

# **Using Insurance & Contracts to Manage Risks on Construction Projects**

**Ben Dachepalli**  
**Presenter**



**HILL WARD HENDERSON**  
**ATTORNEYS AT LAW**

**Recent Trends in  
Construction & Real Estate**

# WHAT COULD POSSIBLY GO WRONG?



paint color.avi



**HILL WARD HENDERSON**  
**ATTORNEYS AT LAW**

**Recent Trends in**  
**Construction & Real Estate**

# AVOIDING RISK

“The first step in the risk management process is to acknowledge risk. Denial is a common tactic that substitutes ignorance for thoughtful planning.”

- Charles Tremper, Ph.D.



# TOOLS FOR RISK AVOIDANCE

» INSURANCE

» CONTRACTS



**HILL WARD HENDERSON**  
ATTORNEYS AT LAW

**Recent Trends in  
Construction & Real Estate**

# INSURANCE

- Main Types
  - Commercial General Liability (CGL)
  - Professional Liability (PL)
  - Excess and Umbrella (not the same)
  - Others
    - Wrap Ups: OCIP/CCIP
    - Builder's Risk
    - Environmental



# CGL POLICIES IN FLORIDA

- Generally Covers Damages (PD or BI) Resulting From Your Defective Work
- Generally Does Not Cover Defective Work Itself
- Many Gray Areas In Between
- CGL Policies Do Not Overlap With Performance Bonds



# 15 STANDARD EXCLUSIONS

- 2.a – Expected or Intended Injury
- 2.b. – Contractual Liability
- 2.c. – Liquor Liability
- 2.d. – Worker’s Compensation
- 2.e. – Employer’s Liability
- 2.f. - Pollution
- 2.g. – Aircraft, Auto or Watercraft
- 2.h. – Mobile Equipment



# 15 STANDARD EXCLUSIONS

- 2.i – War
- 2.j. – Damage to Property
- 2.k. – Damage to Your Product
- ***2.l. – Damage to Your Work***
- 2.m. – Damage to Impaired Property or Property not Physically Injured
- 2.n. – Recall of Products, Work or Impaired Property
- 2.o. – Personal & Advertising Injury





Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

**k. Damage To Your Product**

"Property damage" to "your product" arising out of it or any part of it.

**l. Damage To Your Work**

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damage arises from work or the work out of which the damage arises was performed on your behalf by a subcontractor.

**m. Damage To Impaired Property Or Property Not Physically Injured**

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

**n. Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, replacement, repair or

(1) "You

(2) "You

(3) "Imp

if such

or recal

person.

suspect

danger

o. Person

"Bodily

vertising

Exclusions

by fire to p

rarily occu

owner. A

this covera

which

right an

any "su

we will

against

sonal a

surance

cretion, "investigate any offense and settle any

claim or "suit" that may result. But:

(1) The amount we will pay for damages is

limited as described in Section III – Limits

Of Insurance ; and

(2) Our right and duty to defend end when we

have used up the applicable limit of insur-

ance in the payment of judgments or set-

tlements under Coverages A or B or medi-

cal expenses under Coverage C.

# I. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

# TWO SIGNIFICANT CASES

- *U.S. Fire Ins. Co. v. J.S.U.B, Inc.*, 979 So.2d 871 (Fla. 2007)
- *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So.2d 1241 (Fla. 2008)



# *U.S. Fire Ins. Co. v. J.S.U.B, Inc.*

- Subcontractor's faulty workmanship caused damage to the general contractor's work
  - Subcontractor used poor soil and improper soil compaction & testing
  - Caused damage to foundations, drywall, and other interior portions of the homes
  - Damage appeared after completion of the project and delivery of the homes



# *U.S. Fire Ins. Co. v. J.S.U.B, Inc.*

- **ISSUE:** Whether a post-1986 standard form CGL policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage for damage to the completed project caused by a subcontractor's defective work?
- **Brief Answer: YES!**



# *U.S. Fire Ins. Co. v. J.S.U.B, Inc.*

- ANALYSIS:
  - In *JSUB*, Florida Supreme Court ruled that “your work” includes damage caused by your subcontractor (assuming your policy says so)
  - applies to completed ops only
  - Policy means what it says
  - You paid the premium, so you get the coverage
  - Insurance companies reacted



# *Auto-Owners Ins. Co. v. Pozzi Window Co.*

- After moving into the house, the owner complained of water leaking around the windows, which was caused by defective installation of the windows.
- Insurance company paid for the resulting interior damage, but refused to pay for the replacement of the windows.



# *Auto-Owners Ins. Co. v. Pozzi Window Co.*

- **ISSUE:** Does a standard form CGL product completed operations hazard coverage, issued to a general contractor, cover the general contractor's liability to a 3<sup>rd</sup> party for the costs of repair or replacement of defective work by its subcontractors?
- **BRIEF ANSWER:** It depends!



# *Auto-Owners Ins. Co. v. Pozzi Window Co.*

- COURT – If the windows were purchased by the homeowner and were not defective before being installed, then coverage would exist for the cost of replacement or repair of the windows . . . However, a different result would follow if the windows were defective prior to being installed.





