

BASIC PRINCIPLES OF CONSTRUCTION INSURANCE *OTHER INSURANCE ISSUES*

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OTHER INSURANCE ISSUES

There are a myriad of insurance products on the market. However, despite certain insurers' attempts to create new products, the payment and performance bonds traditionally used in the construction industry have not been supplanted or replaced and remain in common use.

A. Builder's Risk

For almost every construction project an owner will maintain property insurance known as Builder's Risk insurance. The purpose of Builder's Risk insurance is to cover losses arising from unforeseen catastrophic events such as fire or flood which may damage the property during the construction process.¹ Builder's risk insurance is not liability insurance:

Stated differently, the subject policy is not, as urged, a builder's liability policy which insures the plaintiff/insured against the claims of third parties against the insured for the insured's alleged faulty workmanship; it is a first-party claim policy which insures the builder against physical damage or loss to the property brought about by some external cause other than the insured.²

¹ *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161 (Fla. 2003); *Great American Ins. Co. v. Jefferson County Comm.*, 776 F.Supp. 2d 1252, 1264 (N.D. Ala. 2010); *Tocci Building Corp. v. Zurich American Ins. Co.*, 659 F.Supp.2d 251 (Mass. 2009); *Allianz Ins. Co. v. Impero*, 654 F.Supp.16 (E.D. Wash. 1986); *US Fire Ins. Co. v. Sovran Const. Co., Inc.*, 854 So. 2d 221, 222 (Fla. 1st DCA 2003); *Edward J. Gerrits, Inc. v. Nat'l Union Fire Ins. Co.*, 634 So. 2d 712, 713 (Fla. 3d DCA 1994); *Trinity Indus., Inc. v. Ins. Co. of North America*, 916 F. 2d 267 (5th Cir. 1990).

² *Edward J. Gerrits, Inc. v. Nat'l Union Fire Ins. Co.*, 634 So. 2d 712, 713 (Fla. 3d DCA 1994).

Builder's Risk insurance often contains an exclusion that eliminates repair costs for losses resulting from design deficiencies or deficiencies in the work.³ This standard exclusion is not ambiguous and excludes claims for "expenses associated with repairing the design defect."⁴ Courts' rationale was that an exception to an exclusion should not "swallow" the exclusion and create coverage which would otherwise not exist.

B. Workers Compensation in Florida

Most states have very broad Workers Compensation schemes.⁵ The policy behind the Workers Compensation Insurance is to secure prompt payment for work-related injuries without regard to a determination of liability and the rights to reimbursement.⁶ The Worker Compensation laws typically provide for limited exemptions for corporate officers, having recently eliminated once again the exemption for sole proprietors, partners, and independent

³ *Great American Ins. Co. v. Jefferson County Comm.*, 776 F.Supp. 2d 1252, 1264 (N.D. Ala. 2010); *Allocation of Losses in Complex Ins. Coverage Claims* § 16:3, Seaman, Scott M. and Schulze, Jason R. (Westlaw 2016); *Swire Pacific Holdings*, 845 So. 2d at 165. (Policy excluded "Loss or damage caused by fault, defect, error or omission in design plan or specification, but this exclusion shall not apply to physical loss or damage resulting from such fault, defect, error or omission in design plan or specification").

⁴ *Swire Pacific Holdings* . at 168.

⁵ Chapter 440, *Fla. Stats.*; *Zurich American Ins. Co. v. GM Corp.*, 242 F.Supp.2d 736 (E.D. Cal. 2003); Cal. Labor Code D. 4, Ch. 1, Part. 1, *et seq.*

⁶ *Cardillo v. Liberty Mutual Ins. Co.*, 67 S.Ct. 801 (1947); *Port Everglades Terminal Co. v. Canty*, 120 So. 2d 596 (Fla. 1960); *Blount v. State Road Dept.*, 87 So. 2d 507 (Fla. 1956); [Rodriguez v. RWA Trucking Company, Inc. \(App. 2 Dist. 2013\) 190 Cal.Rptr.3d 663, 238 Cal.App.4th 1375](#), as modified, review granted and opinion superseded [165 Cal.Rptr.3d 61, 314 P.3d 52](#), review dismissed, cause remanded [187 Cal.Rptr.3d 667, 348 P.3d 874](#), publication ordered [190 Cal.Rptr.3d 317, 352 P.3d 881](#).

contractors.⁷ In many states, officers of corporations in the construction industry are not exempt from coverage on any commercial building projects that have a value of \$250,000.00, or commercial buildings including resident buildings or other buildings larger than four units.⁸

General contractors are required to procure Workers Compensation for all of their employees. Some states even require the general contractor to provide Workers Compensation coverage for all of their subcontractors' subcontractors, too.⁹ The underlying rationale is that the contractor is responsible for securing Workers Compensation coverage unless the subcontractor has the coverage, thus protecting employees of irresponsible or uninsured subcontractors. In effect, the legislature is shifting the burden to insure Workers Compensation coverage to the general contractor, who they believe to be in a better financial position than the subcontractor.

