

# RISK & INSURANCE

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## A Golden Opportunity to Further Limit Employer Liability in Injury Cases

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Those of us who defend general contractors or subcontractors in construction injury cases, and the general liability carriers who retain us, are eagerly awaiting the California Supreme Court's decision in the case of Seabright Insurance Company v. U.S. Airways, Inc. The impact of this decision could reverberate throughout the country, impacting how employers, and their general liability carriers, manage the increasing risks of hiring independent contractors to perform specialty work.

In this age of ever-increasing personal-injury claims, employers continue to face exposure to claims by injured employees of independent contractors through creative theories by plaintiff attorneys who are clearly dissatisfied with the limited (and generally exclusive) remedies available under most state workers' compensation systems. Fortunately, most courts have been leery to extend what, in essence, is pure vicarious liability against the hirer.

Under common law, the rule was that the non-negligent employer hiring an independent contractor was not liable for injuries to independent contractor's employee. However, as case law evolved, that rule was eroded away until exceptions swallowed the rule. In 1993, the California Supreme Court decided the seminal case of Privette v. Superior Court. The plaintiff, an employee of a roofing subcontractor hired by the owner of a duplex, was injured while performing work under the contract between the owner and the employee's employer. The injured employee sued the owner of the duplex, even though he was receiving workers' compensation benefits, alleging the building owner was liable under the "peculiar risk" doctrine.

The peculiar risk doctrine, an exception to the common law rule of no liability, simply states that the party who hires the independent contractor to do inherently dangerous work bears responsibility for any risk of injury -- even if the employer is without fault and the injured worker is compensated under workers' compensation.

In Privette, the California Supreme Court rejected vicarious liability under the peculiar risk doctrine, holding that workers' compensation gives the employee a windfall where the hirer is without fault. Furthermore, the non-negligent hirer is without recourse because he generally cannot seek indemnity from the negligent employer.

Since Privette, injured employees have gone to great lengths to get around the workers' compensation exclusivity rule, to find ways to attach liability to hirers, property owners, and other subcontractors. Such theories include "retained control" or breach of non-delegable duties set forth in a variety of safety statutes or regulations.

Under the "retained control" theory, injured employees attempt to attach liability to the hirer by alleging that the hirer "[was] actively involved in, or assert[ed] control over, the manner of performance of the

contracted work, such as directing that the contracted work be done by use of a certain mode..."(Hooker v. Department of Transportation (2002)). Thus, the general contractor would be directly, rather than vicariously, liable. However, the courts, consistent with Privette, have limited this assertion unless the employee can demonstrate the hirer affirmatively contributed to the injuries.

In Hooker, an employee of a subcontractor hired by the California Department of Transportation (CalTrans) was killed when his crane tipped over after he retracted the outriggers. CalTrans was aware that he was doing so to let vehicle traffic pass and was further aware that doing so was dangerous, but did not instruct the contractor to cease the activity.

However, the court found that this was insufficient to demonstrate retained control, holding "a general contractor owes no duty to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct. The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff."

Not to be undone, plaintiff attorneys in California have turned to safety regulations to attach direct liability to general contractors in those situations wherein liability against the general contractor would be vicarious at best. They have argued that the Legislature's 1999 amendments to the Evidence Code permitting the introduction of safety regulations in third party cases support their theory.

Essentially, plaintiff attorneys find general safety regulations that apply to the injured party's employer and then argue that those regulations apply to the general contractor as well, notwithstanding any contractual provisions to the contrary. Plaintiffs argue that the violation of a safety regulation ameliorates any requirement that the plaintiff prove the violation affirmatively contributed to the employee's injuries.

The issue of whether a violation of a safety regulation, by itself, is affirmative conduct creating liability on the general contractor is currently pending before the California Supreme Court in the case of Seabright Insurance Company v. U.S. Airways. In Seabright, the workers' compensation carrier for the employer of an injured employee subrogated against U.S. Airways, who had hired its insured to inspect and maintain luggage conveyor belts at San Francisco International Airport. During an inspection of one of the conveyor belts, the employee's hand was caught and injured.

The injured employee intervened and asserted, along with Seabright that U.S. Airways was liable for the injuries because it violated two general safety regulations regarding guarding of conveyor belts, even though U.S. Airways did not own or perform any maintenance on the belts. The trial court granted U.S. Airways' motion for summary judgment, finding that U.S. Airways did not owe the injured employee a duty of care.

The intermediate appellate court reversed, finding that the safety regulations could not be delegated to the injured employee's employer, and that the violation of the safety statute alone was sufficient to create a triable issue of material fact, a conclusion that runs contrary to Privette and its progeny.

The Supreme Court is expected to hear oral arguments and render its decision in the Seabright case later this year; its decision will have dramatic ramifications for construction injury claims against general contractors and property owners for construction-site injuries.

The intermediate appellate court's decision in Seabright, if permitted to stand, will create impermissible burdens on general contractors. First, the decision would impair the contractual relations between the general contractor and subcontractor, precluding the contractor from delegating safety to the subcontractor, who is in the best position to address safety issues. Worse yet, the subcontractor will still

pass the costs of its insurance onto the general contractor in the contract price, with no real protection for the general contractor other than the juxtaposition of available insurance.

Finally, plaintiffs will be able to insulate themselves from summary judgment motions by alleging that general contractors have violated general safety regulations, forcing them to settle or go to trial. When dealing with catastrophic injuries, general contractors will, in all likelihood, face exposure beyond their policy limits in cases that should have otherwise been disposed of due to a lack of duty owed.

The Seabright Court should not permit such burdens to be imposed upon the general contractor or hirer. The label applied to a given fact pattern, whether "retained control" or "breach of regulatory duty", cannot transform a truly vicarious liability case into one of direct liability simply to evade the court's long-held position that the hirer is not vicariously liable for injuries to the employee of an independent contractor.

Any liability should rest with the independent contractor unless the non-negligent hirer explicitly agrees otherwise. Reversal of the lower court's decision in Seabright will be a major victory for general contractors and their general liability carriers by limiting potential claims arising out of construction injury cases and signaling the return to our common law roots of non-liability for hirers of independent contractors. While plaintiff's bar clearly perceives the limits of workers' compensation to be a problem, perpetuating claims against non-negligent general contractors or hirers is not the solution. If the employer's liability is limited to the remedies available under workers' compensation, then so, too, should be the hirer's.

Let's hope the California Supreme Court sees it the same way.

Editor's note: Muñoz is the lead trial attorney for the general contractor Pepper Construction Company Pacific in the construction injury case of Lewis v. Pepper, a companion case with the Seabright v. U.S. Airways case currently pending before the California Supreme Court. Muñoz also authored an amicus curiae brief on behalf of the Air Transport Association of America, Inc. in support of U.S. Airways in the Seabright matter.