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Building Codes

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FEMA Introduces New National Building Code Strategy

On April 13, 2022, the Federal Emergency Management Agency (FEMA) released a new building codes strategy, defining the goals and objectives it will pursue to promote the application, adoption and enforcement of hazard-resistant building codes across the United States.

The strategy focuses on three core goals:

- 1 Integrating building codes and standards across FEMA,
- 2 Strengthening nationwide capacity for superior building performance, and
- 3 Driving public action on building codes.

Hurricane Season Heightens Awareness of the Issues

With hurricane season now upon us, the urgency intensifies to find better ways to reduce damage and save lives, as coastal communities brace them-



This Just In...

Several courts have now ruled against policyholders claiming business interruption coverage due to the impact of COVID-19 on their businesses.

In May, the 7th Circuit cited its earlier rulings in *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.* and *Paradigm Care & Enrichment Center LLC v. West Bend Mutual Insurance Co.* in affirming a ruling by the U.S. District Court in Milwaukee that ruled against a Chicago childcare facility (*Paradigm Care & Enrichment Center LLC*).

In *Sandy Point*, "we found that COVID-19 has a negligible impact on physical property, as 'it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days,' leaving property physically unchanged," the three-page ruling said.

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selves for more powerful storms. The National Oceanic and Atmospheric Administration has predicted 14 to 21 named storms in the Atlantic this season, with six to 10 becoming hurricanes and three to six “turbo-charging into major hurricanes with winds greater than 110 mph (177 kph).”

Underserved Communities Disproportionately Impacted

FEMA’s strategy also aims to support underserved communities that have a greater probability of living in structurally unsafe housing. Low-income communities, which are less likely to have been constructed according to modern building codes, have been shown to be disproportionately impacted by natural hazards. FEMA plans to expand support to these communities to foster safe and resilient communities nationwide.

Laying a Cornerstone for Loss Reduction

FEMA Administrator Deanne Criswell announced the strategy at this year’s National Hurricane Conference in April, where she described the strategy of upgrading hazard-resistant codes as “a cornerstone of loss reduction,” that will “save property, but more importantly, save lives.”

As part of its strategy, FEMA highlights several building codes, specifications, and standards – including nine International Codes and two International Code Council standards. “The strategy works towards internal alignment of priorities and practices across all of FEMA’s programs related to building codes

and acts as a guide, both inside and outside of the agency, to promote consistency and the value of building codes towards disaster mitigation,” said FEMA in its news release.

Majority of U.S. Communities Have Outdated Building Codes

Nearly two out of every three communities in the United States have outdated building codes, according to the National Initiative to Advance Building Codes. This makes communities vulnerable to climate impacts and higher energy costs, officials said. The FEMA initiative is designed help state, local, Tribal, and territorial governments adopt current building codes and standards, enabling communities to be more resilient to hurricanes, flooding, wildfires, and other extreme weather events that are intensifying due to climate change.

Billions in Disaster Recovery Savings

“The adoption of hazard resistant building codes saves communities \$11 per every \$1 invested,” Criswell said, citing a finding by the National Institute of Building Sciences. The codes will work to ensure that buildings can better withstand damage from all natural disasters, such as wildfires, tornadoes and floods.

Modern codes also reduce heating and cooling costs by requiring better insulation. According to a FEMA analysis, the typical household savings in energy costs from implementing the new codes could be about \$162 per year.

As an example of how simple changes to building codes can have a dramatic effect at

This Just In

The 11th U.S. Circuit Court of Appeals in Atlanta cited an earlier Miami case in denying coverage in *Town Kitchen LLC v. Certain Underwriters at Lloyd’s, London et. al. Town Kitchen*, said the court, “failed to plead that its losses and expenses are covered” under its policy.

Citing its earlier decision in *SA Palm Beach v. Certain underwriters at Lloyd’s London*, another court in Florida ruled against the plaintiff in *PF Sunset View, LLC et al. v. Atlantic Specialty Insurance Co.* (a consortium of Planet Fitness owners).

Said the court, the franchisees’ arguments “are a non-starter — binding precedent mandates that franchisees show a ‘tangible alteration of the insured propert(y)’ and that losses stemming from suspension of operations and extra expenses incurred in response to COVID-19 closure orders do not count.”

The courts are simply not buying the argument that it is an insurable event if a virus prevents people from entering your premises.

little cost, consider a recent change made to the Florida building codes. Researchers have found that using ring-shank roofing nails made shingles much more resistant to hurricane winds. Ring-shank nails are now standard in Florida.

