



Mass Withdrawal of Construction Liability Writers in NY Traced Back to Scaffold Law

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By Meg Green, senior associate editor

New York is plagued by high premiums and the flight from the state by construction liability insurers due in part to a law that's been on the books in the state since 1885, experts said.

Under section 240 of the state's labor law, also called the New York "scaffold law," any worker who falls and is injured is not only eligible to receive workers' compensation benefits, but also can sue the developer or owner, who is considered liable even if the worker was at fault.

"There are very few defenses. It is basically bring your check book," said Maureen Caviston, president of Partners Specialty Group and a former NAPSLO president. "You can rectify some of the problem with risk management, contracts and risk transfer, but in the five boroughs, the legal environment is very difficult for insurers," she said during a Best's Review webinar on surplus lines.

It's resulted in a "massive withdrawal of underwriters" from the New York construction liability market, said David Bresnahan, president of Lexington Insurance Co. And as a result, general liability premiums in New York, especially New York City, are among the highest in the nation.

"It's a tough market," said Gary Henning of the American Insurance Association's Albany office. Construction contractors, especially those working on bridges, are impacted by the law, but so are home builders.

The scaffold law was enacted long before the Occupational Safety and Health Administration and workers' compensation programs were enacted to protect injured workers. "Back in the 1880s, the rationale for the law made sense," Henning said. "It was an extra standard of care for the workers, and the absolute liability from falls from heights."

But with the advent of workers' comp, which compensates injured employees for both lost wages and medical expenses, the scaffold law is no longer necessary, he said. "It's now an outdated law," Henning said.

Illinois had an almost identical law until it was repealed in 1995. Five years later, the number of construction jobs had risen 25% and construction fatalities had dropped by 30% in Illinois, according to scaffoldlaw.org, a project of the Lawsuit Reform Alliance of New York.

"New York is the only state in the nation with a scaffold law on the books, making employers absolutely liable when a worker is hurt on a job site. It doesn't matter if the worker is drunk, high or not using the safety equipment provided to them; the employer is completely responsible for the injury," said Ellen Melchionni, president of the New York Insurance Association.

"Frivolous lawsuits are out of control in New York and need to be reined in. Reforming or ideally repealing the scaffold law would be a great start," she said.

Republican New York state Sen. Patrick M. Gallivan and Assemblyman Joseph Morelle sponsored legislation to repeal the law earlier this year, but the bills never gained traction.

"I guarantee this will come up again; it has every year," said Matthew F. Guilbault, director of government and industry affairs for the Professional Insurance Agents of NY, NJ, NH and CT.

Ten years ago, the average liability loss costs in New York City were 500% higher than the loss costs in seven other states: Pennsylvania, Virginia, Georgia, South Carolina, Ohio, Massachusetts and North Carolina combined, according to a study by the AIA. For New York state, outside of New York City, the loss costs averaged 232% more than the other states. The study indicated the only difference between New York and the other states was the Scaffold Act, which accounted for one third of the cost differentials (Best's Review, July 2003).

But tort reform in New York is a difficult battle because the "plaintiffs' bar is a very influential interest group in New York," Henning said. "They will fight tooth and nail to preserve this law."

The scaffold law is not just an issue for insurers. Taxpayers have to pay more for public projects due to increased liability insurance costs, and the scaffold law adds \$10,000 to the cost to build a new home.

