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CURRENT CD LITIGATION/CLAIMS HANDLING ISSUES:

Notes from attendance at the 12-1-16 Defense Counsel Seminar.

TITLE: “The Never-Ending Battle Over Defense Fees and Costs”

1. Buss reservations causing developers to aggressively pursue the subcontractors.
2. No case law regarding allocation of Crawford fees.
3. Subrogation rights in construction contracts? Subcontractors not willing to give up this right and demanding that developer not settle with other subcontractors.
4. The AI insurers who are paying defense costs demanding to be involved in settlement negotiations with other subcontractors.
5. Discussed need for interim defense cost funding arrangements.
6. Developers not utilizing SB800 as often as they used to.
7. Developers telling plaintiffs not to give issue releases because they don't want to lose their subrogation rights.
8. Developers won't allow subcontractors to defend tsugheir scope of work.
9. Developer attorneys not providing their billing.
10. Issue of assignment versus intervention.
11. During panel discussion, I suggested the “tiered” approach as an allocation method and no one on the panel other than Bjorn Green as the moderator discussed it.
12. Someone on the panel mentioned “per capita” but they did not explain what it was about.
13. They mentioned Pro Rata Approach.
14. The panel mentioned the possibility of some sort of penalty for not defending. This issue did not get discussed probably because of the mix of participants on the panel.
15. Joint and several defense obligations mentioned but not discussed.
16. One of panelists indicated he did not believe the Valley Crest decision applied since it was not CD.
17. Contractually the subcontractors are only liable for their own work. (Civil Code Section 2782 modified 2013)

This concludes the notes I took during the panel discussion. It was obvious to me there were competing interests.

Excerpts from the power point presentation:

1. Minor subcontractors are complaining that they cannot resolve cases.
2. Multiple competing claims of developers/general contractors and carriers seeking reimbursement make it difficult to generate a single demand to subcontractors or their carriers.



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3. Lack of cooperation and trust.
4. Lack of cooperation by those participating in defense. (developer & AI carriers?)
5. Equitable subrogation/contribution actions to get other subcontractors and or their carriers involved in defense.
6. Can a carrier sue a non-defending subcontractor directly? Valley Crest? Need an assignment of GC's rights?
7. GC's now arguing that the defense obligation is joint and several and each subcontractor owes 100% of their defense fees and costs.
8. One issue they discuss is the continuing need for Crawford MSA's. Obviously, an acronym but what does it mean? (Mandatory Settlement Agreement?)
9. The California Supreme Court in Footnote 12 appears to indicate that if the parties to a CD litigated case cannot agree on how to allocate the defense fees and costs they will make that determination later which will involve additional litigation. Smart? (Bottom page 9 of power point presentation)
10. One issue they mention are defense fees and costs incurred by the GC that are related to a specific trade such as expert costs. How should these fees and costs be allocated? What is equitable? Should they be included in the overall construction investigation costs and paid equally by all of the subs. If there is an excellent chance that a minor subcontractor will be dismissed after the investigation phase I believe so. The developer/GC would have to cooperate.