Where Does Your Subs' Liability End and Your Liability Start?

by Quenda Behler Story

Let's say that your framing subcontractor is cutting sheathing with the guard pinned back on his saw. The building inspector comes along (or the homeowner or another sub or even a passing stranger) just as the framer is putting the saw down with the blade still spinning. The spinning blade catches on the subfloor, and the saw runs over the inspector's foot. That's negligence, and the inspector can sue that subcontractor.

In addition to being able to sue the framing subcontractor, the inspector can sue you, the contractor. In fact, he can sue you without even bothering to sue your subcontractor. Maybe the sub doesn't have insurance, or maybe the building inspector never liked you anyway and blames you for the stitches he had to get in his foot, or the lost toe.

(Note that I specifically did not include one of your employees as a possible victim in this example. That's because employment law makes it easy for your employee to sue the framing subcontractor for negligence but hard for him to sue you for negligence. In the vast majority of cases, workers' compensation is the only thing an employee can get from you.)

Joint and Several Liability

The legal expression for the liability in the framing case is joint and several liability. What "joint and several" means is that the plaintiff can pick and chose among his potential defendants, because they are all liable. The plaintiff will probably pick you because you're the one with the deepest pockets. You probably do have insurance. Even if you don't, or if your insurance is inadequate, you may own some expensive equipment, have some accounts receivable and maybe some cash in your company bank account — all of which could be attached by the inspector's lawyer.

But you're not the guy who disabled the guard on your saw, so how did you get to be a potential defendant? Here's how: As the general contractor, you have a legal duty to maintain a safe job site and to supervise your trade contractors. If you fail to fulfill that duty, you're considered negligent. All the inspector's attorney has to do is put together enough facts to demonstrate that you knew, or somehow should have known, that your sub was pinning back the guard on his saw.

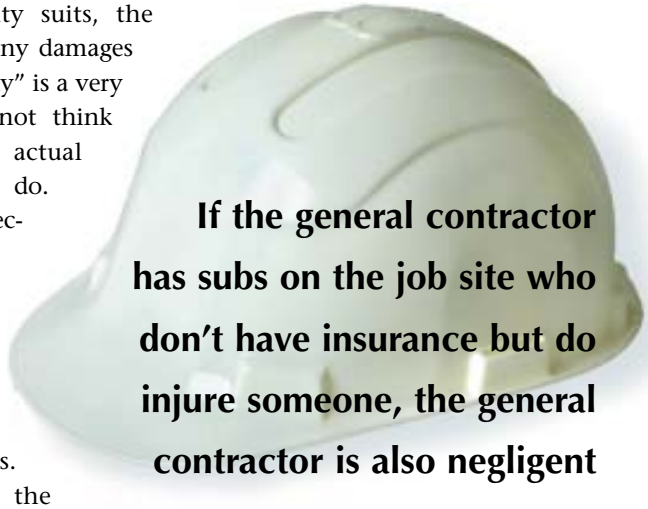
Here's another way you could become a potential defendant: Lots of cases on the books say a general contractor has a duty to see to it that his or her subcontractors carry liability insurance. If the general contractor has subs on the job site who don't have insurance but do injure someone, the general contractor is also negligent, because he didn't see to it that his subs had liability insurance.

Assessing Damages

Negligence claims are *liability* claims. Unlike workers' compensation claims, they aren't limited to lost wages and medical bills. In liability suits, the plaintiff can collect for any damages actually suffered. "Actually" is a very elastic term. You may not think emotional suffering is actual damage, but the courts do. Suppose the injured inspector says he can't do his job anymore, because the pain and suffering he experienced has made him afraid to approach people who are using circular saws. What do you think the remaining 20 years of his livelihood are worth? You'll find out if the jury rules against you.

Does this mean that you will always be liable when your sub is careless and reckless? No, not always. One way to avoid liability would be to prove that you had no way of knowing your sub was pinning back the guard and that you had made every effort to find out, including regular safety inspections and vigorous and ongoing efforts to eliminate unsafe practices on the job site (as well as other kinds of careless or reckless behavior such as drinking and horseplay). But unless you did all those things, and have a good paper trail to prove it, there's a good chance you'll get burned.

Okay, so you're liable, but what about the sub? Maybe his truck is worth something, and he might even have some other assets. Although the nature of joint and several liability is that the plaintiff doesn't have to bother suing your sub for his part in this fiasco, *you can*. The legal theory is called contribution. Even if the plaintiff won't spend his valuable dollars suing the sub who actually caused the damage, you may choose



If the general contractor has subs on the job site who don't have insurance but do injure someone, the general contractor is also negligent

to drag that sub into the lawsuit on a cross-claim.

Protecting Yourself

What can you do to stay out of a mess like this in the first place, or better protect yourself if you should get dragged into something similar? First, put together a safety plan and make it part of your contract. Require your subcontractors to agree to meet your safety rules. Then regularly inspect to make sure they are actually following your safety plan. Second, make sure you carry enough liability insurance. Third, make sure your subs have current liability insurance. Ask to be named as beneficiary on the sub's liability policy. That way you will be informed if the policy is cancelled for some reason, such as nonpayment.

An important question here is what your insurance company's response will be. The insurance company has to defend you if your liability policy was in force at the time of the incident. In fact, you will find that the insurance company's lawyers have the right to defend you, even if you don't want them to. If you read the fine print in your insurance contract, you will find that they also have the right to settle that claim, even if you don't want them to.

Even if your insurance company doesn't cancel you outright or raise your premiums so high you have no hope of paying them, it will institute regular audits of your books to make sure that you're using only subcontractors who carry liability insurance. If you are not following that rule, you will probably end up paying additional retroactive premiums.

Quenda Behler Story *has practiced and taught law for over 25 years and is the author of* The Contractor's Plain-English Legal Guide *(http://www.craftsman-books.com).*