

THE 4 QUARTERS OF RISK TRANSFER



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1st Quarter

Know the Players,
Know the Rules

2nd Quarter

Defense Counsel
in Lineup

3rd Quarter

Call the Right
Plays

4th Quarter

Finish Strong at
Trial

Get your plan of attack together early, both offense and defense.

Offensive Strategies: How to Maximize Participation

- Maintain a “living” insurance matrix for your insureds so it’s easy to issue tenders.
- Know your insured’s policy, insured’s contract, applicable law, and who you’re going to tender to.
- Issue tenders early and often when the facts change or if you’re not getting a response.
 - Send by Certified Mail or another method with tracking so you can verify date of service.

1st Quarter – Know the Players, Know the Rules
Issue Initial Tender(s)

A Tender Should At Least Include:

1. Name of the insured,
2. Policy number,
3. Policy period,
4. Claim number (if known),
5. A clear indication the tender is a demand for defense and indemnity,
6. Complaint, 558 Notice, or other operative documents asserting claims against the insured,
7. Contract for the insured that includes defense, indemnity, hold harmless and/or additional insured obligations to the insured, and
8. If possible, the Certificate of Insurance(s) and/or Insurance Policy(ies) for the insured.

**1st Quarter – Know the Players, Know the Rules
Must-Have Information for a Tender**

1. If this information is not clear from the Complaint, 558 Notice, or other documents, consider including more factual information about:
 - a. The project,
 - b. Claims asserted against the insured,
 - c. The insured's scope of work,
 - d. When the insured's work was performed, and
 - e. Payment records as proof of the scope and timing of work.
2. Procedural status of the claim – is it pre-suit, in litigation, set for trial, or are there any other critical deadlines?
3. Discuss any other crucial contractual provisions, such as contractual indemnity, defense, and/or additional insured obligations.

1st Quarter – Know the Players, Know the Rules
Additional Information to Consider Including in a Tender

Defensive Strategies:

How to defend risk transfer efforts from another carrier

- Read the contract
 - What was your insured required to have as far as insurance?
 - Is there a valid additional insured provision?
- Read the policy including endorsements and exclusions
 - Is there a completed operations exclusion?
 - Wrap policy exclusion?
 - Does the policy provide additional insured status to the party seeking defense and indemnity?
- Does the insured have any other policies at play?

**1st Quarter – Know the Players, Know the Rules –
Before Picking Up the Defense**

- Duty to Defend versus Duty to Indemnify
- Invite Everyone to the Party
 - Horizontal Risk Transfer – Right to Contribution from Insured's Other Carriers
 - Vertical Risk Transfer –Downstream Risk Transfer
- Statutory Insurance Requests



**1st Quarter – Refresher on Florida Law and Concepts
Relating to Risk Transfer**

- An insurer's duty to defend is separate and distinct from its duty to indemnify.
- The duty to defend is analyzed under the “Eight Corners Rule” which is a comparison of the four corners of the complaint with the four corners of the insurance policy.
- If another carrier is being difficult, such as continuously asking for additional records to “complete their evaluation,” point out that they have all necessary documents for their evaluation – the policy and the complaint.

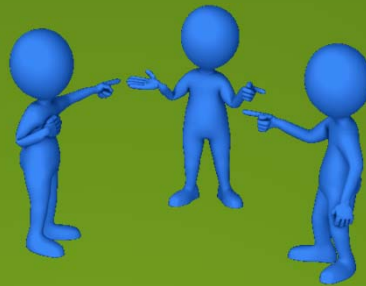


Duty to Defend versus Duty to Indemnify

- **Engage All of Your Insured's Carriers Early**
 - Issue formal written tenders with tracking information so there is no dispute about notice in the future.
- **Take Advantage of New Florida Law**
 - For any claim, suit, or other action initiated on or after January 1, 2020, Florida Statutes § 624.1055 gives insurance companies a right of contribution for defense costs among liability insurers who owe a duty to defend.
 - Under this new statute, contribution may not be sought for defense costs incurred before the liability insurer's receipt of the notice of claim, suit, or other action.
 - This is why tendering early is critical.
- **Consider Including Florida Statutes § 624.1055 in Your Tenders to Other Carriers**

