The State of the New York Insurance Market

The Impact of Labor Law 240

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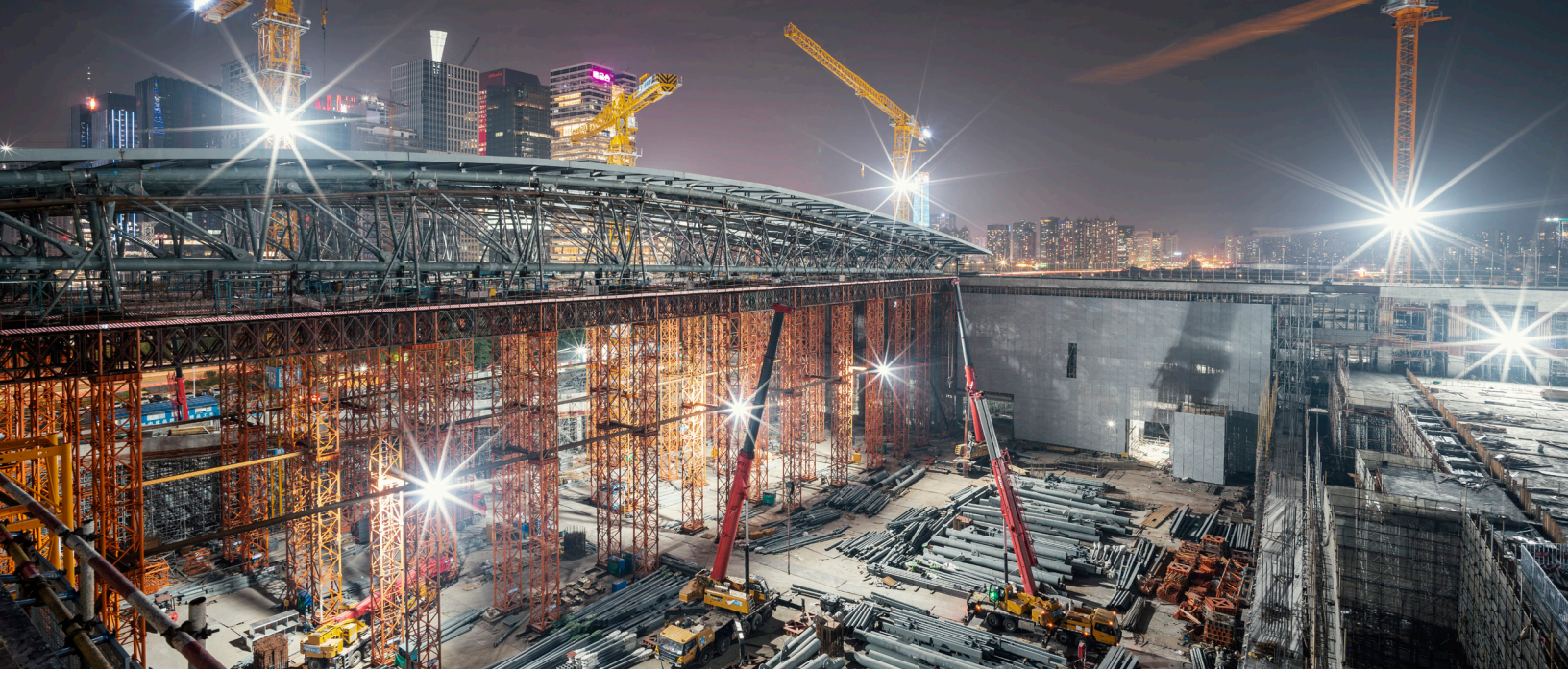

The Impact of Labor Law § 240(1) on the Claims Environment

Enacted in 1885, New York Labor Law § 240(1) was created to grant construction workers a legal avenue to recover for injuries resulting from workplace accidents which were on the rise at the time since worker safety was not a priority and modern safety equipment did not exist. Similar laws were passed by other states with the same goal but have since been modified or repealed with New York now the only state with a strict liability statute such as Labor Law § 240(1) on its books.

