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Recent Construction Risk Issues and Cases and Common Sense Recommendations for 2021

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**Paper Title: Recent Construction Risk Issues and Cases and
Common Sense Recommendations for 2021**

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**Session Title: The Top 10 Issues and Cases in Construction Risk
from 2020 and for 2021**

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Introduction

The apocryphal saying, “may you live in interesting times” surely fits the events and tenor of 2020. The phrase – seemingly a blessing on its face - is typically understood ironically. “Uninteresting times” are placid, “interesting times” mean trouble. Under this or really any other metric, 2020 likely qualifies as “really interesting times.”

Construction risk didn’t start in 2020 and won’t end in 2021. But certainly the unique nature of the current moment – “interesting times” – provides the backdrop for each of the following issues and cases that deserve attention going forward into 2021:

- Contractor Liability for Subcontractor “Wage Theft”
- Status of Business Interruption Insurance Claims for COVID-19
- Current Snapshot of Construction Defect Laws and Insurance Coverage
- Addressing Shortages - Escalation Clauses, Claims Clauses and Expectations
- General Contractor “Unjust Enrichment” Liability to Subcontractor’s Suppliers
- Workers Compensation & COVID-19 - Legislation and Retroactive Presumptions
- COVID-19 Vaccinations in the Workplace
- Expanding Tort Liability to General Contractors and Construction Managers
- Legal Impacts of New Developments in Safety
- Keeping Up with Changing Technology in Construction Contracts

The topics above and the current legal landscape are addressed below, along with Common Sense Recommendations for addressing these risks.

1. Contractor Liability for Subcontractor “Wage Theft”

“Wage theft” encompasses certain actions that result in workers not being paid what they are owed for work. It can include refusing to pay workers minimum wage or overtime, illegal deductions, writing bad checks, or simply refusing to pay workers. Misclassification of workers as independent contractors can also be considered “wage theft,” as can misclassifying the work an employee is performing in order to pay the worker less if prevailing wages are required. Traditionally liability for wage theft was borne exclusively by the actual employer of the particular employee. In the construction industry, recent state laws have trended towards expanding the definition of “employer” to include general contractors, even if the employee is employed by a subcontractor, or, in some instances, subcontractors of any tier.

In July 2020 Virginia followed several other states by enacting a state level wage theft law applicable to commercial projects valued at more than \$500,000, making the general contractor jointly and severally liable for paying wages owed to the employees of a subcontractor of any tier. Under the law a general contractor is deemed as the employer of the subcontractor’s employees, and if the subcontractor (of any tier) fails to pay employees as required, the general contractor may be liable for civil and criminal penalties. Also included is a provision allowing Virginia employees

to directly file suit against its employer to recover unpaid wages and seek treble damages as to the amount of wages owed plus attorneys' fees and costs. Previously Virginia employees were limited to filing a claim with the Virginia Department of Labor and Industry. In Virginia, subcontractor employees now have a private cause of action against the subcontractor and the contractor with significant teeth.

Many states have had such laws for several years, including California, Maryland, Oregon, Massachusetts, and Colorado. These laws are intended to and accomplish the imposition of liability on general contractors – Maryland's law enacted in 2018 is called the "General Contractor Liability for Unpaid Wages Act." Since 2018, multiple enforcement actions of these laws have been engaged in by individuals and state labor authorities. As early as 2017, the California Labor Commissioner began issuing fines, starting with fining a general contractor almost \$250,000 fine for a subcontractor's wage and hour violations on a Southern California hotel project.

Many Employment Practices Liability Insurance ("EPLI") policies exclude coverage for wage and hour claims, typically excluding claims under the Fair Labor Standards Act, for unpaid wages, or employee misclassification. *See, e.g., Southern California Pizza Co. v. Certain Underwriters at Lloyd's, London Subscribing to Policy Number 11EPL-2028*, 252 Cal. Rptr. 3d 635, 645 (Cal. Ct. App. 2019). While there may be circumstances where such policies may cover defense costs, the damages that a claimant may seek in these cases include penalties, treble damages, and the employee's attorneys' fees, which could be significant individually and even more so in a class action.

