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Time is Money – Insurance Coverage for Construction Delays

By: Dave Beck, Clark Construction Group; Seth Firmender, Lockton; Lauren Smith and Michael McNamara, Pillsbury Winthrop Shaw Pittman LLP

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This session will explore insurance risk-shifting devices that insureds can use to recover costs for construction delays.

A. Builders Risk Insurance

Builders Risk is first party insurance coverage generally providing coverage for loss of property during construction. While ISO forms exist, builders risk insurance is typically written on manuscripted forms – each insurer has its own forms. It comes in two basic varieties: Named peril and all risk. Both cover damage to property resulting from accidental causes. Named peril policies only provide coverage if the cause of the loss was specifically named; all risk policies provide coverage if the cause of the loss is not specifically excluded.

In addition to exclusions for damage (in the legal sense) caused by certain perils (or risks of loss), builders risk policies typically have exclusions barring coverage for certain categories of damage – even if that damage results from a covered peril. Most policies exclude consequential damages. Insurance carriers will typically take the position that delay damages are consequential damages. Carriers often offer to let insureds “buy back” coverage that is otherwise excluded by purchasing coverage extensions.

1. Soft costs

One of those coverage extensions includes “soft costs,” which are typically defined in the policies. Here is an example from a policy form:

This policy . . . insures against risks of direct physical loss of, or damage to,
PROPERTY INSURED . . .

* * *

PROPERTY INSURED means “All materials, supplies, equipment, machinery and other property of a similar nature . . . the full value of which has been included in the **TOTAL INSURED VALUE** . . .

TOTAL INSURED VALUE means “the total value of all **PROPERTY INSURED*** including . . . charges . . . which will become a part of or will be expended in the **INSURED PROJECT*** plus the value, if any, of **SOFT COSTS/ADDITIONAL EXPENSES**.”

* * *

SOFT COSTS / ADDITIONAL EXPENSES “shall mean additional expenses for the following, which are actually and necessarily incurred by the Named Insured during the **PERIOD OF INDEMNITY** and which would not have been incurred by the Named Insured if the **DELAY** had not occurred, all only to the extent coverage for each is

provided by this Endorsement as indicated in the Delay in Completion Sublimits Schedule:

- a. Interest upon money borrowed to directly finance **CONTRACT WORK**;
- b. Realty taxes and/or ground rent;
- c. Advertising and promotional expenses;
- d. **PROJECT ADMINISTRATION EXPENSES**;
- e. Legal and/or accounting fees;
- f. **INSURANCE PREMIUMS**;
- g. Security Expenses;
- h. **LOAN FEES AND COSTS**;
- i. Architectural and engineering fees;
- j. Municipal fees and permits; and/or
- k. **EXTENDED GENERAL CONDITIONS.**¹

2. Delay in completion endorsements

Insureds can buy delay-in-completion coverage, typically for additional premiums. Consider this policy language, which includes delay-in-completion coverage:

This policy . . . insures against risks of direct physical loss of, or damage to, **PROPERTY INSURED** . . .

* * *

PROPERTY INSURED means "All materials, supplies, equipment, machinery and other property of a similar nature . . . plus the value, if any, of **SOFT COSTS/ADDITIONAL EXPENSES, LOSS OF RENTAL INCOME** or **LOSS OF EARNINGS** to be insured under (and as defined in) the Delay In Completion Endorsement when applicable.

* * *

. . . this Policy is extended to indemnify the Named Insured, specified in the Delay In Completion Endorsement, for a **DELAY IN COMPLETION LOSS** actually sustained during The **PERIOD OF INDEMNITY** and caused by a **DELAY**.

* * *

DELAY IN COMPLETION LOSS Shall mean . . . the **LOSS OF RENTAL INCOME, LOSS OF EARNINGS** and/or **SOFT COSTS/ADDITIONAL EXPENSES** . . .²

Some policies will also indemnify the insured for costs related to delay in completion losses:

We will pay your "soft costs" during the "period of delay in completion".³

* * *

"Period of delay in completion" means the period of time that:

¹ TechnicalRisk Underwriters, Supplemental Declarations, Specimen, TRU 2020DC (05/20).