Commonly referred to as the "Scaffold Law," Labor Law § 240(1) imposes absolute AKA strict liability on owners, contractors and their agents for all "gravity related" injuries resulting from the lack, or inadequacy of, safety devices of the kind called for in the statute which includes ladders, scaffolds, hoists, pulleys, braces, and more.

The Scaffold Law is "absolute" in two senses. It imposes strict liability on owners, contractors, and their agents engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" and does so regardless of the comparative fault of the plaintiff in contributing to the accident. Thus, even where plaintiff is 99.9% at fault and the owner assessed with no active negligence, they will nonetheless be held 100% liable under the statute. Indeed, owners are subject to the statute's strict liability regardless of whether they supervise or control the work.[1]

The definition of what encompasses a gravity or elevation-related hazard has continued to expand harming owners, contractors and their agents which have been the victims of unfavorable Court decisions and the coinciding increased cost of construction (and insurance) in New York. Likewise, in the thirteen plus decades since Labor Law § 240(1) was enacted, NY Courts have continued to expand the type and scope of accidents which fall within the statute's purview.

In addition to the expansion of what falls under the scope of Labor Law § 240(1), New York courts have continued to issue decisions further reducing the vitality of the two defenses defendants have to a Labor Law 240(1) claim—the sole proximate cause and recalcitrant worker defenses.

Even traditionally available defenses to Labor Law § 240(1) such as the argument that the accident occurred before the start of the workday or during "routine maintenance" have been narrowed by the Courts making it harder to defeat such claims. In sum, recent case law has continued to expand the scope of Labor Law § 240(1) making it practically impossible to successfully defend against such claims particularly on a motion for summary judgment to the further detriment of owners, contractors, and their agents who are not only left paying the cost to defend such claims but also forced to incur exorbitant insurance premiums just to develop and perform construction work in New York.

Below we delve into industry trends, recent case law and analyze the current state of the New York Labor Law claims environment and its impact on the cost of insurance.

[1] The only exemption is for owners of one and two-family homes "who contract for but do not direct or control the work."

The continued expansion of New York Labor Law § 240(1)

- In Crutch v. 421 Kent Dev., 192 AD3d 977 (2d Dept. March 24, 2021), the Appellate Division, Second Department, reversed the trial court's order denying plaintiff's motion for summary judgment on Labor Law § 240(1) and dismissing the 240(1) claim sua sponte after searching the record finding that the plaintiff's accident did not fall within the purview of the statute since the accident occurred before the start of the workday since he was not engaged in HVAC work when the accident occurred but rather was leaning against a railing of a loading dock waiting for the elevator in order to gain access to his work area. The Appellate Division reversed granting plaintiff summary judgment on Labor Law § 240(1) finding that "accessing and waiting at the loading dock for the elevator, even before working hours began, was necessary to the plaintiff's work. We therefore conclude that the loading dock from which the plaintiff fell is included under 'those parts, which must be accessed by a worker to do his or her job' and are afforded the protections of Labor Law § 240(1)."

- In Hensel v. Aviator FSC, Inc., 198 A.D.3d 884 (2d Dept. Oct. 20, 2021) plaintiff was assisting in loading boards into the back of a box truck where a forklift (which had been modified to fit in the area resulting in the elimination of certain safety devices such as load guides and guardrails) was being used. Plaintiff was standing next to the forklift at ground level, when one of the boards slid off the forklift and struck plaintiff in the head. The Second Department upheld the trial court's order awarding summary judgment to plaintiff on his Labor Law § 240(1) claim finding that the disassembly and removal of "heavy soccer boards" used to form an indoor soccer field constituted the partial dismantling of a "structure" as well as "demolition" and that the disassembly and removal of the boards was a significant physical change to the structure's configuration, which constituted "altering" under Section 240(1). The Court further found that plaintiff's role in hauling away the boards after they had been removed by defendant was an act "ancillary" to the demolition and alteration of the structure, and therefore was a protected activity under Labor Law § 240(1). The Court emphasized that liability in falling objects cases is not limited to those occurring when an object is in the process of being hoisted or secured but extends to those which occur where the object required securing.

