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The firm is pleased to announce that Amy L. Larson has become a partner as of January 1, 2009. Since our last newsletter, the firm has also added attorneys Charles (Chip) J. Paternoster as Of Counsel, and associates Spencer S. Adams, Emily M. Nazarov, Amy K. Arnett and Kalen J. Fredette. Chip joined the firm’s litigation department, bringing with him substantial litigation and trial experience in the areas of business and employment law. Amy joined the firm’s business department where she continues her practice in business transactions, mergers and acquisitions, and entity formation. After clerking for Federal Magistrate Judges Paul Papak and Donald Ashmanskas, Emily joined the firm’s litigation department, where she practices in the area of commercial litigation. Kalen joined the firm’s litigation department where he focuses on commercial litigation and insurance coverage. Spencer is licensed to practice law in both California and Oregon and continues his insurance coverage work for the firm’s policyholder clients. For additional information on these attorneys, please visit our website at [www.pfglaw.com](http://www.pfglaw.com).

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**Parsons Farnell & Grein, LLP** is a boutique firm specializing in helping Northwest businesses and their leaders. Our law practice concentrates on general business litigation, policyholder insurance disputes, construction litigation, business formation, business and real estate transactions, estate planning, probate, and tax planning/litigation.

## **Fundamentals of Liability Coverage for Contractors**

Michael E. Farnell & Spencer S. Adams 

### **GENERAL LIABILITY INSURANCE FOR CONTRACTORS**

General liability insurance provides insureds with protection against two types of potential loss resulting from a lawsuit. First, it covers damages awarded to a third party (the plaintiff) because of injury or damage for which the insured is legally responsible. Second, it covers the cost of defending the insured against the claims alleged in the suit. Defense costs, which include attorney fees, consultant fees, and other legal expenses, can add up quickly even when plaintiffs’ claims are meritless. The indemnity (payment of damages on the insured’s behalf) and defense (payment of legal expenses) duties constitute an insurer’s primary obligations under a general liability insurance policy.

While insurance exists for various types of loss a contractor may experience, general liability insurance only insures against the potential loss arising from claims against the insured. General liability insurance does not protect a contractor from, for example, damage to its own property, or damage to or loss of its equipment. The chart on the following page (Figure 1) summarizes some types of loss that generally are not covered by general liability insurance, and references the type of policy that would provide the necessary coverage.

### **TENDERING CLAIMS TO GENERAL LIABILITY INSURERS**

A. *Deciding Whether to Tender to The Insurer*  
When a claim is made or a suit is filed against a contractor, the contractor and its counsel need to decide whether to tender the claim

Figure 1

Nature of Liability / Damage / Loss	Appropriate Insurance Policy
Bodily injury, property damage, and cleanup costs due to pollution	Environmental Liability; Pollution Insurance
Claims against an organization arising from mistakes by directors and officers of the entity	Directors & Officers Liability Insurance
Damage to an insured's equipment or tools	Inland Marine Insurance; Contractors Equipment Floater
Loss caused by dishonest or fraudulent acts of an employee	Commercial Crime Insurance
Damage to property during the course of construction	Builder's Risk Insurance

to its liability insurers. In order to trigger coverage under a general liability policy, the insurance company must first receive notice of the claim. This process is called tendering the claim.

While a contractor may not initially know whether a particular policy provides coverage for a lawsuit, it should strongly consider tendering the claim to its insurer as soon as possible. Coverage under certain policies, the “claims made” variety (where coverage only exists if a claim is made during the policy period), can be lost entirely if the contractor tenders too late in the process. Most other insurance policies require tender or notice “as soon as possible” after the contractor receives a claim.

When considering whether to tender, contractors may need to find out if the tender may, regardless of the insurer’s ultimate response, increase the contractor’s future premiums or make it difficult for the contractor to find coverage with the same or another insurance carrier in the future. Nonrenewal of a policy can be a particular problem in the construction field where coverage for certain trades and projects has narrowed with the increase in construction defect litigation. In addition, contractors may not wish to tender to certain carriers where coverage may be needed for payment of other claims. Where possible, contractors should consult their risk managers, brokers, or attorneys to discuss the possible impact of a tender on their insurance programs. Unless, however, a contractor has made an informed decision with sound professional advice to not tender, the best advice is to tender a claim, and to tender it as soon as possible.


