

PARSAC

JPA Member News



WATCH THOSE INSURANCE ENDORSEMENTS AND MINIMIZE YOUR RISK!

By Gregory L. Rippetoe, Esq.

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Everyone reading this article should realize that lawsuits against public entities result in untold expenses. In addition to the expense of hiring outside counsel, significant expenses are incurred for experts and the "in-house" costs, such as lost production time for employees to assist with the case.

The public entity can significantly reduce these expenses by proactively working to ensure that their contracts contain risk shifting indemnity and hold harmless language, and by confirming that the insurance requirements of the contracts are met. The importance of proper monitoring of the insurance requirements is not limited to large contracts.

We have obtained coverage from third party insurance carriers on multi-million dollar claims based on contract insurance requirements for services such as graffiti removal, tree trimming, lease agreements, or public facility membership agreements. Many times, the entirety of the defense and indemnity costs were shifted by our public entity clients to the third party insurance carrier.

The contracts used by public entities are typically prepared or reviewed by risk managers or attorneys and contain appropriate contractual indemnity and hold harmless language. Well-drafted contracts require the third party to maintain appropriate general liability insurance. These contracts also require that the public entity be named as an "additional insured" on all insurance policies to support the hold harmless and indemnity provisions.

Without appropriate insurance requirements in place, the risks from these contracted activities are oftentimes not shifted to the third party or their insurance carrier until the conclusion of a lawsuit. Meanwhile, the public entity is forced to incur the expense of the litigation and may be asked to absorb these expenses as a means of resolving the lawsuit. By having proper insurance requirements in place, prior to the claim arising, these expenses are shifted to the third-party insurance carrier rather than to the public entity.

This article identifies some common things to look for when monitoring the insurance requirements of your contracts and pitfalls associated with inadequate insurance documentation.

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A Quick Word . . .

Dear Members,

Businessman Peter F. Drucker said “What brought you here, won’t take you there.” A timely message as we celebrate our 20th year and embark on our next journey.

We have weathered some storms and not only survived, but thrived collaboratively as unique individuals with common vision and purpose. We emerged from a core group of people who invested in the well-being of others to an engaged and involved membership that is confident in our direction as a pool and mindful of our responsibility in the outcome of our efforts.

Join me in celebrating PARSAC’s past, present and future. Each member’s input and knowledge is the foundation on which we can build the future of our organization. There are currently six active subcommittees that work closely with the Executive Committee to further develop and improve PARSAC’s policies and programs.

My first year with PARSAC was focused on the pursuit of understanding each member and their unique needs. The second year focused on creating systems to meet those needs. As the third year begins, we are putting products in place to support your efforts. You will find many training opportunities over the next year as well as several best practices templates available for your use.

It is an honor and privilege to be a part of PARSAC and to join you in your journey for many years to come.

Best regards,

Joanne Rennie

PARSAC General Manager

Meeting

August 31, 2006

Funding. WC Subcommittee directed to explore increasing the pool’s LAWCX SIR to \$500,000. Also, General Admin. costs were reallocated to Liability, Workers’ Comp, and Property Programs at 55%, 40% and 5%, respectively. Finally, WC Settlement Authority aligned with Liability Settlement Authority; authority between \$101k - \$250k moved to the GM, with the WC Subcommittee Chairperson and an Executive Committee Officer. All items were ratified by the Board in November.

Operational Best Practices. Per End Result 2, a Sidewalk Inspection Program and Vehicle Use Policy were approved. Templates are posted on the PARSAC website under “Member Log In.” A Vehicle Accident Kit that guides employees in the event of an accident is available on request.

Claim Procedure Manual. This more user-friendly manual focuses on claims handling exclusively and has been distributed to members. All coverage-related language was incorporated into the Memorandum of Coverage.

Member Outreach. Exec. Committee members volunteered to visit members as needed to promote or discuss PARSAC. They will also serve as liaisons with members’ key management personnel to help ensure consistency during transition periods.

November 29-30, 2006

New Officers Appointed. Vice Pres. Plett has assumed presidency and appointed Catherine DiCamillo [South Lake Tahoe] as Vice President and Ronda Rivera [Citrus Heights] as Member-at- Large. Cathy Wilcox-Barnes was recognized for her dedication and service to PARSAC.

Highlights

Strategic Planning Update. Action Plan Tracking Worksheet discussed; staff was complimented on progress. Governing Docs Subcommittee directed to work with Officers to develop Member Performance Standards.

