

RECENT DEVELOPMENTS IN PROJECT RISK MANAGEMENT



Rice Global E & C Roundtable

Houston, Texas

By Kerry C. Williams ©2005

PROGRAM

- 1. Bases of Risk**
- 2. Risk Management**
- 3. Special Issues**

BASES OF RISK



LEGAL BASES FOR RISK

- 1. Contractual Liability**
- 2. Tort Liability**
- 3. Criminal Liability**

CONTRACTUAL RISKS

- ▶ **Failure to perform on time**
- ▶ **Failure to meet required quality**
- ▶ **Failure to indemnify**
- ▶ **Failure to provide insurances**
- ▶ **Failure to meet warranty requirements**

TORT RISKS

- ▶ **Injuries to persons**
- ▶ **Loss or damage to property**
- ▶ **Pollution/contamination losses**

CRIMINAL RISKS

- ▶ **Foreign Corrupt Practices Act**
- ▶ **Foreign Tax Laws**

LIABILITY PROTECTION

**Insurance
Coverage**

**Corporate
Structure**

**Work
Performance**

**Contact
language**

NON-CONTRACTUAL PROTECTIONS



NON-CONTRACTUAL PROTECTIONS

- **No verbal promises during negotiations**
- **Review/understand contract before signing**
- **Review contract with lawyer**
- **Have broker review insurance requirements**
- **Document everything on project**
- **Management to monitor work**
- **Only use competent personnel**
- **Ensure equipment is working properly**
- **Put subcontractors on "back-to-back"**

NON-CONTRACTUAL PROTECTIONS

- **Claim for every extra**
- **Always ask for extra time for all changes**
- **Never produce schedules showing "float"**
- **Plan ahead**
- **No swearing of verbal insults**
- **Never threaten**
- **Know the details**
- **Know "Best case" - "worst case"**
- **Do not do "Lessons Learned"**

CONTRACTUAL PROTECTIONS



CONTRACTUAL ISSUES

- 1. Payments**
- 2. Warranties**
- 3. Indemnities**
- 4. Consequential Damages**
- 5. Pollution**
- 6. Insurances**
- 7. Builder's Risk Insurance**
- 8. Choice of Law**
- 9. Dispute Resolution**

PAYMENT ISSUES

- 1. Reasonable payment period (30 days)**
- 2. Undisputed amount to be paid**
- 3. No deductions, withholdings or set-offs**
- 4. Right to audit should exclude profit**
- 5. Right to suspend for non-payment**
- 6. Parent company guarantee (Due Diligence)**
- 7. Retainage limits**

WARRANTY ISSUES

- 1. Standard of performance to be defined**
- 2. Liability limited to re-performance**
- 3. Do not give a "*performance guarantee*"**
- 4. Time period for liability to be defined**
- 5. If materials purchased – assignment only**
- 6. U.C.C. waiver of implied warranties**
- 7. Set limit of liability for warranty defects**

INDEMNIFICATION ISSUES

- 1. Define “*COMPANY*” and “*CONTRACTOR*” broadly**
- 2. Use a “knock-for-knock” Indemnity scheme**
- 3. Must be clear and unequivocal**
- 4. “*Express Negligence*” Language**
- 5. Anti-Indemnity Statutes**
 - ▶ Texas Oilfield Anti-Indemnity Statute**
 - ▶ Louisiana Oilfield Anti-Indemnity Statute**
 - ▶ Architect/Engineer Anti-Indemnity Statute**

INDEMNIFICATION LANGUAGE

COMPANY shall be responsible in any case of illness, injury or death, suffered by the employees of any member of COMPANY Group and in loss or damage to the property of any member of COMPANY Group, including the property which is the subject of the Work, arising out of or relating to the performance of the services under the Agreement and **REGARDLESS OF WHETHER CAUSED OR BROUGHT ABOUT BY ANY MEMBER OF CONTRACTOR GROUP'S NEGLIGENCE (INCLUDING ACTIVE, PASSIVE, SOLE, JOINT OR CONCURRENT NEGLIGENCE) OR ANY OTHER THEORY OF LEGAL LIABILITY, THE UNSEAWORTHINESS OF ANY VESSEL AND THE UNAIRWORTHINESS OF ANY AIRCRAFT INCLUDING STRICT LIABILITY AND INCLUDING PRE-EXISTING CONDITIONS**, and COMPANY shall release, defend, protect, indemnify and hold harmless all members of CONTRACTOR Group from and against any loss, cost, claim, obligation to indemnify another, suit, judgment, award or damage (including reasonable attorney's fees) on account of such illness, injury or death, loss or damage.

