

## Real Estate Title Insurance & *Construction Law*

### A Guide to Insurance Coverage For Construction Projects

Protect the participants  
against risk

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**C**onstruction projects require careful risk management. Insurance is a critical part of that risk management. The key to obtaining adequate insurance coverage for owners, contractors, consultants, design professionals, managers, subcontractors and suppliers, is to ensure that it is thoroughly addressed in the project contracts. The insurance provisions of the contract documents generally cover a multitude of issues, including the type of insurance, the named insureds, the quality of the insurer (carriers are often ranked and not all carriers are authorized to do business in the state where the project is located), coverage amounts, scope of coverage, primary, secondary and excess coverage issues, conditions of claims (i.e., claims made or occurrence-based poli-

cies), and also mandate who is responsible for maintaining the insurance. The terms can also cover what happens in the event of a default on that obligation. The default penalties can be of particular significance because other than the insurance policies, there may be no other protection for the project in the event of a default. Where no insurance exists, some additional safeguard may be needed (e.g., access to insurance of affiliates or parent companies or other forms of guarantees).

Once all the participants are contractually obligated to purchase insurance for the project, and depending on the risks that the project's participants seek to have covered, it may still prove difficult to obtain the expected coverage in the event of a claim. There are, however, ways to improve the chance of successfully prosecuting a construction project claim. The goal of this article is to provide an abbreviated and simplified guide to coverage disputes that will allow project participants to be prepared for the obstacles

they are likely to encounter in filing an insurance claim for a construction project loss.

#### Verification of Coverage Begins With Design Professionals

The design professionals are likely to be the first people involved in the project, and their coverage could be implicated even before ground breaking. Professional liability insurance is readily available for project architects and engineers. It is important to ensure that the design professionals provide proof of coverage prior to beginning work, and certainly before any plans or drawings or specifications they produce are used for contract exhibits, approvals, permitting or construction.

#### Certificates of Insurance

While providing evidence that a policy might exist, a certificate of insurance by itself is insufficient to definitively establish coverage and should not be relied upon as a guaranty of coverage or even the existence of a policy. Moreover, if you are expecting to be an additional insured, the certificate of insurance, while indicating additional insured status, could easily end up being wrong. A certificate of insurance could be procured and the policy could be cancelled the following day without notice. The certificate of insurance could be produced by

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the agent, rather than the carrier, and the corresponding insurance application could ultimately be rejected, modified or simply never processed, leaving the certificate of insurance in place without any policy behind it. Similarly, a request could be made by the insured to its agent to add someone to the policy, without the request ever being processed by the insurance agent or the carrier. It is important to avoid the hazards of relying upon a certificate of insurance by verifying coverage, being named as a certificate holder, ensuring that you are notified under the terms of the policy and the certificate directly in the event of any changes in coverage and securing a copy of the actual bond or insurance policy.

### **Construction Contractors**

Once the project design is completed and applications for approvals and permits have been submitted, insurance for the next set of participants must be in place. The construction contractors must demonstrate at a minimum that they have general liability, workers' compensation and automobile insurance. Moreover, if your project contracts call for the issuance of bonds, then performance and payment bonds should also be in place. As with the professional liability policies, the certificates of insurance alone do not offer proof that coverage exists for these contractors. Additional verification is required. The owner may also wish to secure builders' risk insurance for the project itself, which is generally designed to cover damage to the property during construction (e.g., from water, fire or other accidental loss). If additional insured status is required by contract, then some verification of that status is appropriate. Copies of the specific additional insured endorsement from the actual policy or a blanket additional insured provision covering all persons whom the insured is contractually required to name as an additional insured would be helpful.

### **Verify coverage periods**

It is of critical importance to understand and verify the coverage period for the policies for the project. Claims-made policies cover claims made during the period of time that the policy is in effect. If the policy only lasts for

the time period the project is being built and a claim is made after the project is complete, coverage is jeopardized. Occurrence-based policies are more common for construction projects. For the coverage to exist, the claim would have to have "occurred" during the time when the policy was in effect. What is or is not an "occurrence" under a policy of insurance is the subject of many disputes. A general rule of thumb is that third-party damage is required for an occurrence to have taken place. For example, a claim related to a burst pipe might not cover the actual pipe that was damaged, but would likely cover damage to the furniture and other areas of the building. It is also important to demonstrate the date of the occurrence. To ensure coverage for the claim, the damage has to have occurred during the policy period. Continuous trigger theories have developed over time for damage that started during one policy period and continued into another policy so that coverage under multiple policies could be triggered.

### **Exclusions**

An equally important issue is whether or not a particular exclusion exists in the policy that could preclude coverage for a claim. There are countless exclusions and there is no way to know what has been inserted until the policy itself has been examined. Examples of concern include contractual liability exclusions, mold exclusions, completed operations exclusions, owned property exclusions, work-product exclusions, additional insured limitations and exclusions, exclusions based on term definitions and other product-based exclusions. An exclusion could quickly result in the rejection of a claim. Loss of coverage can be avoided if the policies are reviewed and necessary modifications made in a timely manner. In some cases changes to the policy might require time for the carrier's underwriters to authorize and any additional cost of the insurance to be analyzed, invoiced and paid. This should be done earlier rather than later to ensure continuity of coverage.

### **Ten Essential Steps**

To avoid some of the pitfalls discussed above, a party seeking coverage should consider ensuring that:

(1) Project contracts are adequate to maximize the insurance benefits to which you are entitled

(2) You possess adequate proof of coverage under both your policies, and policies under which you could seek coverage as an additional insured or as an intended beneficiary

(3) The policies that are applicable to the project do not contain particularly objectionable exclusions

(4) The policy is an occurrence-based policy so that its term is not artificially limited, or that you maintain coverage under a claims-made policy for all relevant time periods

(5) Notices regarding coverage are sent to you as well as the named insured so that you can take steps to protect your interests in the event a policy is prematurely cancelled or was otherwise ineffectual

(6) Your own policy is secondary and those of other contractors for whom you are an additional insured is recognized as primary

(7) Coverage is adequately supplemented by excess coverage policies and policies of other participants

(8) You review the provisions of all applicable policies to ensure that claims are not lost by inadvertently failing to abide by hyper-technical requirements (e.g., notice provisions)

(9) There are no gaps in your coverage (e.g., that the policies in place for the project cover all manner of risk for which coverage was expected and that policy renewals were in place to ensure no break in coverage during (and in some cases after) project construction)

(10) You modify coverage terms to ensure that an innocent beneficiary of the policy is not unfairly prejudiced by the conduct of others over whom they have no influence or control (e.g., an additional insured losing coverage because a named insured failed to complete a contractually required but comparatively immaterial form for the carrier).

Adequate insurance coverage could make the difference between a project that makes money and a project that puts the participants out of business. A disciplined and trained eye should be applied to ensure that adequate coverage is in place to protect the project participants against the risks. ■