

CLC Insurance/Surety Committee Presentation

2013-07-15

Bruce D. Partington

Clark Partington Hart

Practical Advice for Clients on Construction Insurance Issues

- **Overview**

- Risk Allocation Principles
- Up front (Contract negotiation)
 - Risk Allocation
 - Project Delivery Method
 - Position of client
- Claims
 - Pre/Early Litigation/Claim
 - Bond claims
 - Pleading issues
 - Other litigation issues

- **Risk Allocation Principles**

- Personal paradigm shift: 1995 CLC Seminar: "Construction Law and Risk Management"
 - Construction Contracts and Risk Allocation
- Who is best able to:
 - Manage the risk
 - Insure the risk
 - Does it make sense to allocate the risk in this way?
- The visceral tendency to try to shift risk away from your client can lead to shifting it to someone who cannot insure it nor manage it -- is that where it makes sense?

- Read the contracts for construction/design -- especially insurance, indemnity and bonding requirements.
- Read the policies
 - Read the endorsements -- sometimes contradictory
- **Up Front -- Draft or edit the contracts for design and construction to ensure risk is in the right place, insurable, and insured (or bonded)**
 - **Advice varies depending upon the position of the client and project delivery method**
 - Project Delivery Method
 - Traditional Design-Bid/Negotiate-Build
 - Design/Build
 - CM at risk
 - CM advisor
 - Position of client
 - Owner/Developer
 - Design professional
 - Design/Builder
 - Construction Manager (CM)
 - General Contractor
 - Subcontractor
 - **Project Delivery Methods**
 - Principally relevant at top tier -- Owner/Lead Design Professional/ Contractor
 - Traditional Design-Bid/Negotiate-Build
 - Design effort predominantly separate from construction effort -- so analysis of liability coverage separated both by time (design precedes construction) and different roles (design v. construction)
 - Property insurance (builder's risk) -- Owner typically carries (required by AIA General Conditions)

- Flood and windstorm required by AIA General Conditions, but generally separate policies
 - Consider Flood even if not in flood zone
- Insurance requirements for construction should be re-evaluated as design evolves.
- Design/Build
 - Single entity bearing with both design and construction responsibility
 - Often a special purpose entity or joint venture (JV)
 - Be sure that entity is an insured on pertinent policies -- and Additional Insured on downstream general liability policies
 - JV Partners or members should also be named insureds
 - Liability coverage for both design and construction
 - Most often separate policies
 - Combined policies occasionally -- especially bigger projects
- Construction Management (CM) -- actual structure can vary; but generally considered to include "professional services" to some degree
 - CGL Policies now often specifically exclude coverage for CM services - - so don't use CM term lightly
 - Professional E&O coverage also important, or specific CM endorsement on CGL policy
 - Important to get endorsement ensuring coverage, because even if CM services are not specifically excluded, insurer can argue CM services are within broad professional services exclusion.
 - CM at Risk -- CM as Contractor
 - Approach similar to Design-Bid/Negotiate - Build
 - Contract should clarify/specify
 - CM liability coverages
 - Additional insured requirements
 - Owner coverage
 - Property

- Liability
- Subcontractor coverage
- CM Advisor
 - Liability and E&O -- E&O of heightened importance because of more predominant "advisor" role
 - Contract should clarify/specify coverages
 - CM Coverages
 - Additional insured requirements
 - Owner coverages
 - Property
 - Liability
 - Owner/Contractor(s) coverages
 - CM as additional insured
 - Subcontractor coverages
- **Position of Client -- Considerations**
 - Owner/Developer (own perspective)
 - Project delivery method
 - If project is being competitively bid, insurance requirements should go in bid documents
 - Also in bid package, require provision of actual policies and endorsements as a contractual obligation
 - Own liability coverage
 - Problematic (but typical) exclusions/endorsements
 - Condo/Multifamily
 - EIFS/DEFS
 - Pollution
 - "Your work" exclusion and subcontractor exception