FEMA says that communities that have implemented modern building codes are saving an estimated \$1.6 billion per year by avoiding damage from major disasters. That’s approximately \$132 billion for the next 20 years that won’t need to be spent on disaster recovery. ■

How to Reduce Risk in the Construction Industry

Recent technologies — from robotics to project management software — as well as better ways to identify and deal with risk are helping the construction industry save money and reduce accidents.

Workforce Shortage

COVID and its ramifications have placed a strain on finding good workers for most industries. This is no less true for construction. With the increased demand for skilled workers, some firms are adopting automated technologies for tasks like excavation, drywall installation, painting and roofing. Using robotics not only reduces labor costs but jobs can be completed faster since robots work night and day and don't need regular shifts.

Construction Defects

Construction defects result from poor workmanship and errors and omissions. Poor workmanship occurs when the hired sub-contractors are just wrong for the job. Proper homework is the best remedy. Design defects result from architect and engineer errors, including errors in drawings and working documents. When design errors occur and change orders are needed, liability including additional costs incurred should be contractually transferred to the design professional. Use a knowledgeable insurance agent.

Contractual Risk

Hiring sub-contractors entails a fair degree of risk, which in general can be addressed by

using precisely worded contracts, such as those that follow American Institute of Architects language. However, these clauses don't necessarily protect you from the negative actions of subs (and their subs), they just provide a legal remedy after the damage occurs.

Your best course is to heed the advice published on the website [Jobsite](#), paraphrased here: At the outset of any project, during the bid stage, spell out the team's roles and responsibilities. Getting a list of all subcontractors and their subs at bid time gives you a chance to qualify them so you not only know who is working on the project, but also their qualifications, experience, and track records.

Site Protection

The website [ForConstructionPros.com](#) offers these tips:

- 1 Increase lighting in off-hours
- 2 Let employees know that the boss is paying attention
- 3 Schedule supplies only as needed
- 4 Keep good records with documentation
- 5 Practice effective inventory management
- 6 Secure perimeter with fencing
- 7 Review security plan and process
- 8 Use theft deterrents or cameras

Environmental Risks

Hurricanes happen, as do tornadoes, floods, fires and lightening storms. It's hard to predict a natural disaster, so be prepared. Contaminants and other jobsite hazards are also environmental risks. Some potential hazards contractors should be aware of in order to mitigate risk include:

- ✱ Air emissions from chemicals, equipment or activities like welding and concrete cutting
- ✱ Spills from fuels or lubricants associated with construction equipment
- ✱ Release of asbestos particles from asbestos containing materials (ACM) such as insulation, floor tiles, or ceiling tiles
- ✱ Release of lead particles from lead-based paint
- ✱ Release of mold or mold spores from areas where water intrusion has occurred, such as broken pipes or inadequate drainage
- ✱ Releases of chlorofluorocarbons (CFC's) in air conditioners or refrigeration units
- ✱ Spills of oil used, transferred or stored at construction sites
- ✱ Moving soil on or off-site that contains hazardous chemicals.



Managing Change Orders

These tips come from eSub, a construction management software vendor:

- 1 Identify issues before you begin.** Before starting the project, carefully examine the plans and specifications to identify any ambiguities or conflicts immediately. Putting in the extra time at the front end of a project to review the work, bid, drawings, and details can minimize change orders.
- 2 Be transparent with stakeholders.** Stakeholders need to stay informed. Always communicate any project changes and updates to prevent misunderstandings and save time.
- 3 Verify how the change impacts the project.** Change order disputes can greatly impact a project, especially if the work

is put on pause while the parties dispute the change order. If not resolved as soon as possible, change order disputes can increase project delays and escalate costs.

Using construction management software can greatly streamline the process and make it more effective.

Documentation Organization

Proper document management is a tedious and time-consuming task. Construction projects require hundreds, sometimes thousands, of documents. Now that contractors are transitioning from paper to digital documentation accessing them can be streamlined. Construction software platforms use cloud-based technologies that allow instant document retrieval, reducing schedule delays and centralizing accessibility in one location. ■

Why Did I Get a “Reservation of Rights” Letter?

Your organization has just been sued, and you’ve notified your liability insurer. Then you receive a reservation of rights letter. Here’s what it means and what to do.