Common Sense Recommendations: Contractors need to take steps to avoid potential liability for wage theft from a subcontractor's employees. Vetting and prequalification of subcontractors remains critical, as well as identification and approval of sub-subcontractors regardless of tier. Strengthening and clarifying indemnification provisions in standard subcontract forms, and obligating flow downs to sub-subcontractors is also recommended. Contractors should implement procedures for ensuring subcontractor and sub-subcontractor compliance with employee pay requirements through reporting and certifications for every payroll period. Given the broader prevalence of these laws, general contractors should review existing EPLI policies and explore other options for coverage as needed.

2. Status of Business Interruption Insurance Claims for COVID-19

The global pandemic has placed heavily burdened U.S. businesses, forcing many to close or limit services to comply with government directives to prevent the spread of COVID-19. This has led to a growing number of lawsuits over whether temporary COVID-19 related closures and shutdowns of property are compensable under business interruption insurance. As of April 2021, in excess of 180 COVID-19 related insurance lawsuits have been filed, the majority of which are business interruption claims from COVID-19 closures. Results in most jurisdictions have been favorable for insurance carriers.

In an example of a typical case, *Atma Beauty, Inc. v. HDI Global Specialty SE*, 2020 WL 7770398 (S.D. Fla. Dec. 30, 2020), an insured filed a lawsuit seeking a declaratory judgment that government orders closing non-essential retail and commercial establishments triggered its

business interruption insurance coverage. There the court granted the insurance carrier's motion to dismiss and held that temporary loss of functionality of property from COVID government restrictions did not constitute "physical loss or damage" to the property, and therefore did not trigger insurance coverage. *See id.* This result is consistent with holdings in other courts and jurisdictions. *See Infinity Exhibits Inc. v. Certain Underwriters at Lloyd's London known as Syndicate PEM 4000 et al.*, 489 F.Supp.3d 1303 (M.D. Fla. 2020) (granting insurance carrier's motion to dismiss because insured could not plead that impairment to an insured's use of its property amounted to physical loss or damage); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020) (granting insurance carrier's motion to dismiss because loss of functionality of the property from a government shutdown is not a "direct physical loss" to the property); *but see Kingray Inc., et. al. v. Farmers Group Inc.*, 2021 WL 837622 , at *8 (C.D. Ca. March 4, 2021) (denying insurance carrier's motion to dismiss because it was "plausible that 'direct physical loss of' property includes physical dispossession because of . . . a civil authority order requiring [the insured's business] to close.").

Many business interruption insurance policies contain a virus specific policy exclusion precluding coverage arising from losses sustained from viruses. These policies exclude from coverage those losses due to widespread disease such as a pandemic, a lesson learned by carriers from the 2003 severe acute respiratory syndrome (SARS) outbreak. These exclusions will typically bar recovery for COVID-19 related business interruption claims—regardless of how the insured argues the existence of "direct physical loss or damage." *See Brian Handel, D.M.D. v. Allstate Ins. Co.*, 2020 WL 6545893, at *4 (E.D. Penn. Nov. 6, 2020) (holding that even if the insured if pled sufficient facts for physical damage or loss as a result of COVID-19, the policy's virus exclusion would still preclude coverage).

Claimants have incurred significant losses and continue to raise new and creative arguments for coverage. One such claim that remains undecided in many states is whether COVID-19 contamination at the property can be considered "direct physical loss or damage" to the property. In April 2021, the Ohio Supreme Court agreed to consider a certified question on this issue. *See Neuro-Communication Services, Inc. v. Cincinnati Ins. Co.*, Case No. 2021-0130 (Ohio, April 14, 2021).

Common Sense Recommendations: While it is likely that the current trend of judicial interpretations will remain, contractors with business interruption claims due to COVID 19 should remain aware of developments in policy coverage issues. When in doubt it is best to present timely notice and claims to the carrier. In the event of denial, seek legal counsel regarding whether potential claims may be presented based on this evolving area of the law.

3. Current Snapshot of Construction Defect Laws and Insurance Coverage

Whether defective work an "occurrence" under a standard comprehensive general liability (CGL) insurance policy has been considered in many states. The list of states deciding that a subcontractor's defective work constitutes an "occurrence" under a standard comprehensive general liability (CGL) insurance policy has continued to expand in 2020.

