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Look Out: Trends in Defense of Construction Accident Claims, Right to Repair Laws: Fix It or Skip It

I. Introduction

A key underlying factor confronting claims professionals nationwide is the emerging labor crisis in the construction industry. The lack of a qualified labor force and shortage of skilled artisans has not only led to an increase in construction accidents but also has sewn the seeds for a wave of deficiencies in the construction arena from high rises to production housing.

The Perfect Storm

During the 2008 economic downturn, construction workers left the industry in droves as jobs dried up. Displaced workers found employment in other industries. When the economy began to pick up and the construction industry rebounded, the majority of the skilled workers remained in their new industries. In turn, this resulted in a shortage of qualified workers. In August of 2017, the Associated of General Contractor of America reported the results of an industry-wide survey which reflected that seventy percent of contractors were having difficulty finding craft workers to hire with the shortages most severe in the West.

These challenging conditions have left contractors desperate to fill the jobs needed to complete projects and to rumors of poaching. Less experienced workers have poured in to fill the void. Desperate to hold onto newfound jobs, these same workers may be hesitant to ask for direction in the field regarding construction practices or safety measures. To the extent skilled workers remained in or returned to the industry, contractors faced another challenge: the greying of the qualified labor pool. The skilled labor pool is aging, and the career field has held little allure to date for millennials.

Bucking the overall trend of an increase in jobsite safety across the United States, these challenges have resulted in a skyrocketing level of accidents in many sectors of the construction industry.

This trend also foreshadows a potential future wave of construction deficiencies due to the influx of laborers who lack the requisite experience to tackle complex construction challenges.

The claim professional must also consider how off-site construction of building components or entire structures fits into this equation in terms of mitigating risk or simply fueling liability and exposure due to lightening fast assembly methods.

The Rise in Construction Fatalities

The New York Committee for Occupational Safety and Health ("NYCOSH") highlighted the increase in construction fatalities in "Deadly Skyline", its latest annual report on construction fatalities issued in January of 2018. The report cited to alarming increases in construction fatalities in New York State with those fatalities rising to a ten year high in 2016. Significantly, . NYCOSH stressed that the skyrocket in construction fatalities in the last five years far exceed the increase in construction jobs. The rate increased by 41.5 percent over the last five years and by 29.5 percent in the last year alone. The fatality rate among construction workers in New York State was also 4.6 times the rate of fatalities among all other workers. This placed New York (along with Alabama, Arkansas, Mississippi, Montana, New Mexico, Oklahoma, South Dakota, Tennessee, and West Virginia) among the top ten states with the highest construction fatality rate. (Deadly Skyline: An Annual Report on Construction Fatalities in New York State (Jan. 2018) Charlene Obernauer, Executive Director, NYCOSH, pp. 10 - 12.)

With respect to the leading causes of deaths in the private construction sector, the "Fatal Four" accounted for 63.7 percent of overall deaths in 2016 according to the Department of Labor's "Commonly Used Statistics". These leading causes include falls, being stuck by an object, electrocution, and workers killed when caught in or crushed by equipment, objects, or collapsing structures or material.

NYCOSH exposed a number of common threads behind the rise in the number of accidents in New York. Consistent with the national figures, the most common cause of deaths was falls which the report characterized as "particularly egregious because they are almost always preventable". Not surprisingly, NYCOSH identified a tie between employers which disregard regulations and cut corners on worker safety and accidents on the job. Non-union jobsites were among the most dangerous with non-union workers comprising 93.8 percent of the construction workers who died on private sites in 2016. Non-union contractors were subject to less oversight, whereas union sites have a trained workforce that is more likely to recognize and report safety violations and have protection against retaliation.

The report also noted that Latino and/or immigrant workers were more likely to be harmed on the job as they may be reluctant to report violations. The study also found 55 – 64-year-old workers to be dying at disproportionate rates. The underlying factor here was that older workers are more likely to be seriously injured or die in an incident that may not have as serious a consequence for a younger worker. (Deadly Skyline, pp. 17 –23.) These factors are not unique to New York

In terms of what the future holds, NYCOSH also expressed grave concerns over potential deep cuts to OSHA's budget and elimination of worker safety training as a part of the 2018 budget. (Deadly Skyline, p. 21.) Such potential governmental impacts ought to be closely watched

The Impact of Diverse Regulatory Schemes

While the overall trend nationwide reflects an increase in construction accidents and attendant concerns of inadequate construction, statistics vary from state to state. One component of this variance is the diverse nature of regulatory requirements from state to state and county to county on the construction industry.