² TechnicalRisk Underwriters, Supplemental Declarations, Specimen, TRU 2020DC (05/20).

³ Travelers Ins., Commercial Inland Marine Policy Form CM T2 23 04 13.

- a. Begins with the "planned completion date" or after any applicable Soft Costs Waiting Period shown in the Declarations from the "planned completion date", whichever is later; and
- b. Ends on the date when Covered Property should be completed using reasonable speed and similar quality.⁴

Importantly, many delay in completion endorsements only apply to the named insured on the endorsement, which is often the project owner. General contractors who are additional insureds on the policy but not specifically identified on the delay in completion endorsement may not have access to delay coverage, including for soft costs.

3. Expediting and Extra Expense Coverage

Builders Risk policies may extend coverage to expediting expenses and extra expenses, which typically cover costs related to acceleration. This language is from a commonly used Travelers policy:

Each of the following Coverage Extensions applies . . .

a. Expediting Expense and Extra Expense

- (1) In the event of direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss, we will pay for the reasonable and necessary:
 - (a) Expediting charges, including overtime, night work, work on public holidays, express and air freight, and the extra cost of rental construction equipment, you incur solely to expedite repair or replacement of the Covered Property sustaining such loss or damage.
 - (b) Extra Expenses you incur during the period of restoration or repair of the Covered Property sustaining such loss or damage that are over and above the total costs that would normally have been incurred during the same period of time had no loss or damage occurred. We will only pay for such extra expenses you incur for the purpose of continuing as nearly as practicable the scheduled progress of undamaged work.

Extra expense includes equipment rental, emergency expenses, additional security, de-mobilization and remobilization of equipment and facilities, and temporary use of property, all when necessarily incurred to re-duce time delays in the contract schedule.⁵

4. Sue and Labor Coverage

“Sue and Labor” is a term of art in the insurance industry. In layman’s terms, it means work required to mitigate the impact of a loss. There is precedent for these costs to be impliedly covered. Some policies expressly extend coverage to costs related to the defense of an insured’s property:

⁴ Travelers Ins., Commercial Inland Marine Policy Form CM T2 23 04 13.

⁵ Travelers Ins., Commercial Inland Marine Policy Form CM T2 23 04 13.

In the case of actual or imminent loss or damage by a peril insured against, it shall, without prejudice to this insurance, be lawful and necessary for the Insured, their factors, servants, or assigns to sue, labor, and travel for, in, and about the defense, the safeguard, and the recovery of the property or any part of the property insured hereunder, nor, in the event of loss or damage, shall the acts of the Insured or of this Company in recovering, saving, and preserving the insured property be considered a waiver or an acceptance of abandonment. This Company shall contribute to the expenses so incurred according to the rate and quantity of the sum herein insured.⁶

B. CGL Insurance

Commercial General Liability insurance is third party insurance, generally providing coverage to the insured in the form of defense against a covered claim and indemnity in the event that a judgment for covered damages is entered against an insured. Most CGL policies are issued on standard forms put out by the Insurance Services Office (ISO). Coverage A on a typical ISO form applies to property damage and bodily injury claims and provides that the insurer “will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.”

“Property damage,” in turn, is defined as “(a) physical injury to tangible property, including all resulting loss of use of that property. . . . or (b) loss of use of tangible property that is not physically injured.”

In *Clark Construction Group, Inc. v. Eagle Amalgamated Services, Inc.*, the court found that an insurer must indemnify an insured for property damages, which included liquidated damages.⁷ In that case, Clark Construction, as the general contractor, contracted with the City of Memphis and the Memphis Cook Convention Commission to renovate and expand the Memphis Cook Convention Center.⁸ Because part of that work included demolition, Clark entered into a contract with Eagle Amalgamated Services (“Eagle”) to complete the demolition work, which resulted in damage to the nearby convention center.⁹ Consequently, the owner of the nearby building sued Clark Construction for the resulting damage.¹⁰

Clark Construction sought recovery as an additional insured on Eagle’s insurance policy, but the insurer refused to pay, claiming that liquidated damages are “based on breach of contract, not property damage.”¹¹ Ultimately, the court found that liquidated damages were not expressly excluded from coverage and that they were a “direct result of property damage that was clearly covered under the policy.”¹² Therefore, liquidated damages constituted “property damage” under the CGL policy for which the insured was obligated to indemnify Clark Construction.¹³

⁶ *GTE Corp. v. Allendale Mut. Ins. Co.*, 372 F.3d 598, 606 (3d Cir. 2004) (citing Affilliated Policy, J.A. at 265; IRI Policy, J.A. at 450; Federal Policy, J.A. at 737).