On June 29, 2020, Michigan joined this growing list when the Supreme Court of Michigan held in *Skanska USA Building Inc. v. M.A.P. Construction Contractors, Inc.*, 952 N.W.2d 402 (Mich. 2020) that a subcontractor's defective work constitutes an "occurrence" that implicates potential coverage under a modern CGL insurance policy. *See id.* at 410; *see also Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1289 (C.A. 2011); *Sheehan Constr. Co., Inc. v. Continental Cas. Co.*, 935 N.E.2d 160, 171 (Ind. 2010); *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So.2d 1241 (Fla. 2008); *Cypress Point Condominium Ass'n Inc. v. Adria Towers LLC*, 143 A.3d 273 (N.J. 2016).

New York may become the next state to follow suit. In *Black & Veatch Corp. v. Aspen Ins. (Uk) Ltd.*, 882 F.3d 952, 967 (10th Cir. 2018) (applying New York law), the United States Court of Appeals for the Tenth Circuit predicted that if the question decided today by New York's highest court, New York would hold that a subcontractor's defective work constitutes an "occurrence" under a standard CGL policy.

Common Sense Recommendations: Courts that have examined this issue in depth have discounted interpretations of a prior version of standard CGL policy language which is now outdated. Courts have been willing to overturn older case law in light of the language of the more current CGL form. Even if the existing case law remains unfavorable in a particular jurisdiction, it is still advisable to timely provide notice to the carrier. If faced with a claim for defective work through state-required notice provisions, *see, e.g.*, §558.01, *Fla. Stat., et seq.* (setting forth notice and pre-suit disclosures required from claimants for alleged construction defects), or on receiving notice of a claim for defective work, contractors should timely notify carriers so claims are properly presented.

4. Addressing Shortages - Escalation Clauses, Claims Clauses and Expectations

Shortages of material and labor can impact construction projects and contractors in multiple ways. Shortages can delay, reduce scope, or even delay projects. Uncertainty about materials may limit the number of bids received by owners from contractors, and may lead to lack of firm price quotes to contractors from subcontractors and suppliers. Subcontractors who may in the past have been willing to keep prices open for 60 days or even 90 days may be less willing to keep that risk open. Shortages lead to increased project costs, either through change orders or bidders seeking to price unknown (and possibly unknowable) potential shortages over the course of a project.

Lumber, steel and concrete have reported shortages and accompanying price increases over the past year. Material shortages lead to increase costs and delays when needed material is unavailable or will be delayed, sometimes indefinitely.

There are some tools available for mitigating significant material price escalation, including bid contingencies, contract allowances, and contract terms. Contract terms are most important for contractors bidding new work.

Escalation Clauses permit contractors receive increases contract price if costs for particular materials or labor increase over the course of the contract if the circumstances described in the clause are met. Unit priced items may be increased under such a clause if a hardship results from

increased quantity requirements. Such clauses are typical in government contracting and across project delivery methods. Typically such clauses will kick in after an agreed upon threshold increase in cost. Escalation clauses protect the contractor from price increases that could not have been predicted at the time of submitting a bid for the work. Without such a provision, the contractor typically bears the entire risk of material and labor price escalations, regardless of the cause.

Claims Clauses addressing shortages appear mainly in public works projects and provide contractors the opportunity for compensation and time in the event of unexpected shortages of material. *See, e.g.* FDOT Standard Specifications for Road and Bridge Construction, §8-7.3.2 (allowing consideration of “delays in delivery of materials or component equipment that affect progress on a controlling item of work as a basis for granting a time extension if such delays are beyond the control of the Contractor or supplier[,]” whether based on area-wide shortages or other factors affecting feasible sources of supply). Typical clauses require documentation of the efforts to obtain material and documentation of the shortage as being broadly applicable and that such shortages could not have been anticipated. *Id.* (requiring “substantiating letters from a representative number of manufacturers of such materials or equipment clearly confirming that the delays in delivery were the result of an area-wide shortage[.]”). For existing contracts as of last year, such clauses may be applicable, for agreements made post-pandemic questions over the ability to anticipate such shortages may arise.

