PENTARISK PERSPECTIVES

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Construction Litigation - Best Practices to Win

At PentaRisk, we have represented Prime and General Contractors that have been defendants in civil litigation arising from serious construction site accidents. Many of these accidents were caused by negligent subcontractors. From our past experience, we have developed advanced risk management and defense tender strategies to ensure that the third party claim and your legal expenses are transferred to the appropriate subcontractors so your company's balance sheet is not compromised. This update will focus on items **4-6**. Check our website for more information on our best practices to transfer risk at project inception.

Our best practices:

1. Provide updated subcontractor insurance and indemnity requirements (at bid time).
2. Audit subcontractor certificates of insurance for compliance (during the contract).
3. Train project managers and estimators about subcontractor risk (annually).
4. **Provide guidance and advice during the first 10 days of a claim to ensure all the facts and defense strategies have been identified. Develop litigation and best practices strategy.**
5. **Provide advice and advocacy during the litigation process.**
6. **Consult a network of attorneys for insurance coverage and trial work. Our recommendations are based on 30 years of litigation experience and over 150 trials.**

We view your civil litigation strategy as a three level chess game. After handling over 1000 litigated matters to conclusion, we have the insight and knowledge to help achieve the best result for you.

Most lawsuits take several months or a couple of years to mature to a settlement or a jury trial. If your company has no negligence, it is frustrating, but you still must actively build a defense. You, as the general contractor, must protect your assets and avoid a judgment. As most general contractors know, a large judgment entered against them makes it difficult to bid on future projects, even when the judgment is being paid by their insurance company. And what about your insurance rates? "Everything was good until we were served with this lawsuit" is a common theme with general contractors that were not prepared to defend themselves.

Many attorneys view civil litigation as a straight line event. There is a plaintiff, a defendant, layers of discovery, depositions, maybe a failed motion for summary judgment, followed by a settlement or a trial. Your defense lawyer's primary goal is to protect you from an adverse judgment ... but is all legal advice the same? What is really required to fully protect your interests?

We view your defense as a three level chess game. Each independent board level must be played effectively to contain or eliminate your costs.

The Three Level Chess Game

- **Level 1: Comparative Negligence**
- **Level 2: Additional Insured Rights**
- **Level 3: Express Indemnity**

How to Play the Three Levels for the Best Outcome

Comparative Negligence:

The first level of the game: You must be honest about your company's negligence in the accident and you must make sure that all facts are shared with your defense lawyer. Many lawsuits are lost within the first ten days when a defense strategy is being formed based on the facts you present to your lawyer. Misinformation is a prime cause. A company that attempts to put a better spin on its actions (what its employees did or did not do) sets the defense lawyer on a specific course of action. Your lawyer, who accepted your positive spin on the facts, will rely on the misstatements until an unfavorable deposition is on the record or other discovery torpedoes the illusion. The point is simple: Always stick to the facts. A better defense strategy can be developed when your lawyer knows the whole truth of your actions (good and bad). When you are honest about the facts, this allows your lawyer to develop valid comparative negligence theories against your subcontractors as to their fault. The more comparative negligence that is assigned to a subcontractor's employees for their acts or omissions, the smaller your obligations. It also helps define your active and passive negligence. Passive negligence actually inures to your benefit to get additional insured coverage and express indemnity from your subcontractors.

Additional Insured Rights:

This leads to the second board level; additional insured rights. Usually these additional insured rights are specified in the written subcontract agreement. Hopefully, your company received a certificate of insurance plus all of the required policy endorsements before the accident and you had the opportunity to determine if they were all sufficient. The word "sufficient" is important because not all additional insured endorsements are equal so please be diligent with the review of these forms. If you don't have a clear understanding of what the endorsements mean, such as granting coverage for operations or completed operations, or what amount of insurance coverage a subcontract should have for a specific project, your company could be at risk. Call us, we will help you with this process.

If the certificate and endorsements from your subcontractors are in order, you must act quickly. Additional insured rights must be asserted against each potential insurer to trigger their defense and indemnity obligations to your company. If your company delays notice to any insurer, it gives the insurer a method to qualify its coverage. A common issue is an insurer will only pay for those defense fees and costs from the date of your first notice to that insurer.