Horizontal Risk Transfer – Right of Contribution from Insured's Other Carriers

- What about claims, suits, or other actions initiated before January 1, 2020?
 - The presence of multiple insurers has never excused any single insurer from fully defending the insured.
 - Even though Florida law has not always allowed contribution “between insurers for expenses incurred in defense of a mutual insured, that does not mean that Florida law permitted an insurer to shirk its contractual defense obligations simply because another insurer had already recognized its duty to defend.” *KB Home Jacksonville LLC v. Liberty Mut. Fire Ins. Co.*, 2019 WL 4228602 (M.D. Fla. Sept. 5, 2019).



Horizontal Risk Transfer – Right of Contribution from Insured’s Other Carriers

Evaluate All Contracts for Potential Risk Transfer and Issue Tenders to Other Carriers Early

- Is the insured an Additional Insured under the subcontractor's policy or another insurance policy?
- Are there contractual provisions requiring another company to defend and indemnify the insured?
- An insurer's obligation to defend an additional insured is equal to the obligation to defend a named insured.
- If you receive a tender remember:
 - A purported additional insured cannot trigger additional insured coverage by alleging facts beyond those facts set forth in the underlying or original complaint against the purported additional insured.
 - Conclusory buzzwords are generally insufficient to trigger a defense obligation.

Vertical Risk Transfer – Downstream Risk Transfer

Florida Statutes § 627.4137 Request for Insurance Information

- A claimant will often request insurance information including: (1) the name of the insurer, (2) the name of each insured, (3) the limits of the liability coverage, (4) a statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement, and (5) a copy of the policy.
- Before disclosing, evaluate whether you are required to disclose insurance information.
 - If the policy was not issued for delivery in Florida do you really need to produce?
- You can also use this as a tool to seek insurance information about others involved in a project.

Statutory Insurance Requests

- Retain defense counsel who is experienced in risk transfer and can explain the benefits to the insured
- Work together with defense counsel to continue issuing supplemental tenders
 - Issue supplemental tenders if there are changes in the pleadings, expert opinions, or damages
 - Always issue supplemental tenders before mediation and upon receipt of a settlement demand
- Strike early with strong affirmative defenses including allocation of liability to specifically named *Fabre* defendants



**2nd Quarter – Defense Counsel in Lineup
Update, Supplement, and Renew Tender(s)**

Florida Statutes § 725.06 Construction Contracts; Limitation on Indemnification

- If an indemnitee is seeking indemnification for its own negligence, the contractual indemnification provision is void and unenforceable unless the provision contains a monetary limitation on the extent of indemnification that:
 - bears a reasonable commercial relationship to the contract, and
 - is part of the project specifications or bid documents, if any.
- Always include an affirmative defense as to the validity of the contractual indemnification provision and think about preparing dispositive motions early in a case to limit potential indemnification obligations.

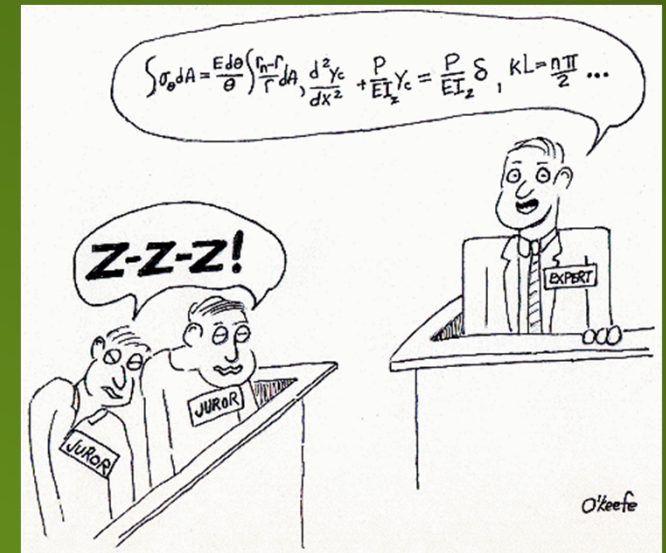
Contractual Indemnity Provision Requirements

Contractual Indemnity in Florida

- Agreement by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party.
- In design and construction setting there are restrictions on contractual indemnity:
 - Must be commercially reasonable limit of not less than \$1,000,000.00; and limit must be part of project specifications or bid documents, if any; or
 - The person/party indemnified by the contract must have given a specific consideration to the indemnitor for the indemnification that was to be provided for in the contract and in a section of the project specification or bid documents, if any.
- Without the limit, agreement to indemnify another's negligence is void and unenforceable.