Common Sense Recommendations: Consider including escalation clauses when bidding work and in contracts, regardless of project delivery method. ConsensusDocs 200.1 – Time and Price Impacted Materials addendum provides a method for addressing material escalations. GMP contracts pose a special risk without an escalation clause or a qualification or exclusion – evaluate contractual language creating exceptions to the GMP for increases in material costs above that on which the price is based.

5. General Contractor “Unjust Enrichment” Liability to Subcontractor’s Suppliers

A recent decision by Virginia’s highest court expands a general contractor’s obligations to pay lower tier suppliers. In *James G. Davis Constr. Corp. v. FTJ, Inc.*, 298 Va. 582, 841 S.E.2d 642 (2020), the Virginia Supreme Court held that a general contractor was unjustly enriched and had to pay the supplier of a terminated subcontractor even though the general contractor had to pay more than the original subcontract price to complete the terminated subcontractor’s work.

In that case, a general contractor on a condominium project subcontracted drywall work to a subcontractor. The general contractor and the subcontractor entered into a joint check agreement in relation to paying a drywall supplier. Supplier shipped material and was paid via the joint check arrangement, but soon after the supplier stopped receiving payment. Both the general contractor and the supplier were aware the subcontractor was having financial difficulties, and communicated directly with each other regarding the same, with the general contractor even going so far as to set the supplier up as a vendor on the general contractor’s accounting system. The supplier alleged that it relied on the representations by the general contractor to continue making shipments, and that it did not receive payment for supplies furnished over a three month period. The contractor ultimately terminated the subcontractor, contracting with a replacement subcontractor at a higher cost than the balance remaining on the original drywall subcontract. The materials furnished by

the supplier were used by the replacement subcontractor to complete the work, but the supplier was not paid for several months of materials furnished.

The supplier sued the drywall subcontractor, its principal (who had signed a guarantee), and the general contractor, asserting breach of contract, unjust enrichment, and enforcement of a mechanic's lien. The subcontractor and the principal were defaulted, but the trial court also entered judgment in favor of the supplier against the general contractor on the unjust enrichment claim. The Virginia Supreme Court affirmed the judgment in a 4-3 decision which arguably expands prior interpretations of unjust enrichment claims as well as upsets traditional contractual relationships that govern construction projects.

On appeal, the general contractor argued that it was not unjustly enriched as it had paid more than the subcontract price with the original subcontractor following termination. While the court acknowledged this general principle, but held that it did not apply because the general contractor had not ever paid anyone for the specific materials the supplier furnished. The court concluded that in this instance the general contractor "is not being forced to pay twice for supplies provided by [the supplier]. It is being asked to pay once." *James G. Davis Constr. Corp. v. FTJ, Inc.*, 298 Va. 582, 596, 841 S.E.2d 642, 649 (2020). Further, the court observed that had the supplier not furnished the drywall, the replacement subcontractor would have had to purchase it, thereby passing that cost to the general contractor. The Virginia Supreme Court "emphasize[d] the limited scope of [its] decision" and reiterated that "[i]n ordinary circumstances, a supplier of labor or materials to a subcontractor will not be able to obtain a judgment against an owner or a general contractor." *Id.* at 651. However, ultimately the court held that the general contractor should have reasonably expected to pay for the materials and the supplier reasonably expected to be paid for them, and affirmed the trial court.

Common Sense Recommendations: The case arguably expands the scope of a general contractor's liability for payment to suppliers to its subcontractors as well as the concept of unjust enrichment. One recent case has suggested the Virginia decision should be limited to its facts. *See Staltzer, Tr. for Estate of Morse v. Am. Merch., Inc.*, 1:19CV00023, 2020 WL 7023892, at *4 (W.D. Va. Nov. 30, 2020) (distinguishing *Davis* as having "turned on general contractor's unordinary practice of processing payments directly to the supplier after the subcontractor, the usual intermediary between them, became financially strained."). However, the *Davis* decision is an unfortunate precedent for general contractor liability by Virginia's highest court and may be adopted in other jurisdictions, and general contractors should watch for other courts adopting this rationale. General contractors should also continue careful vetting of subcontractors to avoid defaults of this nature in the first instance, and limit communications or assurances to lower tier suppliers. Clearly one factor in the Virginia Supreme Court's decision was the communication between the general contractor and the supplier and the court's suggestion that there were assurances by the general contractor to the supplier regarding payment. General contractors should limit communications with a subcontractor's suppliers to the minimum necessary and consider including additional language in joint check agreements disclaiming obligations to pay suppliers directly. Consideration could also be given to subcontract language affirming that general contractor payments to subcontractors is allocated to sub-subcontractors and the subcontractor's suppliers first.