- In Padilla v Touro Coll. Univ. Sys., 2022 NY Slip Op 02232 (1st Dept. April 5, 2022), the Appellate Division reversed the trial court's award of summary judgment to defendants dismissing plaintiff's Labor Law § 240(1) claim against them finding that "Although the sheetrock that fell on plaintiff was located on the same floor as he and was not being hoisted or secured, issues of fact exist as to whether Labor Law § 240(1) applies to this case." Specifically, the Court held that it is for the jury to determine whether plaintiff's own conduct in disregarding his supervisor's instructions not to move the stacked sheetrock was the sole proximate cause of his accident as opposed to a violation of Labor Law § 240(1).

- However, less than a month later, in Grigoryan v. 108 Chambers Street Owner, LLC et al., 2022 N.Y. Slip Op. 2620 (1st Dept. April 21, 2022), the Appellate Division reversed the trial court's decision denying plaintiff's motion for summary judgment on his Labor Law § 240(1) claim and awarded plaintiff summary judgment. There, the Court held that the failure to secure the fire pump which was 3 to 4 feet tall and weighed 300 to 500 pounds, which had been standing upright on the floor on its narrower end when it fell and struck plaintiff's leg was a violation of Labor Law § 240(1). The Court emphasized that although the fire pump was on the same level as plaintiff and fell only a short distance, it could generate significant force and therefore was a load that required securing and the failure to do so was a violation of the statute finding defendants' arguments that issues of fact remained as to whether plaintiff was the sole proximate cause of the accident unavailing.

So... are there any viable defenses to a Labor Law § 240(1) claim?

In theory, there are two defenses to a Labor Law 240(1) claim: (1) the Sole Proximate Cause Defense and (2) the Recalcitrant Worker Defense. However, as you will see from the case summaries below, the successful application of these defenses to bar a plaintiff's Labor Law 240 claim is rare. Oftentimes these defenses are used in the hopes of poking enough holes in the plaintiff's case so that they do not obtain summary judgment in their favor which triggers the running of interest at 9% per year.

To establish the Sole Proximate Cause Defense, a defendant must establish that there was no violation of Labor Law 240(1) and that the plaintiff's own actions were the sole proximate cause of the accident. This means that the defendant must establish that:

1. Adequate safety devices were "readily available" at the site;
2. Plaintiff knew that adequate safety devices were available and that plaintiff was expected to use such devices (i.e., the "normal and logical response" would be to obtain/use these devices); and
3. Plaintiff unreasonably chose not to use or misused such devices.

In sum, if the plaintiff was the sole proximate cause of the accident, then the accident could not have been caused by the absence of or defect in a safety device. On the other hand, where the failure to provide a proper and adequate safety device was a cause of the accident, plaintiff could not have been the sole proximate cause. Since comparative negligence is not a defense to a Labor Law 240 claim, defendants will be strictly liable for the accident and resulting injuries/damages.

Recent cases discussing the sole proximate cause defense are summarized below:

- In 2018, the Appellate Division 1st Department in Hong-Bao Ren v. Gioia St. Marks, LLC, 163 A.D.3d 494 (1st Dept. July 26, 2018), reversed the trial court's decision denying plaintiff summary judgment on his Labor Law 240(1) claim finding the accident resulted from the failure to provide plaintiff with a proper safety device. There, plaintiff testified that it was "impossible to perform this job if [he] stood on the [8-foot, A-frame] ladder" provided since it did not reach the area, he had to access to secure the rig and remove the ventilator (i.e., his work area). While the trial court denied plaintiff's motion, the Appellate Division reversed the Order and granted plaintiff's motion finding Labor Law 240(1) was violated as a matter of law thereby triggering the running of interest at 9% per year.

- In 2019, in Ferguson v. Durst Pyramid, LLC, 178 A.D.3d 634 (1st Dept. Dec. 26, 2019), the 1st Department emphasized that "Because no safety devices were available to plaintiff to access the platform, as a matter of fact and law, plaintiff's attempt to use the inverted bucket cannot be the sole proximate cause of his accident." Thus, the Appellate Division held that Labor Law 240(1) was violated and defendants therefore strictly liable for all injuries/damages sustained (plus interest).

