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Effective Strategies for Resolving Catastrophic Construction Site Injury Claims

Introduction

Catastrophic injuries on construction sites raise the same contractual defense, indemnity, and insurance issues as typical construction defect disputes with the addition of priority of coverage issues. Understanding the overlap can assist claims professionals and defense counsel in efficiently resolving these claims.

This panel discussion will present a hypothetical job site injury on a commercial project in California. The panelists will discuss issues relating to workers compensation liens and waiver of subrogation clauses, tendering the claim under indemnity obligations in the construction contract, tendering to multiple levels of insurers and the use of joint defense agreements.

Hypothetical

In our hypothetical, a worker for a skylight subcontractor is cutting a hole in the roof. The general contractor's foreman instructs the worker to stop his cutting because he is dropping debris onto workers below. The worker is directed to secure the hole. The skylight worker covers the hole but does not secure the hole. Later, a scaffolding company employee is walking the roof without the mandatory safety equipment. The scaffolding employee falls through the hole suffering massive injuries.

Impact of Workers Compensation Claims

Under California law, an employee injured on the job is barred from filing a suit directly against its employer. Direct claims are handled through the workers compensation system. An injured worker is not prohibited, however, from filing a civil action against the general contractor, or any other responsible subcontractor on the job. Once the worker sues the general contractor, the general contractor tenders its defense and files a cross-complaint against the injured worker's company. An analysis of the credits and offsets relating to the workers compensation benefits paid to the worker is performed. The panel will discuss these issues in the context of the *Aluma System Concrete Construction v. Nibbi Bros., Inc.*

An underlying workers compensation case results in the filing of workers compensation liens. An understanding on how to identify and resolve these liens is required for any settlement. The effect of waiver of subrogation claims clause contained within the subcontracts may limit a participating carriers rights to seek reimbursement of its defense and indemnity costs from potentially responsible subcontractors.

Contractual Indemnity Issues

When jobsite injuries occur, they normally involve the overlapping work of multiple subcontractors, as well as implicate the supervisory role of the general contractor and owner. In California, most subcontracts contain indemnity provisions designed to shift the risk of an accident or construction defect claim from the owner and general contractor to the subcontractor who has the most control over its work.

The response to the general contractor's tender under the parties' contractual indemnity agreements depends on the language of the contract and the application of Civil Code Section 2782.05. A subcontractor can agree to defend the claim with counsel of its choice or agree to contribute to the general contractor's defense. Conflict of interest issues may arise if the subcontractor chooses to defend the claim with its own counsel. In this regard, can a general contractor contractually prohibit a subcontractor from selecting the subcontractor's attorney to defend the general contractor, or is such a provision void as against public policy under Section 2782.05? Further, the failure of a

subcontractor to timely respond to a tender by the general contractor can increase a subcontractor's exposure to paying more than its fair share in defense fees. The panel will discuss Crawford v Weather Shield, UDC-Universal v. CH2M, Valley Crest v. Mission Pools, and Oltmans Const. v. Bayside Interior.

Insurance Coverage Issues

Another layer of risk shifting is accomplished by requiring the subcontractors to name the general contractor as an additional insured on their general liability policies. An analysis is required of the coverage afforded by the additional insured endorsement and a comparison of the additional insured endorsement versus the contractual insurance requirements. The language of the additional insured endorsements, whether it is "arising out of" or "caused in whole or in part" of a subcontractor's work, can influence the coverage provided. The panel will discuss coverage limitations of vicarious liability caused by a subcontractors' operations and if that excludes coverage for the general contractor's negligence.

In addition, the impact of the primary non-contributory language must be analyzed. Questions regarding the sufficiency of the primary limits or the order of exhaustion between the carriers for different parties and if those policies are primary or excess also must be addressed. Further the impact of Insurance Code section 11580.04 statutory limitations will be reviewed.

Impact of Passive vs. Active Negligence

In most workplace accident cases, the facts surrounding the accident and the cause of the injury are known by the parties by the time litigation is filed. CAL OSHA reports, workplace accident reports and employee interviews provide the basic facts of how an accident occurred and which trades work is implicated by the accident. A careful analysis of the impact of passive versus active negligence also is required. Facts that implicate the willful misconduct or sole negligence of an indemnified party may affect the indemnity and defense obligations of the subcontractors and impact the insurance coverage of various parties.

Joint Defense Agreements

What are the advantages of co-defendants entering into a joint defense agreement? Will the agreement be limited to allowing co-defendants to share privileged information without losing privilege protections? Can the parties rely

on the "common interest privilege" to keep documents and defense experts confidential if they are shared with co-defendants, or is a more formal agreement required? Will defendants be able to agree on a joint defense agreement that includes an allocation of defense and indemnity obligations or provides the ongoing funding of the litigation through multiple levels of insurers? The panel will discuss the pros and cons of using a joint defense agreement in these types of cases.

In defending catastrophic injury claims, the co-defendants must analyze all these issues prior to meaningful settlement discussions. Understanding how these different layers of risk transfer interact is key to planning any joint defense agreement and creating a strategic litigation and settlement action plan.