6. Workers Compensation and COVID-19

Many state legislatures have established or extended workers' compensation presumptions for COVID-19. These actions vary in terms of applicability and the extent of the presumption, but generally the statutes provide that a presumption that the contraction of COVID-19 arises in the course of and within the scope of employment and therefore is a compensable injury or disease.

This presumption was adopted by nine states in 2020 (Alaska, California, Illinois, Minnesota, New Jersey, Utah, Vermont, Wisconsin, and Wyoming), and most legislation has provided for retroactive applicability. Vermont's new law extends the presumption to employees that had a positive test for COVID-19 starting in April 2020 through 30 days after the termination of the state of emergency. Illinois recently voted to extend the COVID-19 presumptions through June 30, 2021 (HB 4276). Other states (Alaska, Minnesota, and Wisconsin) may extend presumptions, expand types of workers covered, or provide for retroactive application.

In 2021, additional states, including Connecticut, Iowa, Maryland, Massachusetts, Montana, Nebraska, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, and Virginia, are considering establishing new workers compensation presumptions for COVID-19 for certain workers.

So far most legislation addressing this presumption has limited the scope of coverage to emergency services personnel and health care providers. For example, Virginia's recent legislation (HB 2207/SB 1375) established the presumption for law enforcement and corrections officers, firefighters, and emergency medical services personnel. Other legislation addresses health care providers (HB 1985).

Legislation is expanding the types of workers covered beyond first responders and health care workers. Maryland, Minnesota and Texas have pending legislation that would establish presumptions for teachers and school employees. Under pending legislation in Iowa and Connecticut, all employees in the state would be subject to the presumption.

The exclusivity of remedy under workers' compensation structures is also being addressed legislatively as well. Arkansas and West Virginia have pending legislation providing that workers compensation is the exclusive remedy for COVID-19 claims. On the other hand, legislation in Hawaii (HB 1224/SB 1415) proposed an exception to the workers compensation exclusive remedy when an employer fails to maintain workplace protections against exposure to COVID-19 and an employee contracts the virus.

Common Sense Recommendations: The expansion of workers' compensation coverage for both additional categories of employees is likely to continue, as is retroactive application. Potential liability outside of workers' compensation for failure to maintain workplace protections against exposure will likely continue to be an issue. Contractors should maintain compliance with CDC and applicable state and local regulatory guidance for the health and safety of workers.

7. COVID-19 Vaccinations in the Workplace

Employers face some difficult questions regarding the workplace and everyone's interest in getting back to "normal" when it comes to vaccination requirements. The Equal Employment Opportunity Commission ("EEOC") recently updated its guidance on COVID-19-related employment issues to indicate that employers may implement mandatory vaccination programs, subject to certain specific limitations. Employers considering mandatory vaccinations should evaluate multiple factors to determine the appropriateness of such a requirement for their workplaces and the protocols and processes to do so.

If vaccinations are required as a condition of employment, employers will be tasked with addressing employees who may have legally cognizable exemptions such as medical conditions that may preclude taking the vaccine. Under the ADA, an employer that implements a mandatory vaccination program that tends to screen out individuals with a disability must show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be reduced by reasonable accommodation." Likewise, employers with more than 15 employees who fall under Title VII of the Civil Rights Act of 1964 ("Title VII") must also provide reasonable accommodations for employees whose sincerely-held religious beliefs or practices prevent them from receiving a COVID-19 vaccination, unless doing so would cause undue hardship on the employer. Exemptions will also require an employer to address how that employee can remain as part of the company when other employees are in fact vaccinated. Permitting an unvaccinated employee in the workplace when there is a workplace rule requiring vaccinations could raise multiple issues for the employer, both with regard to disclosures to employees and the requirements to provide reasonable accommodations.

