



IRMI[®]

Workshop O

***EVALUATING THE MERITS OF
DEFAULT INSURANCE***

Presented by

**Steven M. Charney
Managing Partner
Peckar & Abramson, PC**

Wednesday, November 10, 1:30–3:00 p.m. and 3:30–5:00 p.m.

Workshop O



**BRIDGING THE GAP IN
AN UNCERTAIN ECONOMY
DEMANDS A HIGH LEVEL
OF SURETY EXPERTISE.**

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Steven M. Charney
Managing Partner
Peckar & Abramson, PC

Mr. Charney, presenter for Workshop O, "Evaluating the Merits of Default Insurance," on Wednesday afternoon, is the managing partner of Peckar & Abramson's New York office. Peckar & Abramson P.C. is a national law firm, perhaps the largest in the country with a practice concentrated on the construction and development industries. Mr. Charney's practice, as does the firm's, includes ongoing representation of many contractors that are among the top 10 as reported by *Engineering News Record*. Mr. Charney's background couples extensive academic and hands-on experience in the construction industry with more than 15 years of experience in litigating for and providing legal counsel to contractors and developers.

Throughout Mr. Charney's career, he has handled numerous construction-related disputes in court, arbitration, or in alternative dispute forums. Mr. Charney frequently handles multimillion-dollar delay, lien, default, equitable adjustment, termination, and construction and design defect matters. Mr. Charney's practice has included international clientele, including the representation of the owner and developer in a \$250 million project in the Bahamas. Mr. Charney's experience includes the representation of contractors and owners in connection with some of the most prominent projects built throughout the United States. He represented the developer of the largest private building project ever to take place in New York City and represented contractors and design/builders in connection with numerous professional sports facilities (such as the Arthur Ashe tennis stadium and several National Football League and Major League Baseball stadiums).

A substantial portion of Mr. Charney's practice involves providing counsel and guidance to clients in connection with construction projects and issues. He has taken an active role in addressing emerging issues affecting the construction and development industries, both in providing guidance to the industry at large and in counseling clients of the firm. Mr. Charney led the Associated General Contractors of America to establish a task force to study mold-related issues, and then vice-chaired that task force as it drafted the industry's first guide to understanding the problem. Mr. Charney has also taken a lead role in guiding contractors in understanding and addressing other emerging issues affecting the industry. He lectures frequently on such issues, including subcontractor default insurance and evolving legislation.

Mr. Charney's practice took a most unique turn in the wake of the terrorist attacks on the World Trade Center. The contractors that conducted the rescue, recovery, and debris removal work at the World Trade Center site would not be insured for the unique risks inherent in that work. Mr. Charney's clients, including the Building Trades Employers Association of New York, an industry association that his firm represents, and the General Contractors Association of New York, called upon him to address that problem. These efforts led to the passage of legislation by the United States Congress, which was signed into law by the president, funding \$1 billion to form a captive insurance company to provide such insurance.

Mr. Charney's industry experience includes positions with both local and national construction contractors. Before joining Peckar & Abramson, Mr. Charney served as Eastern Division Counsel for Turner Construction Company. Mr. Charney was employed by Turner Construction Company for nearly a decade, prior to entering private legal practice, and served in a number of operations-related roles, including field superintendent, cost and scheduling engineer, and manager of litigation and claims, before serving as counsel.

Mr. Charney lectures nationally regarding matters related to construction contracting and frequently presents private lectures and training to the nation's leading contractors. He presented a three-part

seminar before the prestigious Association of the Bar of the City of New York titled "Truly Understanding Construction Contracts" and is a frequent lecturer before the General Building Contractors of the State of New York, The Construction Financial Managers Association, the New Jersey Building Contractors Association, and other construction-related organizations. Mr. Charney has also lectured before the American Concrete Institute, the South Florida Chapter of the Associated General Contractors, Associated Minority Enterprises of New York.