Subcontractors are not liable for providing Workers Compensation coverage for the employees of other subcontractors on

⁷ Fla. Stat. § 440.02 (2004); *Great Southwest Fire Ins. Co. v. Hercules Bldg. & Wrecking Co., Inc.*, 35 Mass. App. Ct. 298 (1993); but compare, *Creek Coal Co. Inc. v. Bates*, 134 F.3d 734 (6th Cir. 1997).

⁸ Fla. Stat. §440.02(14)(b)(2) & (3) (2004) (officers may file for exemption from law).

⁹ Fla. Stat. §440.10; *Candyworld, Inc. v. Granite State Ins. Co.*, 652 So. 2d 1165, (Fla. 4th DCA 1995); *Motchkavitz v. L.C. Boggs Indus., Inc.*, 407 So. 2d 910 (Fla. 1981); New York Construction Industry Fair Play Act, NY Labor § 861 (2010)(workers compensation required for all employees in construction industry)

a project.¹⁰ However, the subcontractor will not then have immunity from claims of injury by the employees of other subcontractors.¹¹ The bottom line is that the general contractor remains responsible for insuring that all of the subcontractors obtain Workers Compensation Insurance, but the individual subcontractors have no liability for the other subcontractors' failure to secure Workers Compensation Insurance. Insurers who issue policies to subcontractors are estopped from denying coverage due to its own errors when a general contractor relies on that policy to establish that a subcontractor had coverage.¹²

Where a general contractor and a subcontractor both maintain Workers Compensation coverage, the subcontractors' insurer is the primary insurer with regard to claims of sub-subcontractors.¹³ In effect, the subcontractor is responsible for all employees and sub-subcontractors of the subcontractor in the same manner that the general contractor is responsible for all of its subcontractors.

Generally where Workers Compensation is provided, that coverage is the sole remedy of an injured person, and he/she is

¹⁰ Fla. Stat. §440.10(1)(e).

¹¹ *Scott & Jobalia Constr. Co. v. Halifax Paving, Inc.*, 538 So. 2d 76 (Fla. 5th DCA 1989).

¹² *Atlantic Masonry v. Miller Constr. Co.*, 558 So. 2d 433 (Fla. 1st DCA 1990).

¹³ *Dodge v. William E. Arnold Co.*, 373 So. 2d 98 (Fla. 1st DCA 1979).

precluded from recovering against a fellow employee or another subcontractor.¹⁴

C. Design Liability:

Design professionals typically maintain professional liability insurance to protect themselves from losses arising out of the rendition of their service. In the industry, such policies are generally referred to as “errors and omissions” policies (“E&O”) which provides the design professional with coverage for legal liability arising out of an “error, omission, or negligent act” which occurs while rendering professional services.¹⁵ Anecdotal evidence has suggested that increasingly design professionals operate without errors and omissions insurance in an attempt to theoretically minimize their exposure to lawsuits.

In contrast with CGL Policies, errors and omissions policies typically do not utilize the “occurrence” or “accident” to trigger coverage. A typical professional liability policy provides coverage on a claims-made basis.¹⁶ This means that unless the policy provides otherwise, design professionals are afforded coverage only for those

¹⁴ Fla. Stat. 404.11; *Motchavitz v. L.C. Boggs Indus., Inc.*, 407 So. 2d 910 (Fla. 1981).

¹⁵ *Utica Mut. Ins. Co. v. Pennsylvania Nat'l. Mut. Cas. Co.*, 639 So. 2d 41, 441 (Fla. 5th DCA 1994); *Security Ins. of Hartford v. Kevin Tucker & Assoc. Inc.*, 64 F.3d 1001 (6th Cir. 1995); *Alterra Excess & Surplus Ins. Co. v. Gotama Bldg Engineers, Inc.*, 2014 WL 3866093 (C.D. Cal 2014)

¹⁶ *Eagle American Ins. Co. v. N. Chols*, 814 So. 2d 1083, 1085 (Fla. 4th DCA 2002) and *Gotama Bldg Engineers, Inc.*, 2014 WL 3866093 * 4 (C.D. Cal. 2014).

