

WELCOME

Message to our Readers

Thank you for reading the Winter 2017 issue of the Welby, Brady & Greenblatt, LLP Construction Report. We are pleased to bring you a summary of new legal happenings related to the construction industry as well as highlight the impact Firm Partners and Associates are making on the Legal Industry and the markets we serve.

In this issue, we are pleased to present articles written by our Partners. Gregory J. Spaun discusses *Does Your Builder's Risk Policy Really Cover What You Need to Build?*; and Thomas H. Welby shares *New OSHA Guide to Building a Safety Program "From the Ground Up."*

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Does Your Builder's Risk Policy Really Cover What You Need to Build?

By: Gregory J. Spaun, Esq., Partner



Gregory J. Spaun

First party property insurance has been around for centuries, generally dating back to the aftermath of the Great Fire of London in 1666. Property coverage is a great way to cover a completed structure from the usual perils of fire and weather, et cetera. However, what if the property you wish to insure is an incomplete construction project? It is well known that construction is, by its nature, perilous.

Further, a typical first party property insurance policy will not cover incomplete structures or construction activities. Enter, builder's risk insurance.

Builder's risk insurance is a specialty type of property insurance specifically designed to cover the extra risks that may befall a property under construction. Builder's risk insurance is also available to a contractor. This is important because a contractor who is under an obligation to safeguard the property during construction (and is concomitantly liable for any damage that occurs to that property) does not have any traditional insurable interest in such property because it is not the owner.

Like many policies, builder's risk policies are increasingly subject to exclusions. These exclusions have been created as carriers gain experience with the product and carve out. New York's courts dealt with two of these exclusions in the recent case of *Lend Lease (US) Construction LMB, Inc. v Zurich American Insurance Company* (___NY3d___, 2017 WL 572478, 2017 NY Slip Op 01141 [February 14, 2017]). The facts of *Lend Lease* will be familiar to many in the Tri-State area, as they arise out of Superstorm Sandy and the crane which was left dangling over West 57th Street in its wake. The crane was erected in such a way that parts of the crane (where it was anchored to the building) would

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remain in place, as a part of the building, long after the crane was dismantled and the building was occupied. These elements would not have been designed into the building but for the plan to use this particular tower crane. Prior to construction and the erection of the crane, a builder's risk program was put in place, with defendant Zurich American having the lead policy.

Immediately after the storm, a claim was placed against the builder's risk policy to cover, amongst other things, the damage to the crane. Zurich denied the claim on two principal grounds: 1) that the crane was not a covered "temporary work", as parts of that crane were designed into the building and were to remain after occupancy; and 2) the crane constituted a contractor's tool, which was excluded from coverage. Lend Lease commenced a lawsuit, seeking a judgment declaring that Zurich had the obligation to cover this loss since the crane was neither designed to be a permanent part of the building, nor did it constitute a contractor's tool. Zurich counterclaimed, seeking its own declaratory judgment to the opposite effect based on the reasons cited in its disclaimer.

Shortly after the lawsuit was started, motions and cross-motions for summary judgment were made. The contractors contended both that the crane was a temporary work and, therefore, covered under the policy, and that it did not constitute a contractor's tool (which would remove it from such coverage). The contractors also argued that a finding that the crane was either a permanent work or a contractor's tool would require reading those policy definitions so broad as to improperly render coverage illusory, in violation of public policy. The insurers countered that the policies were clear that as the components of the crane were (concededly) permanent, and that the crane constituted a tool, there was no coverage. The trial court ruled that the motions were premature, and that there were questions of fact, amongst others, as to whether the crane could be considered a permanent structure.