Contractual Indemnity Provision Requirements

- Select the right expert who is experienced in the manner of liability (i.e. construction, premises liability, trucking, etc.), as well as insurance defense litigation.
 - Do you need multiple experts? Liability and damages?
 - For construction cases, you must evaluate whether there were design failures, owner decisions, or other factors that could be the cause of alleged issues and related damages.
- What discovery can be done to shift liability to other parties?



3rd Quarter – Call the Right Plays

Selecting Experts and Supporting Opinions

Most Common Causes of Action in Construction Defect Cases

- Breach of Contract
- Breach of Warranty
 - Express warranty
 - Warranty in Contract
 - Statutory Warranty
 - Implied warranty
 - Fitness of plans and specifications
 - Merchantability and fitness for a particular purpose
 - Habitability
- Violation of the Florida Building Code - Florida Statutes § 553.84
- Subrogation
- Common Law Indemnity

3rd Quarter – Call the Right Plays

Theories of Liability in Construction Defect Cases

Most Successful Defenses in Construction Defect Case

- Lack of a valid contract – easily defeat demands for contractual indemnity and additional insured status if a valid contract cannot be authenticated
- Statute of Repose – Florida Statutes § 95.11(3)(c) provides a 10-year period to bring claims relating to construction
- Statute of Limitations – Florida Statutes § 95.11(3)(c) provides a 4-year period to bring claims
 - The 4-year clock for latent defects is triggered when a plaintiff “knew or should have known with the exercise of due diligence”

3rd Quarter – Call the Right Plays
Defensive Strategies

Most Successful Defenses in Construction Defect Case

- Betterment – is the plaintiff asking for more than the original contract?
 - Was the original contract for a Hyundai and now they're asking for a Maserati?
- Contractual Indemnity – is it a valid provision?
- Standing – be sure to review the Declarations and/or Covenants for the project early on to see if the plaintiff actually has a basis to maintain the claims.
 - Also confirm whether there were any prior settlement agreements that may change the rights to bring a claim.

**3rd Quarter – Call the Right Plays
Defensive Strategies**

Motions for Summary Judgment

- Duty to Defend – if you are owed a defense, consider filing this early to get your subcontractor to pick up your defense
- Contractual Indemnity
- Standing – even if you cannot wholly eliminate claims, you may be able to narrow the scope to only common element claims if the plaintiff cannot prove all claims are “matters of common interest”
- Statute of Limitations
- Statute of Repose
- Common Law Indemnity – especially useful for claims by a general contractor as Florida law requires the indemnitee to be wholly without fault

3rd Quarter – Call the Right Plays
Pre-Trial Motions

Daubert Motions

- Expert testimony is admissible under the *Daubert* standard if:
 - The expert is sufficiently qualified to render opinion testimony
 - The expert's testimony is based off sufficient facts or data;
 - The expert's testimony is the product of reliable principles and methods; and
 - The expert has applied the principles and methods reliably to the facts of the case.
- A *Daubert* motion should rely heavily on analysis of the expert's report and deposition testimony.
- The court must hold an evidentiary hearing before ruling on a *Daubert* motion.
- While it is unlikely for *Daubert* motions to reach the evidentiary hearing stage in large construction defect cases, *Daubert* motions are useful tools for exposing expert weaknesses and putting pressuring on the other side to lower their settlement expectations.

3rd Quarter – Call the Right Plays
Pre-Trial Motions



Motions in Limine

- Is there certain evidence you need in or excluded to assist risk transfer?
- These rulings will determine the presentation of evidence at trial.



Jury Instructions

- Are you required to follow standard jury instructions?
- Use jury instructions from the beginning of the case to prepare your trial strategy.



