

# 2022 Surety Bonding and Construction Risk Management Conference

Learn more at [risk.agc.org](https://risk.agc.org)

## Recent Court Rulings On Builders Risk Insurance Claims



**AGC**  
THE CONSTRUCTION  
ASSOCIATION

THIS PAPER WAS WRITTEN IN CONJUNCTION WITH A BREAKOUT SESSION AT AGC'S 2022 SURETY BONDING AND CONSTRUCTION RISK MANAGEMENT CONFERENCE.

## **AGC 2022 Surety Bonding and Construction Risk Management Conference**

**Paper Title: Recent Court Rulings On Builders Risk Insurance Claims**

**Session Title: Navigating Builders Risk and Other Property Insurance Claims**

Miles C. Holden, Esq.  
Partner and Insurance Recovery Practice Leader  
Hanson Bridgett LLP  
425 Market Street, 26th Floor  
San Francisco, CA 94105  
[mholden@hansonbridgett.com](mailto:mholden@hansonbridgett.com)  
415-995-5039

### **Author/Presenter Biographical Information:**

Miles Holden is a partner at Hanson Bridgett LLP's San Francisco office and serves as the firm's Insurance Recovery Practice Leader. He advises on a wide variety of insurance matters and litigates insurance-coverage actions throughout the US. Miles has represented both insurers and insureds, but now focuses on advising and advocating for insureds. He is a frequent speaker on construction-related insurance-coverage topics. Miles obtained his undergraduate degree from Stanford University and his J.D. from Benjamin N. Cardozo School of Law, Yeshiva University. He is admitted to practice law in Arizona, California, Florida, New Jersey, New York, and various federal courts.

# Recent Court Rulings On Builders Risk Insurance Claims

## **I. Introduction**

Builders risk claims present some of the most complex and debated insurance-coverage issues in the construction industry. While each claim involves a unique combination of facts, policy language, and applicable law, recent rulings by courts throughout the United States offer a glimpse of recurring coverage-dispute themes that influence the policyholder-insurer relationship.<sup>1</sup>

## **II. Case Summaries**

### **A. Scope of Covered Property**

One of the most important aspects of procuring builders risk insurance is ensuring there is agreement and clarity regarding what constitutes covered property under the policy.

That issue, however, was disputed in *6 West Apartments, LLC v. Ohio Casualty Insurance Company*, No. 1:20-cv-02243-RBJ, 2021 WL 4949154 (D. Colo. Oct. 25, 2021), which involved, among other things, water damage to modular building units for an apartment complex in Colorado. A subcontractor delivered the modular units to the job site with interior paint, flooring, and appliances already installed. The general contractor then "began the process of rigging and stacking the units, connecting plumbing and utilities, finishing the roof and exterior, building hallways, and performing all other services required to turn these units into finished apartment buildings." *6 West*, 2021 WL 4949154, at \*1.

After the buildings suffered water damage, the insurer denied coverage for the modular units, arguing that the following exclusion barred coverage:

5. Standing Building Or Structure – "We" do not cover any:
  - a. standing building or structure;
  - b. part of a standing building or structure; or
  - c. standing building or structure to which additions, alterations, improvements, or repairs are being made.

A standing building or structure means any building or structure that has been wholly or partially constructed, erected, or fabricated.

A standing building or structure also means any building or structure that is in the process of construction, erection, or fabrication at the inception of this policy.

*Id.* at \*1, 4. The insurer argued that because the units were constructed offsite, they fell within the exclusion, and moved for summary judgment on this issue after the policyholder filed suit. The policyholder took the position that the exclusion was ambiguous and that that there was "a mutual intent that the Policy would cover the modular housing units." *Id.* at \*4.

---

<sup>1</sup> All case orders discussed herein were accessed using Westlaw and included this notation: "© 2021 Thomson Reuters. No claim to original U.S. Government Works."

The Colorado federal trial court denied the insurer's motion, explaining:

The Policy's language is contradictory and ambiguous. It covers "buildings and structures while in the course of construction," but excludes "any building or structure that is in the process of construction[.]" The limits of the "Standing Building or Structure" exclusion are not plain and unambiguous, as defendant asserts. I find it impossible to construe the exclusion without more evidence of the parties' intent and perhaps trade usage. The conflicting Policy provisions incline me towards finding that the modular housing units are covered.

*Ibid.* (citations omitted). But the judge also noted that this ruling "should not necessarily be read as my final legal construction of the contract. Additional evidence is likely to shed light on the parties' intentions regarding coverage for the modular housing units." *Id.* at \*6.

In connection with opposing the insurer's motion, the policyholder asserted that "the modular units comprise half of the project cost on which the Policy premiums were based." *Id.* at \*4. If that contention was accurate, the lack of clarity as to whether the modular units constituted covered property represents a substantial potential coverage gap and a dispute that seemingly could have been avoided by more explicitly documenting the insured status of the modular units during the underwriting and policy-procurement process.