Both sides appealed the decision, redoubling their arguments to the Appellate Division. Unlike the trial court, the appellate court found that the crane was not a temporary structure, and that it was a contractor's tool. As to the first ground, the Appellate Division held that the crane was not an incidental structure since the "[b]uilding was specifically designed to incorporate the Tower Crane during construction' and the crane's design and erection involved an 'in-depth process' that had to be approved by a structural engineer. Moreover, once it was integrated into

the structure of the building, the custom designed tower crane, rather than serving a minor or subordinate role, was used to lift items such as concrete slabs, structural steel and equipment, was integral and indispensable, not incidental, to the construction of the 74-story high-rise, which could not have been built without it". With regard to the second ground, the court not only relied on the contract defining the crane as "equipment", it noted that "[t]he tower crane is assembled when the project starts, disassembled and completely removed when the project is complete, and then moved to the next job" and, thus, meets the definition of a tool. The Appellate Division's holding, however, was not unanimous. Two dissenting judges found that the language in the policy was ambiguous. Accordingly, giving the insured the benefit of any doubts in the language, the dissenters not only found that the crane was, indeed, a temporary structure included in the ambit of coverage, but that the crane cannot be found to be both a temporary structure and a tool without improperly rendering coverage illusory. The importance of the two-judge dissent is that it not only showed the division on the issue, but it gave the contractors the right to a further appeal without having to seek permission of the Court of Appeals.

Although the contractors did seek that further appeal, they did not fare any better. While the Court of Appeals found that the crane was not a permanent structure (and, therefore, coverable under the "temporary works" provision), such was not sufficient to salvage coverage from the Court of Appeals' holding that the crane constituted a contractor's tool. In so holding, the Court of Appeals noted that the language of the tools exclusion also included machines and machinery, and held that the crane clearly qualified as such. As to the argument that such a broad definition would impermissibly render coverage illusory, the Court of Appeals posited that since there was still coverage for items such as scaffolding, temporary buildings, formwork, shoring, fences and the like, the exclusion did not impermissibly "swallow the policy".

This decision, which generated a vociferous dissent at the mid-level appellate court, leaves one to wonder the exact extent to which a construction project is actually insured under a builder's risk policy. While the Court of Appeals was able to put together a short list of covered items—which was just long enough to get the policy beyond the "illusory" threshold—the important (and expensive) items would seem to fall outside of the ambit of coverage. Accordingly, contractors would be well advised to seek counsel of their attorneys and insurance professionals at

the time insurance is procured to see to it that the items which the contractor needs insured actually are covered under their insurance policies.

Scan here to learn more about
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New OSHA Guide to Building a Safety Program “From the Ground Up”

By: Thomas H. Welby, P.E., Esq.



Thomas H. Welby

The nature of the construction industry is such that, if you run a construction company, you are — for better, for worse, and until death do you part — in a partnership with OSHA.

From year to year, construction accidents account for more than one-sixth of all workplace fatalities. (In 2014, according to the Bureau of Labor Statistics, the figure was 18.65%). It’s good news that, overall, work-related fatalities have dropped from about 16,000 in 1951, to fewer than 5,000 today (as the U.S. population has doubled, and the number of job-holders has more than doubled). For the last dozen years or so, the incidence of workplace injuries and deaths has tracked steadily downward (excepting only one year, 2012). For these gains in workplace safety, the OSH Act and, yes, even those pesky inspectors, and great strides made in management awareness, can rightly claim some of the credit.

However, in truth, the remarkable reductions in workplace injuries and deaths are largely a function of reductions in the percentage of the workforce in such high-risk occupations as farming, mining, and logging; the outsourcing of much manufacturing; and the fact that, today, roughly 83% of American workers are performing services, rather than producing goods.

Construction work has been, and must continue to be, made safer. However, putting up buildings and tearing them down can’t be made *wholly* injury-free and, even with the advent of modular construction techniques, there are constraints on how much construction work can be out-

sourced overseas. Thus, as fewer and fewer Americans are engaged in inherently dangerous jobs *other than construction*, even with the progress we have made, and our best efforts going forward, the injury and illness profile of the construction industry is likely to become more (and not less) conspicuous, as a contributor to workplace mayhem. As such, it will continue as a primary target for OSHA enforcement.

So, if you hope to stay in business as a construction contractor or subcontractor, you need to get used to the idea of being, so to speak, “married” to OSHA. Like most “spouses,” OSHA will, from time to time, scrutinize your behavior, and point out things you have done wrong. However, while even the most rewarding moments in your relationship with OSHA will ever rival the birth of your kids, or a vacation in Paris with your real-life mate, OSHA is not *entirely* about finding fault with your health and safety performance.