- JSUB/Pozzi Windows
- For problematic exclusions/endorsements, look at ways to "insure the gaps" (below)
- LEED Certification Risks
 - 2010 Florida Bar Journal Article
 - http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/62d131a5d4f5d767852576d50074d702!OpenDocument&Highlight=0,leed*
 - Also Fred Dudley's presentation and paper at 2009 Construction Law Institute
 - LEED Certification Insurance:
 - <http://www.greenbuildinglawupdate.com/2009/08/articles/legal-developments/insurance/a-green-building-holy-grail-leed-certification-insurance/>
 - Property Insurance (Builder's Risk) -- AIA Documents contemplate Owner providing; contract needs to reflect who is providing.
 - Lender requirements
 - Flood; consider higher than standard NFPA limits
 - Windstorm
 - Green/LEED Rebuild Coverage
 - <http://sustainability.thomsonreuters.com/2012/09/18/insurance-coverage-and-policy-discounts-for-green-building/>
 - Consider coverages and limits to require downstream for design and construction, including bonding
 - What limits appropriate -- varies by project
 - Use excess/umbrella to get higher limits if necessary.
 - Consult with lender; determine lender requirements
 - Design Professional Requirements (Owner perspective)
 - Insurer rating requirements

- Appropriate limits for project
- New Statute limiting individual design professional liability (§ 558.035, Fla. Stat.)
 - <http://laws.flrules.org/2013/28>
 - Took effect July 1, 2013.
 - Basic requirements
 - Entity is party to written contract; individual design professional not named as party
 - Insurance requirements in written contract, and are met by the design professional entity
 - Disclaimer in contract; all caps, 5 point sized larger than rest of text
 - Damages "solely economic and the damages to not extend to personal injuries or property not subject to the contract" – no one knows what this means yet
 - Unclear about non-privity claimants -- statute only speaks to contract between the design professional and the "claimant". It appears that individual liability would remain for non-privity claimants.
 - Require continued coverage for appropriate period of time after construction (ties into individual liability law -- to maintain individual liability exclusion, the extended coverage will need to be explicit in contract and then the design professional has incentive to maintain the insurance and keep the individual liability protection)
 - Downstream consultant requirements/limits
 - Continued coverage after completion because of "claims made" nature of policies; consultants too.
 - Won't be able to AI on design policy. Deal with it in indemnity provisions
 - Condominium/Multifamily Exclusions
 - LEED Coverage? Is it a warranty?

- Good article for both design professionals and contractors on coverage
- <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Author/62D131A5D4F5D767852576D50074D702>
- Contractor/CM coverage requirements (Owner Perspective)
 - Insurer/Surety rating requirements
 - Risk shifting dangers
 - Design risk shifting -- performance specifications
 - Design delegation
 - Owner should require (in contract) provision of a full copy of the policy and all endorsements; not just certificate of insurance
 - Limits to require
 - AIA Forms do not address limits or have "defaults"
 - Consider size/nature of project
 - Additional Insured -- include completed operations
 - Now required in 2007 version of AIA General Conditions -- 11.1.4
 - Plethora of different AI endorsements -- need to see it and read it.
 - Don't rely on certificate of insurance
 - Primary/Secondary issues with Owner's liability policy
 - Post completion requirements -- How long post completion is contractor required to maintain insurance? (most claims will be completed operations claims, and "occurrences" happen over time)
 - Problematic Endorsements/Provisions
 - Subcontractor Exception to the "Your Work" exclusion (JSUB/Pozzi)
 - Is policy pre or post JSUB?
 - Condominium/Multifamily