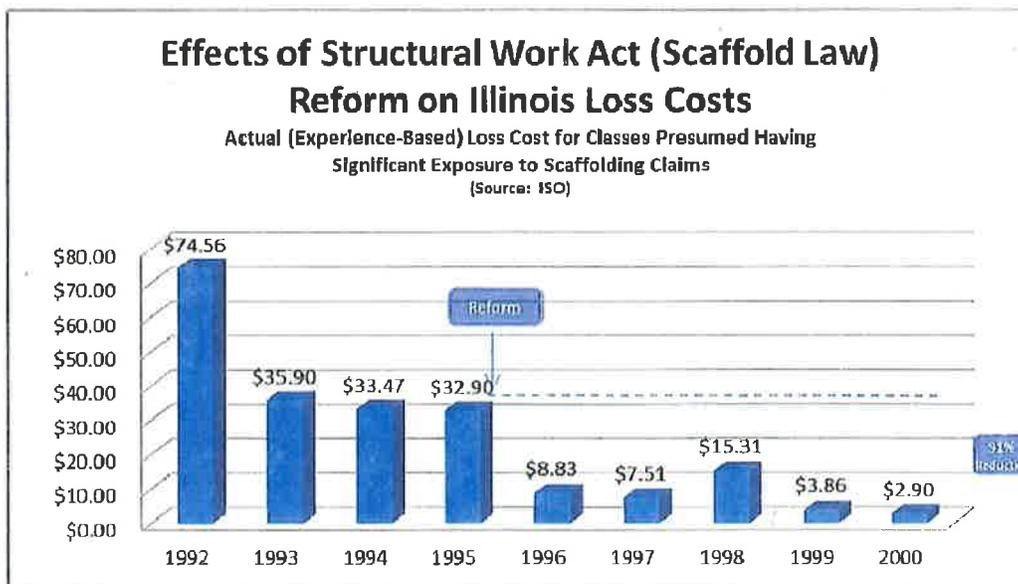
The Lawsuit Reform Alliance of New York estimates the scaffold law is responsible for about \$100 million in additional liability costs for the Tappan Zee Bridge replacement project, a \$5.2 billion project that received federal approval earlier this week.

"Taxpayers, homeowners, businesses all pay extra because of this outdated law that isn't going to be changed because it's a gravy train for the plaintiffs' bar," Henning said.

THE SCAFFOLD LAW: ONLY IN NEW YORK!



- No other state in the union has an absolute liability standard still on its books like the “Scaffold Law,” §240 of the Labor Law, which, along with court decisions, imposes a standard of absolute liability on contractors and owners for gravity related injuries on construction sites.
- The Scaffold Law is the only area of civil liability in New York State in which comparative negligence does not apply.
- Other than Illinois, no state has had such an absolute liability standard since at least the 1940s, when workers compensation became the norm.
- Illinois outright repealed their statute, known as the “Structural Work Act,” in 1995. In addition to significant reductions in insurance loss costs, they experienced a significant increase in construction employment and significant reductions in construction workplace fatalities and injuries.



- As observed above, preceding the 1995 reform in Illinois, there was a significant decrease in rates resulting from a 1991 Illinois court ruling, allowing that third parties held liable for a work-related injury could seek contribution from the injured worker’s employer, but such contribution may be capped by the amount of applicable workers compensation benefits. This cap is named for an Illinois case—Kotecki v. Cyclops Welding Corp., 146 Ill. 2d 155, 166 Ill. Dec. 1, 585 N.E.2d 1023 (1991)—that first imposed it.
- Post reform, loss costs fell dramatically from the 1995 level in subsequent years to a point where the 2000 loss costs were 91% lower than the 1995 loss cost.

- The increase noted in 1998 is likely attributable to a significant increase in bridge work, particularly in the Chicago area, during the period of time.
- In addition to the significant insurance loss cost reductions documented above, the following was observed:
 - Number of Construction Jobs rose by 25%.
 - Decrease in Workplace Fatalities by 30% over a six year span.
 - Overall worker injury rate decreased by 53% giving Illinois the 10th lowest injury rate in the country.¹
- The plaintiffs' bar in Illinois has made occasional pushes to re-institute the "Structural Work Act." Those unsuccessful efforts have gained little or no traction and have been strongly opposed not only by the construction and business communities, but significantly, have not been supported by organized labor, despite initially opposing repeal—based upon the substantial increase in construction employment that resulted from the decrease in the cost of construction.

"It's a legislative issue for the trial lawyers, but not necessarily for organized labor at this time. If the construction industry does well, our members do well and this is going to erode that relationship." -- Dennis Gannon, Past President of the Chicago Federation of Labor²

- Currently, 39 states allow for filing of both a general liability and workers compensation claim for a jobsite injury. None of them treat gravity related injuries differently than other workplace injuries, as New York presently does. Rather, comparative negligence applies.
- There are currently 11 states which treat workers compensation as the sole remedy for a workplace injury and bar an injured worker from filing a general liability claim against a general contractor or owner except under very limited circumstances.³
- Reforming the Scaffold Law along the lines of the current Gallivan/Morelle bill (S.111/A.3104) by introducing comparative negligence would bring New York State more or less in line with 39 other states but would not go as far as the 11 states that generally treat workers compensation as the sole remedy.