*B. The Mechanics of Tendering a Claim*

The initial tender can impact the handling and outcome of a claim. After locating its insurance policies (a task made unnecessarily difficult by document retention policies that do not specifically require permanent retention of all insurance policies, however old) and deciding whether to tender the claim, a contractor will need to decide: 1) Whether to make a “short form” or a “long form” tender; 2) Who should make the tender; and 3) When to make the tender.

A short form tender simply notifies the insurance company of the case, usually by attaching a copy of the complaint or other form of written demand to a short letter tendering the defense and requesting indemnity. An “additional insured” party to the insurance contract should enclose with the tender letter all certificates and endorsements

in its possession evidencing its additional insured status. A short form tender is appropriate where coverage is relatively clear or as a precursor to a long form tender.

Long form tenders usually include an analysis of the triggering events and the law, and typically have more effect when sent by experienced coverage counsel. Moreover, coverage for contractors often requires creative approaches, which risk managers and brokers may not be trained to consider. Contractors generally should not delegate to a risk manager or broker the crucial task of tendering unless a short form tender is all that the contractor intends to send. When delegating the tendering task to a risk manager or broker, contractors should follow up to ensure timely tender, to confirm tender under all potentially relevant policies, and to obtain copies of the tenders.

Ensure that your tenders are timely. Ensure that your tenders request both a defense against and indemnity for all claims asserted. Ensure that your tenders are made on behalf of all entities – and individuals – that are implicated by the claims. Finally, if you have any questions about tendering or about obtaining the benefits of your insurance coverage, see your coverage attorney. 

**Construction Defect Litigation:  
When Your Additional Insured Status Matters**

*Spencer S. Adams*



**MANY SITUATIONS ARISE** where a person or business may be entitled to receive benefits under an insurance policy it did not purchase. This situation commonly arises in the construction context. Construction contracts often require that the general contractor be added as an “additional insured” under the policy issued to the subcontractor. The general contractor is typically added as an additional insured through an endorsement to the subcontractor’s policy. The nature and extent of coverage provided depends on the endorsement to the policy. One hotly-debated issue is

whether additional insured coverage for a general contractor extends to claims filed for property damage occurring after the project has been completed.

Whether coverage exists for the additional insured post-construction may depend upon the type of additional insured endorsement issued with the policy. Three common methods of providing additional insured coverage are the “blanket” endorsement, the “long form” endorsement, and the “short form” endorsement. The “blanket” endorsement extends additional insured status to any person or organization with whom the named insured has agreed in a written contract to name as an insured under its general liability coverage. Additional insured status is typically limited to liability arising out of ongoing operations performed by the named insured or on the named insured’s behalf on the project specified in the construction contract.

The long form endorsement (I.S.O. form CG 20 09) provides that the additional insured becomes an insured “but only with respect to liability arising out of [the named insured’s work] for the additional insured or acts or omissions of the additional insured in connection with their general supervision of [the named insured’s] work.” The long form also specifically incorporates certain exclusions of the liability policy and replaces others with exclusions specific to the endorsement. One is an exclusion for bodily injury or property damage occurring after all work (other than service, maintenance or repairs) performed by or on behalf of the additional insured at the site has been completed, or that portion of the named insured’s work out of which the injury or damage arises has been put to its intended use.

The short form endorsement (I.S.O. form CG 2010) is a one-sentence endorsement that adds as additional insureds listed persons. The limitations on coverage vary by edition date. The 1985 and earlier editions limit coverage to only that “liability arising out of ‘your work’ for that insured by or for you.” The 1993, 2001 and 2004 editions add the concept of “completed operations” to the coverage limitation, providing that the listed person is only an additional insured “with respect to liability arising out of your ongoing operations performed for that insured.”

