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Workshop N

BUILDERS RISK CLAIMS TACTICS

Presented by

Timothy L. Pierce
Partner
Thelen Reid & Priest LLP

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

Workshop N

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Timothy L. Pierce
Partner
Thelen Reid & Priest LLP

Mr. Pierce is presenting Workshop N, "Builders Risk Claims Tactics," on Wednesday afternoon. A partner in the Los Angeles office of Thelen Reid & Priest LLP, he is a member of the firm's Construction and Government Contracts practice group and his practice focuses on the construction industry. Mr. Pierce also represents insureds in insurance coverage disputes and in addressing risk management issues in the construction industry. He writes and speaks regularly on risk management issues in the construction industry.

Mr. Pierce graduated from Virginia Tech with a bachelor of science and a master of science in mechanical engineering and was employed as a manufacturing engineer with Hewlett Packard before attending law school. He received his J.D. degree from the University of Santa Clara. Mr. Pierce is a member of the American Bar Association and the Fiscal, Insurance, and Risk Management and Legal Advisory committees of the Associated General Contractors of California.

Notes

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BUILDERS RISK CLAIMS TACTICS

Timothy L. Pierce
Thelen Reid & Priest LLP

I. Four Steps To Successfully Resolving Builder's Risk Claims

- A. Set-up A Comprehensive Insurance Program
- B. Have An Action Plan That Is Implemented When Damage To The Project Occurs
- C. Prepare The Claim Wisely
- D. Resolve The Claim Through Smart Negotiations

II. Setting Up A Comprehensive Insurance Program

- A. Who Is Responsible For The Coverage?
 - 1. Best candidates are the owner or the general contractor. Which party under the contract has responsibility for damage to the property?
 - a. Under the AIA 201 Contract, the Owner essentially has this responsibility, but it can transfer responsibility to the contractor.
 - b. If the contract is unclear, then the contractor will have that responsibility. *USF&G v. Parsons* (1927) 147 Miss 335, 112 So. 469.
 - 2. Although the owner may want to purchase the policy to conserve on project costs, is the contractor getting sufficient coverage? A contractor that has responsibility for damage to the property may want to use its own coverage because its policy may provide broader coverage and/or it may prefer to deal with its insurer if it becomes necessary to adjust a claim.
 - 3. If the owner is acquiring the policy, but the contractor is responsible for damage to the project, who is responsible for any deductibles?
 - a. Responsibility for some amount of deductible may provide an incentive for the contractors to prevent covered losses.
 - 4. In the end, make sure all the respective responsibilities for the parties are delineated in the contract documents and that the policies satisfy both the contract requirements and each parties' risk management objectives.
- B. Does The Project Have The Right Coverage?
 - 1. Are all the appropriate perils covered in the policy?
 - a. All Risk Coverage subject to exclusions such as nuclear and war.
 - b. Is coverage appropriate for earthquake, flood, windstorm, pollution, wear and tear, boiler and machinery and dishonesty?

- c. Coverage should be tailored to work to be performed. *Interior Shutters v. Valiant Ins. Co.* (2000) 2000 U.S. App. LEXIS 33816 - No coverage when plastic sheeting failed because no damage occurred to the building (sheeting not part of roof).
2. Defective Workmanship Exclusion
- a. Excludes coverage for cost of correcting defective workmanship.
 - b. Exception for Ensuing Loss caused by a covered peril
 - i) Coverage still exists for resulting damage by covered peril. *Blaine Construction Corp. v. INA* (1999) 171 F.3d 343
 - ii) No coverage for damage to installed work during repair of defective work. *Laquila Construction, Inc. v. Travelers Ind. Co.* (1999) 66 F.Supp. 2d
 - c. Failure to perform work on schedule is not defective work. *M.A. Mortenson v. IINA* (1999) 1999 U.S. Dist. LEXIS 22641.
 - d. No coverage to correct condominium workmanship defects. *Swine Pacific Holdings, Inc. v. Zurich Ins. Co.* (2001) 139 F.Supp. 2d 1374. *See also, John S. Clark Co. Inc. v. United Nat'l Ins. Co.* (M.D.N.C. 2004)304 F.Supp.2d 758.
 - e. *Merz v. Markel Ins. Co.* (2004) 2004 Cal.App. Unpub. LEXIS 1936. Damage to retaining wall caused by slope failure due to defective workmanship is not an "ensuing loss."
 - f. *Nat'l Housing Bldg Corp. v. Acordia of Virginia Ins. Agency, Inc.* (Va. 2004) 267 Va. 247. Professional Negligence claim against broker for failure to name contractor as an additional insured failed because damage to retaining wall caused by defective work was not covered under the policy.
3. Court will not find coverage to compensate for insured's inadequate risk management procedures. *Pine Ridge Realty v. Mass. Bay Ins. Co* (2000) 752 A.2d 595 [No coverage for flood damage when no evidence insured intended to procure flood coverage]
4. Does the policy provide full replacement costs?
- a. Limits of coverage must increase with value of project. *Rouse v. Federal Ins. Co.* (2001) 544 S.E. 2d 609 [Project valued at \$4.1 million and Policy Limits Remained at \$2.4 million] Compare *St. Paul v. Griffin Constr. Co.* (1999) ["open" policy limits increase automatically with value of Project]
5. Are the necessary forms of coverage such as soft costs coverage included in the policy? Who has responsibility for such losses if they are incurred?