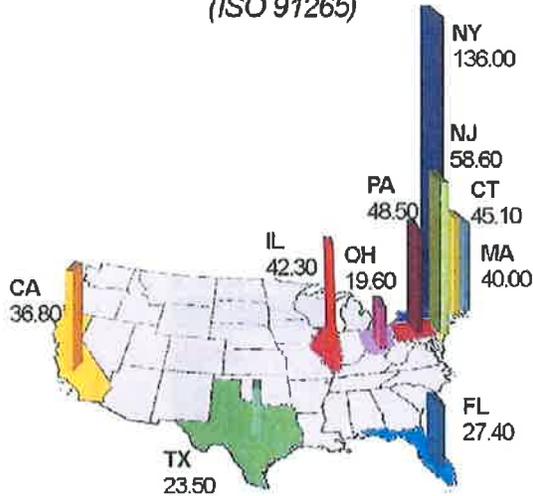
¹ Willis of New York, Inc., letter to Silverstein Properties and Gotham Organization, 31 January 2012.

² *Chicago Sun-Times*, "Labor Leader: Scaffold Law More Important to Lawyers Than Unions," 20 December 2002.

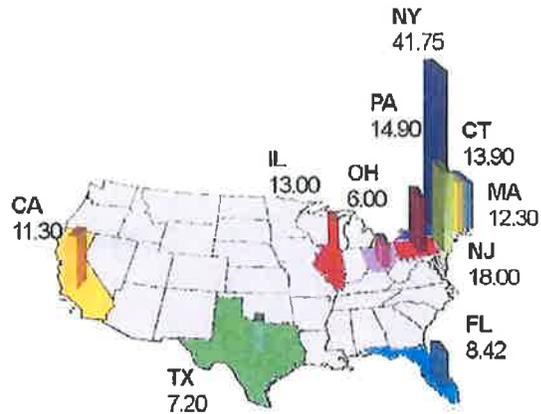
³ These 11 states are: CO, FL, GA, KY, MD, MS, NE, OR, PA, TX and UT.

THE SCAFFOLD LAW: SENDING NEW YORK'S CONSTRUCTION BASE LOSS COSTS INTO THE STRATOSPHERE

ISO Base Loss Costs, 2012
Bridge/Elevated Highway Construction
(ISO 91265)



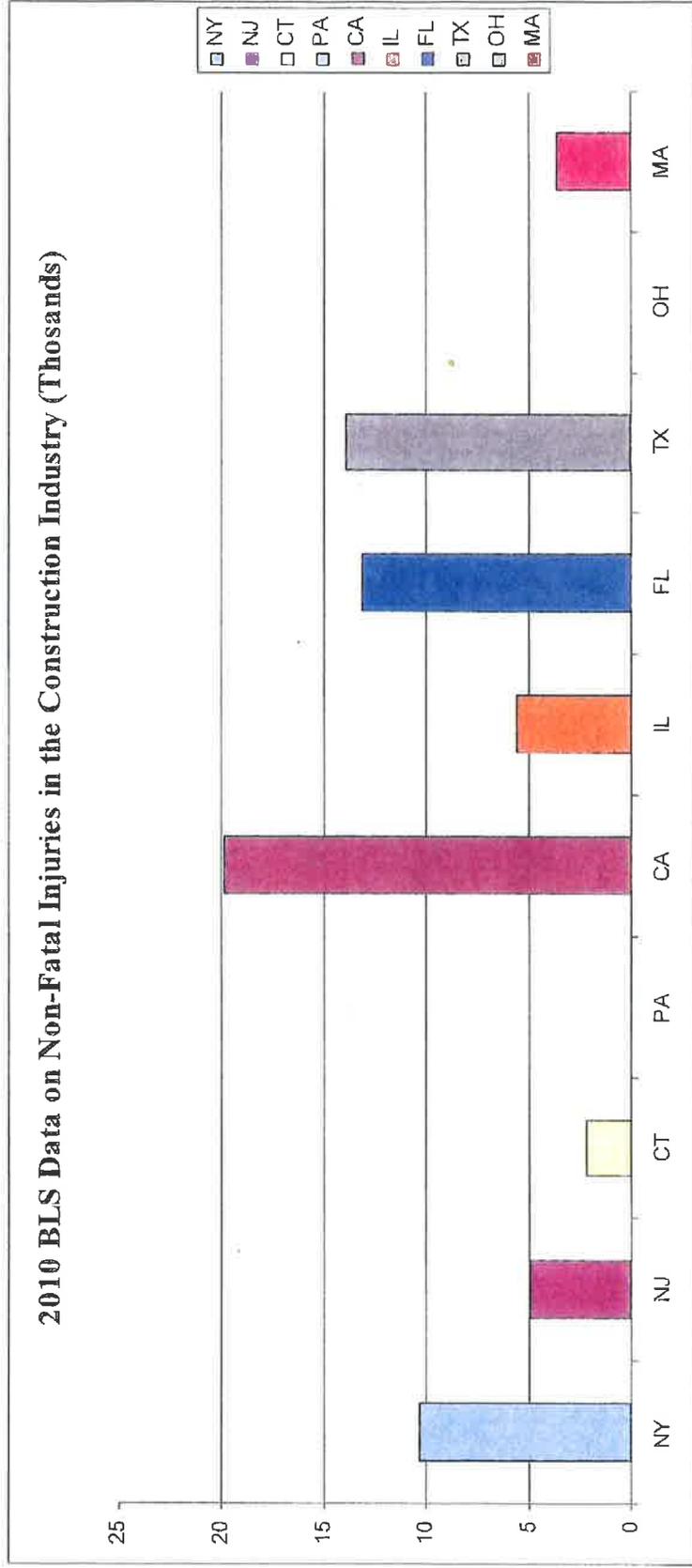
ISO Base Loss Costs, 2012
Structural Metal Construction
(ISO 97655)