claims which arise during the policy's period and which are made during the policy period.¹⁷

Thus the focus of litigation in the construction context is often the definition of a claim in the policy. Obviously, in the construction setting, disputes between the design professionals and the general contractor or subcontractors, as well as the owner, are not only frequent but often continue throughout the course of the entire construction project. Despite the ongoing disputes between the parties involved in the construction project, those various disputes do not necessarily lead to litigation nor the involvement of any one's insurance carrier. However, a claim requires something more than a general awareness of a potential litigation. Typically, the claim requires a monetary demand or an assertion of a legal duty on the part of the design professional resulting from a covered act.¹⁸

D. Excess Coverage:

In most instances in a construction project there may be overlapping issues of insurance coverage. One of the most frequent problems with the insurance coverage is who is the primary insurer and who is the excess insurer. Typically, a CGL Policy will contain a provision that the general contractor's liability insurance policy is

¹⁷ *Id.*; *Mactown, Inc. v. Cont'l Ins. Co.*, 716 So. 2d 289 (Fla. 3d DCA 1998); and, *Gotama Bldg Engineers, Inc.*, 2014 WL 3866093 * 4 (C.D. Cal. 2014)..

¹⁸ *Paradigm Ins. Co. v. P & C Ins. Systems, Inc.*, 747 So. 2d 1040 (Fla. 3d DCA 2000).

excess of other insurances such as the insurance policies of its subcontractors where the general contractor is named as an additional insured. In general, policies which afford additional insurance coverage containing excess other insurance clauses in contrast with an additional insured's policy containing a pro-rata or a primary other insurance clause, the additional insured's own policy will respond in a primary basis¹⁹. Generally, an excess insurer will not have an obligation to defend a suit until the establishment of liability in excess of the primary insurance.²⁰

E. Other Insurance Coverages:

Another insurance product which is beneficial on a large construction project are wrap-up insurance programs, such as consolidated insurance programs "CIPS" or owner controlled insurance programs "OCIPS." Essentially, one entity, usually the owner or project manager, would be in charge of the program and maintains control over all aspects of risk management and insurance. Wrap-ups are typically used on extremely large construction projects where the value of construction exceeds \$50,000,000.00 and has a significant number of subcontractors. The concept requires one party to be

¹⁹ *Demshar v. AAA Cov. Auto Transport, Inc.*, 337 So. 2d 963, 965 (Fla. 1976); *Sniden v. Cont'l Ins. Co.*, 519 So. 2d 12, 13 (Fla. 5th DCA 1987); *Pacific Coast Building Products, Inc. AIU Ins. Co.*, 2008 WL 492 7351 (9th Cir. 2008); and *Highland Ins. Co. v. Gerber Products Co.*, 702 F.Supp. 109 (D. MD 1988) .

²⁰ *North American Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325, 1331 (Fla. 4th DCA 1996); *Pacific Coast Building Products, Inc. AIU Ins. Co.*, 2008 WL 492 7351 (9th Cir. 2008); and *Highland Ins. Co. v. Gerber Products Co.*, 702 F.Supp. 109 (D. MD 1988) ..

assigned at fault for an accident and to be able to deduct responsibility costs from progress payments.²¹

The main benefits of the financial wrap-up program are financial, because it provides substantially more marketing purchasing power to have so many entities premiums rolled together. However, an owner may also be able to obtain a substantially higher insurance than would otherwise be available. For example, a \$25,000,000.00 wrap-up would provide \$25,000,000.00 in coverage rather than a \$1,000,000.00 per subcontractor. In addition, the additional insured problem discussed above disappears in a wrap-up program. Typically, the wrap-ups are used for Workers' Compensation costs in large construction projects.²² A potential pitfalls of a wrap-up in the general liability arena is the work performed exclusion, which would theoretically exclude any claims for general liability as to all parties are insured. However, careful tailoring of the policy to limit the work performed exclusion to work with a particular insured seeking coverage, not the work of other insureds making it a viable option.

²¹ *First Mercury Ins. Co. v. Waterside Condominium Ass'n*, 2013 WL 6383883 (Ore. 2013); *Pogue v. Oglethorpe Power Corp.*, 82 F.3d 1012 (11th Cir. 1996)

²² *Casey v. Vanderlande Indus., Inc.*, 2002 WL 1496815 (W.D. Ky. 2002) and *Pogue v. Oglethorpe Power Corp.*, 82 F.3d 1012 (11th Cir. 1996).

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