

Insurance and Construction

A Continuing Education Program

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Introduction

- Introduction
- Project Delivery Systems (and OCIPs, CCIPs)
- Major Contract Families (AIA)
- Defective Workmanship
- Indemnification Agreements, A/Is and Certs
- Design Professionals
- Material Suppliers

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Introduction

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Introduction

According to OSHA:

Out of 4,693 worker fatalities in private industry in calendar year 2016, 991 or 21.1% were in construction — that is, one in five worker deaths last year were in construction. The leading causes of private sector worker deaths (excluding highway collisions) in the construction industry were falls, followed by struck by object, electrocution, and caught-in/between.

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Introduction

According to OSHA: Top Ten OSHA Standard Violations

1. Fall protection – construction
3. Scaffolding
6. Ladders
9. Fall protection – training
10. Electrical wiring and components

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Introduction

According to the BLS:

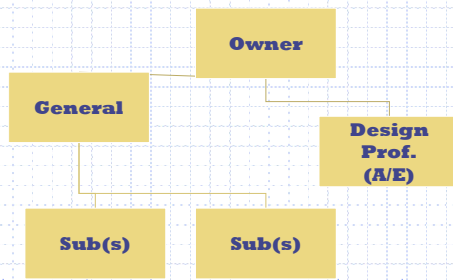
- 2,900,000 nonfatal workplace injuries and illnesses in 2016, or about **2.9 per 100 FTEs**
- The construction industry had about 204,000, or about **3.2 per 100 FTEs**, which is a marked decline.

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Project delivery systems

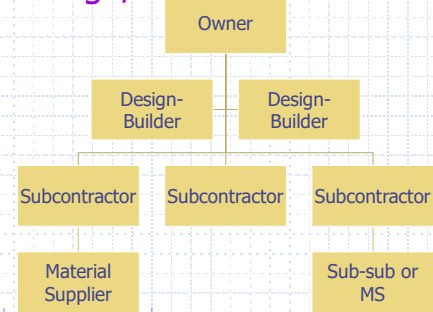
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Project Delivery Systems: Traditional



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Project Delivery Systems: Design/Build



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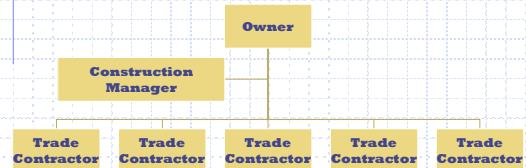
Project Delivery Systems

The Typical Trades Are

- | | |
|---|---|
| <ul style="list-style-type: none"> • Sitework • Concrete • Structural and Miscellaneous Steel • Masonry • Drywall and Plaster • Roofing • Mechanical | <ul style="list-style-type: none"> • Electrical • Fire protection • Flooring • Wallcovering • Elevators • Carpentry • General Construction and • Doors, Windows and Hardware. |
|---|---|

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Project Delivery Systems: Construction Management



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Project Delivery Systems: Other New Forms

- Building Information Modeling ("BIM")
- LEED/Green Building
- Integrated Project Delivery

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But what About OCIPs and CCIPs?

According to USDOT: The basic operational features of an OCIP are:

- (1) The owner purchases insurance coverage (all or some specific elements) to cover all contractors and subcontractors on a project;
- (2) There is an integrated owner-contractor managed safety program on the project; and
- (3) Claims are processed centrally.

age 14

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OCIPs and CCIPs

According to Wrap-Up Resources, LLC, OCIPs generally include:

- Necessary "general liability coverage for insureds' activities at the project site, including both bodily injury and property damage protection to non-project property.
- Typically, "provid[ing] completed operations protection against construction defect lawsuits matching in length the longest applicable statute of limitations..."

age 15

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OCIPs and CCIPs – What Are They?

According to The Contractors Group:

- The premise is that the insurance will cost less to purchase it in "bulk" (covering all contractors under the same policy) than it costs when each contractor purchases insurance on his own.

age 16

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OCIPs and CCIPs – What Are They?