In addition to the above, there will likely also be employees who simply do not want to take the vaccine for various reasons. Based on the current federal guidance available, generally speaking employers may require vaccinations and terminate non-compliant employees (subject to exceptions discussed above); however, this does not mean this is a risk free endeavor. Every state and/or jurisdiction may have different rules for mandatory vaccinations. Several states allow individuals to decline vaccinations on philosophical grounds, in addition to religious grounds, and other states permit individuals to decline vaccinations for any reason. Employees objecting to vaccination could also point to the fact that the vaccines for COVID 19 are authorized by the U.S. Food & Drug Administration for use under Emergency Use Authorizations only. Additionally, employers that want to require vaccinations would need to apply the vaccination policy evenhandedly across the board and could not make exceptions (other than lawfully required exceptions). This means that an employer may end up in the unenviable position of having to terminate otherwise productive and satisfactory employees over this issue.

Even if the employer determines a mandatory vaccination program is appropriate for its workplace, this may not result in a "back to normal" work environment. While the guidance may change, as of right now CDC guidance and recommendations still include masking and social distancing in the workplace, even with the vaccination roll out.

Common Sense Recommendations: Each employer must evaluate and determine what is best for its workplace and its employees. Given the potential minefields and problematic employment decisions that would very likely be required, employers may be better off strongly recommending vaccinations rather than requiring them as a condition of employment. Employers can implement policies that encourage vaccinations such as paid time off to get vaccinated, paying for the vaccine (if necessary) or providing financial incentives to employees to get vaccinated. Employers that want to require vaccinations should carefully plan the processes and procedures it will use to: implement the requirement, verify compliance, respect privacy issues and exemptions, and disciplinary actions for noncompliance.

8. Expanding Tort Liability to General Contractors and Construction Managers

Contractors and construction managers continue to face claims for tort liability from entities or persons with whom they lack contractual privity. These types of claims sound in negligence, and either for purely economic losses or for personal injury and property damage. In recent years more and more courts have adopted positions that increase the exposure of general contractor and construction managers for such claims.

In the past many of these claims would be considered barred by the economic loss rule, which prohibits third parties from claiming purely economic losses against parties to which they were not in privity of contract. However, the majority of jurisdictions now diminished the economic loss rule and instead adopted the approach in Restatement (Second) of Torts §552(a), entitled Information Negligently Supplied for the Guidance of Others, which provides in part:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552 (1977). For general contractors and construction managers this trend means that in many jurisdictions third parties may assert potential claims in negligence regardless of contractual privity.

Recent cases have confirmed this trend. In several cases out of Louisiana, courts there have held that a construction manager hired by the owner may be sued by a general contractor for negligent professional undertakings despite a lack of privity, and the fact that the construction manager was not a design professional. *See Lathan Co., Inc. v. State, Dep't of Educ., Recovery Sch. Dist.*, 237 So. 3d 1 (La. Ct. App. 2017) (owner's construction manager owed duty to general contractor such that negligence claim could be sustained); *see also McDonnel Group, LLC v. DFC Group, Inc.*, CV 19-9391, 2020 WL 871210, at *8 (E.D. La. Feb. 21, 2020) (general contractor's lawsuit against owner's construction manager permitted to proceed, general contractor allegations that owner's representative was heavily involved in reviewing payment applications and certificate of substantial complete were sufficient to demonstrate the high degree of economic control over general contractor such that a negligence claim could proceed).

Conversely, contractors have used the same arguments to forward negligence claims against design professionals. In a recent Florida case, a general contractor sued architectural firm and architect for professional malpractice, alleging that contractor suffered economic losses from defective plans. The trial court granted the design professionals' motion to dismiss but the appellate court reversed. The appellate court held that a special relationship existed between the general contractor and the design professionals, due to the knowledge of the design professionals that the general contractor would rely on the erroneous documents and could be injured as a result. *See Hewett-Kier Construction, Inc. v. Lemuel Ramos and Associates, Inc.*, 775 So.2d 373, 375 (Fla. 4th DCA 2000); *see also Russell v. Sherwin-Williams Co.*, 767 So.2d 592, 593-595 (Fla. 4th DCA 2000) (permitting painter's claim for negligence and fraudulent inducement against paint manufacturer associated with product application instructions, economic loss rule did not bar recovery where manufacturer supplied plaintiff with false information in the course of its business on which it could have reasonably expected painter to rely).