# *Auto-Owners Ins. Co. v. Pozzi Window Co.*

- Analysis:
  - Because the subcontractor’s defective installation of the windows caused damage to the non-defective windows there was “property damage” under the terms of the CGL policy.
  - Therefore, there **IS** coverage for the costs to repair and replace the windows.



# LEGAL STRATEGIES

- As your attorneys, if possible, we must draft complaints to allege defective installation/work, not defective product.
- Must plead into coverage . . . Why? To trigger duty to defend.



# INSURANCE INDUSTRY'S RESPONSE

- Modify the language of *Exclusion 2.1* to delete the “exception to the exclusion” language, i.e. **NO SUBCONTRACTOR EXCEPTION.**



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF**

This endorsement modifies insurance provided under the following:

### COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion I. of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

#### 2. Exclusions

This insurance does not apply to:

##### I. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

# PRACTICAL SUGGESTIONS

- *JSUB* Fallout:
  - Start the Renewal Process Early
  - Use Your Agent's Expertise
  - Providing Detailed Claims History May Be Beneficial
  - Learn About What You're About to Buy – Does It Meet Your Needs & Expectations?



# PRACTICAL SUGGESTIONS

- If You Cannot Get Coverage for Damages Caused by Subcontractor's Work, Then What?
  - Performance Bonds by downstream parties?
  - Uninsured risk until carriers create alternative?
  - Umbrella policy?
  - Work with your agent to see if any solution exists



# PERFORMANCE BONDS

- Defective Work Covered
- Increased Importance Due to *JSUB* fallout
- Performance Bonds Issued By Those Downstream
- Are All Downstream Entities Bondable?
- Can Costs Be Passed Through (Upstream?)



# GETTING THE RIGHT CGL POLICY

- Goal: Transfer Risk to Best Party Capable of Controlling and Financing Risk
- Achievable Goal? If Yes, Only Through:
  - Good agent or broker who knows your company, the construction industry and the details of any policy you're about to buy
  - Analyze and Plan In Advance: Before contract signed and policy purchased
  - If in doubt . . . contact your attorney.





# TOP 6 CONTRACT CLAUSES FOR AVOIDING RISKS

1. Insurance – Additional Insured (AI)
2. Limitations of Liability
3. Waiver of Consequential Damage
4. Indemnification
5. Payment
6. Warranties



# INSURANCE

- Contractual Insurance clauses should require Additional Insured status
- Don't just get the Certificate of Insurance . . . Why?



# CERTIFICATES OF INSURANCE

- Read the upper right-hand corner. The Certificate provides no coverage. All coverage is in the policy itself.
- The Certificate does provide valuable "Identification Information":
  - names of carriers
  - the name of the coverage, if it is occurrence or claims made
  - the dates of expiration
  - the limits
- Does the statement on a certificate provide Additional Insured status? There are a few decisions that say yes, but not what the extent of that coverage is. Still the language of the policy will prevail.





# CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)  
02/07/2007

PRODUCER  
MARTZ-ALTSCHULER & ASSOC INC  
2 GREEN VILLAGE RD  
MADISON NJ 07940

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURED  
TY MONK'S PAINTING  
523 HOWARD BLVD  
LAKE HOPATCONG NJ 07849

INSURERS AFFORDING COVERAGE

INSURER A: SELECTIVE WAY INSURANCE COMPANY  
INSURER B:  
INSURER C:  
INSURER D:  
INSURER E:

NAIC #

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO SUCH POLICIES, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, CONDITIONS AND COVENANTS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO SUCH POLICIES, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, CONDITIONS AND COVENANTS OF SUCH POLICIES.

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

DEDUCTIBLE					
RETENTION \$					
WORKERS COMPENSATION AND EMPLOYERS' LIABILITY				<input type="checkbox"/> NO SPECIAL TOW LIMITS <input type="checkbox"/> OTHER	
ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below				E.L. EACH ACCIDENT	\$
OTHER				E.L. DISEASE - EA EMPLOYEE	\$
				E.L. DISEASE - POLICY LIMIT	\$
DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS PAINTING CONTRACTOR					
CERTIFICATE HOLDER			CANCELLATION		
NEW JERSEY OFFICE OF ATTORNEY GENERAL DIVISION OF CONSUMER AFFAIRS 124 HALSEY ST 7TH FLOOR NEWARK NJ 07101			SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 10 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.		
			AUTHORIZED REPRESENTATIVE <i>Thomas E. Hays</i>		



HILL W  
ATTORNEY

Recent Trends in  
Construction & Real Estate

# CERTIFICATES OF INSURANCE

- The Certificate does provide valuable "Identification Information":
  - names of carriers
  - the name of the coverage, if it is occurrence or claims made
  - the dates of expiration
  - the limits
- QUESTION - Does the statement on a certificate provide Additional Insured status? There are a few decisions that say yes, but not what the extent of that coverage is. Still the language of the policy will prevail.