Target Equity Policy. Will align pool with industry best practices and CAJPA guidelines; implementation will provide greater financial stability, reduce likelihood of assessments, and increase flexibility. Funding Policy Resolution to be presented in May.



Governing Documents Review. Subcommittee's recommended changes to the Bylaws were approved; substantial changes include:

- Voting by Program established and related quorum language clarified;
- 1% penalty for failure to attend at least one Board meeting per year; and
- Staggered election schedule (one leadership and one finance officer per election).

2005/06 Financial Audit. James Marta presented the audit and reported an unqualified opinion indicating PARSAC's financial reports fairly represent its financial condition. A management comment by Mr. Marta identified an issue with the TPA claims payments not reconciling with the TPA loss runs. Mike Kielty, George Hills Co., explained the discrepancy was in the data only; all payments were reconciled with the bank statements. Immediate steps were taken to correct the data for future audits and will continue to be monitored.

Operational Best Practices. Templates for a Contractual Risk Transfer Policy and Return to Work Program were approved and are also available online.

ERMA Update. ERMA is working to improve training records to ensure members receive proper credit for completing courses. Training required in CRMT, SMART Risk Management and Sexual Harassment (AB1825). Periodic compliance notices will be sent to members.

Member Training Calendar. A series of workshops were approved for 2007 including Dangerous Conditions, Sewer Back-Up Prevention, and Backlog. Look for the full calendar online.

Member Audits. A schedule of ten member audits were approved. Audits are an effective tool for implementing best practices by increasing awareness and identifying loss control resources.

2006 Best Practices Awards. The Town of Yountville was recognized for their ADA Complaint Policy & Program. We encourage members to submit their successful programs and policies for the 2007 Best Practices Awards in November.

New Litigation Manager. After 17 years of service, Russ Dawson of George Hills announced his retirement. We wish him well and welcome Steve Kochly to the PARSAC team.

For complete meeting minutes and other useful information, visit www.parsac.org.



Legal



Briefs

On December 1, 2006, Federal Rule 26(f) created a new category of discovery for electronic information (e-mail, databases, back-up tapes, etc.). This means almost all of your work product and communication is subject to discovery, even items marked “privileged” or “confidential.”

One piece of good news is that you can not be sanctioned for failing to produce information that has been lost during the good-faith operation of a system (unless there are “exceptional circumstances”). Also, there is a “clawback” provision that allows you to recall privileged information that is mistakenly turned over in good faith.

Since timelines for producing information tend to be very short, we strongly recommend you start developing a data recovery plan now. Defense Counsel is required to assist you in gathering information pertinent to pending litigation and should determine how it will be produced for the court.

Are You Ready



for e-Discovery?!

1. Update your Document Retention Policy to address how and where electronic information is stored and labeled; ensure policies are consistently followed.
2. Prepare and implement a data-gathering or “Electronic Information Recovery” plan. Start by putting together an e-discovery team that includes Defense Counsel and an experienced IT person. This team should not only develop the plan but also produce the e-discovery information for the court.
3. Establish e-mail protocols such as:
 - a) Limit distribution to a “need to know” basis. Multiple copies create extra work for counsel since all e-mails related to a case must be reviewed. Also, all those extra copies are stored on the server, which can cause it to operate slowly.
 - b) Ensure the subject line matches the content. Trying to find a specific topic that has been buried under the wrong subject can be frustrating and time consuming. Keep in mind, you will be paying your Defense Counsel to help research this information.
 - c) Use “Privileged and Confidential” wisely. Counsel often begins their discovery by specifically searching for items marked “privileged” and then reviews each one closely. Also, using this label may give people a false sense of security since these items are not private unless you substantively meet the legal standards for privileged information.

Did You Know?

ERMA Attorney Hotline Available

The Hotline is just one of the many benefits of ERMA membership. Jackson Lewis and Liebert Cassidy Whitmore are available to answer your labor questions on topics such as harassment, retaliation, wrongful termination, discrimination, and workplace torts.

Each member gets up to an hour of consultation every month - that's 12 hours of FREE legal advice from the top brains in labor law. Contact staff for your assigned firm or log in at www.parsac.org.

WELCOME NEW BOARD MEMBERS!

Welcome Terrence Beaman, City of Placentia; Larry Brilliant, City of Elk Grove; Chuck Dantuono, City of Highland; Claudia Hillary, City of Point Arena; Dale Neiman and Melissa Swanson, City of Clearlake; Michelle Price, Town of Yountville; Michael Tree, City of Twentynine Palms; Diane McLaughlin and Alex Terrazas, Town of Truckee; Charlene Wiseman and Jim Becklenberg, City of Pacific Grove; William "Bill" Way and Michelle Pengilly, City of California City; Kenneth Barnes, City of Alturas; and Ken Thrailkill, City of Trinidad.