Thus, a takeaway from this case is to ensure that the scope of coverage under a builders risk policy is agreed upon and clarified in the policy itself, particularly where the insured project involves any non-traditional elements, such as modular units that are manufactured offsite.

## **B. The Duty to Cooperate and Other Post-Loss Policyholder Obligations**

A basic element of a builders risk claim is the policyholder's facilitation of and cooperation with the insurer's investigation. The degree to which that occurs as required can be another area of dispute.

For example, the insurer in *6 West, supra*, also moved for summary judgment on whether the policyholder's post-loss acts or omissions barred coverage under the builders risk policy. "Specifically, it allege[d] that [the policyholder] failed to timely notify [the insurer] of damage, document damage, and allow inspection before conducting repairs." *Id.* at \*6. The Colorado federal trial court denied that portion of the insurer's motion as well, reasoning that summary judgment was unwarranted because:

- regarding timely notice, "a jury could . . . find that [the policyholder] notified [the insurer] in a reasonable amount of time after discovering each new bit of damage"; and
- regarding cooperation, "[f]irst, failure to cooperate does not bar recovery absent a showing of prejudice to the insurer. Second, the Policy's cooperation requirements are best read as promises, not conditions precedent. Finally, the record could

support a jury determination that [the policyholder] did comply with the cooperation provisions. *Id.* at \*7-8.

Similarly, in *Shinui Builders, LLC v. American Zurich Insurance Company*, No. 5:20cv278-TKW-MJF, 2021 WL 4955909 (N.D. Fla. Aug. 26, 2021), the policyholder was insured under six separate builders risk policies for six residential properties it was building in Florida that suffered wind damage from Hurricane Michael. The policyholder moved for partial summary judgment on whether it had "fulfilled the post-loss conditions" under the policies, while the insurer argued that it had not complied with the policies' cooperation clauses "with respect to the proof of loss and the production of all requested documents." *Shinui*, 2021 WL 4955909, at \*3. The Florida federal trial court granted the policyholder's motion.

Regarding the policyholder's allegedly untimely submission of a sworn proof of loss, the *Shinui* court explained that although the policies required submission "within 60 days after it was requested" by the insurer, it was undisputed that the policyholder submitted the proofs of loss about a month later and that the insurer did not suffer prejudice due to the timing of that submission. *Id.* at \*4. Regarding the policyholder's alleged failure to cooperate in the insurer's claim investigation by maintaining accurate project records and allowing the insurer to review those records, the dispute was really over whether the policyholder was obligated to provide the insurer with "(1) the .ESX file for the Xactimate estimates prepared by its adjuster, and (2) the 'source documents' for the spreadsheet." *Ibid.*

Because the policyholder provided a PDF version of the Xactimate estimates and because it offered to provide the spreadsheet source documents if the insurer paid the costs of compiling and redacting the documents (which the insurer never agreed to pay), the court concluded that "no reasonable jury" could find the policyholder's conduct to constitute "a prejudicial failure to comply with post-loss obligations." *Id.* at \*4-5.

In short, policyholder cooperation with insurer claim investigations and compliance with other post-loss obligations appear to be a recent source of conflict and litigation under builders risk policies. Accordingly, policyholders should diligently comply with all policy obligations and document those efforts.

### **C. Scope of Delay-In-Completion Coverage**

Although delay-in-completion coverage is often available to owners under builders risk policies, it is less common for contractors to be insured for that type of loss. Nevertheless, the extent to which an owner receives such coverage can directly impact the project relationship between the owner and the contractor.

The case of *99 Wall Development, Inc. v. Allied World Specialty Insurance Company*, No. 18-CV-126 (RA), 2021 WL 4460638 (S.D.N.Y. Sept. 29, 2021), involved the renovation and conversion of a 29-story building in Lower Manhattan into residential condominiums that suffered water damage during the project from two separate incidents. *99 Wall*, 2021 WL 4460638, at \*1. The builders risk insurer paid over \$2 million to cover the physical damage, but refused to pay for the delay costs allegedly caused by the leaks. *Ibid.*

The policy defined "delay period" as:

[T]he period of time the completion of the construction, erection, or fabrication of a covered '[rehabilitation or renovation project]' is 'delayed' as a result of direct physical loss or damage caused by a covered peril to property covered under the Builders' Risk Coverage form to which this coverage part is attached.

*Id.* at \*3. The insurer's position with respect to the delay claim was that "the Policy requires the parties to measure delay to the Project as a whole, rather than to some interim date." *Id.* at \*9 (citation and quotation marks omitted).

