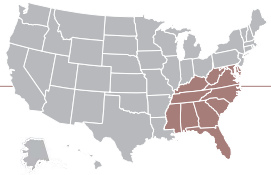

Rulemakers

Silica Rule Delayed to September

OSHA will not enforce the new crystalline silica standard for the construction industry until Sept. 23, 2017. It previously had a June 23 effective date. OSHA says, "[a]dditional guidance is necessary due to the unique nature of the requirements in the construction standard." It will use the extra time to "conduct additional outreach and provide educational materials and guidance for employers." The agency says it expects construction industry employers to take steps to become compliant with the new permissible exposure limits (PEL) or "to implement specific dust controls for certain operations," which are detailed in Table 1 of the standard, which matches construction tasks with dust control methods. Employers need to be familiar with all the details of the standard. According to an OSHA FactSheet: "Employers who follow Table 1 correctly are not required to measure workers' exposure to silica and are not subject to the PEL."

While the Trump administration has signaled it plans to reduce burdensome regulation, there is no indication this rule is going away before implementation. OSHA states: "Construction employers should also continue to prepare to implement the standard's other requirements, including exposure assessment, medical surveillance and employee training."

Crystalline silica, a carcinogenic dust, is common on construction sites, but measuring it accurately is very difficult. The rule lowers the permissible exposure limit for workers to a uniform 50 micrograms of respirable crystalline silica per cubic meter of air average over an eight-hour shift. That's down from the previous limit of 250 micrograms for construction.

The Best Indemnity Party Ever

A rarely used and often misused Florida construction statute entitles a party to indemnity for damages caused by that party's own negligence.

By Adam Richards

Section 725.06, Florida Statutes, titled "Construction contracts; limitation on indemnification," has been on the books for about 16 years in Florida. This law entitles Party A to indemnification from Party B for damages incurred by Party A even if Party A partially or wholly caused those damages. To be indemnified for one's own negligence, the statute requires that the parties include a monetary limitation on the extent of the indemnity, and that limit must bear a reasonable commercial relationship to the construction contract. Without this limitation, any such clause attempting to use this silver bullet shall be deemed void and unenforceable, according to the statute.

Adam Richards

Quite surprisingly, though, 725.06 remains a hidden and misunderstood gem for the construction industry in Florida. Attorneys familiar with the details of the statute may prove their clients are not liable in construction claims.

Indemnification and construction claims go together like peanut butter and jelly. Due to the numerous parties involved in large construction projects (e.g., owner, design professional, general contractor, subcontractor and materialman), today's standard construction contracts include indemnification provisions. Because most of those parties would likely be implicated in a defect claim, indemnity and third-party practices provide a mechanism

Pretty Bids Weighs Less in Florida

An $800 million bridge project in Miami was supposed to grant equal weight to aesthetics and engineering in the scoring of proposals. The Florida Department of Transportation, however, gave greater value to the technical scoring than aesthetics, say local civic and political leaders. The scoring agreement was hashed out in 2013 when FDOT officials faced a lawsuit over their original consideration of a lower-cost bridge designed more for functionality than beauty. Sarnoff and his fellow critics argue the state is violating that agreement. The plan the technical committee voted for—and which FDOT declared the winning bid—was submitted by Archer Western/de Moya and is designed to look like a fountain of water spouting over Biscayne Boulevard. The community committee's winner was designed by Fluor-Astaldi-MCM and represents dancers in a *pas de deux*, a nod to the nearby performing arts center. Bidding documents released by the state show that technical merits of the proposals received up to 60 points in the scoring; aesthetic merits were limited to 30 points. Second-place bidders Fluor, Astladi and MCM have sent FDOT a letter of protest over the award. ■

to place the liability and exposure, ideally, on the doorstep of the party that caused the loss. Section 725.06 takes this process one step further and actually entitles a party to indemnity even if that party itself caused the loss, in part or in whole, as long as the contract includes a monetary limitation on the extent of that indemnification. That's right—even if a party is negligent, or at least faces allegations of negligence, that party can still be entitled to defense and indemnity; all it has to do is comply with the law!

Shockingly, the overwhelming majority of construction contracts in Florida, ranging from a $10,000 bathroom to a $100 million hotel in South Beach, fail to include any reference to Section 725.06 let alone an attempt to be indemnified for one's own negligence or an inclusion of the requisite monetary limitation on the extent of that negligence.

Those that have been around the block a few times already know that a contract is no more than a piece of paper and that, despite a clear breach and damages, the contract alone may do nothing for you. You still may find yourself spending thousands if not tens of thousands of dollars suing the other party to the contract with only the hope that the contract is in your favor, unambiguous and enforceable. Compliance with 725.06 can be a life vest in those choppy waters.

A few case studies illustrate how and why compliance with 725.06 is so critical. Years ago, we defended a contractor in a personal injury lawsuit filed by an individual who fell outside of a national chain restaurant during a buildout. The restaurant sought indemnity from my client for damages caused by the restaurant's own negligence. Once confronted with the 725.06 statute, the restaurant's counsel attempted to argue that the minimum insurance limits found on another page, and not within the indemnity clause, satisfied the monetary limitation prong of the statute. We defeated the claim at summary judgment not only because the monetary limitation was absent from the indemnity clause but also because the restaurant got greedy and included a sentence immediately after the minimum insurance amounts, specifying that those limits were in no way a limitation of liability on the contractor, in direct contravention of the statute.

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Last year, in a wrongful death lawsuit involving a scaffolding collapse, a subcontractor decided to settle the claim directly with the decedent's family. It did so without inviting its general contractor (my client) to the table, and it cleverly included in the release not only itself and its insurers but also any third parties that would be vicariously liable for the actions of the subcontractor. In a subsequent lawsuit by the estate against the general contractor in which only direct negligence claims were asserted, despite the subcontractor's blatant breach, the subcontractor and its insurers had no duty to defend because the underlying contract failed to comply with Section 725.06. Compliance should and likely would have discouraged a secret settlement and protracted litigation.

Currently, I am involved in a large construction defect case defending a subcontractor that contracted with a national homebuilder for roofing services. I thought I had finally found the unicorn, a contract in compliance with this law, because the indemnity provision actually cites the statute and limits the indemnification to the contract amount. After a closer look, though, the drafter put the cart before the horse. Despite citing the statute by name, the scope of the indemnity provision includes only those damages incurred by the homebuilder due to the subcontractor's negligence. The clause includes no language whatsoever entitling the homebuilder to indemnity for damages caused by its own negligence, a likely fatal oversight.

Section 725.06 was intended to promote greater efficiency in the complex, multiparty, extremely expensive, construction defect landscape. Instead, complete unawareness, coupled with a lack of understanding, seems to have triggered the opposite effect. In terms of compliance, make sure the scope of your indemnity provision includes damages caused by either or both the indemnitor and indemnitee and a monetary limitation on the extent of the indemnification for your own negligence that bears a reasonable commercial relationship to the total contract amount. And do not get greedy!

Let me reiterate that this statute is not a get out of jail free card and should in no way encourage shortcuts or shoddy work. Rather, this is about awareness and compliance with the law and, thus, improved efficiency from the claims stage through litigation, as indemnification and third-party practices still largely dominate the construction defect world. For those brokers, adjusters, contractors and construction attorneys outside of sunny Florida, make sure to research whether your state has a similar law and be sure to keep these drafting and practice tips in mind for compliance. ■

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