The insurance reference resource *Practical Risk Management* defines a reservation of rights as “an insurer’s notification to an insured that coverage for a claim may not apply. This allows for an investigation by the insurer without waiving its right to later deny coverage.”

When the insurer sends you a reservation of rights letter, it is telling you that it has doubts whether your policy covers some or all of the claims. In a liability lawsuit, the plaintiff often makes several claims. The policy might cover some and exclude others. When a claim is first filed, the insurer might not know whether coverage applies with the facts at hand.

When you buy a liability policy, your insurer agrees to pay for your legal defense costs in addition to any damages you might be legally obliged to pay. Most states recognize this “duty to de-

fend” as fairly broad under a commercial general liability policy. If there is a possibility that coverage might apply, the insurer must provide your legal defense.

When an insurer receives a claim that might be covered only partially by its policy or not at all, it can do one of the following:

- 1 Refuse the duty to defend.** If the insurer does this and the court later finds that coverage applied, the insurer must reimburse your defense costs, along with settlement costs over which it had no control.
- 2 Investigate the claim and begin your legal defense.** Insurers like to avoid this due to the principle of estoppel, which bars an individual from “denying or alleging a certain fact...because of that individual’s previous conduct, allegation, or denial” to the detriment of another. (Black’s Law Dictionary) In other words, if your insurer begins investigating or defending your claim, this could lead you to assume it will cover your claim.
- 3 File a declaratory action,** in which the insurer asks the court to determine whether it is obligated to defend the claim. An insurer will seldom do this when it first receives notice of a claim.
- 4 Send the insured, by certified mail, a reservation of rights letter** and proceed with its investigation. This allows the insurer to gather more facts before deciding whether to deny coverage, while preserving its right to do so. Thus, your insurer might defend your liability claim but later deny indemnification (or paying settlements or judgments) if its de-



fense is unsuccessful. Different rules may apply, depending on location. The liability policy also either explicitly or implicitly obligates you to cooperate with the insurer in its conduct of your defense. This allows the insurer to direct your legal defense, including giving it the right to settle. But investigations can also give it facts needed to deny you coverage. For these reasons, a reservation of rights letter indicates a conflict between you and your insurer.

If you receive a reservation of rights letter, you will want to protect your coverage rights by doing the following:

- 1** Read the reservation of rights letter and the policy to which it applies carefully.
- 2** Respond to your insurer, saying that you disagree. The experts with the *John Liner Review*

recommend asking the insurer to commit to coverage before it begins its investigation.

- 3** Arrange for your own counsel.

Some reservation of rights letters will state the insurer reserves the right to recoup defense costs if the insurer does not owe a defense. Depending on the facts of the case and the jurisdiction, you could indeed be obligated to reimburse your insurer for defense costs if it were later determined coverage did not apply.

In a straightforward claim, you have no cause to worry. A reputable insurer will provide a quality defense. It’s the gray areas, where coverage might or might not apply, that can cause conflicts. For this reason, we recommend thoroughly reviewing your liability coverage on a regular basis. A review can point out gaps in coverage, outdated forms and language, and other problems. For more information, please contact us. ■

What is Environmental Liability Insurance?

Standard business general liability (GL) policies provide little coverage for pollution damage, including toxic spills like the one in West Virginia in 2014. Today most companies that store or handle potentially toxic materials purchase a separate environmental liability policy. These policies cover the exposure that the GL policy excludes.

Property owners purchase environmental impairment liability insurance. It covers property loss and liability arising from pollution-related damages for sites that have been inspected and found uncontaminated. It is usually written on a claims-made basis so policies pay only claims presented during the term of the policy or within a specified period after the policy expires. It limits liability insurers' exposure to unknown future liabilities.

In general, coverage includes statutory clean-up requirements and bodily injury and property damage third-party claims and legal expenses resulting from pollution or contamination incidents. The coverage kicks in both for incidents that are "sudden and accidental" and "gradual." Coverage also exists for business interruption losses.



Several other types of environmental liability insurance exist:

- ✳ Environmental consultants errors and omissions policies cover consultants who advise third parties about environmental conditions.
- ✳ Environmental contractor policies cover operations that a remediation contractor performs.
- ✳ Environmental testing laboratory coverage addresses the liability of firms that analyze hazardous materials in the soil, ground or air.

In addition, there are policies that protect lenders and real estate agents if they handle properties that later turn out to be contaminated.

Please contact us if you think your business may need environmental liability insurance. ■

Insurance Buyers' News



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