C. Is Everyone Covered?

1. Are all of the important subcontractors and material suppliers covered as insureds under the policy.
 - a. *Holden v. Connex - Metalna* (2000) 2000 U.S. Dist LEXIS 18359 [Endorsements should be unambiguous - "Subs" refers to subcontractors and not subsidiaries].
2. Should design professionals be named as insureds?
3. Get waivers of subrogation to avoid internal disputes and disruptions to the project if a claim does arise.
 - a. *Best Friends Pet Care, Inc. v. Design Learned, Inc.* (2003) 77 Conn.App. 167. Waiver of subrogation by insured limited to losses and property covered by the policy. Claim for loss of use not covered by policy was not waived via a waiver of subrogation.
4. General contractors may want to consider contract clauses that give them control over resolving claims that involve the work of subcontractors. This can simplify the claims process and eliminate problems caused by too many insureds and/or the squeaky wheel subcontractor.

D. Is Everything Covered?

1. Besides coverage for the work, is coverage needed for:
 - a. Installed Equipment
 - b. Landscaping
 - c. Temporary Works - scaffolding, forms, falsework, shoring, fences, lighting and temporary structures.
 - d. Contractors' Tools and Equipment
 - i) *Ajax Building Corp. v. Harford Fire Ins. Co.* (11th Cir. 2004) 358 F.3d 795 – Broad coverage grant for equipment was limited by separate clause limiting coverage to property that was to become a permanent part of the structure. Note: policy did not contain an equipment float-er.
 - e. Adjacent Property – *Detroit Water Team Joint Venture v. Agricultural. Ins. Co.* (6th Cir. 2004) 371 F.3d 336 – Adjacent existing property not included in "total insured value" and thus no coverage for damage to pre-existing work.
2. Is property covered at all appropriate locations such as:
 - a. At the Project Site
 - b. In transit

- c. When temporarily stored offsite
 - d. When at an offsite manufacturer's facility
- E. When Does Coverage Commence
- 1. *Bosecker v. Westfield Ins. Co.* (2000) 724 N.E. 2d 241 [Coverage started at policy inception even before work commenced].
 - 2. *Scottsdale Ins. Co. v. Guaranty Nat. Bank* (Miss. App. 1999) 733 So.2d 863 [Policy period extended when insurer failed to give statutory notice to mortgagee].
- F. Supplemental Insurance by Contractors and Subcontractors
- 1. If the coverage provided by the policy acquired by the owner or general contractor is not complete, contractor(s) should purchase appropriate insurance to supplement the gaps in the initial policy.
 - 2. *Holden et al. v. Connex-Metalna Management Consulting* (5th Cir. 2002) 302 F.3d 358. – Builders Risk policy responds to a crane collapse claim before blanket property policies are triggered.
- G. Avoid Losses Before They Occur
- 1. The coverage is not absolute even for covered perils. A common policy condition requires insureds to take reasonable steps to avoid damage to the covered property.
- H. Conform With Policy Obligations *Tapatio Springs Builder v. Maryland Cas. Ins. Co.* (1999) [Coverage limited to homes properly reported in monthly inventory].

III. Responding To A Builder's Risk Claim

- A. Recognizing A Builder's Risk Claim
- 1. Since many of the steps to a successful claim must be taken promptly after a claim arises, the project personnel must be aware of circumstances that potentially give rise to a builders risk claim.
 - a. Certain damages, such as rain damage, are generally obvious. Many project personnel, however, may not be aware that theft or damage to scaffolding may be covered under a builders risk policy.
- B. Establish An Action Plan Before A Loss Occurs
- 1. Educate project personnel on the scope of coverage provided.
 - 2. Who is responsible in the event of a loss?
 - a. Ensure that one or more persons on the project are designated as the point person(s) to handle potential claims. Also project personnel must know the right person to contact at the home office when such a claim arises.