While one might assume that general contractors must be licensed in all states, that is not the case. For example, Florida, Arizona, Nevada and California all require general contractors to be licensed at the state level. In contrast, New York, Colorado, and Texas do not regulate general contractors at the state level, but local counties and municipalities may do so. Both Texas and New York do regulate certain specialty contractors. For example, the Texas Department of Licensing and Regulation licenses HVAC contractors, electricians, mold assessors and remediators, and the New York State Department of Labor's Licensing and Certification Unit issues licenses and certificates for asbestos abatement. Similarly, in Illinois, the state does not regulate contractors except as to public works and roofing, but local counties and municipalities may do so. Building permit requirements also vary widely nationwide.

Licensing requirements help contractors keep up to date on current industry standards for construction and safety. Similarly, inspections attendant to building permit requirements also provide some oversight on safety and means and methods. With the growing ranks of inexperienced contractors and non-union jobs, regulatory requirements may provide another window into whether new entrants are receiving education on safety and their craft. This translates into another factor impacting accidents and whether work meets the standard of care in the industry. Accordingly, state and local regulations are another area to watch closely to see whether less regulation equates to greater risk.

II. Liability: Putting on the Offense

Faced with a potential wave of increasing construction accident and defect claims, a proactive approach to risk avoidance and transfer is essential.

On the ground level, contractors may seek to buck this trend by increased emphasis on training in the safety and construction methods arenas as well as use of experienced job site supervisors in critical positions wherever feasible. As to the latter, one of the challenges is simply the fight for qualified personnel in the midst of a shortage.

The panel will discuss the approaches the members take to identifying potential defenses and targets for risk transfer from the outset and laying the ground work for a successful defense. In the personal injury context, this evaluation will necessary include consideration of treatment of workers compensation and employees of independent contractors from a liability perspective.

Insurance coverage analysis also a stalwart cornerstone of the analysis of exposure. The prudent claims professional must not only examine potentially implicated policies, the scope of coverage thereunder, and the impact of new policy language but also the effect of state legislation and emerging case law on exposure.

The last decade saw a groundswell in right to repair laws across the country fueled by a wave of optimism that such laws were the key to reduction in residential construction defect claims. The success of this approach on a state by state basis is a matter of impassioned debate. This wave took hold when jobs were manned with experienced crews that gave builders confidence that repairs were a cost effective and well-reasoned approach to the defect claim. However, with the dilemma posed by the void left due to the exodus of qualified workers during the economic downturn, the risk manager, general counsel, and claims professional charged with claim resolution must weigh on a case by case basis whether championing this typically pre-litigation procedure is a prudent approach.

III. Emerging Trends in Damages

Today's panel discussion will focus on three areas of emerging trends in damages that highlight a shifting field of exposure analysis and impact strategic decision making in claims handling.

Medical Liens: A Schism in Treatment of Medical Bills

The Pebly Effect: Turning the manner in which the value of medical treatment is analyzed, Division Six of the Second Appellate District of the California Court of Appeal ruled that insured plaintiffs who elect to not seek covered treatment are deemed "uninsured" and are permitted to offer the full billed amount of medical expenses into evidence. This May 2018 case is the first in California to hold that a party with insurance "shall be considered uninsured" in this context. Moreover, the court held that the fact a plaintiff does not turn to available insurance is "irrelevant" to whether damages were properly mitigated. Dealing a final blow, it held also that the fact a plaintiff had insurance at all is properly excluded under Evidence Code, section 352. (Pebley v. Santa Clara Organics, LLC (May 8, 2018, No. B277893) ___Cal.App.5th___).