⁷ No. 01-2478, 2005 WL 1972586 (W.D. Tenn. Aug. 12, 2005).

⁸ *Id.* at *3.

⁹ *Id.* at *1.

¹⁰ *Id.*

¹¹ *Id.* at *3.

¹² *Id.*

¹³ *Id.*

In a similar case, *Mattiola Construction Corp. v. Commercial Union Insurance Co.*, as the subcontractor, contracted with IA Construction Corporation to perform concrete saw-cutting work on a bridge owned by Pennsylvania Turnpike Commission (“PTC”).¹⁴ One of Mattiola’s employees accidentally cut certain structural steel members on the bridge, causing damage to the bridge, halting the project, and ultimately resulting in project delays.¹⁵ PTC then sought liquidated damages from Mattiola, which Mattiola, in turn, sued Commercial Union Insurance Co. (“CGU”) to indemnify Mattiola.¹⁶ Much like in *Clark Construction*, the court held that the CGU must pay Mattiola the liquidated damages resulting from the delay because liquidated damages constituted a part of “property damage,” which included a loss of the use of tangible property.¹⁷

In relation to consequential damages, the court in *Am. Home Assurance Co. v. Libbey-Owens-Ford Co* found an insurer was obligated to pay consequential damages even though the insurer was not obligated to pay for damage to the actual property at issue.¹⁸ In *American Home*, the insured, Libbey-Owens-Ford Company (“LOF”), manufactured glass windows that were installed in the Hancock Building in Boston.¹⁹ After installation, the windows suffered “substantial breakage” from major storms.²⁰ The building owner then replaced those windows and sued LOF for damages to the windows.²¹ Under LOF’s excess CGL insurance policy, American Home agreed to indemnify LOF for money it became obligated to pay “because of … property damage” as defined in the agreement.²² Property damage included “physical injury to, or physical destruction of, tangible property, including the loss of use thereof.”²³ The court found that the American Home must cover “consequential damages that physical injury to its windows may set in motion” but not costs related to repair and replacement of LOF’s windows.²⁴

C. Subcontractor Default Insurance

Subcontractor default insurance (“SDI”) is an alternative to traditional payment and performance bonds (or self-insuring) for the contractor as a first-party insurance policy that protects from catastrophic loss and costs associated with the default of a subcontractor. Subcontract performance bonds are tripartite contracts amongst the contractor (principal), subcontractor (obligee), and surety. In contrast, subcontractor default insurance is an insurance policy with a two-party relationship, where the contractor is the insured and the carrier is the insurer.

The standard SDI policy reimburses the insured for “Loss” arising out of a “Default of Performance” by subcontractors enrolled on the policy. “Loss” is generally split between “Direct

¹⁴ 60 Pa. D. & C.4th 412, *1 (Com. Pl. 2002).

¹⁵ *Id.* at *1.

¹⁶ *Id.* at *1.

¹⁷ *Id.* at *3-5.

¹⁸ 786 F.2d 22 (1st Cir. 1986).

¹⁹ *Id.* at *23.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at *26.

²³ *Id.* at *24.

²⁴ *Id.* at *28.

Costs" and "Indirect" or "Supplemental" Costs, and the classification of costs into one of these categories impacts the available limits.

Most policies provide the option of capturing "Indirect" / "Supplemental" Costs in two ways during a claim:

- A percentage of Direct Costs without proof of loss or verification of costs (most commonly 10%)
 - o May be subject to a maximum amount per claim (Ex: \$500K)
- Indirect Cost Sublimit with proof of loss or verification of costs (most commonly \$5M)

The process of proving/verifying indirect costs up to a sublimit is typically much more cumbersome and an administrative burden, which is why the percentage of direct costs option is provided.

