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Navigating Insurance Coverage for Accident-Related Project Delay

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Navigating Insurance Coverage for Accident-Related Project Delay

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Session Title: Navigating Insurance Coverage for Accident-Related Project Delay

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Biographical Information

Jeremiah Welch is the Managing Partner of SDV's West Coast office and is a member of the firm's Executive Committee. In addition, Jeremiah has represented major stakeholders in some of the most significant construction disasters of the past decade, including the Florida University bridge collapse, the Louisiana Hard Rock Hotel collapse, and the "tilting" San Francisco Millennium Tower. Further, Jeremiah also played a key role as coverage counsel to stakeholders in the post-9/11 World Trade Center debris removal litigation.

Jeremiah's experience deems him one of the foremost leaders in handling complex insurance challenges that require creativity and tenacity. He guided a major retailer through the complex business interruption coverage challenges following the devastating trio of hurricanes Katrina, Wilma, and Rita. In addition, Jeremiah is also amongst the insurance industry's most respected scholars outside of the courtroom. He provides education, training, and advice as a consultant to insured corporations and several of the world's largest retail and wholesale brokerages. As an architect of the innovative and industry-leading Labor Guard Insurance Program, Jeremiah has forged a path of insurance product innovation based on cooperative risk management between the insurer and the insured. Further, Jeremiah's practice is focused on leveraging a 25-year culmination of knowledge and experience very few insurance professionals have – litigation of some of the country's most significant insurance disputes, combined with day-to-day challenges facing brokers and their clients, and placing complex coverage for many of the largest commercial and civil construction projects.

Russ Johnson is a respected expert in construction and risk management. He has 17 years of experience dealing with commercial insurance and claims management. Russ is also a long-standing member of the AGC's National Surety Bonding and Risk Management Committee.

Patrick J. O'Connor is the Vice President of Risk Management & Counsel for The Walsh Group, a privately held construction concern, operating through subsidiaries nationwide and in Canada. Patrick joined the legal department as Corporate Counsel for The Walsh Group in 2006 after working as a trial attorney in construction injury and defect litigation. After working in the legal department at Walsh for four years, Patrick made the move to Assistant Risk Manager. After two years working in the Insurance department, Patrick took the reins of the department. Over the next few years, Patrick remade the department into a full-fledged Risk Management operation.

The Walsh Group is the 15th largest construction company operating in the United States. As head of the risk management department, Patrick leads a team of 20 risk professionals handling the strategic and tactical concerns of the company, including owner and subcontractor contract underwriting, project-specific and corporate insurance solutions,

vendor risk analysis and qualification, and insurance claims management. The Risk Management department is also responsible for all employee benefit management.

Patrick is a proud member of the Illinois Bar since 2004, since graduating from Indiana University's Maurer School of Law. Patrick studied at the University of Illinois, receiving a Bachelor of Arts degree in Rhetoric in 2000.

Tammy Pike has been in Risk Management and Insurance for almost 30 years, starting out as a broker and then joining Kiewit's corporate Risk Management and Insurance Department 22 years ago. Her responsibilities over the years have included supervision of the Insurance Analyst team, providing Risk Management Services to the company's operating districts, including mega and P3 project programs in North America, and supervision of the Claims team, responsible for management and adjustment of claims, management of TPA and RIMS vendor relationships, and coordination with Corporate Safety, Leave, Human Resources, Accounting, Payroll, and Legal departments. Tammy's expertise includes risk assessment, cost containment, construction contract review and negotiation, claims negotiation and oversight, vendor management, and overall construction risk management consulting.



Overview

Insurance coverage for construction project “delay” is a frequent source of disagreement between insurers and insureds. Delays can result in significant project cost increases as well as business income loss for the project owner. Some policies treat delay directly with exclusions and exceptions whereas others treat delay more obliquely, with coverage for “damages because of property damage” and “loss of use.”

Meaning of Delay

The term “delay” creates a lot of confusion, and that often starts with the meaning of the word itself. The meaning of “delay” can be very different in a construction contract as compared to a construction insurance policy. There are various types of “delay”, and “delay” can be treated differently in contracts and policies depending on the cause of the delay and the type of damages resulting from the delay.

Some insurance policies use definitions for “delay” and delay-related terminology, but some do not. Merriam-Webster’s dictionary defines “delay” as “the act of postponing, hindering, or causing something to occur more slowly than normal: the state of being delayed.” Delay is obviously a significant risk for a construction project. When a construction project stakeholder speaks of “delay,” they usually have a definition similar to Merriam-Webster’s in mind. The question is then about the extent to which a stakeholder can recover from insurance for the financial consequences of project delays caused by fortuitous events.

“Delay” sometimes gets confused (dare we say deliberately) with “time”. Repairing damage takes time, but not all time is delay. In construction, time is a common measure for the attachment of contractual obligations, such as payment. General conditions, general requirements, profit, overhead, and many other related elements are often charged based on time. All too often, we see insurers whose policies have delay exclusions challenging the time element of repair costs as an excluded delay. Repairs take time. Imagine a single contractor hired to replace a roof. His work is expected to take two weeks and he charges based on time and materials. Halfway through the work, a rainstorm occurs, and water penetrates the exposed roof and damages wood and insulation. It takes the contractor a full week, doing nothing else, to repair the water damage. He finishes the job a week late. In this example, the time change for the extra week is not delay, it is repair. The contractor charged for the cost of the repair work, not a cost occasioned by the delay.