> **Because no safety devices were available to plaintiff to access the platform, as a matter of fact and law, plaintiff's attempt to use the inverted bucket cannot be the sole proximate cause of his accident.**

- In 2020, in Biaca-Neto v. Boston Rd. II Hous. Dev. Fund, 176 A.D.3d 1 (Feb. 18, 2020), the Court of Appeals reversed the decision of the First Department finding that the lower court improperly dismissed plaintiff's Labor Law 240(1) claim as there was a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries. The Court noted although the general contractor had issued a standing order that workers not enter the building through the window cut-outs, there was no evidence establishing the GC or any other contractor, including the employer advised plaintiff of such. The Court emphasized that the two co-worker sworn statements affirming that they used the exterior scaffold to enter the building through window openings at various floors showed defendants acquiesced to such. As the Court explained, "the accepted practice could have negated the normal and logical inclination to use the scaffold, stairs, or hoist instead of the cut-outs."

> **...the accepted practice could have negated the normal and logical inclination to use the scaffold, stairs, or hoist instead of the cut-outs**

A glimmer of hope from NY's highest court regarding Labor Law § 240(1)?

On April 28, 2022, the NY Court of Appeals (highest Court in NY) issued three decisions involving Labor Law § 240(1) which is a rarity in and of itself. All three decisions were favorable to the defense. We expect to see all three of these cases relied on and cited in summary judgment motions by defendants and in opposition to defeat plaintiff's motion for summary judgment (and hopefully avoid triggering interest at 9% per year) in the months/years to come. A summary of each case is provided below.

- In Cutaia v. Board of Mgrs. of the 160/170 Varick St. Condominium, 2022 NY Slip Op 02834 (April 28, 2022), the Court of Appeals reversed the 1st Departments decision and issued an Order denying plaintiff's motion for summary judgment on his Labor Law § 240(1) claim finding "questions of fact exist as to whether the 'ladder failed to provide proper protection,' whether 'plaintiff should have been provided with additional safety devices,' and whether the ladder's purported inadequacy or the absence of additional safety devices was a proximate cause of plaintiff's accident[.]" The Court went on to find that the expert affidavit submitted by plaintiff was "conclusory" and failed to meet plaintiff's burden to establish proximate cause as a matter of law. There, plaintiff had to cut and reroute pipes in the ceiling located near electrical wiring. To reach the pipes, plaintiff used an A-frame ladder which he leaned against the wall in the closed and unlocked position due to "spatial limitations." While standing on the ladder and attempting to connect two pipes, plaintiff received an electric shock and fell to the ground sustaining electrical burns and other injuries[2].

While standing on the ladder and attempting to connect two pipes, plaintiff received an electric shock and fell to the ground sustaining electrical burns and other injuries

- In Bonczar v. American Multi-Cinema, Inc., 2022 NY Slip Op 02835 (April 28, 2022), the Court of Appeals affirmed the decision of the Appellate Division, 4th Department, agreeing that the Appellate Division holding that plaintiff failed to show he was entitled to summary judgment on his Labor Law § 240(1) claim was correct as was the court's holding that a factual issue remained as to whether the statute was violated or if plaintiff's own acts and omissions in positioning the ladder from which he fell and failing to check the ladder's locking mechanisms were the sole proximate cause of his accident. Thereafter, the case was remanded to the trial court where it was tried by the jury who returned a defense verdict finding that Labor Law § 240(1) was not violated and that plaintiff's failure to properly position the ladder was the sole proximate cause of his accident and resulting injuries. The trial court denied plaintiff's motion to set aside the verdict and unanimously affirmed the judgment in defendants' favor. The Court of Appeals upheld the jury's decision finding that a rational trier of fact could have found in defendants favor on the Labor Law 240(1) claim[3]. Thereafter, on September 15, 2022, the Court of Appeals denied a motion to reargue the decision.