Depending on the policy, delay-related costs may fall into different categories. For example, some older policy forms broadly defined "Direct Costs" as "the cost of completing the defaulted Subcontractor's obligations under the Covered Subcontract (including amounts the defaulted Subcontractor is required to pay under the Covered Subcontract)." (Cove 2017 SDI Policy). To the extent a subcontractor is obligated under their subcontract to pay for delay costs attributable to their default of performance, those delay-related costs may be covered Direct Costs.

However, more recent policy forms have narrowed the scope of covered Direct Costs such that delay-related costs are more likely to fall into the category of Indirect or Supplemental Costs. For instance:

- "Indirect Costs means the costs, expenses, and damages incurred and paid by you as a result of a Default of Performance of a Subcontractor, which you would not have incurred and paid but for such Default of Performance and which are not Direct Costs. Indirect Costs include, for example, liquidated damages asserted against you by the owner of the Scheduled Project, or actual delay costs for which you are liable to the owner (but not both); delay costs for which you are liable to other subcontractors; Mark-up, overhead (including unabsorbed home office overhead), and profit are not recoverable Indirect Costs. . . ." (Cove 2022 SDI Policy)
- "Supplemental Costs are strictly limited to: (1) Liquidated damages for delay, . . . (2) Acceleration costs paid by the Insured for subcontracted or self-performed work . . . (3) Extended project general conditions and overhead paid or incurred by the Insured . . . (4) Expanded project overhead paid or incurred by the Insured, which is an identifiable increase in project-specific overhead . . . These can include costs and expenses for specifically outlined services under the defaulted Covered Subcontract, which were assumed by the Subcontractor solely in the case of project delay due to the Subcontractor. . . ." (Arch 2022 SDI Policy)

- “Indirect Costs means those costs and expenses paid by the Insured that result directly from a Default of Performance of a Covered Subcontractor, and which are properly categorized as one of the following: a. Extended general conditions – excluding home office overhead costs – that are directly charged to the Scheduled Project, unique to the Scheduled Project, and required to complete the Scheduled Project; b. Liquidated damages for delay that are charged to or asserted against the Insured by the Owner of the Scheduled Project whether paid by the Insured or withheld from payments due to the Insured by the Owner of the Scheduled Project; c. Acceleration costs paid by the Insured for subcontracted or self-performed work other than acceleration costs paid to the replacement subcontractors completing the actual construction work within the scope of the Covered Subcontract. . . .” (Vantage 2022 SDI Policy).

Here are screenshots of each policy form’s current definition of Indirect Costs:

Arch – Subcontractor Default Coverage Form (00 GL0581 00 08 22)

Supplemental Costs means the following costs and expenses that you incur, after the **Notice of Default** is issued and prior to the end of the **Extension Period**, only to the extent they result from the **Default of Performance** and are not specifically included in Definition f., **Default Costs**.

Supplemental Costs are strictly limited to:

- (1) Liquidated damages for **delay**, whether paid by the **Insured**, withheld by the owner of the **Scheduled Project**, charged to, or asserted against the **Insured**;
- (2) Acceleration costs paid by the **Insured** for subcontracted or self-performed work, outside of the costs and expenses covered under subparagraphs (1) and (3) in Definition f., **Default Costs**.
- (3) Extended project general conditions and overhead paid or incurred by the **Insured**. Examples include: corporate and field office overhead expense of any kind; project management; superintendents; general foremen; executive level management; estimating; engineering; coordinating; expediting; purchasing; detailing; legal, accounting, data processing, or other administrative expenses; shop drawings; permits; insurance; vehicle costs; lodging and subsistence; warranty expense costs; and the cost for small tools where the purchase cost of each item is fewer than \$1,000.
- (4) Expanded project overhead paid or incurred by the **Insured**, which is an identifiable increase in project-specific overhead and is not included in subparagraph 10.bb.(3) above. These can include costs and expenses for specifically outlined services under the defaulted **Covered Subcontract**, which were assumed by the **Subcontractor** solely in the case of project **delay** due to the **Subcontractor**. Examples include temporary utilities, which were not the sole responsibility of the **Subcontractor** until after such **delay** took place, and were not budgeted as a portion of project general conditions or overhead costs.
- (5) Legal and other professional expenses paid by the **Insured** that are reasonably necessary:
 - (i) to prepare and present a claim under this Policy;
 - (ii) to pursue recovery of damages from the defaulting **Subcontractor** pursuant to obligations contained in this Policy; or
 - (iii) to defend against a written claim asserted by the **Subcontractor** against the **Insured**; or
- (6) Any costs or expenses not referred to in subparagraphs 10.bb.(1) through 10.bb.(5) above that are paid by the **Insured** and pertain to a scope of work other than that contained within the **Covered Subcontract**.

