



Panel Discussion:

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ASSISTING CLIENTS IN THE BUILT ENVIRONMENT

Hedging Risk: Construction Bonds, Insurance and Indemnities

Construction Law Primer

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Insurance Programs for Construction Projects

McHUMOR.com by T. McCracken



"Build it, and they will sue."

Who controls the insurance programs for construction Projects

- owner can require contractor and subcontractors to provide insurance
- or owner can

Insurance coverage and contractual obligations

Types of insurance

Builders All-Risk

- owner, contractors, subcontractors, consultants, subconsultants
- waiver of subrogation, except consultants

Wrap-up policies

- wrap up liability places all liability coverage under one policy
 - other alternatives: owner, contractor and consultants under one policy restricted to claims that “are construction related”
 - or add owner and consultant as additional insureds under the contractor’s CGL policy

Wrap-up policies - why use them?

- one common insurer
- reduces finger pointing
- protects owner's and contractor's ongoing insurance program
- reduces delays when seeking to immediately address damage

Wrap-up policies

- disadvantage, cannot “stack” coverages of each separate party to the construction in the case of a “disaster”
- often more restrictive, and excludes “damage to the project”
- excludes professional liability
- limited term of cover

Design Build Contracts

- lack of understanding on the part of contractors as to the exposure on the design side,
- does the contractor become the designer?
- is there appropriate insurance coverage?

what happens when losses are greater than
the insurance limits?

coverage gaps

CCDC insurance provisions

IBC 4047 - Builders Risk Policy CCDC Endorsement (For use with IBC 4042)

"RESULTANT DAMAGE" shall mean physical damage to the insured property other than the cost of rectifying the defect or fault that caused the physical damage. The cost of rectifying the defect or fault (the cost of making good) shall be the cost which the Insured would have incurred to do so had such defect or fault been discovered immediately before the physical damage occurred and rectified at that time.

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aggregate limit of not less than \$5,000,000 within any policy year with respect to completed operations, and a deductible not exceeding \$5,000. The insurance coverage shall not be less than the insurance provided by IBC Form 2100 (including an extension for a standard provincial and territorial form of non-owned automobile liability policy) and IBC Form 2320. To achieve the desired limit, umbrella or excess liability insurance may be used. Subject to satisfactory proof of financial capability by the *Contractor*, the *Owner* may agree to increase the deductible amounts.

2. Automobile liability insurance in respect of vehicles that are required by law to be insured under a contract by a Motor Vehicle Liability Policy, shall have limits of not less than \$5,000,000 inclusive per occurrence for bodily injury, death and damage to property, covering all vehicles owned or leased by the *Contractor*. Where the policy has been issued pursuant to a government-operated automobile insurance system, the *Contractor* shall provide the *Owner* with confirmation of automobile insurance coverage for all automobiles registered in the name of the *Contractor*.
3. Aircraft and watercraft liability insurance with respect to owned or non-owned aircraft and watercraft (if used directly or indirectly in the performance of the *Work*), including use of additional premises, shall have limits of not less than \$5,000,000 inclusive per occurrence for bodily injury, death and damage to property including loss of use thereof and limits of not less than \$5,000,000 for aircraft passenger hazard. Such insurance shall be in a form acceptable to the *Owner*.
4. "Broad form" property insurance shall have limits of not less than the sum of 1.1 times *Contract Price* and the full value, as stated in the *Contract*, of *Products* and design services that are specified to be provided by the *Owner* for incorporation into the *Work*, with a deductible not exceeding \$5,000. The insurance coverage shall not be less than the insurance provided by IBC Forms 4042 and 4047 (excluding flood and earthquake) or their equivalent replacement. Subject to satisfactory proof of financial capability by the *Contractor*, the *Owner* may agree to increase the deductible amounts.
5. Boiler and machinery insurance shall have limits of not less than the replacement value of the permanent or temporary boilers and pressure vessels, and other insurable objects forming part of the *Work*. The insurance coverage shall not be less than the insurance provided by a comprehensive boiler and machinery policy.
6. "Broad form" contractors' equipment insurance coverage covering *Construction Equipment* used by the *Contractor* for the performance of the *Work*, shall be in a form acceptable to the *Owner* and shall not allow subrogation claims by the insurer against the *Owner*. Subject to satisfactory proof of

selecting your Insurance Broker

matching contractual indemnities to
available insurance

for professionals look for limiting language:
an indemnity limited to those losses covered
by one or more policies of insurance

Construction Defects

Every major construction deficiency claim

- involves an unhappy owner
- and a policy or policies of insurance that may or may not respond

McHUMOR by T. McCracken



"I haven't found anything wrong yet, but it's OK for you to go ahead and worry a bit longer."

Construction deficiency claims

- multi party, multi issue
 - relationships primarily contractual
 - overlap of tort and contract
 - engage some form of insurance coverage either during the course of construction (builder's risk) or after (CGL or other completed operations insurance)

Construction Context

- do note that many claims are being defended which years ago may not have triggered coverage
- *Progressive Homes v. Lombard* (Supreme Court of Canada)

Key Risk Areas

- loss occurs on a construction project years after completion
- owner or subsequent purchaser sues contractor
- contractor seeks insurance coverage from insurer
- direct damages claimed, consequential damages claimed, pure economic loss claimed
- a headache!
- *Progressive Homes v. Lombard* (Supreme Court of Canada - September 2010)

Progressive Homes v. Lombard (Supreme Court of Canada - September 2010)

- what it has and has not decided
- why this case is important to you
- future implications

Progressive Homes (cont'd)

- insurance responds to fortuitous events
- the economic loss argument fails: damage caused to one part of the construction by another defective part of the construction is not pure economic loss - rather a form of property damage

Key Concepts

- policy exclusions
 - workmanship
 - the defective element itself
- exceptions to exclusions
 - subcontractor exception

will there be attempts to have insurance limits include defence costs with occurrence based policies?

IBC insurance language is not mandatory
language for each insurer is not exactly the
same

- we return to broker selection and the importance of having a broker knowledgeable about construction insurance

Questions?

- Thank you!