Verdict Form

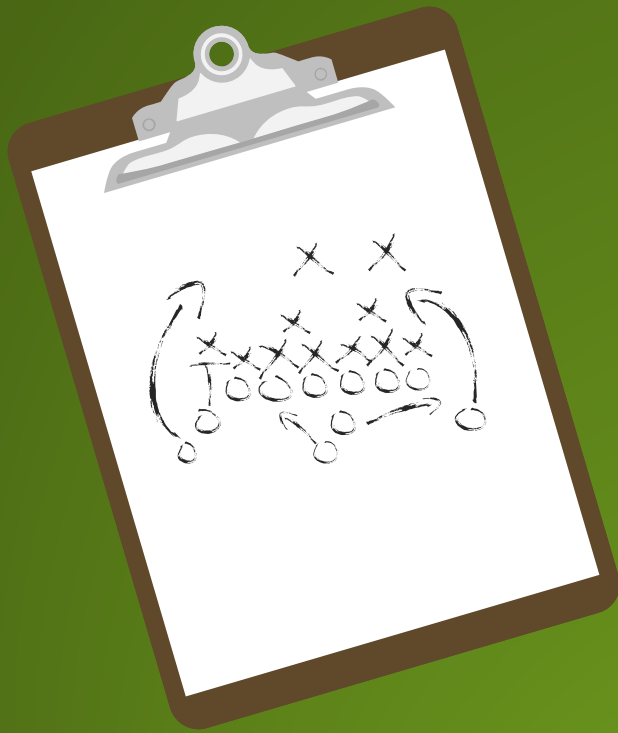
- How will you get the jury (or judge) to allocate liability to someone else?
- Don't forget to amend your affirmative defenses before trial, if necessary.

4th Quarter – Finish Strong at Trial with MILs, Jury Instructions, and Verdict Forms

- Duplicative Expert Testimony – is there a Court Order limiting the number of experts?
- Undisclosed Expert Opinions
- Extrapolation
- Unpled Claims and Damages
- Duplicative Damages and/or Loss of Use Damages
- Maintenance and/or Repair if the owner has not performed maintenance and/or repairs
- Life Safety
- Expert Opinions on Questions of Law – including the Florida Building Code
- Hearsay as Expert Opinion
- Opinions by Fact Witnesses

4th Quarter – Finish Strong at Trial
Substantive Motions *in Limine*

Florida Statutes § 624.1055 – Right of Contribution from Other Carriers



- Maintain records of all tenders to other carriers for defense.
- Reach out to other carriers before each mediation to try and engage their participation.
- Include date of the initial tender in all subsequent tenders.
- If defense counsel has been hired, suggest that other carrier share in the defense costs.

Don't forget to have your overtime strategy ready just in case.

- This June, our firm's Motion for Summary Judgment based on the 10-year Statute of Repose was granted against a large multi-family home builder in Orange County, Florida.
- The Court's ruling barred claims against the stucco subcontractor on 324 of the 390 townhomes (83%) involved in the case and held that each individual townhome Certificate of Occupancy ("CO") issued between 2005 and 2008 triggered Florida's 10-year Statute of Repose.
- The subcontractor completed its work on a unit-per-unit basis before the issuance of the COs.

Statute of Repose Case Study

Spring Isle Community Association, Inc. v. Pulte Home Corporation v. Herm Enterprises, Inc., Semocor Enterprises, Inc., et al.

- As a result, each unit required a separate analysis under the Statute of Repose, rather than treating the community as a whole for trigger purposes.
- The Court also ruled that master subcontract agreements between the builder and our subcontractor could not support a later contractual completion date for the Statute of Repose analysis, and warranty or punch list work did not constitute work rendered for “completion of the contract” which might otherwise toll the repose clock.
- This ruling can narrow the scope, or even entirely bar, untimely multi-family home claims, especially for subdivisions constructed under master subcontract agreements.

Statute of Repose Case Study

Spring Isle Community Association, Inc. v. Pulte Home Corporation v. Hermes Enterprises, Inc., Semocor Enterprises, Inc., et al.

QUESTIONS?



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