- The Owner then looks to each contractor to credit back to him the cost of the insurance that the contractor would normally include in the bid as overhead costs. The Owner requires the contractor(s) to break his bid down and show how much of the bid is insurance costs.

age 17

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The Drawbacks:

- MORE PAPERWORK. The, uncompensated for, additional administration costs involved with dealing with the paperwork generated by the OCIP.
- INADEQUATE LIMITS. The possibility that the insurance coverage provided through the OCIP will not be enough coverage for the contractor.

age 18

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More Drawbacks:

- **VARIATIONS IN COVERAGE.** Contract deductions that exceed the contractor's actual insurance costs.
- **HIGH DEDUCTIBLES.** \$50,000 or more.
- **PROFESSIONAL COVERAGE.** Are professionals (engineers, etc.) covered?

age 19

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More Drawbacks:

- **SHIFTS Insurance; DOES NOT ELIMINATE it.**
- Subcontractors still need to carry and provide the owner/builder with Certificates of Insurance for auto liability and workers' compensation.
- Subcontractors still need to carry and provide proof of Commercial General Liability insurance for their own construction activities away from the project site.

age 20

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When Are Wrap-Ups Used?

- **Commercial Wrap-ups – for over 50 years**
 - Predominantly for large (\$100M) public works or private, single purpose projects
 - General Liability, Workers Compensation and Builders Risk
- **Residential Wrap-ups – for 5-10 years**
 - Condominium / Townhouse Projects
 - Large Tract Residential Developments
 - General Liability and occasionally some form of limited (B.I. & P.D.) professional Liability.

Source: Houck, Yaron, Wrap-Up Policies, Current Policy Concerns, and Insurance Trends (Assoc. of Defense Counsel, Northern Ca. and Nev. 2008)

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Wrap-up Problems and Pitfalls

- **Proper Policy Construction**
 - Remove Exclusion "L" (damage to "your work")
 - Confirm completed operations coverage extension for full statute period
 - Warranty / Repair Extension
- **Environmental / Mold Coverage**
- **Enrollment & Administration Procedures**

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Major contract families

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Major Contract Families

- AIA (American Institute of Architects)
- AGC (Associated General Contractors of America)
- CONSENSUS Docs
- EJDC (Engineers Joint Contract Document Committee)(formerly NSPE)
- DBIA (Design Build Institute of America)

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Major Contract Families

AIA forms are standard, and have the following benefits

- Common industry knowledge of AIA terms.
- Tendency to be more balanced and neutral than manuscripted forms.
- Less ambiguity due to wide and prolonged use.
- A great deal of case law interpretation exists.
- The AIA forms constitute an integrated set of documents.

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The American Institute of Architects' A-201

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Article 11 of the AIA A201-2007

- The basic commandment of the AIA's A-201 as regards insurance is that the contractor obtain the insurance.
- As for the typical subcontract, the A-401, Article 13 calls for insurance to be maintained by the Subcontractor on a project, but the types and extent of coverage are to be manuscripted.

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Article 11 of the AIA A201-2007

Contractor's Basic Insurance Requirements (¶ 11.1.1)

- The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below...

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Article 11 of the AIA A201-2007

Scope of Coverage Requirements (¶ 11.1.1):

- ...which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable...

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Article 11 of the AIA A201-2007

- Worker's Comp and Employer's Liability
- Bodily injury for other than employees
- "Usual" personal injury coverage
- Damage to tangible property
- Motor vehicle liability
- "Claims for bodily injury or property damage arising out of completed operations"
- Claims for indemnity under §3.18

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Article 11 of the AIA A201-2007

Continuity of Coverage (§11.1.2):

- Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment...

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Article 11 of the AIA A201-2007

Continuity of Coverage (§11.1.2):

- ...and, with respect to the Contractor's completed operations coverage, until the expiration of the period for correction of the work or for such other period...specified...

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Article 11 of the AIA A201-2007

A Mixed Bag for this Change...

- The good: a recognition that policies do expire, and an understanding that the continuity of coverage is a matter of contract, not certificate
- The bad: failing to meet the insurance requirements of a long-finished project can trigger a contract breach

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Article 11 of the AIA A201-2007

Certificates of Insurance (§ 11.1.3):

- Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work...

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Article 11 of the AIA A201-2007

Certificates of Insurance (§ 11.1.3):

- ...and thereafter upon renewal or replacement of each required policy of insurance...

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Article 11 of the AIA A201-2007

Certificates of Insurance (§ 11.1.3):

- Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness

[DELETE: in accordance with the Contractor's information and belief].

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Article 11 of the AIA A201-2007

Additional Insured Status (§ 11.1.4):

- The Contractor shall cause the commercial liability coverage required by the Contract Documents to include (1) the Owner, the Architect and the Architect's Consultants as additional insureds for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations...

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Article 11 of the AIA A201-2007

Additional Insured Status (§ 11.1.4):

- ...and the Owner as an additional insured for claims caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's completed operations.