General contractors and construction managers continue to be sued in negligence by entities with whom they are not in privity, or face extracontractual claims from those with whom they are in contractual privity based on negligence principles. In a recent example of such extracontractual claims, a subcontractor sued a general contractor for negligent misrepresentation associated with the baseline schedule for an Iowa construction project for a new pork processing facility. The general contractor subcontracted \$14 million worth of work to the subcontractor for water, boiler and biogas work on the project and provided a baseline schedule. Following delays the subcontractor submitted claims for over \$7 million. In litigation the subcontractor asserted a claim for negligent misrepresentation against the general contractor, arguing justifiable reliance on the information furnished by the general contractor in the baseline schedule. The federal district court permitted the claim to proceed over objection from the contractor relying on prior precedent that such claims were not barred by the economic loss rule. *See Epstein Constr., Inc. v. Modern Piping, Inc.*, 19-CV-106-CJW-KEM, 2020 WL 6072620, at *7 (N.D. Iowa Apr. 7, 2020)

But there are limits to the expansion of tort liability and the economic loss rule remains viable in certain circumstances. For example, a Wisconsin appellate court recently upheld dismissal of a claim by an electrical subcontractor against an HVAC subcontractor, alleging delay that caused purely economic damages to the electrical subcontractor. *Mech., Inc. v. Venture Elec. Contractors, Inc.*, 944 N.W.2d 1 (Wis. Ct. App. 2020) (applying economic loss doctrine to electrical contractor's claim because "there is no independent tort duty owing from [HVAC subcontractor] to [electrical subcontractor] to timely perform its contract with [the general contractor], or to avoid the risk of economic loss to [electrical subcontractor]."); *see also Bel Air Carpet, Inc. v. Korey Homes Bldg. Group, LLC*, 245 A.3d 64, 82-83 (Md. Ct. Spec. App. 2021) (economic loss rule barred subcontractor's claim against homeowner's lender alleging that lender had duty to "ensure that the general contractor on a home construction project pays all of its subcontractors for work completed when the lender disburses funds to the general contractor, and where there is no privity of contract or intimate nexus between the lender and the subcontractors.").

Common Sense Recommendations: General contractors and construction managers should pay careful attention in contract negotiations and avoid broad delegations of duties beyond the actual

scope of work. Consideration should be given to disclaimers regarding the extent of reliance that nonparties may place on the contractor's work product. Express statements disclaiming third party beneficiary status should likewise be included. Insurance coverage for potential liability exposure should also be investigated.

9. Legal Impacts of New Developments in Safety

The construction industry has made huge gains in safety and reducing overall injuries and the severity of injuries in the workplace. According to the U.S. Bureau of Labor Statistics (BLS) the total number of employer-related workplace injuries (all industries) remained the same for 2018 at 2.8 injuries per 100 full-time workers.

This immediate trend is disconcerting for a number of reasons. The construction industry has invested huge resources and time dealing with safety. Every contractor focuses on safety. It is not only concern for the health and welfare of each worker but every injury, even a non-recordable one, has an economic and morale impact. Safety also has an impact on overall profitability and obtaining new work. In every negotiated procurement, the owner wants to know the Experience Modification Rate (EMR). Also, the EMR directly affects workers compensation rates. Everyone wants a safe workplace and safe employees. Why has the recent investments, including in worker protection and technology, not generated corresponding improvements in preventing workplace injuries?

This 'steady state' of injury incidence contrasts with the rate dropping steadily for the prior 15 years. In fact, for the construction industry, workplace injuries rose in 2019 to a 12-year high and more concerning the fatal injury rate also rose. BLS reported in its annual report on occupational deaths that private sector construction fatalities increased by some five percent to 1,061. This increase matched the largest number of fatalities since 2007.

Some in the industry say the increase is driven by a large increase in falls from heights. Some point to the entry into the construction industry of new and inexperienced workers.