Mr. Charney is a member of Associated General Contractors of America and serves on both the Contract Documents and Risk Management committees of this leading national organization. He has often published commentary regarding issues applicable to the construction and development industries, including commentary in the *New York Construction News*. He is a member of the Association of the Bar of the City of New York and served on the Construction Law Subcommittee of that association. He is also a member of the American Bar Association and the New York State Bar Association.

Mr. Charney is a graduate of Seton Hall University School of Law, where he attended as an evening student while working full time in the construction industry. In 1983, Mr. Charney received a master of science degree in construction management from the School of Civil Engineering at New Jersey Institute of Technology (where he also studied as an evening student while working full time in the construction industry). Mr. Charney also holds a bachelor's degree in accounting from Syracuse University, with a minor in construction technologies.

EVALUATING THE MERITS OF DEFAULT INSURANCE

***Steven M. Charney
Peckar & Abramson, PC***

1. What is SDI and How Does It Work

- i) Alternative to Subcontractor Surety as Risk Management for Subcontract Defaults
- ii) Insurance v. Surety
- iii) Not a Surety Product
- iv) For General Contractors/Construction Managers—Holding Subcontracts
 - (a) Prime Guard/Owner Guard—Limited Availability
- v) Contractor's Insurer v. Subcontractor's Surety
- vi) Premise is "Skin in the Game"
- vii) No Indemnity
 - (a) High Deductible or SIR—Catastrophic Protection
- viii) Trigger—Subcontractor Default
- ix) Contractor Controls Response—Not Surety or Carrier
- x) Reimbursement of Cost
 - (a) After Subcontract Balance and Deductible are Expended
 - (b) After Contractor Actually Pays
- xi) Subrogation by Insurer
- xii) Qualification Procedures

2. Cost & Profitability

- i) Key Benefit—Coverage is considerably less cost—Actual Figures
- ii) Deductible Option
- iii) SIR Option
- iv) Captive Structures
- v) Experience yields increased profitability

3. Comparison To Surety

- i) Theoretical vs. Practical Distinction is Basis for Comparison
 - (a) How Bonds Really Work vs. Subguard
 - (b) Deductible/SIR—Does Surety really pay 1st dollar?
 - (c) Time lapse—Immediate v. Wait for Surety to Decide
 - (d) Contractor Controls—Surety Controls
 - (e) Cost
 - (f) Opportunity for Increased Profit
 - (g) Cover all Subs, not just those with capacity
 - (i) MBE/WBE
- ii) No Personal Indemnity—
 - (a) Subcontractors are
 - (i) Less exposed
 - (ii) Less motivated

4. Performance

- i) Actual Experience—Contractors satisfied
- ii) Very small number of claims hit Zurich layer
- iii) Tells what?
 - (a) Zurich doing well
 - (b) Contractors enjoying experience dollars
- iv) Subrogation—minimal success
 - (a) Weakness—pursue subrogation too late
 - (i) only after payment
- v) Frustration
 - (a) Cash flow shortfall
 - (b) Coverage only after Subcontract Balance is exhausted

5. The Policy Form

- i) Win-Win for Carrier
 - (a) Subrogate and Recover
 - (b) Lose - no default—Insured returns
- ii) Timing of Notice—potential trap
- iii) Mitigation
- iv) Proof of Loss—Subjectivity
- v) Control of Subrogation/Recovery Proceeding
- vi) Qualification Procedures—Cancellation
- vii) Delay in bringing Subrogation Claim—too late
- viii) Counter-Claims defended
- ix) Experts
- x) Liens Discharged

6. Subcontract Terms

- i) No payment bond—payment failure is default
- ii) Guaranty in lieu of Indemnity

7. Implementing a Program

- i) It's Your Money
- ii) Training:
 - (a) How to Proceed with Defaulted Work
 - (b) How to Process a Claim
- iii) Keeping the Carrier Involved—Reimbursement Causes Delay