CONSEQUENTIAL DAMAGES

- 1. “*Company-Buster*” Type of Damages**
- 2. Many times Un-insurable**
- 3. Reciprocal Waiver of Consequential Damages**
- 4. Law requires Definition of Consequential Damages to be specifically listed**
- 5. Ensure that they apply regardless of fault**

CONSEQUENTIAL DAMAGES LANGUAGE

Notwithstanding anything to the contrary contained elsewhere herein, neither CONTRACTOR nor COMPANY shall be liable to the other for any consequential, incidental, indirect or punitive damages of any kind or character, including, but not limited to, loss of use, loss of profit, loss of revenue, loss of or delayed production whenever arising under this Agreement or as a result of, relating to or in connection with the services hereunder, and no claim shall be made by either CONTRACTOR or COMPANY against the other **REGARDLESS OF WHETHER SUCH CLAIM IS BASED OR CLAIMED TO BE BASED ON NEGLIGENCE (INCLUDING SOLE, JOINT, ACTIVE, PASSIVE, CONCURRENT OR GROSS NEGLIGENCE), OR ANY OTHER THEORY OF LEGAL LIABILITY, THE UNSEAWORTHINESS OF ANY VESSEL AND THE UNAIRWORTHINESS OF ANY AIRCRAFT STATUTE, STRICT LIABILITY OR OTHERWISE.**

POLLUTION ISSUES

- 1. Pollution Risks not fully insurable under many contractor's insurances**
- 2. “*Company-Buster*” Type of Damages**
- 3. Obtain a broad release and indemnity**
- 4. Ensure that they apply regardless of fault**

POLLUTION LANGUAGE

COMPANY shall assume all responsibility for, including control and removal of, and defend, protect, indemnify and hold harmless all members of CONTRACTOR Group from and against any loss, cost, suit, demand, judgment, award, obligation to indemnify another, or damage arising out of or relating to pollution or contamination which:

- (a) originates from the equipment of any member of COMPANY Group; or
- (b) comes from the surface or subsurface of the land

and which arises out of the services of CONTRACTOR and COMPANY agrees to protect, defend, indemnify and hold harmless all members of CONTRACTOR Group from and against any loss, cost, claim, suit, demand, judgment, award, obligation to indemnify another, penalty, fine, or damage arising out of the above **REGARDLESS OF WHETHER CAUSED OR BROUGHT ABOUT BY ANY MEMBER OF CONTRACTOR GROUP'S NEGLIGENCE (INCLUDING ACTIVE, PASSIVE, SOLE, JOINT OR CONCURRENT NEGLIGENCE) OR ANY OTHER THEORY OF LEGAL LIABILITY, INCLUDING STRICT LIABILITY, THE UNSEAWORTHINESS OF ANY VESSEL AND THE UNAIRWORTHINESS OF ANY AIRCRAFT AND INCLUDING PRE-EXISTING CONDITIONS.**

INSURANCE ISSUES

TYPES OF INSURANCES:

- 1. Commercial General Liability Insurance**
- 2. Worker's Compensation Insurance**
- 3. Builder's Risk Insurance**
- 4. Directors & Officers Insurance**

SPECIAL ISSUES:

- 1. Waivers of Subrogation**
- 2. Additional Assured**
- 3. Primary Status of insurances**

INSURANCE LANGUAGE

The naming of COMPANY as an additional assured, the primary status of CONTRACTOR's policies of insurance and the underwriter's agreement to waive all rights of subrogation against all members of COMPANY GROUP shall only be to the extent and not in excess of or beyond the risks for which CONTRACTOR has agreed to assume responsibility and to indemnify or release COMPANY under this Contract.

BUILDER'S RISK ISSUES

- 1. Builder's Risk covers loss or damage to the Work**
- 2. Owner should procure Builder's Risk Coverage for the Contractor's Work**
- 3. Contractor should be an additional assured**
- 4. Underwriters should waive rights of subrogation in favor of Contractor**
- 5. Contractor should be "loss payee" as interest appear.**

CHOICE OF LAW

- 1. Jurisdiction which supplies substantive law**
- 2. Must be a substantial relationship to parties or the work**
- 3. Contractor should be knowledgeable of impact of choice of law**

DISPUTE RESOLUTION

- 1. Litigation vs. Arbitration**
- 2. Jury vs. arbitrator issues**
- 3. Venue**
- 4. Number of arbitrators**
- 5. Applicable Rules**
- 6. Federal or State Law applicable**