Let’s add a general contractor to the fact pattern. The owner hires the GC to replace the roof and paint the building. The painting is supposed to take two weeks and the whole job one month. The painter will start as soon as the roofer is done. Because of the roof damage, the painter’s start is delayed one week, and the job runs a week over. But the GC

had to pay the painter to sit idle while the roofer finished, to keep the painter on the job. Had the GC not done so, the painter would have taken another job, and the project would have been stalled for two weeks. Now we have damages that seem to fit into the “delay” category – the idle charges the GC had to pay the painter were because of the delay caused by the roofer. Now let’s add that the owner incurred extra cost from relocating tenants during the work – more delay damages. The goal here is to identify what costs truly are because of delay versus simple time-based repair costs.

Another important issue which intersects with insurance coverage for delay damages is contractual liability. Most types of policies include an exclusion for contractual liability with an exception for third-party indemnity. However, most policies also qualify the definition of contractual liability by stating that contractual liability does not include liability the insured would have in the absence of the contract, which essentially means liability for negligence. Again, because construction contracts typically measure both costs and damages by time, attempts to recover these damages frequently result in the insurer citing the contractual liability exclusion. Coverage depends on the extent to which the insured would have liability under ordinary negligence law. Liquidated damages are a good example. Contracts usually specify a daily rate for damages in the event the contractor fails to deliver the project on time. Most states will only allow enforcement of these “liquidated damages” if the damages are a reasonable estimate of actual damages, and not punitive in nature. Consequently, some courts have supported the idea that liquidated damages resulting from property damage are covered. Others have held that while consequential damages may be excluded from contractual liability, actual damages are covered, and actual damages may be the same or at least very close to the liquidated damage liability.

Builder’s Risk Insurance and Delay

Builder’s risk insurance is often the first policy considered when it comes to delay damages. Most builder’s risk policies sold in the US are “all-risk” policies, meaning they cover losses caused by all fortuitous perils unless specifically excluded. Many policies have an exclusion substantially similar to the following:

We will not pay for loss caused by or resulting from delay, loss of use, loss of market or any other consequential loss.

At first blush, this exclusion seems to broadly exclude all delay-related damages, and insurers often attempt to apply it that way. In reality, this exclusion means no more than it says – delay is not a covered peril. This simply means that the insurer does not guarantee the project schedule. Most of these policies cover “physical loss of or damage to” covered property. This “delay exclusion” means that a project that simply moves more slowly than expected does not present a claim for physical loss of covered property. This exclusion does *not* take away coverage for delay damages because of a covered peril, such as fire, flood, or even faulty workmanship. This result makes sense and is consistent with the insured’s expectations.



Some insurers have attempted to prevent the result discussed above by adding “anti-concurrent cause” language to the exclusion, which says that delay is not covered where it plays any role in the loss:

We will not pay for loss caused by, resulting from, contributed to or made worse by any of the following, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by:

- (1) Loss of market or delay;
- (2) delay in completion;
- (3) liquidated damages or performance penalties;
- (4) penalties for non-completion; or
- (5) non compliance with contract conditions.

Whether caused by a peril insured or otherwise.

Insurers with this policy language tend to deny any line related to increased time or schedule disruption.

Insurers with broad delay exclusions often offer various coverage extensions designed to restore some coverage for delay-related costs due to covered perils. A typical example is “extra expense” coverage, which typically applies to a contractor’s increased costs during a period of repair. “Extra expense” coverage usually does not include schedule impact that continues after repair work is completed. “Expediting expense” coverage applies to costs incurred to expedite repair work, including payroll overtime. “Delay in opening” coverage typically applies only to the property owner and includes coverage for lost revenue due to delayed completion, and soft costs incurred during a delay.

While the “delay in opening” extension is good for owners, we have seen it cause problems for contractors. Insurers will argue that it is the “only” delay coverage available under a policy (whether or not it was purchased), that it applies only to owners, and that contractors therefore have no coverage for any delay-related damages. This may be compounded in situations where an owner declines to pursue the “delay in opening” coverage and pursues the contractor instead. Very often, this position that “delay in opening” is the only coverage is simply wrong.

Commercial General Liability Insurance and Delay

Commercial general liability (“CGL”) policies offer coverage for damages because of property damage, and property damage is typically defined to include loss of use of property. CGL policies frequently provide broad coverage for damages claimed against a contractor for increased costs of construction and consequential, delay-related, damages. Some states have extended this principle to delays resulting from bodily injury. For example, a New York court recently held that an owner claiming delay damages against a contractor resulting from a stop work order following a worker injury was an allegation of “damages because of bodily injury” under a contractor-controlled insurance program (“CCIP”) CGL policy. Parties should remember that CGL policies are effectively

“consequential damage” policies for bodily injury and property damage – this is important when considering a potential consequential damage waiver in a contract.

Professional Liability Insurance and Delay

Contractors typically purchase either traditional professional liability insurance or a more specialized contractors protective and professional insurance (“CPPI”). Both offer defense of third-party claims, and CPPI adds “protective coverage” and may also add “rectification” and/or “mitigation” coverage. The “protective” coverage is built primarily for design-builders and covers the contractor’s damages resulting from a design professional’s mistake, in excess of what the contractor can recover from a design professional. Rectification is rework coverage and mitigation is expenses to reduce loss. The coverage parts of these policies typically cover delay damages as a result of negligent professional services. Professional services are typically defined broadly – for a contractor this can include construction management, value engineering, and pre-construction services. For a design-builder, this coverage can even include delay damages resulting from cost overruns and bid busts.

Conclusion

Any analysis of potential insurance coverage for construction delays must start with understanding what is, and is not, a “delay” for insurance purposes. Remember that insurance policies are governed by their own language and interpretive case law and may not use language and terms of art the same way as construction contracts. How damages are categorized and explained can have a significant impact on whether and how quickly an insurer pays them. Ultimately, the insured must understand how each of the potentially applicable policies treat delay and be ready to explain/argue in the event the insurer takes the wrong position.