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Article 11 of the AIA A201-2007

A Mixed Bag?

- Until now, AIA did not require additional insured status for Owner, but it did require the contractor to insure, "Claims of contractual liability insurance arising under § 3.18 (indemnification)."
- This was usually accomplished via an additional insured endorsement...

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Article 11 of the AIA A201-2007

A Mixed Bag?

- ...But the new clause is a radical expansion of the additional insured status...
- ...that surely changes the underwriting...
- And one can sincerely question whether the ISO form 20 37 07 04 meets the contract requirements...

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Article 11 of the AIA A201-2007

A Mixed Bag?

- The AIA's comment about the expanded additional insured status is:
 - "It has become common industry practice..." and "This practice saves legal expenses...by consolidating defense costs under one insurance policy."
- AIA omits "and we're glad it's not ours!"

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The AIA Forms Changes in 2017 Impacting Insurance

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Exhibit A (Insurance and Bonds)

- Used with the A101, A102 and A103 Owner/Contractor Agreements
- Outlines the required insurance and bonds for the Project
- Includes some terms that were formerly in A201-2007 Article 11
- **But why do an "Exhibit"?**

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The AIA 2007 Conflict

- A201-2007, Section 11.1.3:
- *Certificates of insurance: These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner...*

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The AIA 2007 Conflict

- A201-2007, Section 9.10.2:
- *Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect ... (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner...*

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The AIA 2007 Conflict

- ACORD 25 Certificate of Liability Insurance (as of 2007):
- *SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL _____ 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.*

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The AIA 2017 Conflict

- ACORD 25 (2010/05) Certificate of Liability Insurance:
- *SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.*

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The AIA 2017 "Fix"

- A201-2017, Section 11.1.4:
- Within 3 business days of date Contractor becomes aware of impending or actual cancellation of any required insurance, **the Contractor shall provide notice** to Owner of such impending or actual cancellation or expiration.

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The 2017 Exhibit A – Insurance and Bonds

Builder's Risk

- A2.3.1. Still "all risk" coverage. Owner adjusts loss as fiduciary. 11.5.1.
- A2.3.1. No more "as their interests may appear". Other project participants are listed as insureds which is probably a smart way to address the debate whether participants should be listed as named insureds. Gives project participants de facto waiver of subrogation protection.

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Exhibit A – Insurance and Bonds

- A2.3.1.1. Provides for specific coverage for ensuing loss caused by negligence.
- A2.3.1.2. Provides a laundry list of required coverages. This is useful to review what type of coverages you want but just because it is in the contract does not mean the specimen policy will provide coverage.

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Exhibit A – Insurance and Bonds

A2.3.3 Requires the Owner to have property insurance in place for an existing structure when the "Work" is remodeling or constructing an existing structure. The waiver of subrogation extends to this new requirement.

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Exhibit A – Insurance and Bonds

Subrogation Issues

- Purpose of waiver
- 11.3.1. Addresses split of authority as to whether waiver extends beyond "work" and makes it clearer that it does.
- Also clears up whether waiver applies to post completion property insurance
- Welcome changes, but true effect won't be felt for some time.

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Exhibit A – Insurance and Bonds

Other Subrogation Issues

- The relationship between subrogation and indemnity. Insurers try to use anti-indemnity statutes to avoid the waiver of subrogation.
- Does the waiver of subrogation apply to a CGL policy? *Tellspen Builder, L.P. v. Kendall Heaton Insurance*, 325 S.W.2d 692 (Tex. App. 2010)

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§A.2.4 - New, Optional Coverages for Owners:

- Loss of Use, Business Interruption, and Delay in Completion Insurance
- Ordinance or Law Insurance
- Expediting Cost Insurance
- Extra Expense Insurance
- Ingress/Egress Insurance
- Soft Costs Insurance

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§A.2.4 - New, Optional Coverages

- Most all of these enhanced builder's risk coverages have to be amended **IN**.
- For instance, a standard builder's risk policy **EXCLUDES**: "The enforcement of any ordinance or law (1) regulating the construction, use or repair of any property; or (2) requiring the tearing down of any property, including the cost of removing its debris."

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§A.2.4 - New, Optional Coverages

The standard amendatory endorsement adds back **IN**:

- "loss to the undamaged portion of the building caused by enforcement of any ordinance or law
 - Requiring demolition or
 - Regulating construction or repair

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OK...what's the skinny...really...?