- EIFS/DEFS
 - Mold
 - Pollution
- Insuring the gaps (in all coverages)
 - Buying out endorsements for additional premium
 - Typically not difficult to do this with "Your Work" in post-JSUB policies
 - Separate policies (even project specific) for other endorsements (e.g. EIFS/DEFS)
 - Bonding -- Performance Bond
 - Indemnity provisions in contract
 - But -- Keep § 725.06, Fla. Stat. in mind if seeking indemnity for own fault.
 - http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0725/Sections/0725.06.html
- Design Professional (own perspective)
 - Individual liability protection (see above)
 - Ensure coverages match contractual requirements; adjust fee if more than typical
 - Coverage exclusions
 - Condo/Multifamily
 - Length of "tail"; time to continue coverage -- consider in setting fee or provide method of fee adjustment
 - "First dollar defense" endorsement (no deductible on defense costs)
 - "Wasting" policies -- ensure client understands consequences
 - Heard rumors of non-wasting policies for design professionals but have not seen
 - "Claims made" v. Occurrence
 - Downstream requirements for consultants

- Limits
- Continued coverage
- Indemnity requirements
- Individual liability protection in downstream contracts
- Be involved in insurance requirements in Owner/Contractor relationship
 - Be sure parties understand design delegation, and insurance requirements
 - Ensure AI coverage under Contractor's liability policy, including completed operations (required by AIA General Conditions at 11.1.4)
- Contractor (own perspective)
 - Prime contract requirements
 - Problematic endorsements
 - Subcontractor work
 - Post JSUB/Pozzi Windows -- can still get the coverage - - but have to know to ask
 - EIFS/DEFS endorsements
 - Buy out or separate policy
 - Condo/Multi family
 - Either get coverage, or don't build
 - Mold (this is Florida, we have mold/mildew)
 - buy out endorsement or get coverage under pollution policy
 - Pollution
 - Can sometimes get mold coverage under pollution policy
- Keep risk shifting principles in mind in contracts with subcontractors
- Ensure Owner is providing full property coverage; get verification
- Delegated design

- Understand the scope of it -- how much is delegated?
- 3.12.10 of A201-2007
- Shop Drawings/Submittals
 - Verify E&O coverage of engineers stamping shop drawings
- If there is a lot of this (performance specifications), consider whether design E&O is required, or ensure that those stamping required submittals have coverage.
- Additional insured coverage/endorsement -- compare to contract requirements -- especially for completed operations (AIA GC Requirement)
 - Endorsement versus certificate
 - Provide to Owner in advance; let Owner make call on sufficiency
- Downstream requirements for subs
 - What does prime contract require for downstream?
 - Subcontract should require provision of policies and endorsements
 - Mirroring coverage required by Owner
 - Match coverage requirements with risk
 - AI, including completed operations; require continuing coverage to match time required in Owner/Contractor agreement.
 - Bonding
 - Potential premium reduction if subs bond too.
- Primary versus secondary (whose policy is primary; whose is secondary)
- Indemnity provisions of contracts
 - s. 725.06, Fla. Stat.
- Subcontractor (own perspective)
 - Review contract requirements -- match to policies

- If different from standard coverages, confirm coverage with insurance agent; purchase additional coverages
 - Ensure AI coverage is as required
 - Confirm property coverage
 - If there are sub-subcontractors, see above as if contractor.
- **Insuring the "gaps"**
 - Separate, project specific policies
 - "Buying out" unacceptable endorsements or replacing with more acceptable endorsements
 - Excess/Umbrella policies
 - Bonds
- **Claims – Invoking all potential coverages, insurance and bonding, to minimize actual out of pocket loss to clients.**
 - **Pre/Early Claim/Litigation**
 - Insurance policy demands -- upstream and downstream
 - § 627.4137, Fla. Stat.
 - http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0600-0699/0627/Sections/0627.4137.html
 - Consequences of lack of response -- none (if not provided, file complaint with Dept. of Insurance)
 - Design professional issues – some E&O carriers contend that they are not subject to § 627.4137
 - Copies of contracts/subcontracts
 - Accumulate what you have; request others
 - Verify what coverage was required
 - Ch. 558 Process -- insist on following the process
 - Inspection is critical to understanding issues and characterizing problem for coverage.

