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# Construction & Surety Law Newsletter

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of the New York State Bar Association

## Summary of Decisions and Statutes

### INDEMNITY

**35-1.** Section 5-322.1 of the General Obligations Law does not preclude a partially negligent general contractor from seeking to enforce the contractual indemnification provisions of its subcontract for that portion of the damages attributable to its subcontractor. The statute merely prohibits the general contractor from seeking indemnification for its own negligence. *Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204, 869 N.Y.S.2d 366 (2008).

### INSURANCE

**35-2.** The subcontractor agreed to procure commercial general liability insurance naming the general contractor as an additional insured. The general contractor could not rely on a certificate of insurance, which expressly stated that it was issued as a matter of information only and conferred no rights upon the certificate holder, when the general contractor was not named as an additional insured in the policy. *Home Depot USA, Inc. v National Fire & Marine Insurance Company*, 55 A.D.3d 671, 866 N.Y.S.2d 255 (2d Dep't 2008).

### LABOR LAW §§ 200, 240, 241

**35-3.** The strict liability provisions of Labor Law § 240(1) cover employees but not persons who volunteer to work on a project. The employer-employee relationship usually involves an agreement to perform a service in return for compensation, an exercise of authority by the employer in directing and supervising the manner and method of the work, and an assessment by the employer whether the task undertaken by the employee has been completed satisfactorily. If there is no expectation of payment, and the owner does not control or supervise the effort, the injured party is acting as a volunteer and cannot recover under Labor Law § 240(1). *Stringer v. Musacchia*, 11 N.Y.3d 212, 869 N.Y.S.2d 362 (2008).

**35-4.** The presence of a home office does not negate the exemption from liability under Labor Law §§ 240 and 241 for owners of one- and two-family dwellings, who contract for but do not control work performed on their property. *DeSabato v. 674 Carroll Street Corp.*, 55 A.D.3d 656, 868 N.Y.S.2d 209 (2d Dep't 2008).

**35-5.** When a property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the property owner must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition, to avoid liability under Labor Law § 200. *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 867 N.Y.S.2d 123 (2d Dep't 2008).

**35-6.** A demolition subcontractor's employee fell 10 to 12 feet with the collapse of the permanent second floor of a five-story apartment building undergoing renovation. After reviewing the inconclusive precedents of the Court of Appeals and the inconsistent precedents of the Appellate Divisions, the Third Department held that the collapse of a permanent structure is within the scope of recovery for damages under Labor Law § 240(1), but that the injured worker must establish that the collapse was foreseeable, thereby requiring safety devices to have been furnished. *Jones v. 414 Equities LLC*, 57 A.D.3d 65, 866 N.Y.S.2d 165 (3d Dep't 2008).

**35-7.** A worker's fall from scaffolding provided by his contractor employer did not result in liability for the property owner under Labor Law § 200, because the presence of the scaffolding did not constitute a dangerous or defective condition created by the property owner, and because the property owner had no authority to control the manner or method by which the worker performed his work. *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 (2d Dep't 2008).

## PUBLIC CONTRACTS

**35-8.** The Court of Appeals unanimously concluded that the services to be performed under a municipal recycling contract (paper, glass, metals, and plastics) involved the exercise of specialized or technical skills, expertise or knowledge. Accordingly, the municipality was not required to procure these services under the sealed, competitive bid requirements of General Municipal Law § 103. It could, instead, properly award the contract under the request for proposals process authorized by General Municipal Law § 104-b, pursuant to procedures adopted by the municipality. *Matter of Omni Recycling of Westbury, Inc. v. Town of Oyster Bay*, ___ N.Y.3d ___, ___ N.Y.S. ___, 2008 N.Y. LEXIS 3719 (2008).

## STATUTES

**35-9. Chapter 57 (Part MM) of the Laws of 2008**—amends those sections of the Education Law, the General Municipal Law, the Public Authorities Law, the Public Housing Law, and the State Finance Law which require the preparation of separate trade specifications and the award of separate trade contracts on public works projects (Wicks Law requirements), to increase the threshold monetary contract amounts for applying Wicks Law requirements across three defined regions of the State, and to oblige bidders to submit with their bids separate lists of their subcontractors and the agreed upon subcontract amounts for those public works projects where Wicks Law requirements do not apply; amends the Labor Law to authorize project labor agreements pursuant to which Wicks Law requirements may be excused; and authorizes the Commissioner of Labor to enforce Wicks Law requirements. Effective July 1, 2008.

**35-10. Chapter 565 of the Laws of 2008**—the "State Green Building Construction Act" requires new construction or substantial reconstruction of state agency buildings to comply with standards and regulations promulgated by the Department of Environmental Conservation pursuant to various identified green specifications. Effective March 24, 2009.

**35-11. Chapter 619 of the Laws of 2008**—requires the permittee or its contractor or subcontractors to post a payment bond in accordance with State Finance Law § 137, whenever a municipal corporation issues a permit subject to compliance with the hours, wages and supplement provisions of Labor Law § 220. Effective September 25, 2008.

**35-12. Chapter 631 of the Laws of 2008**—authorizes the New York State Energy Research and Development Authority to create and administer a green residential building program, including incentive payments, by adding section 1872 to the Public Authorities Law. Effective September 25, 2008.

## SUBROGATION

**35-13.** The antisubrogation rule precludes an insurer from making a claim against its own insured as a consequence of the very risk for which insurance coverage is provided. An employee of the prime contractor was severely injured by the contractor's vehicle while operated by another employee on the municipality's public works site. The injured employee sued the municipality which impleaded the contractor, claiming common law indemnification. Insurance coverage under the contractor's commercial general liability, commercial automobile, and umbrella liability policies was excluded by the terms of the policies. An owners' and contractors' protective liability policy purchased by the contractor from the same insurer named only the municipality as the insured. Accordingly, there was no coverage conflict between the contractor and the insurer, and the antisubrogation rule did not apply to preclude recovery from the contractor on the municipality's indemnification claims. *Pesta v. City of Johnstown*, 53 A.D.3d 884, 862 N.Y.S.2d 162 (3d Dep't 2008).

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