In addition to conducting inspections and handing out citations, OSHA engages in a number of programs intended to educate employers, and help them avoid not only citations, but injuries and illnesses to their workers. It’s important, certainly, to keep your OSHA citations to a minimum, notably because too many citations can hurt your ability to get work (especially on public projects) or even put you out of business.

However, while our firm counsels clients in negotiating with OSHA and contesting citations that we think were wrongly issued, Safety Goal #1 isn’t to never get a citation, or to succeed in getting your current OSHA citation vacated, or downgraded. Rather, it’s getting every employee home safe every night, with serious injuries few and far between.

To that end, OSHA recently came out with a helpful tool in building, from the ground up, a safety program for a construction-industry business. This guide (released in October 2016, and available for free online on the OSHA website, www.osha.gov) is entitled “Recommended Practices for Safety & Health Programs in Construction,” and is useful also in evaluating and improving an existing safety program.

New York poses special challenges to construction employers. One of them is that OSHA mandates that your workers be trained *in a language they can understand*. English and

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Spanish covers roughly three-quarters of the New York City population, but the remaining 25%, more or less, when at home speak Chinese (in one of its many variants), Haitian Creole, French, Russian, Yiddish, Hebrew, one or another of the Indic languages (Hindi, Punjabi, Gujarati, etc.), Arabic, and literally *hundreds* of other tongues. Getting safety manuals translated into Navajo, or classroom safety training in Somali, can be a daunting task. (This issue isn't unique to New York City; the Buffalo public schools now offer instruction in 85 different languages).

An imperfect safety program is better than none at all, and, frankly, not a few companies scrape by, with little more than (1) some demonstration by management that safety is important; (2) supervisors who are well-trained, and “no nonsense” in enforcing safety rules; and (3) harping repeatedly on the 10-15 hazards that are primary in construction, or peculiar to your trade. Think: falls from heights, electrical hazards, “struck-by” injuries (vehicles, falling objects), getting caught in-between objects and materials, fires and explosions, heat stroke and over-exertion, accidents while using machinery, slips, trips and falls, and trench collapses. Is the foregoing enough to satisfy OSHA requirements? No, certainly, but if you did nothing more, you might avoid fatalities.

Even if your outfit is too small to support a dedicated safety team, and professionally-written, multi-lingual and color-illustrated safety manuals, you can and should develop a safety program that will get the job done, thereby minimizing both injuries and OSHA citations.

Especially if your company is a start-up, or is growing from mom-and-pop status to a more substantial entity, the OSHA guide is a fine place to start in developing or upgrading your safety program.

OSHA claims that one study, of small employers in Ohio, found that workers' comp claims (and the cost per claim, average work time lost, and number of very large claims) plummeted where companies adopted programs like those described in its “Recommended Practices.”

OSHA's “Recommended Practices” aren't a new set of standards that must be followed, and indeed they stress that they are a framework only, and not a comprehensive, “one size fits all” system.

However, just by reviewing the “Nine Easy Things to

Get Your Program Started” (several of which have been stressed in past articles in this series) you will get an idea of how helpful the “Practices” can be in formulating your program. The “Nine Easy Things” are as follows:

1. Always set safety and health as the top priority.
2. Lead by example.
3. Implement a reporting system (and ensure that workers do not fear retaliation).
4. Provide training.
5. Conduct your own inspections (especially of new activities, new materials, or new equipment).
6. Collect hazard control ideas. *Get your employees involved.*
7. Implement hazard controls.
8. Address emergencies, and plan your response to future emergencies. (Example: a few months back, we discussed that while everyone knows the importance of fall protection, many are not aware that it's critical to have a plan for the prompt rescue of workers dangling from the end of their lanyard, following a fall).
9. Make improvements. With the participation of your employees, you should regularly review your safety program, with an eye to making it better.

OSHA's “Recommended Practices” is an easy read, 40 pages in length. If your company is a start-up, it's a great place to start in developing a safety program, especially if you don't have a huge budget to have professionals provide you with a pre-packaged one.

Even if you're running a long-established company, “Recommended Practices” will likely highlight one or more areas in which your safety efforts could be better. As such (and because it's succinct, easily accessible, and free) it's well deserving of a download.

Scan here to learn more about
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