- In Healy v. EST Downtown, LLC, 2022 NY Slip Op 02836 (April 28, 2022), the Court of Appeals reversed the decision of the Appellate Division, 4th Department, and issued an Order denying plaintiff's motion for summary judgment on Labor Law § 240(1) while granting defendants motion dismissing the 240(1) claims against them finding that plaintiff's activity was "routine" and thus fell outside the protection of the statute as it did not involve an enumerated activity such as cleaning. There, the accident occurred when the plaintiff a maintenance and repair technician employed by the property manager of the building and part of its maintenance staff fell from an unsecured 8-foot ladder while performing work the Court deemed part of the ordinary maintenance of the building.

[2] The dissent vehemently disagreed with the Court's decision, finding this was a "prototypical example of the situations the legislature sought to remedy through Labor Law § 240(1): he was provided an inadequate ladder for his job, and that inadequate ladder was a proximate cause of his fall-related injuries."

[3] The Court of Appeals rejected plaintiff's argument that it should overturn the Fourth Department's 2018 Decision which held that there were questions of fact as to whether Labor Law § 240(1) was violated and as to proximate cause; specifically, whether plaintiff was the sole proximate cause of the accident. Finding that the Appellate Division Order was a nonfinal order which did not "necessarily affect" the final judgment in that it remanded the case for a trial and the jury decided that plaintiff's placement of the ladder was the sole proximate cause of the accident.

Labor Law § 240(1) and the continued rise of "nuclear" verdicts

The expansion of Labor Law § 240(1) has coincided with a significant rise in verdict and settlement values for New York construction claims.

With the backlog in the court system and trials continuously postponed due to COVID-19, the rise of "nuclear" verdicts has coincided with a drastic increase in settlement values in Labor Law cases. Indeed, 8 of the top 20 personal injury settlements in 2021 involved Labor Law claims. The settlements in those cases averaged about $4.9 million and ranged from $3 million up to $11 million[4].

New York courts at both the trial and appellate levels have continued to uphold "nuclear" verdicts in recent years. A few illustrative examples are summarized below:

- Pimenta v. 1504 CIA LLC et. al. (2d Dept. Aug. 18, 2021): After a damages-only trial, the jury awarded $19,026,741 to the 40-year-old plaintiff who was struck by a 14 to 16-foot ladder and fell allegedly sustaining neck, back and bilateral knee injuries requiring a one-level lumbar laminectomy with partial discectomy, implantation of a spinal cord stimulator, right knee arthroscopy with the alleged need for a second knee surgery, lumbar revision surgery and a one-level cervical fusion in the future. The verdict was comprised of $2 million for past pain and suffering, $15 million in future pain and suffering (33.3 years), $383,588 for past medicals, $931,516.76 in future medicals (33.3 years), $222,206 in past lost wages and $1,804,535 in future lost wages (21 years). After the submission of post-trial motions, the Court directed the parties to stipulate to reduce the jury award for past pain and suffering to $1 million and the future pain and suffering award to $2.25 million for a total of $5,660,329. The Appellate Division, 2nd Department, affirmed.

- Joao Dias v. Blue Sea Construction, Co. et. al. (Kings County, Verdict Date: May 25, 2018): After a damages-only trial, the jury returned a $15,228,000 verdict to plaintiff who was previously awarded summary judgment on his Labor Law § 240(1) claim in a case where plaintiff was struck by a plank causing him to fall off a scaffold. Plaintiff allegedly sustained lumbar and cervical herniations and bulges with a two-level lumbar laminectomy, partial discectomy and fusion, and a one-level cervical fusion with partial corpectomy and decompression. The verdict was comprised of $270,000 in past medicals, $358,000 in past lost earnings, $1.5 million in past pain and suffering, $500,000 in future medicals (22 years), $1.1 million in future custodial care (22 years), $10 million in future pain and suffering (22 years) and $1.5 million in future lost earnings (8 years). The Court ordered a new trial on damages unless the parties stipulated to reduce the jury's award to $3.75 million (with $500,000 in past pain and suffering, $2.5 million in future pain and suffering and $750,000 in future medicals), which the parties accepted.