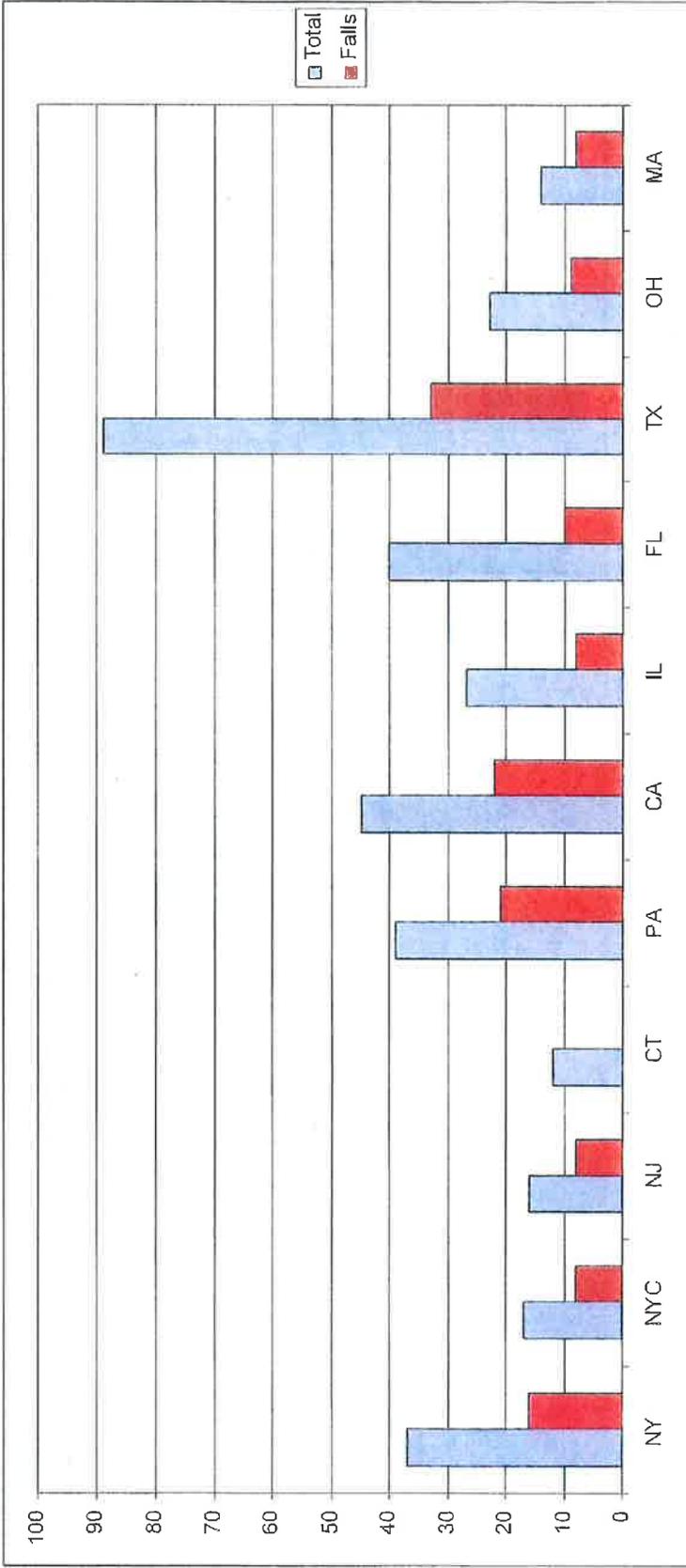
- The following chart and tables of data from the ISO, the property/casualty insurance industry's leading supplier of statistical, actuarial, underwriting and claims data, starkly demonstrate that New York's base loss costs are at least double the next closest comparable state in nearly every key construction class.
- Interestingly, only in carpentry (class code 91342), are New York's loss costs largely on par with those of other states. In fact, Connecticut slightly exceeds New York. This is very notable because carpentry is the class in which one would see the least elevation exposure.
- This marked difference in this particular class for New York is extremely significant, as it strongly indicates that, except for the impact of the Scaffold Law, in other classes where elevation is prevalent our loss costs would be much more in line with comparable states.

