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Avoiding the "Not-It" Syndrome: Keys to Risk Transfer Across Jurisdictions

I. BACKGROUND

Throughout my career in practicing insurance defense litigation primarily representing developer, general contractors and homebuilders in construction defect and construction accident matters, the most critical key to my success is the ability to identify and transfer risk to the true culpable parties. This is true for obtaining both a complete defense and indemnification for clients and their respective insurance carriers. Traditionally in construction matters, the developer/contractor is hired by an owner to construct the project through the retention and use of qualified, skilled subcontractors for each trade and does not self-perform any of the work. These subcontractors enter into contractual agreements with the developer that include express provisions that require the subcontractor to defend, indemnify and hold developer harmless in the event that claims, alleged defects, issues or eventual litigation arises based upon their work at the construction project. When the owner of the property initiates litigation or a claim for construction damages against the developer, the developer uses these tools built into the subcontract agreement and supported by caselaw and statute to transfer the risk to the implicated subcontractor responsible for the alleged damages.

II. PRACTICAL TIPS

The goal is to tender early, follow-up often and leave no stone unturned in your efforts to obtain coverage to your client. "Put a bow at the end of every tender" and make sure that you receive a final coverage opinion (acceptance or valid declination) from every single carrier and subcontractor that you are pursuing. Keep an ongoing accurate tender matrix and update constantly when new information (discovery responses) or new coverage requests or opinions are presented. Create an insurance chart from prior actions for your clients to use for future cases. Challenge all improper coverage denials and if necessary, get coverage counsel involved. And most importantly, be diligent but polite to ensure full compliance from the insurance carriers – phone calls are a great resource.

III. LAYERS OF COVERAGE - TENDERS

It is important to maximize every layer of coverage for the developer. Start with the primary insurance coverage for your client and make sure that all known primary carriers have been placed on notice and provide a final coverage opinion. Then critically review the subcontract agreement, insurance documents and job file documents and create a matrix of all subcontractors and their insurance carriers – and tender to all of them. Once you obtain a single additional insured acceptance, keep pressing the others until you have exhausted all potential defense and additional insured participants by receiving final coverage opinions. Finally, it is imperative to place all excess carriers on notice should the claim potentially exceed primary policy limits. If you are successful in these tender efforts, the developer may be in a position to have the entirety of the defense and indemnity covered by the implicated subcontractors and their carriers.

IV. RISK TRANSFER METHODS

There are three basic methods of risk transfer that assist the developer in obtaining maximum recoveries from the subcontractors and their carriers – (1) indemnification; (2) contractual defense; and (3) additional insured coverage. As discussed above, identifying the potentially implicated trades and reviewing their subcontract language is paramount. Then commence a comprehensive tender letter campaign against all subcontractors and their carriers to place them on notice. Additionally, prepare a proper cross-complaint or Third-Party Complaint/Petition against the subcontractors formally bringing them into the action.

(A) INDEMNIFICATION

For indemnification, each state operates differently, but the general position is to raise the appropriate settlement monies from the trade partners responsible for creating the alleged damage to the owner. The subcontract agreement typically has strong indemnity language that require the subcontractor to indemnify the developer for everything except their own negligence and self-performed work. It may even be necessary to file a Declaratory Relief Action on contractual indemnity against a recalcitrant subcontractor to provide a judicial ruling that the subcontractor owes indemnification to the developer. In the end, a successful resolution of the owner's claims includes raising as close to 100% of the settlement funds from the implicated subcontractors.