One interesting study came from an ASCE Paper, "Latent Effect of Safety Interventions," (published February 22, 2020). This article looks at the possible reasons modern safety policies and workplace improvements have not "moved the proverbial needle." From a psychological standpoint the authors (Professors at Virginia Tech and Clemson University), point to the concept of a latent and little know side effect of safety precautions. This is known as "risk compensation."

They then proceeded to do an empirical study whether this risk compensation reduced (or even eliminated) the benefits of the safety equipment. They chose the roofing industry for the study. Traditionally, the strategy to reduce injury is a combination of safety training, implementing safety standards, and personal protective equipment.

The human adjustment of the level of risk has been studied with athletic behavior, sexual behavior, and driving behavior, and those studies argue the risk compensation reduces or eliminates the benefits of safety interventions.

When we think of risk compensation, think of seatbelts, antilock brakes, adaptive cruise control, road safety and lighting and ask: why has the level of crash injuries and fatalities not decreased? Think child-resistant caps on medicine and ask: why has the poisoning of children not decreased?

This study in the ASCE Journal of Construction Engineering and Management focused on the roofing industry and measuring in a real world setting the impact of safety protocols and equipment. In the construction industry, falls are eight times resulting in fatalities are eight times higher than the average in other industries.

The subjects had three set of conditions: (1) typical PPE (hard hat, gloves and knee pads); (2) PPE and a fall-arrest system (level-1 fall protection); and, (3) PPE, a fall-arrest system and a guardrail (level-2 fall protection). OSHA requires fall protection; however, compliance with OSHA has not had the desired effect and the construction industry continues to experience high fatality and injury rates even when fall protection is in place.

The study showed that that all participants showed more reckless and unsafe behavior with more fall protection in place. All participants demonstrated higher risk taking as a function of safety interventions.

Common Sense Recommendations: Rethink your safety program and consider the potential for “risk compensation” and how that affects your employees in their workplace. Monitor and have good feedback from your superintendent whether the safety protocols are having the desired effect. Look for instances where the amount of safety equipment and protocols may not be making the project more “safe.”

10. Keeping Up with Changing Technology in Construction Contracts

Technology continues to develop quickly in the construction industry. As new technology comes online, contractors are quickly adapting to optimizing the benefits in the field. Drones, BIM, and autonomous equipment all can contribute immensely to performance of the work and accuracy in the field. With new technology comes the need to re-examine the legal frameworks of such technology and allocation of the associated risks.

For example, contractors now use drones to track, map survey, inspect and manage jobsites. Engineers can prepare 3D models for use in overlays, as built, and monitoring project progress. Many public agencies use drone technology in some way and most hire drone related staff, including pilots and drone operation managers. The FAA’s drone operation rules (14 CFR 107 et seq.) were recently amended to permit nighttime drone operations and flying over moving vehicles under certain strict conditions. Effective January 2021, the new rule requires additional training for pilots, location restrictions, signage and anti-collision lighting. Drones provide highly useful information but require strict compliance with regulations, employee training and credentialing, and the liability risk of unmanned flying objects, particularly at night and over moving vehicles.

Increased use of Building Information Modeling (BIM) can improve design collaboration and coordination, with clash detection and analysis helping to reduce costly design errors. BIM’s 3D visualization may improve construction performance and can assist with schedule simulation and improve cost estimates. But as with the advent of BIM in other construction sectors, there are up

front technology and training costs and legal risk. Delegation of BIM responsibilities to subcontractors must be carefully crafted and subcontractors must have staffing and technological capability to perform. Allocation of responsibility for design and potential errors when using BIM collaboratively remains challenging. BIM can impose unintended quasi-design obligations on participants who may not have the appropriate training, licensing or insurance. BIM models provide a wealth of information, but careful contractual language should be considered to limit the extent of reliance on the model by others.

Common Sense Recommendations: Users of new and emerging technologies must consider not only the benefits of using the technology but the potential risks. Some technologies, such as drones, may pose risks to employees, other project participants, and the public at large. Contractors should insure proper training and compliance with regulations as well as insurance considerations. Other technologies, such as BIM, can pose contractual risks when obligations are not fully passed on to project participants and use of modeling information is not appropriately limited. Contractors must adapt contractual terms and disclaimers to protect against improper use of modeling information and the potential limits of subcontractor participation in the model.