AXA XL – Project Attaching Subcontractor Default Coverage Form (KSX 050 0216)

Indirect Costs mean costs and expenses paid by the **Insured** to the extent caused by a **Default of Performance** of a **Subcontractor/Supplier** and that are not specifically included in Definition i. **Loss**, Items (1) through (4). **Indirect Costs** include, but are not limited to, those costs and expenses paid by the **Insured** for liquidated damages, job acceleration, and extended overhead.

Berkshire Hathaway – Subcontractor Default Insurance Policy (SDI-POL-002-07/2018)

Indirect Costs means costs and expenses caused by a **Default** paid by you for time related work and corresponding **Project(s)** **delay** and that are not included in I. **Loss** 1.a., 1.c. or 1.d.

Indirect Costs are subject to the **Each Loss Indirect Costs** Sublimit of Insurance set forth in the Declarations and include job acceleration, extended project overhead, liquidated damages and costs and expenses incurred and paid by you as defined under your contract with your customer to construct the **Project** on which there is a **Default** by the **Subcontractor**.

Indirect Costs shall be subject to a Critical Path schedule analysis which apportions time and **delay** to a corresponding activities or parties functioning for the **Project**. **Insured** shall contemporaneously maintain updated detailed project schedules using Critical Path scheduling methodology. Schedules must be sufficiently detailed to permit an accurate analysis of the discreet **delays** to the Critical Path.

Indirect Costs do not include costs incurred by the **Insured** for time related work and corresponding project(s) **delay** if the **Insured** fails to maintain the data and schedules as described in this definition.

Hudson – Subcontractor Default Insurance Reimbursement Policy (SDI-POL (01/23))

Indirect Costs mean:

- 1) Extended general conditions, including added or extended general requirements, that are directly charged to the **Scheduled Project** which are unique to the **Scheduled Project** and which are required to complete the **Scheduled Project**;
- 2) Damages for **delay**, whether liquidated or actual, and whether paid by the **Insured** or withheld by the owner of the **Scheduled Project**, charged to or asserted against the **Insured**;
- 3) Acceleration or schedule recovery costs paid by the **Insured** for subcontracted or self-performed work other than acceleration or schedule recovery costs paid to the persons completing the actual construction work within the scope of work of the **Covered Subcontract**. Acceleration or schedule recovery costs include, but are not limited to costs for overtime, adding additional shifts, adding additional or supplemental labor, re-sequencing work, claims from others, temporary weather protection, and hoarding; and
- 4) Legal and other professional expenses paid by the **Insured** that are reasonably necessary to:
 - a) Prepare and present its claim for indemnification under the Policy. The most the Company will pay for these costs is the amount specified on the Declarations Item 5-E.; or
 - b) pursue recovery of damages from the defaulting **Subcontractor/Supplier** pursuant to obligations contained in this Policy; or
 - c) Defend against claims asserted by the **Subcontractor/Supplier** against the **Insured**.

Notwithstanding any of the foregoing, the Company shall not be obligated to indemnify the **Insured** for any legal or other professional expenses hereunder until the **Insured** submits to the Company un-redacted invoices for such legal or other professional expenses, which provide a detailed description of the legal or other professional work performed for which reimbursement is sought.

- 5) Any costs or expenses not referred to in paragraphs (1) through (4) that are paid by the **Insured**, that result directly from a **Default of Performance**, and that pertain to a scope of work other than the scope of work under the **Covered Subcontract**.

Indirect Costs do not include costs or expenses incurred for any home office overhead, including, but not limited to, extended home office overhead or unabsorbed home office, unless agreed to in writing by the Company.

