided by the insurer." *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App. 3d 358, 375, 208 Cal. Rptr. 494 (1985).

Finally, an insurer will generally not be able to recover from an insured the cost of defending any claim that was potentially covered by the CGL policy but ultimately was determined not to be a covered claim. The cost of such defense is considered part of the insurer's independent duty to defend as contained in the CGL form. In fact, some courts have referred to this independent duty to defend as "litigation insurance."

However, for those allegations which were never potentially covered by the CGL policy, but which were defended as part of a complaint containing other potentially covered allegations, reimbursement from an insured may be allowed. *Buss v Superior Court*, 16 Cal 4th 35, 65 Cal. Rptr.2d 366, 939 P.2d 766 (1997). Practically speaking, it is not an easy task to demonstrate an entitlement to reimbursement and it is the insurer's burden to clearly demonstrate which defense costs specifically can be allocated to the uncovered allegations. An

[3] *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1985).

insurer providing a defense, who may wish to seek such reimbursement, would be wise to advise the insured of their intent in their partial disclaimer or reservation of rights.