We wish much success to Dave Heath, Town of Truckee; Gene Haroldsen, City of Grass Valley; and Fred Patten, City of Point Arena.



Last, but not least, we want to thank Cathy Wilcox-Barnes, City of Nevada City, for her many years of dedicated service as a PARSAC Board and Executive Committee member and most recently for her leadership as PARSAC's President.

Investment Update

By Lauren Brandt, PFM Asset Management

As you know, the stock market recently took a sharp downward turn followed by only a slight recovery. It is unclear if the stock market is now realizing that economics are weaker than previously thought, or whether it is a temporary blip caused by sub-prime mortgage worries, a sinking dollar, and weak overseas equities, especially China. In either case, we are likely to see bond market yields linked to the stock market until things settle down. Investors took some comfort in a slight recovery in overseas markets and comments from Chairman Bernanke that he still expects some moderate economic growth in the U.S. Yields.

As always, we will closely monitor the markets and the impact on PARSAC's portfolio. In general, the drop in yields will increase the market value of the existing securities in the portfolios (prices move inversely to the direction of interest rates) and consequently the portfolios' total return. With regard to any new investments, the recent drop in rates has removed the value from the market. Accordingly, we will be cautious about adding longer-term investments given the magnitude of the yield curve inversion.



THE CERTIFICATE OF INSURANCE is a document generally supplied by an insurance broker for the third party ("named insured") certifying that certain coverage, such as general liability, automobile, and workers' compensation, are in place for the third party and/or any other named insured.



The public entity should always insist that the Certificate of Insurance name the public entity an "additional insured" under the policy.

To verify, the public entity should request an actual copy of the Additional Insured Endorsement to the insurance policy. The "additional insured" is covered under the insurance policy just as the "named insured," under terms described in the endorsement.

Obtaining insurance coverage from the third party to defend a lawsuit is one of the primary goals of obtaining "additional insured" status. The contractual indemnity and hold harmless language may provide that the third party will hold the public entity harmless; however, this language alone does not guarantee that the public entity will be defended by the third party. If named an additional insured, the public entity can demand that the insurance carrier provide a defense (the "tender [request] for defense and indemnity"). If the insurance carrier does not supply a defense, there is the attendant threat of a bad faith lawsuit against the insurance carrier.

With some exceptions, so long as the public entity's liability arises out of the work of the third party, a defense should be provided to the public entity under the third party's insurance policy. However, the reader should note that California Civil Code, section 2782(b) voids any provision in a public construction contract that would impose liability on a contractor for the active negligence of the public entity.

MONITORING THE INSURANCE REQUIREMENTS. Keep the following points in mind when reviewing insurance certificates and endorsements:

- Include Insurance Requirements in Your Contract:

All specifications and contracts should identify the insurance required and minimum coverage and maximum deductible amounts. These insurance requirements should be reviewed by a qualified risk manager or attorney prior to issuance of

the contract. Typical provisions require that the insurance company be admitted to transact business in the state. Section 7-3 of the Standard Specifications for Public Works Construction ("Greenbook") contains sample provisions; however, the public entity should consider greater minimum requirements than set forth in the Greenbook. We have recently seen cases where deductibles as high as \$250,000.00 are listed. Deductibles at this level, for the most part, make the insurance meaningless.

- Include Indemnity and Hold Harmless Provisions in Your Contracts:

Most contracts for services, or for the lease or use of public facilities, contain indemnity or hold harmless provisions. However, some have separate sections for acknowledging these provisions. In two cases we were successful in enforcing the provision despite the fact it was not executed; however, one of these cases went to the Court of Appeal on this issue before a judgment was affirmed for our client. If the third party had properly acknowledged the provision at the time the contract was signed, the insurance coverage could have been resolved much earlier.



Public entities should ensure the employees who monitor contract language are properly informed and understand the importance of filling out all paperwork fully.

- Always Obtain an Additional Insured Endorsement:

A Certificate of Insurance by itself is not sufficient. Without an endorsement, it is considered "informational" only, and is interpreted by courts merely to supply evidence that the named insured carries the listed types and amount of insurance.

- Request the "CG2010 11/85 or Its Equivalent" Endorsement:

The CG2010 11/85 endorsement is still available, although not commonly obtained by contractors. This endorsement or equivalent language should be requested. The public entity should require the third party to name the public entity, and its employees and officers, as additional insureds. The endorsement should confirm that the third party's policy is "primary and non-contributing" to any other policies.