[4] https://topverdict.com/lists/2021/new-york

- Garcia v. CPS 1 Realty, LP, 83 N.Y.S.3d 129 (2d Dept. Aug. 15, 2018): The Appellate Division, 2nd Department upheld the trial court's order granting defendants motion to set aside the jury verdict on past and future pain and suffering as excessive to plaintiff who was 46 year old at the time of the accident resulting in an inguinal hernia requiring surgical repair, herniated lumbar discs requiring a spinal fusion which failed resulting in urinary incontinence, permanent disability. The Court directed a new trial be held unless plaintiff stipulated to reduce the damages for past pain and suffering from $1.2 million to $750,000 and the award for future pain and suffering from $3 million to $1.25 million (23 years). The Court found the jury awards for pain and suffering as reduced by the trial court did not deviate materially from what would be reasonable compensation given the nature and extent of injuries.

- Kromah v. 2265 Davidson Realty LLC et al (1st Dept. Feb. 21, 2019): The Appellate Division, 1st Department upheld the jury award of $1.6 million for past pain and suffering and $4.5 million for future pain and suffering (45 years) for a total pain and suffering award of $6.1 million to plaintiff who fell on stairs and sustained a trimalleolar ankle fracture requiring 2 surgeries with post-traumatic arthritis and RSD/CRPS alleged. The 1st Department directed a new trial on future medicals unless plaintiff stipulated to reduce the future medical award from $2,547,054 to $2,252,580 (finding the $294,474 awarded for a future radiofrequency sympathectomy unwarranted), for a total award of $12,405,526.

- Gjeka v. Iron Horse Transportation Inc. (1st Dept. Feb. 16, 2021): The Appellate Division, 1st Department, reduced a $4,380,559.90 jury award to plaintiff injured while working as a flagman when struck by a truck to $2,580,559.90 and a loss of consortium award of $1 million to plaintiff's spouse to $800,000 where plaintiff sustained a herniated lumbar disc requiring laminectomy surgery and failed back syndrome. The jury's award of $4,380,559.90 was comprised of $1.5 million for past pain and suffering (6 years), $1.5 million for future pain and suffering (26 years), past medicals of $134,559.90 (stipulated to by all parties), $600,000 for future medicals, and a lost earnings award (past and future) of $646,000. The 1st Department found the past pain and suffering, past loss of consortium and future medical expense awards against the weight of the evidence and ordered a new trial unless plaintiff agreed to reduce the awards for past pain and suffering (from $1.5 million to $500,000), loss of consortium award (from $500,000 to $300,000) and no award for future medical expenses[5].

- Fortune v. NY City Hous. Auth., 201 A.D.3d 705 (2d Dept. Jan 12, 2022): After a damages-only trial, the jury issued a $4,241,911.10 verdict to plaintiff who was 70 years old at the time of his accident, which allegedly caused multiple hip fractures requiring 2 surgeries including a hip replacement resulting in permanent nerve damage and a drop foot. The award was comprised of $2 million for past pain and suffering, $1 million for future pain and suffering (10 years), and $132,000 for future lost earnings (7 years) plus awards for $104,500 in past lost earnings, $217,508.93 in past medical expenses and $634,687.47 in future medicals (13 years) which were not challenged by defendants. Defendants moved to set aside the verdict as excessive, which the trial court denied. The 2nd Department ordered a new trial on damages unless plaintiff stipulated to reduce the awards for past pain and suffering (from $2 million to $1.3 million), future pain and suffering (from $1 million to $700,000 over 10 years) and future lost wages (from $132,000 to $99,000 over 7 years) for a total award of $3,055,696.40[6].

[5] As the First Department explained, no award for future medical expenses was warranted since the testimony of plaintiff's treating physician as to future care should have been precluded and did not prove such damages with reasonable certainty given no report was prepared outlining plaintiff's future medical needs and the doctor first asked about such care on direct examination with the doctor conceding his testimony on the issue was provided "off the top of [his] head."

[6] Plus interest of 9% per year running from December 2019 forward when plaintiff was awarded summary judgment on his Labor Law 240(1) claim against the defendant-owner NYCHA (who was awarded summary judgment on their contractual indemnification claims against plaintiff's employer/third-party defendant American Piping).