- Beneficial to document accumulation; contracts and insurance policies
- During investigation, be cognizant of coverage issues
- Get insurer involved, particularly in inspections or have them affirmatively state they won't attend inspection.
- Notice to carrier:
 - In writing; confirm receipt
 - Property insurance
 - Notify immediately, unless confident that claim will be within deductible
 - But remember different policies/different deductibles
 - Flood
 - Wind
 - General Property Insurance
 - In notice, be deliberate how you characterize the claim
 - Windstorm typically has high deductibles
 - Flood often has lower limits, especially if NFPA Policy
 - If LEED issues, and that was insured (see above) - - be sure you include that in the notice.
 - "Late notice" risk if start repair (other than emergency) without notice.
 - Liability Insurance
 - If your own carrier
 - Clients often want to delay to avoid adversely affecting risk experience
 - Late notice risk and prejudice
 - If Additional Insured
 - No reason not to notify immediately

- Insurers are sometimes careless about assuming no completed operations coverage.
- Bond claims
 - Follow steps in bond
 - Declaring "default" of principal on bond long after construction complete, final payment
- **Pleading Issues**
 - How can I get indemnity/defense for my client, or invoke the coverage of whomever my client needs to sue?
 - Tension relative to CGL coverage (rarely an issue for design professional claims)
 - Duty to defend is controlled by "four corners of complaint"; focus on that first. Hard to get indemnity if you can't get carrier in to defend.
 - Requirement of Fla. R. Civ. P. 1.110(b)(2)
 - "short and plain statement of ultimate facts showing the pleader is entitled to relief"
 - Solution:
 - Include policy language in your pleading to invoke coverage/duty to defend
 - "neither expected nor intended"
 - Moderate your (and your client's) thirst for punitive damages and intentional torts
 - Use the word "negligence" even if breach of contract or other claims
 - "continuous and repeated exposure to same harmful conditions"
 - "physical injury to tangible property"
 - "resulting loss of use"
 - "physical injury and damage to tangible property other than the work of _____"
 - Distinguish different "products"

- E.g., an exterior cladding is typically comprised of multiple products
 - Sheathing, flashings, components, fasteners, lath, membranes, multi-part materials like stucco, sealants, etc.
 - If a problem with one of these is causing damage to others, make that clear in your pleading, even if installed by same subcontractor
- "Manifestation" versus "injury in fact"
 - Multiple policy years/multiple occurrences if single year limits are even possibly insufficient
 - Plead both manifestation and injury in fact
 - Plead dates of policy years if necessary, and "occurrence" within policy years
 - July/August 2013 Fla. Bar Journal on this issue
 - http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/55c5d415922e2f5285257b900053231b!OpenDocument&Highlight=0,manifestation*
 - Try to plead around problematic exclusions if possible
 - Don't say "mold" -- "damage from water and moisture"
 - Also, after *Tiara Condominium Assn., Inc. v. Marsh & McClellan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013), include a negligence count until the law and effects of the decision are settled.
 - Insurer retained defense counsel is limited in ability to attack or challenge pleadings if doing so would adversely affect insurance coverage.
- **Other Litigation Issues**
 - Include individual design professionals, especially until meaning of § 558.035 is sorted out.
 - If coverage denied -- was coverage defense asserted timely? (§ 627.426, Fla. Stat.)

- http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0600-0699/0627/Sections/0627.426.html
- If coverage denied, join insurer as third party defendant, especially if case is pending in state court (minimize *Amerisure Ins. Co. v. Auchter*, 673 F. 3d 1294 (11th Cir. 2012))
- Include fee claim § 627.428, § 627.756 (sureties)
 - http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0600-0699/0627/Sections/0627.428.html
- Subrogation
 - Waiver of subrogation for property insurance claims in A201-2007 (11.3.7)
 - Does not apply to liability claims -- but some insurers think it does.
- Coblenz Agreements
 - *Coblenz v. Am. Sur. Co. of N.Y.*, 416 F.2d 1059 (5th Cir. 1969)
 - Notice of movement toward this may prompt an insurer "change of heart" on coverage.