Once you have asserted your additional insured rights, you may get a subcontractor's general liability insurer to voluntarily defend your company with the insurer's choice of counsel. If the insurer agrees to defend you under a reservation of rights (ROR) letter this is a huge warning. The ROR is a conditional defense and the subcontractor's insurer may want future reimbursement from your company for defense fees and costs incurred for claims that are not potentially covered. This is a common coverage conflict and it could grant you independent counsel under California Civil Code Section 2860; your company can hire an independent lawyer for the litigation but the subcontractor's insurer must pay for your lawyer's fees and costs. This allows your lawyer to direct discovery to avoid coverage issues with the insurer.

Keep in mind that a reservation of rights does not guarantee that the insurer will ultimately pay the plaintiff but it does get you a defense, a big ticket item.

If the insurer denies your company's tender for a defense, don't give up the pursuit of your additional insured rights. As new facts are developed against subcontractors (Level 1 of the game), you should present those facts to the general liability insurers for reconsideration of your coverage rights. Your ultimate goal is to transfer all of your potential exposure to a subcontractor's general liability insurer rather than have the claim recorded against your own insurance.

Express Indemnity:

Express (written) indemnity is the third board level and potentially the most powerful. Your company's express indemnity rights against your subcontractor are separate but also related to your additional insured rights (Level 2 of the game). Generally, express indemnity is your best means to recover from a negligent subcontractor what you have paid to defend and settle a claim. If written correctly in your subcontract, you can immediately demand a defense funded by your subcontractor (duty to defend).

In January 2013, indemnity rights associated to California construction contracts were limited by Senate Bill 474, now codified as California Civil Code Section 2782.05. For general contractors, construction contracts will now only provide for defense and indemnity outside of your company's active negligence. This is a major change for general contractors, but these rights still have tremendous power to transfer risk. If your company has not updated your subcontracts to comply with the new law, contact us for risk management advice.

Assuming that you have an enforceable subcontract allowing indemnity (be sure the contract is signed), a formal letter from your company tendering the defense of the lawsuit to your subcontractor must be done to anchor in the subcontractor's defense and indemnity obligations. Of course, your demand for a defense may be rejected by your subcontractor. Nonetheless, if rejected by the subcontractor, do not abandon your pursuit. Discuss with your defense lawyer the value of an express indemnity cross-complaint against your subcontractor to keep them in the litigation based on breach of contract.

Also remember that your contractual rights can also influence your subcontractor's layers of insurance coverage (primary and umbrella) to your benefit. An express indemnity cross-complaint to keep your subcontractor in the litigation puts pressure on their primary insurer. When that insurer is paying for the subcontractor's defense (along with your defense), that same insurer may become more flexible in providing settlement funds on your behalf. This strategy is a proven method to settle cases.

PentaRisk Review, Advice and Process:

Comparative Negligence: Your defense lawyer should always be developing a comparative negligence case against the plaintiff and your subcontractors. Two potential benefits:

1. The plaintiff may be partially or completely at fault and this reduces your liability.

2. As a subcontractor's negligence becomes a substantial factor, this increases your ability to tender to the subcontractor's insurer or use your express indemnity rights.

Additional Insured Rights: Always be sure to tender your additional insured defense quickly because delays will be used against you by insurers. If your company's defense tender to a subcontractor's insurer is accepted, bravo, you have eliminated the legal expense.

We, at PentaRisk, stay informed on the progress of the litigation because you need to make sure that the subcontractor's insurer funds all settlements or judgments without your company's financial participation. Accordingly, be concerned about letters from insurance companies reserving their coverage rights since insurers will use those letters to limit their indemnity obligations to you and the plaintiff.

Express Indemnity: Never waive your company's express indemnity rights in favor of additional insured coverage. You should not relax this position until full indemnification is offered to your company by the subcontractor's insurers (primary and umbrella coverage). If indemnification is not offered, consider a cross-complaint for express indemnity against your subcontractor. An express indemnity cross-complaint allows your company to obtain the maximum contractual benefits available from your subcontractor.

Conclusion:

Each chess move made on one level can potentially influence all three board levels, so your defense strategy needs to contemplate comparative negligence, additional insured rights and express indemnity to effectively contain your exposure.

There are many ways to play the game, so this overview is not all inclusive of horizontal and vertical exhaustion, equitable contribution, motions for summary judgment or how to limit workers' compensation liens. You are not alone, if you have a current pending case, please call our claims experts and we will help you through the process.

Contact Greg Roush, Vice President, Claims at 408.418.2736, groush@pentarisk.com, or your PentaRisk broker or account executive for more information on *Construction Litigation - Best Practices to Win.* Visit our website at http://pentarisk.com/.

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