State of the NY Liability Insurance Market

Only time will tell how recent case law and in particular the April 2022 Court of Appeals decisions will impact future case outcomes. Likewise, the impact on verdict and settlement values remains to be seen especially if these cases prove useful in defending against summary judgment on plaintiff's Labor Law 240(1) claim.

In the meantime, insurance carriers continue to shy away from New York business operations, with a restricted subset of markets offering limited capacity at a hefty premium. The most challenging classes of business tend to include elevated trade risk, such as concrete/foundation/rebar, steel erection/curtain wall and electrical/mechanical work, but as mentioned throughout this publication, no contract party is exempt from the strict liability imposed by Labor Law § 240(1). While owners/developers and general contractors/construction managers with superb contractual risk transfer and safety management protocols are better positioned, they are not exempt.

Carrier claim data reflects both increased frequency and severity over the past five years, with settlements doubling in value and averaging $1 million to $3 million, generally. According to one of WTW's carrier partners, New York premises/operations claim counts are 12x that of other states, with the largest/most severe claims contributing to significant damages that necessitate almost 2x the excess rate needed as compared to other states. As such, the New York excess market has forced increased underlying attachments in an effort to shift frequency claims to the primary "working" layer.

E&S carriers continue to cautiously support New York contractor business, with additional liability capacity from select E&S markets. Some of these markets will support annual practice programs, while others will only entertain project specific business. Typical primary liability program limits are $5 million/$10 million/$10 million with retentions/deductibles ranging from $1 million to $3 million, but many programs are fully fronted with no risk transfer.

There are some opportunistic domestic E&S markets including various MGAs/MGUs, that will consider project risk, while some retail markets prefer traditional risk transfer/allocation from owner and GC down to subcontractors as a means to attempt to mitigate NY Labor Law risk and claim costs.

It should be noted that not all markets quoting New York risk offer complete and comprehensive coverage. Rather, many policies (whether practice or program specific) are replete with limitations and restrictions including exclusions relative to work from heights, employer's liability/employee claims, action over claims, contractual liability, and other designated work restrictions. For this reason, many Owners/Developers/Contractors will pursue a two-line wrap-up to ensure best in class/available terms for the duration of a project through the statute of repose.

As such, traditional wrap-up/controlled insurance programs for primary and excess capacity remains the most difficult to place, as there are limited risk transfer opportunities. Some admitted/retail markets are selectively willing to support primary GL offerings (with retentions often starting upwards of $2 million-$3 million or more per occurrence)[7]. Some markets will even require deductibles that match the primary limits of $5 million per occurrence. Most excess markets require a minimum of a $5 million GL attachment point and, in many cases, will only offer excess capacity at $10 million or higher while closely managing overall capacity. As a result, there has been an increase in quota share participation up excess towers (though obtaining alignment on terms/attachment point is critical).

Recently WTW has seen requests for much larger primary limits, in the $10 million to $20 million range. Though each market will have slight nuances relative to their preferred program structure and available options, all markets will require a substantial deductible/retention along with reinsurance support to offset the net in-house capacity.

[7] Where a contractor has over 10% to 20% of its operations in NY (as compared to all other states), underwriting support is limited.

Overall, the liability insurance market for New York construction risk remains volatile and willing underwriting support is scarce.

WTW sought input from two of our major carrier partners, longstanding underwriting markets supporting NY construction on both the owner/developer and contractor sides--to help shed light on the current state of the NY market. Some of their anecdotal guidance is as follows:

In the typical case where Labor Law 240(1) is alleged following a less severe incident, it is unlikely to see that claim settle for less than $1 million at this time. **Five years ago, such cases would settle for 50% less with the average settlement in such cases well under $500,000**.

When one or more neck or back surgery is involved, **the claim value is between $2 million-$3 million or more**.

It is unlikely that any project with a Construction Value of $250 million or more will reach the TCO phase without at least one $3 million GL loss but **most projects of this size will have multiple GL losses that settle around $3 million with many settlements reaching the $10 million range** as appellate courts continue to uphold larger and larger verdicts.

On Primary, there around 3.6 GL Prem Ops claims per $10 million of payroll in NY while in all other states, that trends less than 0.3 Prem Ops claims per $10 million of payroll. Likewise, the other carrier experiences **approximately 1 PO claim > $250K in NY for every $10 million in payroll, versus about 0.03 claims > $250K in all other states**.