Liberty Mutual – Project Attaching Coverage Form (SDI-Policy(P) 1/22)

Indirect Costs means:

Costs and expenses paid by the **Insured** to the extent they result directly from a **Default of Performance** of a **Subcontractor** and which are one of the following categories:

- (1) Extended general conditions that are not home office overhead costs and that are directly charged to the **Scheduled Project** which are unique to the **Scheduled Project** and which are required to complete the **Scheduled Project**;
- (2) Liquidated damages for **delay**, whether paid by the **Insured** or withheld by the owner of the **Scheduled Project**, charged to or asserted against the **Insured**;
- (3) Acceleration costs paid by the **Insured** for subcontracted or self-performed work other than acceleration costs paid to the persons completing the actual construction work within the scope of the **Covered Subcontract**; and
- (4) Legal and other professional expenses paid by the **Insured** that are reasonably necessary to:
 - (a) Prepare and present a claim against this Policy; or
 - (b) Pursue recovery of damages from the defaulting **Subcontractor** pursuant to obligations contained in this Policy; or
 - (c) Defend against claims asserted by the **Subcontractor** against the **Insured**. Notwithstanding any of the foregoing, the Insurer shall not be obligated to indemnify the **Insured** for any legal or other professional expenses hereunder until the **Insured** submits to the Insurer unredacted invoices for such legal or other professional expenses, which provide a detailed description of the legal or other professional work performed for which reimbursement is sought.
- (5) Any costs or expenses not referred to in paragraphs (1) through (4) that are paid by the **Insured**, that result directly from a **Default of Performance**, and that pertain to a scope of work other than the obligations under the **Covered Subcontract**.

Optio (Cove) – Subcontractor Default Insurance Projects-Attaching Coverage Form (SDI-0001 06 01 23)

Indirect Costs means the costs, expenses, and damages incurred and paid by you as a result of a **Default of Performance** of a **Subcontractor**, which you would not have incurred and paid but for such **Default of Performance** and which are not **Direct Costs**. **Indirect Costs** include, for example, liquidated damages asserted against you by the owner of the **Scheduled Project**, or actual **delay** costs for which you are liable to the owner (but not both); **delay** costs for which you are liable to other subcontractors; increased costs of completing your own scope of work, excluding the work of the defaulted **Subcontractor** but including the scope of work of your other subcontractors; and attorney's fees and related legal expenses paid to defend wrongful termination claims brought by a defaulted **Subcontractor**.

Mark-up, overhead (including unabsorbed home office overhead), and profit are not recoverable **Indirect Costs**. **Claims Consulting Costs** are included as and erode the sublimit of **Indirect Costs** up to the sublimit listed in item 4. of the Declarations.

**Vantage – Subcontractor Default Insurance Project Attaching Coverage Form (SDI
00001 1223)**

Indirect Costs means those costs and expenses paid by the **Insured** that result directly from a **Default of Performance** of a **Covered Subcontractor**, and which are properly categorized as one of the following:

1. Extended general conditions – excluding home office overhead costs – that are directly charged to the **Scheduled Project**, unique to the **Scheduled Project**, and required to complete the **Scheduled Project**;
2. Liquidated damages for **delay** that are charged to or asserted against the **Insured** by the Owner of the **Scheduled Project** whether paid by the **Insured** or withheld from payments due to the **Insured** by the Owner of the **Scheduled Project**;
3. Acceleration costs paid by the **Insured** for subcontracted or self-performed work other than acceleration costs paid to the replacement subcontractors completing the actual construction work within the scope of the **Covered Subcontract**; and
4. Any costs or expenses not referred to in Section II.H.1. through Section II.H.3. above that are paid by the **Insured**, and that both result directly from a **Default of Performance** and pertain to a scope of work other than the scope of work of the **Covered Subcontract**.

However, under no circumstances will Vantage reimburse the **Insured** for **Indirect Costs** to the extent that costs and expenses exceed the **Indirect Costs** Sublimit stated in Item 3.(c) 2. of the Declarations. Such costs and expenses in excess of the **Indirect Costs** Sublimit shall not be recoverable under this Policy.