In granting the insurer's motion for partial summary judgment on the delay issue, the New York federal trial court found that "the policy precludes measuring delay to interim construction deadlines that were not originally incorporated into the construction contract." *Ibid.* It explained:

[H]ere, the only non-generic description of a rehabilitation or renovation project in the policy describes 99 Wall's project to renovate the whole 29-story building. A different result might be warranted if 99 Wall's project was designed from the start to proceed in multiple phases. But in fact it was not until 2016, after construction was well under way and after the Policy was issued, that 99 Wall and its contractor revised their contract to include multiple TCO dates instead of a single completion date. Under similar circumstances, courts have found that delays must be measured to the whole project.

*Id.* at \*10 (citations omitted). The court concluded that "[t]o the extent 99 Wall's project was in fact delayed as a result of the water damage . . . that delay must be a delay to the completion of the entire project, and not to interim deadlines determined after the fact between 99 Wall and its contractor." *Id.* at \*11.

This case is a reminder that if a policyholder wants a type of coverage to apply in a specific way, it should address that during the underwriting and policy-procurement process. For example, if an insured wants delay coverage for interim project milestones, and not just project completion, it should ensure that the policy language reflects that.

#### **D. Cost-of-Making-Good / Faulty-Workmanship Exclusions**

Many builders risk policies provide first-party insurance for "all risks." But they are, of course, not without their coverage restrictions. Cost-of-making-good exclusions, also sometimes called faulty-workmanship exclusions, are one such limitation that is regularly disputed.

That was the case in *Webcor-Obayashi Joint Venture v. Zurich American Insurance Company*, No. 19-cv-07799-SI, 2021 WL 2719231 (N.D. Cal. July 1, 2021). The project at issue was a new transit center in San Francisco. After it was substantially completed and opened for

use, workers discovered fractures in two separate steel girders and the center was immediately closed. The insurer denied coverage based on the arguments that the damage manifested after the policy term expired and "the fractures were due to faulty or defective materials [or] workmanship."<sup>2</sup>

After filing suit, the contractor insured eventually moved for partial summary judgment on, among other things, whether it met its burden of establishing that the fractured girders fell within the builders risk insuring agreement, thus shifting the burden to the insurer regarding whether the cost-of-making-good exclusion applied. *Webcor-Obayashi*, 2021 WL 2719231, at \*1. In opposing the motion, the insurer argued that "the girder fractures do not constitute 'damage' under the Insuring Agreement because 'the girder fractures cannot be deemed separate from the defective design itself' and the fractures are 'part and parcel of the defective workmanship' excluded under the Cost of Making Good exclusion." *Id.* at \*2. But the California federal trial court found that the contractor had met its burden, thus shifting the burden to the insurer to show that the exclusion limited or precluded coverage. *Id.* at \*3.

A cost-of-making-good exclusion was also at issue in *Joseph J. Henderson & Sons, Inc. v. Travelers Property Casualty Insurance Company of America*, 956 F.3d 992 (8th Cir. 2020). That case involved the construction of a bio-solids building as part of an Iowa municipality's wastewater treatment facility, where roof panels were damaged by a windstorm. *Joseph J. Henderson & Sons*, 956 F.3d at 995. The builders risk insurer denied coverage to the contractor, arguing that the damage was due to the contractor's faulty workmanship. *Ibid.* The contractor prevailed against the insurer at trial before an Iowa federal trial court, and the Eight Circuit Court of Appeals affirmed. *Ibid.*

In rejecting the insurer's appeal, the federal appellate court reasoned:

The faulty workmanship exclusion states that Travelers "will not pay for loss or damage caused by or resulting from [faulty workmanship]," and immediately clarifies that "if loss or damage by a Covered Cause of Loss [e.g., a windstorm] results, [Travelers] will pay for that resulting loss or damage." We construe this language to mean that Travelers will not pay for damage caused by faulty workmanship, except when the damage is caused in part by a covered event, such as a windstorm. . . . If Travelers intended that the faulty workmanship exclusion applied regardless of any concurrent causes, it could have adopted express language [saying so].

*Id.* at 997 (citation omitted).

Cost-of-making-good exclusions can present problematic coverage pitfalls. But even if there is not a clear way to avoid coverage disputes with insurers over such exclusions, being aware of them in advance can assist policyholders in managing their risk exposure on construction projects.

---

<sup>2</sup> These background facts are summarized from a separate, earlier opinion issued in the same case. *See Webcor-Obayashi Joint Venture v. Zurich American Insurance Company*, 476 F. Supp. 3d 987, 988-89 (N.D. Cal. 2020).

### **III. Conclusion**

Recent case law suggests that builders risk claims continue to be litigated throughout the United States. Although that might be unavoidable, the cases provide guidance on how policyholders can get out in front of some of those issues and reduce the chances of finding themselves in court with their builders risk insurers.