# ADDITIONAL INSURED – What Does It Mean?

- AI is covered by Named Insured's policy
- AI has direct rights as a 1<sup>st</sup> party against the Carrier
- “Belt & Suspenders” to indemnity provision; i.e. what if indemnity provision fails as a matter of law
- AI coverage is not defined nor limited by the contractual language of most construction contracts, thus it is generally considered to be broader.



# ADDITIONAL INSURED –

## Scope of Coverage

- Coverage provided to Named Insured will be available to AI.
- Vicarious Liability - Many believe that AI coverage by its nature only applies to derivative liability of the AI. That is, the liability must arise out of Named Insured's acts or omissions. This would be a limitation of coverage. The language of the policy must be clear about whether coverage is dependent on some act of Named Insured.
- DEFENSE is the one coverage that is most sought by and provided to an Additional Insured.



# ADDITIONAL INSURED – Policy & Endorsement Language

- "Additional Insured Status when Scheduled." Endorsement provides coverage to entity when the policy "schedules" that entity. If you are the AI, get the actual endorsement that schedules you!
- "Broad Form." A type of endorsement that is becoming less used. It made any entity that was required, not necessarily in writing, to be an additional insured.
- "When required by Contract." This is becoming the standard type of endorsement. There must be a requirement in a written agreement for coverage to extend to AI.





# ADDITIONAL INSURED – Policy & Endorsement Language

- "Ongoing Operations." Thus, no completed operations coverage. Does NOT mean that Named Insured does not have this coverage, but only that it is not extended to AI.
- QUESTION - What actions of Named Insured constitute "ongoing operations"? Courts have held that there need not be a causal connection but merely some nexus. Mere presence of Named Insured at the site will provide nexus to initiate coverage.
- "Your Work" this is interpreted to include completed operations extended to the additional insured.



# LIMITATIONS OF LIABILITY

- Parties may limit their liability through certain clauses:
  - No Damages for Delay;
  - Liquidated Damages;
  - Monetary limit;
  - Cap on the amount of potential liability that is tied to an insurance policy; or
  - Limitation of the types of damages recoverable



# WAIVER OF CONSEQUENTIAL DAMAGES

- *Perini Corp v. Greate Bay Hotel & Casino*, 610 A.2d 364 (N.J. 1992)
  - Substantial completion of Sand's Hotel renovations were 4 months late
  - Contractor's fee = \$600,000
  - Arbitrator awarded \$14,500,000 for lost profits against GC
- Mutuality of Waiver Benefits Both Parties to a Contract
- Owner's Waiver
  - Rental Expenses
  - Losses of use, income, profit, financing, business & reputation
  - Loss of management employee productivity or services
- Contractor's Waiver
  - Principle office expense
  - Losses for financing, business & reputation
  - Loss of profit except anticipated profit arising directly from work



# INDEMNIFICATION

- To “broad form” or not to “broad form”
  - Can you put a gun to their head?
  - Make ‘em an offer they can’t refuse!
- Must be drafted in accordance with Fla. Stat. §725.06
- Must contain “monetary limitation on the extent of the indemnification that bears a commercially reasonable relationship to the contract and is part of the specifications or bid documents, if any.”



# INDEMNIFICATION

- Insist upon “duty to defend” language
- “Duty to defend” should be separate and apart from indemnification obligation



# PAYMENT

- Agree upon payment procedures
  - AIA Payment Applications
  - For larger Projects, use an agreed form of the schedule of values
- Pay-when-paid provisions can effectively shift the risk of owner non-payment to those downstream.
- Reserve rights to withhold payments



# WARRANTIES

- Consistent warranty obligations for downstream parties
- REMOVE any payment contingencies from warranty obligations
  - E.g., subcontractor refuses to perform warranty work until its final bill is paid
- Negotiate longer warranty periods or require warranty periods to be the longer of:
  - 1 year from date of substantial completion of the Project, or
  - for a longer period if so specified in Contract Documents, or
  - for any applicable period as required by law.
- Specify when or under what conditions a repair must occur
- Require responsibility for the repair of defective work, including all other ancillary work or consequential damages



# AVOIDING RISK

“There are risks and costs to a program of action. But they are far less than the long-range risks and costs of comfortable inaction.”

- John F. Kennedy





# QUESTIONS



**Mr. Osborne, may I be excused? My brain is full!**



**HILL WARD HENDERSON  
ATTORNEYS AT LAW**

**Recent Trends in  
Construction & Real Estate**

# QUESTIONS?



**HILL WARD HENDERSON**  
**ATTORNEYS AT LAW**

**Recent Trends in**  
**Construction & Real Estate**

This presentation is made available by Hill Ward Henderson for educational purposes only to provide you general information and a general understanding of the law, it is not intended to provide nor does it constitute legal advice. The presentation should not be used as a substitute for specific legal advice from a licensed professional attorney. Further, the subject matter contained in this presentation is complex and subject to change. Any tax statements in this material are not intended to suggest the avoidance of U.S. federal, state or local tax penalties.