This ruling upended the prior state of California law. The Pebley court declined to follow Ochoa v. Dorado (2014) 228 Cal.App.4th 120, which came to the opposite conclusion regarding plaintiffs who treat on a lien basis. Under Ochoa, personal injury plaintiffs may recover the lesser of the (1) amount incurred for medical services, or (2) reasonable market value of those services. The rationale for precluding Plaintiffs with medical insurance from offering into evidence the full billed amount was that it represents a misleadingly inflated number given the realities of modern medical practices. When insured is involved, the amount initially billed by health care providers is typically more than the amount ultimately paid. While truly uninsured plaintiffs may offer the amount billed as one indication of what the reasonable market value might be, insured plaintiffs could not do so even if they did not benefit from any discounted rate negotiated by their insurers. (Ochoa v. Dorado (2014) 228 Cal.App.4th 120, 135-36.)

Due to the split in authority, neither the Pebley nor the Ochoa case binds trial judges in California. Rather, the judge must pick whichever approach he or she believes is better reasoned. Against this backdrop, the defense should urge trial courts to follow the Ochoa line of cases rather than the conflicting Pebley decision. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 456.)

The Pebley decision marks a sharp turn in personal injury claims in California. If Plaintiffs are allowed to put the full amount billed before a jury, the jury is more likely to consider this figure to be reasonable despite the reality that the amount is often inflated and later discounted. This leads to a misleading and prejudicial impression of the value of the medical treatment. Further, by upholding the trial court's evidentiary rulings, the Pebley case severely limits the ability of the defense to introduce evidence on the failure to mitigate damages and the reasonable value of medical services. While California based, this decision underscores the critical need to stay abreast of the manner in which medical liens are evaluated as courts wrestle with the realities of managed health care against concerns such as those held by the Pebley court of a plaintiff's "right to seek the best care available".

Phantom Pain from Trauma

Given the nature of injuries emanating from construction accidents, claims professionals may encounter damages claims for phantom pain due to loss of all or a portion of a limb, an organ, or even teeth or due to nerve avulsion or spinal cord injury.

This condition is commonly described as the sensation of pain coming from a limb or organ that is no longer a part of the body. The level, nature and frequency of pain, if any claimed, may vary dramatically.

Whether psychological in nature or emanating from mixed signals coming from the spinal cord or brain due to loss of connection with the "missing" part, phantom pain claims pose challenges in terms of both damage evaluation and avenues of attack. The concept was first described by Ambroie Paré, a sixteenth century French military surgeon. (Weinstein, S. M. (1998). Phantom limb pain and related disorders. Neurologic Clinics, 16(4), 919-935. DOI: 10.1016/S0733-8619(05)70105-5.) Despite this long history, the condition continues to be poorly understood with no agreed theory regarding testing for the presence of the condition, the mechanism for the sensation of phantom pain, or specific treatment guidelines.

Fix –It Law: Repair It or Skip It

As discussed above, fix-it laws were fueled by a wave of optimism that enforceable pre-litigation procedures that afforded builders the opportunity for repairs were the solution to residential construction defect claims. In most instances, successful utilization of this procedure in contingent on a degree of confidence regarding the quality of construction, the wherewithal to carry out repairs to address the claimed damages, and the willingness to accept a resolution that may not involve the ability to secure a release of liability and damages claims for the work performed. Risk managers and claims professionals must examine whether the Fix-It Law represents a simple approach in the context of each claim, or whether there are factors at play that make performance of repairs impracticable or the potential lack of a release too much of a risk to bear. The panel will also examine whether variations on this theme such as securing repair bids but placing responsibility for repairs on the claimant in exchange for payment of monies and a release represent attractive alternatives.

IV. Troubleshooting the Thorny Issues

These construction industry woes create tough challenges for the professional charged with claims handling and for the defense team. Fundamental concerns include identification of states that are presently bad for construction claims, pinpointing the factors which drive the poor reputation of certain jurisdictions, and developing strategies to handle claims in those venues. Related questions for consideration include whether states with the highest level of construction fatalities mirror the worst states for construction claims.

The potential impact of troubled jobsites, such as those that have a history of safety violations or prior accidents, on juror perspectives is also a factor that cannot be ignored in determining whether to try a case and in structuring trial presentation for those cases that get tried. This panel will conclude with a discussion of considerations fueling the cases that do get tried.