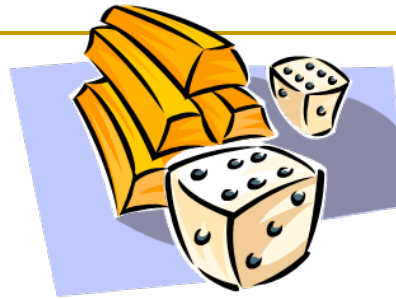# Indemnity & Claims Management Workshop

Speakers: Bruce Wick, VP of Risk Management,
David Tran, Esq.

Contracting is a lot like dating. When you are at the contracting stage…

Like dating…you have to work at it to keep the relationship from turning into something regretful.

Perfect Storm Conditions

- Drought work conditions
- Developer demanding more contribution
- Developer retention of your money
- Hard to find insurance to cover your work
- Increased insurance premiums
- Huge deductible/SIR requirements
- Tidal wave of exclusions

How Did We Get Here?

Keeping Your Relationships Straight

The Big Picture:
Keeping your Focus on:

- Duty to Defense:
    - Investigation costs
    - Adjusting costs
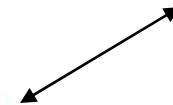   - Court fees
    - Attorney fees
- Duty to Indemnify:
    - Payment on behalf of the subcontractor
    - Payment on behalf of the builder

Subcontract Agreement with Builder

- Broad form indemnity provision

- Contractual duty to defend

- Additional Insured Endorsement

Obligation Of The Parties – Your Risk

- "How broad is the indemnification provision in the subcontract?

- Does it require the subcontractor to indemnify under all conditions except when the general contractor is solely negligent?

Indemnity Defined

- "the obligation resting on one party to make good a loss or damage another party has incurred" *Rossmoor Sanitation, Inc. v. Pylon Inc. (1975) 13 Cal.3d 622, 628*

Indemnity Provisions Cont.

- Type I - Subcontractor liable for its own acts and Developer Acts

  - Subcontractor must indemnify Developer for both active and passive negligence.

<u>Continental Heller v. Amtech</u> (1997) Indemnification without Fault

- Contract language: "subcontractor will indemnify the GC for any loss which arises out of or in any way connected with the performance of the work under this subcontract."

- Court ruling: subcontractor agreed to indemnify the GC for any claims that arose out of the sub's work (even in the absence of sub's negligence)

Heppler v. J.M. Peters Co. (1999)

- Fault on the part of the subcontractor (indemnitor) was required before indemnifying the GC (indemnitee) where the language of the subcontract indicated that the subcontractor was required to defend GC for "*damage to property arising out of or in connection with subcontractor's performance of work*.."

- Indemnity provisions are to be strictly construed against the indemnitee.

- If parties intended to include an indemnity provision that would apply regardless of subcontractor's negligence, they would use specific language.

AB 758 /Civil Code 2782(2005) End of Type I Indemnity

- effective January 2006 it ends Type I indemnity in residential construction contracts.

- It makes unenforceable attempts by builder to pass off to one subcontractor the indemnification of the negligence of the builder and *other* subcontractors.

- Sub can only be required to indemnify builder for defects relating to sub's scope of work under the contract <u>but</u> not for any negligence of the builder.

Insurance Agreement with Insurer

- Occurrence based v. claims based

- Deductible v. SIR

- Exclusions

- Limitations

Occurrence v. Claims Made Policy

- Claims Made Policy: Insurance that pays claims presented to the insurer during the term of the policy or within a specific term after its expiration. It limits liability insurers' exposure to unknown future liabilities.

- Occurrence Policy: Insurance that pays claims arising out of incidents that occur during the policy term, even if they are filed many years later.

Deductible v. SIR

- **Deductible:**
  - Either a specified dollar amount, a percentage of the claim amount paid by the contractor policy holder.

- **SIR: self-insured retention:**
  - The concept of assuming all or a part of the financial risk oneself, instead of paying an insurance company to take it on.

SIR

- In an SIR, the insured performs *all* the functions normally undertaken by an insurance company for losses within the SIR.

- This includes investigation costs, adjusting costs, attorney fees, court fees, litigating case, etc.

- In essence, SIR means that it is the [YOU] insurance company that is paying for the first amount of the case.

Crawford v. Weathershield (2006)

- Question: does subcontractor whose work was found not to be negligent owe a duty to _defend_ the builder?

- Court ruling: YES! The sub does not have to be found negligent before owing a duty to the builder.

- Appeal to Cal. Supreme Court.
  - Arguments heard on 5/7/08.
  - A confirmation could mean that every contractor is responsible to pay builder's attorney fees whether or not they are negligent.

<u>Montrose v. Admiral Insurance</u> (1995)

- Question: what insurance policy to apply for injuries that extend from year to year?