Concludes on Back

If you would like to write a feature article or suggest a topic for a future edition of the PARSAC Press, contact Amanda Wright at (916) 927-7727 or email to awright@parsac.org. We welcome articles and feedback from our members.

2007

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CALENDAR OF EVENTS

2007

- 3/29** Executive Meeting
Rancho Cucamonga
- 5/30 - 31** Board Meeting & Academy II
Sacramento
- 6/10 - 13** PRIMA Conference
Boston
- 8/30** Executive Meeting
Location TBD
- 9/5 - 8** League of CA Cities
Sacramento
- 9/19 - 21** CAJPA Conference
South Lake Tahoe
- 12/5 - 6** Board Meeting & Strategic Planning
Sacramento

2008

- 2/10 - 13** PARMA Conference
Anaheim
- 3/20** Executive Meeting
Location TBD
- 5/28 - 29** Board Meeting & Academy III
Sacramento
- 6/1 - 4** PRIMA Conference
Anaheim
- 9/16** Executive Meeting
South Lake Tahoe
- 9/17 - 19** CAJPA Conference
South Lake Tahoe
- 12/3 - 4** Board Meeting & Strategic Planning
Sacramento

ROAD WARRIORS! ARRIVE ALIVE!

Whether it's your daily commute or a work-related trip, driving is one of the most hazardous activities you do. And, being distracted while driving increases your chances for an accident by 50%. Electronic devices, especially cell phones, are targeted as a top distraction. Avoid making or receiving calls unless you are using a hands-free device and never play with that nifty navigation system or your laptop while driving. The safest thing to do is to pull over before using these convenient tools.



Another major factor in accidents is driver fatigue. If you think that cup of coffee before you drive will keep you alert - - think again! Getting plenty of rest before a long trip is the best way to stay alert. If your back aches after driving, try placing a support behind your lower back, like a rolled up towel, and always take your wallet out of your back pocket.



BEST PRACTICE: UPDATE YOUR VEHICLE USE POLICY TO ADDRESS USE OF ELECTRONIC DEVICES. A SAMPLE POLICY IS AVAILABLE AT WWW.PARSAC.ORG OR CONTACT STAFF FOR ASSISTANCE.



- Require Cancellation Notification:

All liability insurance policies should provide that the public entity will be notified by certified mail of the expiration or cancellation of any such policies.

- Verify the Identity of the Named Insured:

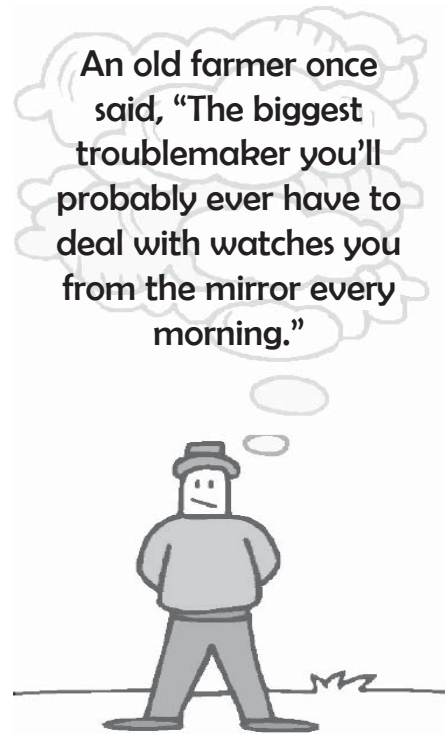
Always confirm that the named insured on the policy is the same as the party that has contracted with the public entity. In the event of a related business, the insurance policy is usually "timed" to provide coverage for a maximum of 90 days after formation of a new business. In one recent matter, the party signing a facility reservation was a separate related entity from the party identified in the policy of insurance. The insurance carrier unsuccessfully argued that the loss did not arise out of an activity by its insured while attempting to avoid providing insurance coverage.

- Guard and Protect the Insurance Endorsements and Certificates of Insurance:



Properly maintain all insurance endorsements and insurance certificates. In many cases, their value does not become apparent for years after they have been issued.

This article was provided by Gregory L. Rippetoe of Beam, Brobeck, West, Borges & Rosa LLP, Santa Ana, California. He can be reached at GRippetoe@bbwbrlawfirm.com. This article is intended to provide the reader with general information regarding current legal issues. It is not construed as specific legal advice or as a substitute for the need to seek competent legal advice on specific legal matters.



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