- The builder's risk market is strong – there are many carriers in it.
- From an underwriting perspective, the real challenge in the market is the partially occupied structure.
- On a related note, ingress/egress insurance is problematic in the renovation context

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OK...what's the skinny...really...?

- Law and ordinance coverage is typically added in, but also normally capped at 10% of cost.
- Specifying to add "Civil Authority" insurance is more difficult in the marketplace.
- Soft Costs coverage (for delay in completion, etc.) is not a marketplace challenge and often is included automatically

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§A.2.5 - New, Optional Owner Coverage

Cyber Security Insurance for loss to the Owner due to data security and privacy breach, including costs of investigating a potential, or actual breach of confidential or private information (*Indicate applicable limits of coverage or other conditions in the fill point below.*)

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Section A.3.1.3 – Additional Insureds

"To the extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Architect and the Architect's consultants, CG 20 32 07 04."

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For the Contractor: §A.3.2.2.2.7

Specification:

The Contractor's CGL shall not exclude...claims related to residential, multi-family or other habitational projects, if the Work is to be performed on such a project

Insurance Industry:

The availability of habitational coverage can be quite jurisdiction specific. Many carriers will have searching underwriting. This coverage is tough to write on a "standard" commercial general liability form.

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Contractor: §A.3.2.2.2.9

Specification:

The Contractor's CGL shall not exclude...claims related to exterior insulation finish systems (EIFS), synthetic stucco or similar exterior coatings or surfaces...

Insurance Industry:

A/R represents over 150 insurance companies and has around 2 to 4 companies that will consider this risk.

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Contractor: §A.3.2.2.2.5 and .6

Specification:

The Contractor's CGL shall not exclude...claims or loss excluded under a **prior work** endorsement or other similar exclusionary language [OR] under a prior injury endorsement or other exclusionary language...

Insurance Industry:

These are routine exclusions in the excess and surplus lines segment of the insurance industry. Be wary of the "troubled" contractor's ability to meet these.

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Contractor: §A.3.2.8

Specification:

The Contractor shall purchase and maintain... Professional Liability Insurance covering performance of the professional services...

Insurance Industry:

Be cautious of this specification – common usage for "Contractor's E&O" is actually for a policy provision to buy back the "your work" exclusion, not to provide true "professional liability" coverage.

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Insurance and defective workmanship claims

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Defective Workmanship Claims

Why Won't a CGL Work? The answer begins in the definitions and the exclusions:

- The three main triggers are "bodily injury" and "property damage" and "occurrence"
- "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

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Defective Workmanship Claims

"Occurrence" means:

- "... an accident, including continuous or repeated exposure to substantially the same general harmful conditions."
- ...something other than faulty workmanship. *State Farm v. Tillerson* (Ill.App. 2002); *R.N. Thompson v. Monroe Guaranty* (Ind.App. 1997).

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Defective Workmanship Claims

"Property damage" means:

- a. Physical injury to **tangible** property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

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Defective Workmanship Claims

Why Won't a CGL Work? The answer concludes in the exclusions:

- **j. Damage To Property**
 - (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
 - (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

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Defective Workmanship Claims

Why Won't a CGL Work? The answer concludes in the exclusions:

- **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 damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

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Defective Workmanship Claims

Why Won't a CGL Work? The answer concludes in the exclusions:

- **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"...

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Defective Workmanship Claims

The bottom line:

"...The coverage is for tort liability for physical damages to others, and not for contractual liability of the insured for economic loss suffered because the completed work is not what the damaged person bargained for."

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Defective Workmanship Claims

- "[T]he policy in question does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident."
 - Damage arising from inadequate materials and substandard construction work is generally NOT covered by a CGL insurance policy because they are not
 - "Property damage" or
 - An "occurrence."
- Indiana Ins. Co. v. DeZutti (Ind. 1980)

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Defective Workmanship Claims

- September 30, 2010
- Indiana Supreme Court
- *Sheehan Construction v. Continental Casualty*
- *Sheehan* changes the approach to insurance coverage for claims of faulty workmanship.
- Broadens prospects for coverage.