COSTS NOT PROPORTIONAL TO INJURIES

- The previous charts show a significantly higher loss cost rate in New York than in other states in every construction class, except for carpentry, which again typically has the least elevation of the construction classes. Why is this? Is construction work at elevation more dangerous in New York than in the other states? Is gravity stronger here? The most recent data available from the Bureau of Labor Statistics clearly say "no."



2010 BLS Data on Fatal Construction Industry Accidents



- With loss costs so substantially higher in every elevation-heavy construction class than in comparable states, we would expect to see substantially higher instances of injuries and fatalities. We do not. They are generally comparable, in some cases better and in some cases worse than states that all have dramatically lower loss costs. This substantial difference and disconnect between actual injury rates and loss costs is attributable to the presence of the Scaffold Law in New York, which invites litigation and leads to large payouts. This data also discredits arguments that the presence of the Scaffold Law leads to safer construction worksites, as we do not see substantially lower rates of injury, either. This demonstrates that the Scaffold Law simply leads to higher loss costs and as a result higher costs for construction in New York.

Source: Bureau of Labor Statistics, <http://www.bls.gov/iif/oshwc/osh/accidents/>

THE SCAFFOLD LAW: DEVASTATING THE LIABILITY INSURANCE MARKET FOR CONSTRUCTION IN NEW YORK

- The frequent and increasingly large losses resulting from the Scaffold Law have set in motion a series of costly and difficult changes in the insurance market, at best substantially increasing liability insurance costs for construction and in some cases drawing into question the very availability of suitable coverage.
- A number of major national general liability carriers currently do not write coverage for construction in New York, and others have recently either restricted their involvement in the market or exited—with Scaffold Law exposure cited as the number one reason. As one expert put it, the Scaffold Law has resulted in a “massive withdrawal of underwriters” from the construction market for insurance in New York.¹
- As the market for liability insurance for construction hardens and shrinks, some contractors are being pushed to the non-admitted lines for coverage, where exclusions on coverage over three stories of elevation or even out-right Scaffold Law exclusions are being seen. That’s akin to a car insurance policy that covers you—unless you have an accident.
- If you cannot insure a project, you can’t build that project. And, the higher your insurance costs for projects, quite simply, the less both public and private owners can build.
- These changes in the insurance market have a particularly dire impact on MWBE contractors, who, as typically smaller firms, generally have less ability to absorb rapidly increasing costs or secure coverage in an increasingly difficult liability insurance market.
- The following letter from Willis and Article from *AM Best* explain in more detail many of the adverse changes being seen in the insurance market for construction as a result of the Scaffold Law.



¹ Meg Green, “Mass Withdrawal of Construction Liability Writers in NY Traced Back to Scaffold Law,” *AM Best*, 3 October 2012.