The distinction in additional insured policy language has proven critical with courts. Most agree that endorsements such as the 1985 short form do not exclude coverage for claims filed after completion of the project. While some courts find that the blanket endorsement, the long form, and the 1993 version of the short form do not provide this “completed operations” coverage, recent cases have held otherwise. For example, in *Valley Insurance Co. v. Wellington Cheswick*, a 2006 case,

the United States District Court for the Western District of Washington holds that “ongoing operations” additional insured language means only that liability must arise from ongoing operations, not that property damage must occur or that claims must be made during those ongoing operations (“While the property damage may not have occurred during those ongoing operations, the alleged liability did.”). Generally speaking, any liability in a construction project would arise from ongoing operations – when the allegedly defective work would have been performed. While insurance companies often take the initial position that coverage to an additional insured under these endorsements ends when the work is completed, arguments to the contrary are available, with significant potential benefits to the additional insured.

The extent to which a subcontractor’s insurer will provide coverage for the general contractor often affects the ultimate resolution of the construction defect case. This coverage may depend on the type of additional insured endorsement and on whether you and your attorney succeed in convincing the insurer that the additional insured coverage provided extends beyond the completion of the project. [Ω](#)

## **Fraudulent Transfers: How a Pre-Litigation “Shuffling” of Assets Can Come Back to Bite You**

*Conrad L. Zubel*



**THERE IS A NATURAL DESIRE** in each of us to want to protect our property – a desire that comes not from any man-made law, but rather, the “law of the jungle.” However, acting upon this desire can sometimes have serious consequences.

Many states, including Oregon, have enacted the Uniform Fraudulent Transfer Act (“UFTA”). The primary intent of the UFTA is to provide a remedy to creditors who have reason to believe that a debtor transferred assets or incurred an obligation “[w]ith actual intent to hinder, delay, or defraud” the creditor. The existence and broad application of the UFTA makes it incumbent upon companies and individuals to carefully consider the structure and timing of nearly every transaction.

By way of example, let’s assume Company A owes \$100,000 to Bank, has since fallen on hard times, and knows that it may have difficulty making its payments to Bank in the future. Prior to any default, Company A transfers substantial assets to Company B for less than 50% of the assets’ fair market value. Company A then defaults on its obligations to Bank, and Bank thereafter sues Company A. Bank, upon

learning of the transfer (which was prior to any lawsuit or threat of a lawsuit) may be able to obtain an order from the court transferring the property from Company B back to Company A. In certain instances, Bank could even seize the newly acquired assets of Company B to satisfy the obligations of Company A. Such a scenario could unfold even if Company B had no knowledge of Company A's intent to "shield" its assets from Bank. In addition, because courts interpret "intent" broadly, Company A could face liability even if it actually had no nefarious purpose or scheme in mind when it transferred its assets to Company B for less than a "reasonably equivalent value." Had Company B known the danger of transacting business with a company facing financial peril, it may have structured the deal differently or not done the deal at all.

Portland's own Freightliner learned first-hand how the UFTA can have a devastating impact on a seemingly routine business transaction. In 2006, a Multnomah County jury returned a verdict against Freightliner for approximately \$488 million, finding, among other things, that Freightliner had shifted assets away from a subsidiary to protect the subsidiary from a possible British court judgment. What is noteworthy about the case is that Freightliner was found to have violated the UFTA even though no judgment or obligation (on the part of the subsidiary) had yet materialized. In addition, because

the jury found that Freightliner's actions were intentionally fraudulent, they awarded \$350 million dollars in punitive damages, including \$280 million against Freightliner's parent company, DaimlerChrysler.

While these examples involve companies and traditional commercial transactions, the UFTA applies to individuals with equal force and can have implications for non-commercial transactions as well, including transactions between spouses and other family members. In addition, the UFTA can apply to a transaction where an individual or company incurs an obligation (generally a debt) that is beyond the individual's or company's ability to satisfy. Accordingly, it pays to have at least one trained eye on the UFTA when analyzing any transaction where one of the parties may be experiencing financial trouble. [Ω](#)

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