

Building Better Outcomes

CONSTRUCTION CLAIMS

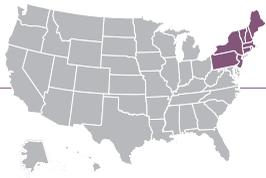
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PEACE NIX

WITH RIOTS AT HOME AND
ABROAD RAMPING UP, CLAIMS
OF LOSS AT CONSTRUCTION
SITES ARE MORE DEPENDENT
THAN EVER ON CLEAR
DEFINITIONS OF PERILS. P26

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Hammer Time Recent Court Rulings

Building Collapse Draws Largest-Ever Settlement

An early February construction disaster agreement marks the largest personal injury settlement in Pennsylvania history. A building being demolished in Philadelphia collapsed, destroying a retail unit of the Salvation Army, killing six people who were shopping there and injuring dozens more. Survivors sued in civil court, winning \$227 million in damages for the June 2013 disaster. The jury found real estate developer Richard Basciano, the Salvation Army, architect Plato Marinakos Jr. and other defendants liable in January. During the demolition phase of a project to redevelop a strip of properties Basciano owned on Market Street, the lateral beams of a building that was being torn down had already been removed—a violation of OSHA rules. That left nothing supporting the wall that Basciano's property shared with the Salvation Army Thrift Shop. The lawsuit revealed communications between Basciano's company and executives at the Salvation Army indicating they all knew a collapse was possible. The Salvation Army was warned by letter that the shop could collapse but remained open anyway, refusing to allow contractors to do needed work by hand from the Salvation Army side of the property, legal documents show. Contractor Griffin Campbell and the excavator operator who was doing building demo when the collapse happened are the only two charged with a crime in the case. Both were convicted, Campbell to 15 to 30 years and Benschop, the excavator, to 7.5 to 15 years. He operated the machine despite taking Percocet and marijuana for medical problems.

Civil, Meet Criminal

Where there is a possibility of criminal prosecution, a civil litigator must immediately strategize about implications in both the civil and criminal contexts.

By Ken Bloom and Jeff Miragliotta

Construction spending in New York City was on track last October to surpass the record set just before the financial crisis. As New York City attorneys working in midtown, there is not a single day we walk through the city without seeing active construction sites. The current construction boom will no doubt generate civil litigation; however, we are also seeing a rise in criminal prosecutions arising from construction accidents. In instances where there is a possibility of criminal prosecution (even a remote one), civil litigators must immediately strategize about the implications of their actions in both the civil and criminal context.



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In New York City, there have been several instances of construction accidents leading to criminal prosecutions, including the March 15, 2008, East 51st Street crane collapse which caused seven deaths; the March 30, 2008, East 91st Street crane collapse which led to two fatalities; and the April 16, 2015, 9th Avenue trench collapse which caused the death of a construction worker and led to a manslaughter conviction.

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.

EPA Issues 2017 Construction General Permit

The EPA's 2017 Construction General Permit includes new language changing enforcement rules for construction sites. For example: "The SWPPP [stormwater pollution prevention plan] does not establish the effluent limits that apply to your site's discharges." This should minimize enforcement charges for minor, temporary differences between a builder's SWPPP and conditions at any given moment at a site. Though SWPPPs must still be updated regularly to reflect changing site conditions, builders won't have to publish their SWPPPs publicly online. The EPA also will not mandate joint SWPPPs for builders in

the same project. Stakeholders argued that coordinating compliance documents from the various companies on a construction site over months or years was nearly impossible. The EPA has, however, added language stipulating that all builders on a shared site are "jointly and severally liable" for compliance with permit rules. This could expose operators who are on the project site at completely different times and bear no legal or physical control over others' activities. The EPA will still set minimum criteria for CGPs, but the changes are expected to save contractors on permit-violation work and legal fees. ■

Discovery Considerations for the Civil Litigator

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 information that can be utilized to contest the DA's investigation and the grounds for criminal counts.

In terms of experts, the same expert should be used in both the civil litigation and the criminal proceeding. A good civil litigator will retain experts as soon after the incident as possible, which is far in advance of the completion of the district attorney's investigation. With that lead time, the expert will be able to put 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.

Criminal defense counsel and civil defense counsel should coordinate in the preparation of civil deposition witnesses to avoid testimony that is adverse to the interest of the construction company and its 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 and its employees may not be defendants in the criminal pro-

Hammer Time

Recent Court Rulings

Manslaughter Conviction in Contractor Death

New York-based Harco Construction must pay a \$10,000 fine after being convicted in December in state Supreme Court of second-degree manslaughter, criminally negligent homicide and reckless endangerment. A 22-year-old worker was crushed when an unsecured trench collapsed at a Manhattan construction site. Harco had "repeatedly ignored grievous warnings about the unsafe conditions," the district attorney's office said in a statement. This is the first time a company has been held criminally liable for the death of a worker at a jobsite, according to the DA. The DA's office also said the fine, though the maximum allowable for a felony conviction of a company in New York, was "Monopoly money," adding it would seek an increase in the maximum penalty from the state legislature. The manager of the site where the death occurred was also convicted earlier in December of criminally negligent homicide and reckless endangerment. He was sentenced to one to three years in state prison.

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.

ceeding and thus shape the testimony, the criminal testimony may adversely impact the civil litigation wherein those stakeholders can be defendants. This is particularly important where these individuals are called as prosecution witnesses by the district attorney and are prepared by the DA 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.

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 to avoid delay, prejudice and expense by invoking the Fifth Amendment. As stated in *S.E.C. v. Saad*, "There is a high likelihood that invocations of the Fifth Amendment

privilege will play havoc with the orderly conduct of...depositions." 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.

These are just a few of the myriad discovery considerations that a civil litigator must consider while navigating through a civil suit when there is also a possible criminal prosecution on the horizon, not only in New York but throughout the Northeast and likely nationwide. ■

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