While Carrier 1 has not written many lead excess policies in NY in the last 5 years, **it continues to sit higher in NY excess towers and still witnesses the UL erosion**.

When looking at larger claims/ excess experience, **Carrier 1's selected run rates for NY wraps are close to double those in all other states**.

In recent years, the frequency of losses impacting the excess layer(s) has risen in New York, regardless of the underlying primary limit.

Both Carriers indicated their average **liability claim costs in NY are some 7 to 10 times higher than any other state in the US** (including NJ, next door).

Some of their largest liability claims each of the last 5 years, along with fleet losses, are related to NY Labor Law, **with both markets confirming they do not expect the Labor Law to get any better and predict capacity will remain challenging for years to come**.

Carrier 2 has recently seen some adverse development in NY Workers' Compensation risks, which had historically been rather steady. However, there has been some adverse developments in loss ratio and frequency on the WC side, which is a harbinger of New York Labor Law claims/risk.

Both markets mentioned their **overall liability loss ratios on NY construction over the last 7-10 years has run in the 150% to 200% range**, depending on time-period, for every premium dollar booked.

Carrier 2 continues to focus predominantly on NY project risks for experienced and reputable owners/developers/sponsors (as opposed to contractor/practice programs).

Some Carriers, including Carrier 2, would provide maximum benefit/credit to pricing/structure for any client utilizing Alternative Dispute Resolution (ADR),[8] Project Labor Agreements (PLAs) and fixed camera technologies, as **these are the two areas where Carrier 2 sees the most promise for mitigating the risk of NY's Labor Law**.

As a result, the cost of construction in New York is not only exorbitant when compared to other states but also the number of carriers willing to write NY business is extremely limited with carriers forced to pull out of the NY construction market.

For more information, see WTW's Global Construction Rate Trend Report Q1 March 2023 Update, which is included in the appendix hereto.

[8] While ADR programs (including one in upstate NY administered by WTW) have had success reducing the frequency and severity of Labor Law claims, these programs require long lead times to initiate and must be implemented and administered properly.

Loss prevention measures

Most carriers who underwrite New York construction risks continue to emphasize the importance of loss prevention and enhanced safety measures, as risk control is one of the only remaining safeguards for clients to remain vigilant against the Labor Law. The importance of fall protection and falling object prevention programs cannot be understated. WTW recommends clients establish a detailed, comprehensive formal fall protection and falling object prevention "management" program for all projects and contractors expected to work at elevations. This program should be communicated down to the workforce via a formal documented training program and incorporated into any ongoing safety plan and/or job hazard review planning efforts. Although ensuring the policy is equivalent to at least a 100% six-foot policy, the program must also address aspects of protection that fall below the six-foot trigger. For reasons explained earlier, Labor Law judgements are influenced more by the influence of gravity itself and less by the actual fall distance in question. As a result, we look to incorporate a comprehensive management program to help alleviate exposures that may contribute to any falling object or person regardless of height or elevation.

Other key loss prevention measures include:

- Contractor pre-qualification procedures to promote quality subcontractors;
- Ladder minimization programs regarding efforts to reduce the un-necessary use of ladders and promote availability of safer ladder alternatives;
- Tool tethering and/or material tie-back programs to prevent falling objects;
- "Zero Tolerance" to fall protection policies;
- Material handling, stacking limitations and storage requirements including "No Leaning" policies to prevent struck by and caught between type injuries;
- Establishment and strict enforcement of robust restricted access zones to prevent work below overhead operation(s);
- Housekeeping initiatives to prevent slips and trips on walking and working surfaces;
- Programs to balance both discipline and recognition to hold supervisors "accountable" to their safety responsibilities;
- Supervisor training and understanding of how NY Labor Law aligns with safety;
- Initiatives to ensure program owners and executive management stay "engaged" in the safety process, optimizing the success of loss prevention programs;
- Establishment of thorough incident investigation programs, return to work and light duty programs to assist in mitigating long term claims costs.

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