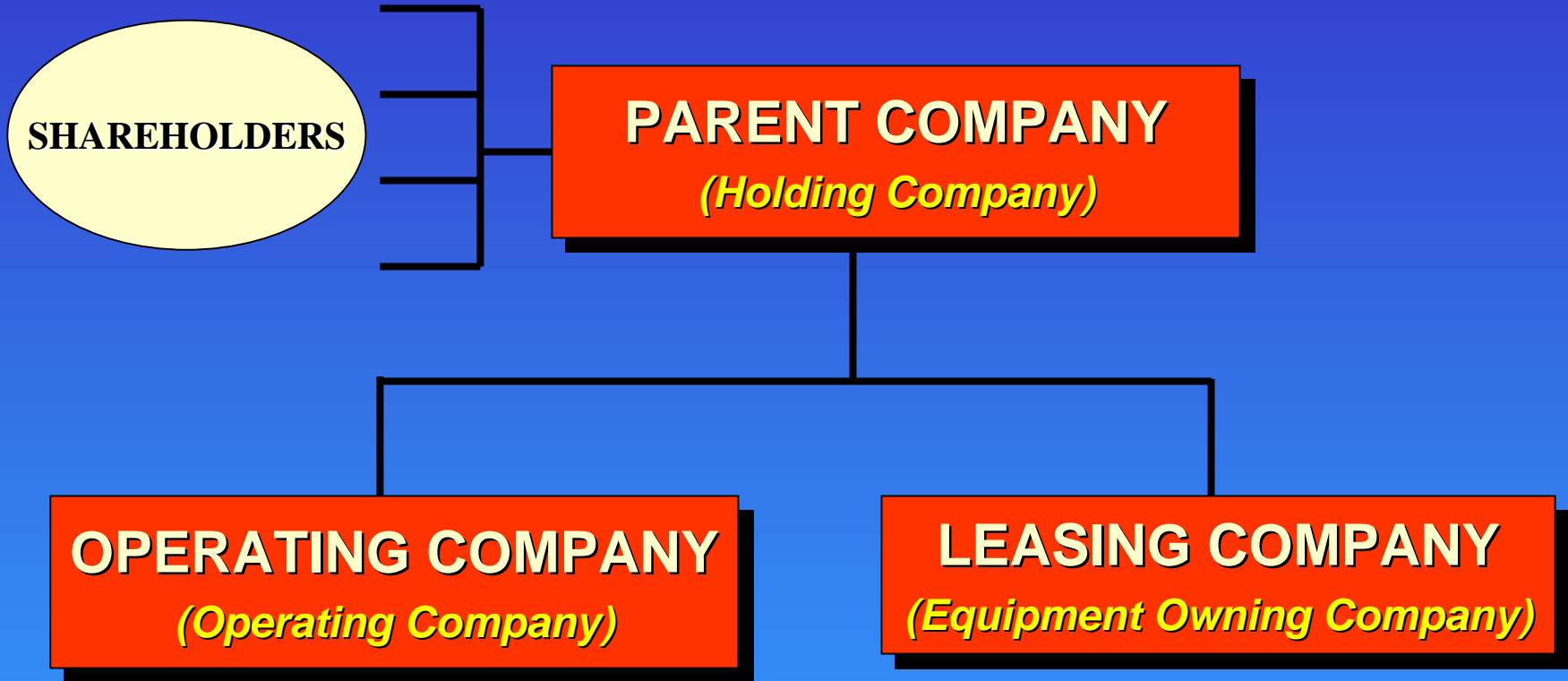
CORPORATE PROTECTIONS



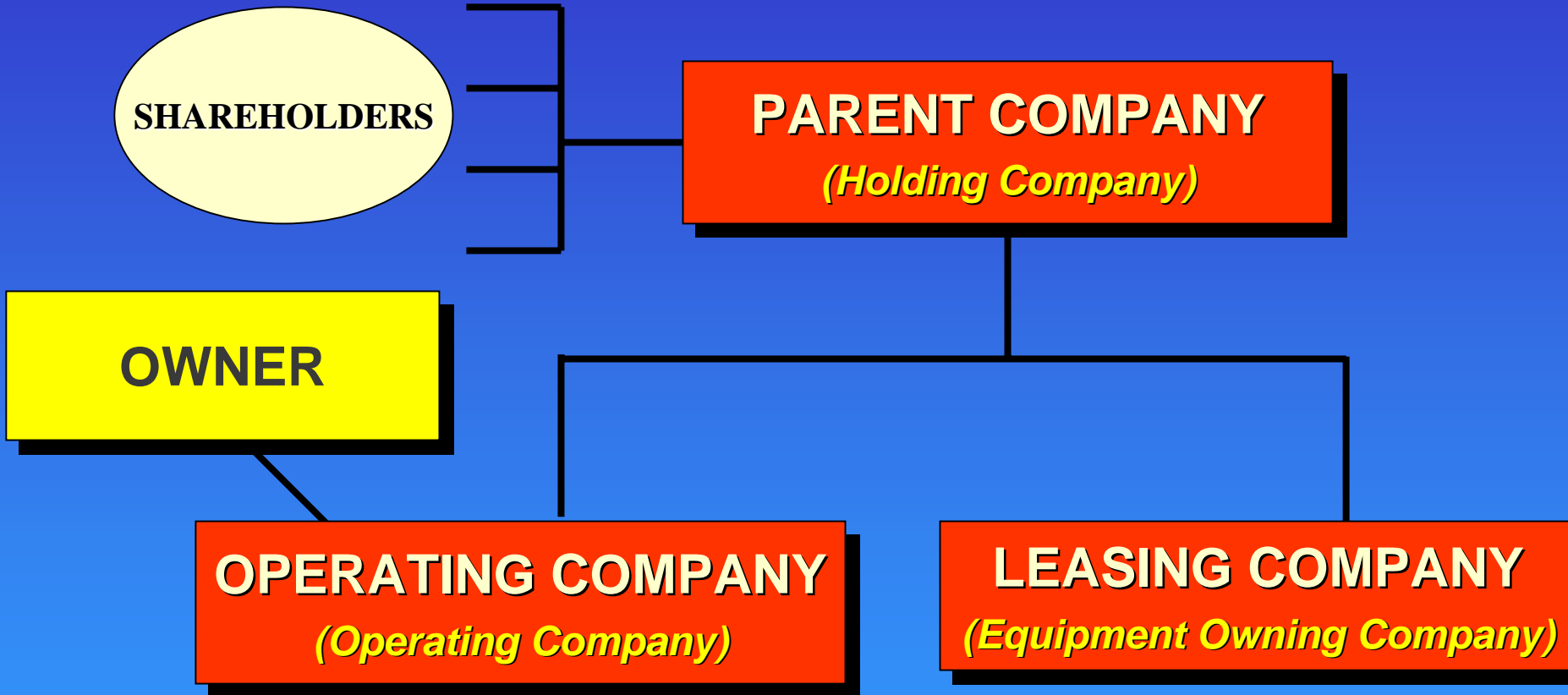
CORPORATE PROTECTIONS

- 1. Use a corporate structure:**
- 2. Maintain records/annual meetings/minutes**
- 3. Pay franchise tax/state income tax**
- 4. Qualify to do business in each work venue**
- 5. Contractor's license issues**
- 6. Split assets from liabilities**

SPLITTING ASSETS FROM LIABILITIES



SPLITTING ASSETS FROM LIABILITIES



CRIMINAL ISSUES



FOREIGN CORRUPT PRACTICES ACT

1. Use of **Interstate Commerce**
2. **Payment** or **offer to pay** anything of value to:
 - Foreign officials,
 - political parties,
 - Candidates of political parties, or
 - Officers of public organizations
3. For **corrupt purposes** to act or refrain from acting)
4. Assisting in the following:
 - **Obtaining** new business;
 - **Retaining** existing business; or
 - Gaining an **Improper advantage**

DUTY TO INQUIRE

1. Discovery of facts would cause a reasonable person to **suspect** that illicit payments are involved
2. Examples of such facts (House of Rep. examples)
 - Unusual proposals as to **methods of payment**
 - Large requirements for **local currencies**
 - **Family relationship** between company and government officials
 - Large size of **commission** to agent (over 4-6%)
 - **Misrepresentation** by agents as to the transaction
 - Requests for **false invoices** or other documentation
 - Other **negative information** during due diligence

FOREIGN TAX ISSUES

***Pasquantino v. U.S.*, 125 S.Ct. 1766 (2005):**

- ▶ **Revenue Rule**
- ▶ **US persons smuggled alcoholic beverages into Canada to avoid Canadian import taxes**
- ▶ **US persons used the telephone/fax/e-mail to coordinate their activities in the US**
- ▶ **Violated the Federal Wire Fraud Statute**
- ▶ **Felony conviction + Prison + fine**

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