C. What To Do In The Event Of A Loss

1. Immediate Action
 - a. Preserve and protect the property from further damage
 - b. Take the necessary steps to mitigate the damages including making temporary repairs.
2. Provide Immediate Notification to:
 - a. Your Management
 - b. Your Insurance Broker and/or insurer
 - i) *Montefiore Medical Center v. American Protection Ins.* (S.D.N.Y. 2002) 226 F.Supp.2d 470 – Prompt notice provisions require notice with a “reasonable time under all the circumstances....”
3. Assessing the Damage
 - a. Identify preliminary scope of damage but do not make unnecessary repairs until a repair plan has been established
 - b. Cooperate with the insurer if a claims representative is sent to the site to assess the damage.
4. Document the Damage Using:
 - a. A standardized accident investigation form.
 - b. Witness Statements other than statements the insurer may request under oath. Consider involving your attorney to ensure the statements are protected under the attorney-client privilege.
 - c. Use of Photos and Video
 - i) Be cognizant that photos and video may create evidence for future plaintiffs.
 - d. Newspaper articles and other media
 - e. Consultants
5. Cooperate With The Insurer Who May Want To:
 - a. Investigate the damage.
 - b. Take witness statements under oath.
 - c. Examine and copy records.
6. Submit A Timely Proof of Loss

7. Develop a Repair Plan
 - a. What repairs will be performed?
 - b. Who will perform the repairs? Almost always the original contractor, but what if the repair will impact other portions of the project. Does the insurer want to bring in additional crews.
 - c. Set-up separate accounting for the costs of addressing any damage from day one. THIS IS CRITICAL
8. Is a Schedule Update Needed?
 - a. If the damage or resulting repairs are likely to disrupt the project schedule or cause delays, update the schedule as of the date of the covered event. This information will be needed for soft cost coverage.

IV. Preparing A Successful Claim

- A. What Expenses Should Be Included In Your Claim
 1. Cost necessary to protect undamaged property
 2. Cost to make temporary repairs
 3. Cost of your damaged property
 4. Cost of damage to the property of others
 5. Total labor and material expenses
 - a. Should costs to perform repairs on premium time be included in the claim?
 6. Additional overhead
 7. Additional necessary expenses
 8. Profit
- B. The Claim Presentation
 1. Organizing your claim to help the insurer
 - a. Provide a well organized and complete claim the first time. You only get to make a first impression on the claims adjuster once.
 - b. Provide a narrative describing the damages, the causes of the damages and when the damages occurred.
 - c. Show each element of the claim with appropriate tables and all supporting documentation.
 - d. Include all elements of the claim, but do not overstate the claim.
 - e. Provide all necessary schedule analyses to support a claim for delay damages.

2. Make it easy for the insurer to understand. Don't make the adjuster work to figure out the claim. Remember, this is not the only claim on the adjuster's desk.
 3. Avoid gaps in the claim information, but when they are unavoidable:
 - a. Explain why information is lacking and provide reasonable alternative means of calculating or approximating the claim.
 4. Be cognizant of problems with multiple deductibles. The 72 hour rule can greatly reduce the value of a claim.
- C. Potential Resources For Preparing The Claim
1. Your broker is invaluable. He or she has lots of experience and knows how the carrier responds to builders risk claims.
 2. A claims consultant or scheduling consultant if the extent of necessary repairs is in question or if there are time critical aspects to the claim.
 3. A cost accountant if the costs have not been adequately segregated in the first instance.
 4. A coverage attorney can be useful to review the claim for legal issues and to show your commitment to the claim.

V. Negotiating The Claim

- A. Understanding The Claims Adjustment Process
1. The claim must be properly documented. Help the carrier with this effort by providing all requested information and a complete claim package.
 2. Take a cooperative approach with the carrier. Assume they want to get your claim resolved as quickly as you do.
 3. Understand that insurance companies have different claims authority levels and that the larger the claim, the more levels of review that will be required.
- B. Take Steps To Resolve The Claim Promptly
1. Do not be evasive. Provide all requested information. Also, do not let requests for information go unanswered. Respond immediately.
 2. Agree to stay any time to sue provisions.
- C. Meet With The Insurer To Present And/Or Discuss The Claim.
1. Objective of such a meeting is to keep the claim process moving and hopefully resolve the claim at the meeting.
 2. Attendees
 - a. Risk manager

- b. Broker
 - c. Project personnel
 - d. Representatives from subcontractors
 - e. An attorney
3. Bring everything that will help the insurer understand the basis for the claim.
- D. Finalize The Negotiations
- 1. Don't let the insurer procrastinate.
 - 2. Be prepared to compromise.