- Court Ruling: adoption of the "continuous injury" trigger where bodily injury and property damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies that cover it.

<u>Armstrong v. Aetna Casualty</u> (1996)

- Each insurer must respond in full subject to the policy's limits, exclusions, applicable other insurance clauses, excess clauses, and subject to right of equitable contribution.

- Policyholder does not have to share pro-rata indemnification and defense costs because of any uninsured or self-insured periods of time.

Armstrong v. Aetna Casualty (1996)

- After <u>Montrose</u> opened the door to continuous trigger of coverage for progressive claims.

- Each policy (carrier) has an independent obligation to respond "in full" up to policy limits.

- Insured has flexibility to pick which policy to respond.

- Carriers respond in full but can seek recovery and contribution from other carriers.

- SIR and self insured don't have to participate.

Net Result of Using Armstrong

- Control out of pocket expenses.

- Make the most of the insurance you already have.

- Limit loss run entries on insurance history.

- Keep insurance defense costs down.

- Keep insurance premiums from skyrocketing based on claims made.

- Retain more of your profit than your competitors

Lawsuit Check List
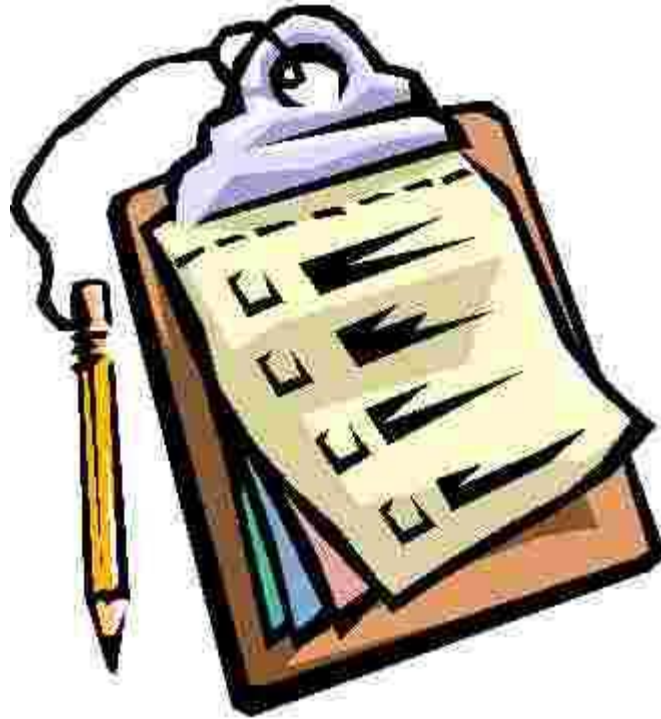
Paper Wars – Are You Ready???

Pre-Construction

- Negotiate Clear Scope of Work With Developer

- Confirm Insurance Coverage

- Negotiate Clear Contracts With Your Subcontractors
- Obtain Copies of Your Subcontractor's Insurance
    - Liability
    - Additional Insured Endorsement

Lot	$$$$	Sub	Sub-Sub
1	$100	X	X
2	$100	X	X
3	$100	X	X
4	$100	X	
5	$100		
	$500	$400 ($300) ---------- $100	$300

During Construction

- ❑ Keep Accurate Documents
  - ■ Daily Logs
  - ■ Change Orders
  - ■ Photographs
  - ■ Invite Independent 3rd Parties To Review The Work

Post Construction

- ❑ Organized Filing System For Keeping Documents

- ❑ Document Warranty Work

- ❑ Have Customer Services "Armed and Ready"

Ready

Set

Go!!!!

Cast of Characters

- Broker
- Plaintiff's Counsel
- Developer's Counsel
- Insurance Adjusters
- Insurance Assigned Counsel
- Personal Counsel

Broker's Interests

- Analyze your business operations and exposures that are specific to construction
- Educate your business on the products available
- Provide you with appropriate coverage.
  - Advise on exclusions
  - Endorsements
  - SIRs/Deductibles

Plaintiff's Counsel Interests

- Maximize recovery for plaintiffs
- Raise realistic and unrealistic issues
- Prosper 'gray area' disputes

Developer's Counsel Interests

- Preservation of developer's insurance
- Manage litigation against subcontractors
- Strong arm tactics against subcontractors
- Package settlement for plaintiffs

Insurance Adjuster's Interests

- Preservation of Insurance Money
- Not Trigger Policy
- Share Expenses Amongst Other Carries

Insurance Counsel's Interests

- Whose interests are they serving?

- Who is paying their bills?

- Repeating the same dance?

- Are they keeping you in the loop?

- Why is there 3 separate law firms defending 1 subcontractor?

Personal Counsel's Interests

- Has only 1 client & loyal to only 1 client
- Fights for insurance coverage
- Keeps insurance policies intact
- 'Manages' insurance assigned counsel
- Preserves assets of client