(B) DUTY TO DEFEND

The duty to defend in almost all states arises from the date of tender. Therefore, it is critical to tender at the earliest possible opportunity to lock in the date. The following is a quick reference by State of the duty to defend obligations:

	CALIFORNIA	**TEXAS**	**FLORIDA**
The Duty to Defend Arises at Tender	The ***duty to defend arises immediately upon the proper tender of defense***	In Texas, the insured only has the burden of proof to show that ***a***	The duty to defend is ***triggered upon tender***. *EmbroidMe.com, Inc. v.*

	(before the litigation has determined whether indemnity is actually owed). *Crawford v. Weather Shield Mfg., Inc*. (2008) 44 Cal.4th 541	***claim is potentially covered***. *Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc*., 939 S.W.2d 139, 141 (Tex. 1997); H*eyden Newport Chem. Corp. v. S. Gen. Ins. Co*., 387 S.W.2d 22, 26 (Tex. 1965).	*Travelers Property Casualty Co. of America*, 845 F.3d 1099 (11th Cir. 2017)
The Duty to Defend is Broad	The duty to defend is broader than the duty to indemnify and applies to claims that are not only actually covered, but ***even those claims that are merely potentially covered***. *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 59.	An insurer can refuse to provide a defense ***only*** when the facts as alleged fall outside of the coverage grant or when an exclusion applies that ***negates any potential for coverage***. *Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc*., 939 S.W.2d 139, 141 (Tex. 1997); H*eyden Newport Chem. Corp. v. S. Gen. Ins. Co*., 387 S.W.2d 22, 26 (Tex. 1965).	Carriers must provide a defense to their insured ***even if the facts alleged are untrue or the legal theories alleged are unsound*** because, in determining if there is a duty to defend, only the allegations of the complaint factor into the analysis. *Grissom v. Commercial Union Ins. Co*., 610 So. 2d 1299 (Fla. 1st DCA 1992).
Nearly Impossible to Extinguish the Duty to Defend	Insurers must be confident that they can prove that there is ***no potential for coverage*** in order to decline a tender of defense. *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 59.	An insurer can refuse to provide a defense ***only*** when the facts as alleged fall outside of the coverage grant or when an exclusion applies that ***negates any potential for coverage***. *Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc*., 939 S.W.2d 139, 141 (Tex. 1997); H*eyden Newport Chem. Corp. v. S. Gen. Ins. Co*., 387 S.W.2d 22, 26 (Tex. 1965).	The insurer's duty to defend the insured, once invoked, continues throughout the case until the claims giving rise to coverage are eliminated from the suit. *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co*., 470 So. 2d 810 (Fla. 1st DCA 1985).

Texas and Florida are 4-corner states and require that all of the defect allegations must be expressly spelled out in the Plaintiff's Complaint/Petition without looking to extrinsic evidence such as a defect list or expert report. To assert potential coverage in your tender, Texas requires that the four corners of the Petition and the insuring agreement (8 corners) are the only two documents that an insurance carrier may examine. Sometimes it is important to educate your Plaintiff to properly plead with specificity all construction deficiencies against all potentially implicated subcontractors' work to ensure full coverage to the developer. California allows extrinsic evidence to supplement the pleadings to afford coverage. Motions for Summary Judgment (*Crawford* - CA) and Dec Relief Actions (TX & FL) are also great strategies to obtain defense coverage.

(C) ADDITIONAL INSURED COVERAGE

Finally, a defense can be provided to the developer through additional insured coverage from the subcontractor's own general liability policy. The developer becomes an "additional insured" with the benefits and coverage similarly afforded to the "named insured" subcontractor. Most developers require subcontractors to provide additional insured coverage (CG 2010 11/85 or equivalent) to the developer as part of their contractual obligations prior to performing work on the project. Make sure to review the type of additional insured endorsement, whether the coverage is for ongoing or completed operations, and any exclusions of coverage. In California, additional insured coverage is typically provided if the actual work was performed during the policy period and damages result from that work.

V. IN SUMMARY

Once these risk transfer tools are employed, the developer will be able to defend all claims brought by the owners through contributions from the implicated subcontractors and their insurance carriers. The developer will also be able to pass along all defect allegations onto those trades responsible through indemnification. A final take-away is to be thorough, transparent, diligent, and efficient. A good file is a closed file according to most claims professionals, but a great file is one where others bear the risk.