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Defective Workmanship Claims

The Damage:

- Leaking windows
- Fungus growth on the siding
- Decayed OSB [oriented strand board] sheathing
- Deteriorating and decaying floor joists
- Water damage to the interior of the home including water stained carpeting

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Defective Workmanship Claims

The Causes:

- Lack of adequate flashing and quality caulking around the windows
- Lack of a weather resistant barrier behind the brick veneer to protect the wood components of the wall
- Bad shingles; bad flashing
- Poor ventilation in the crawl space

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Defective Workmanship Claims

- Continental was Sheehan's insurer with a standard CGL
- Sheehan was the general contractor
- Continental said:
 - faulty workmanship is not an "occurrence" because it is not an "accident;" and
 - even if there is an "accident" or "occurrence," there is no coverage because of the "your work" exclusion.

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Defective Workmanship Claims

"We align ourselves with those jurisdictions adopting the view that improper or faulty workmanship *does* constitute an accident so long as the resulting damage is an event that occurs without expectation or foresight."

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Defective Workmanship Claims

- Contractor insureds will still have to fight through the various business pursuits exclusions.
- The "your work" exclusion will continue to figure prominently in coverage decisions.

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Defective Workmanship Claims

- How will the marketplace respond?
 - CGL carriers?
 - Bonding companies?
- How will the general versus subcontractor issue play out?

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Defective Workmanship Claims

"[W]e join the majority of other courts by holding that a claim for faulty workmanship, in and of itself, is not an 'occurrence' under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident."

Cincinnati Ins. v. Motorists Mutual (Ky. 2010)

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Indemnity, additional insureds, and certificates

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Indemnification Agreements:

- The indemnification agreement does not relieve the indemnitee of liability to an injured third party. Indemnitee is still liable and must pay damages, whether or not the indemnitor responds. However, the indemnitee has right to sue the indemnitor to force it to honor the obligations of the contract.

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Types of Indemnity Agreements:

- Each Indemnity Agreement is unique, however, there are three general types:
 - Broad Form
 - Intermediate Form
 - Narrow or Limited Form

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Types of Indemnity Agreements:

- Courts look at intent of the parties, as expressed in the indemnity provision, when determining the rights and obligations of the parties under an indemnity provision.

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Narrow or Limited Form:

- Obligates the indemnitor to indemnify the indemnitee **only** to the extent of the indemnitor's own negligence.
- Does little or nothing to increase the indemnitor's liability under common law principles.

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Narrow or Limited Form:

- Agreement is useful in proving to the other party's insurer that the agreement qualifies as an insured contract.
- Example: Adams Corp agrees to indemnify Smith Corp for "any liability arising from the negligence of Adams Corp." (only covers liability arising out of Adams acts.)

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Intermediate Form:

- Indemnitee is usually indemnified only for acts of **passive** rather than **active** negligence, which cause or contribute to a loss.
- Does not specifically address the issue of the indemnitee's own negligence.

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Intermediate Form:

- If language does not clearly state an intent to indemnify the indemnitee from the consequence of its own active negligence, then the agreement will probably be considered "intermediate" by the courts.

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Intermediate Form:

- Example: Adams Corp and Smith Corp enter into an agreement where Adams agrees to defend and indemnify Smith against "any and all liability or damages, of any sort, whatsoever." (specifically covers negligent acts of Smith)

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Broad Form:

- Indemnitor assumes an **unqualified** obligation to hold the indemnitee harmless for all liability associated with the subject of the agreement, regardless of which party was at fault.
- Indemnitor is obligated to respond.

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Broad Form:

- Indemnity provision is most favorable to the indemnitee.
- Example: Adams Corp. agrees to indemnify Smith Corp for "all liabilities **arising out of** the Adams work, whether caused in whole or in part by any act or omission of Smith."

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So, Which Kind Is It?

- Netflix Lease in Los Gatos, CA:
- "Except to the extent due to the negligence or willful misconduct of Landlord..."
- **Not broadest form – perhaps intermediate?**

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Indemnity, A/Is, and Certs

Indemnification clauses have existed in the AIA documents since 1911, with the advent of the very first A-201. The tensions between the various contracting organizations and the scope of indemnification language led to anti-indemnification statutes in multiple states, including Florida, New York and California.

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Indemnity, A/Is, and Certs

The "Core" of the Clause (§ 3.18.1):

- the Contractor shall indemnify and hold harmless... against claims, damages, losses and expenses, including but not limited to attorneys' fees....

Who receives indemnity:

- the Owner, Architect, Architect's consultants, and agents and employees of any of them

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Indemnity, A/Is, and Certs

What indemnity relates to:

- ...arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself...

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Indemnity, A/Is, and Certs

Limitations on the scope of indemnity:

- ...but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

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Indemnity, A/Is, and Certs

More Limitations on Scope of Indemnity (§ 3.18.2):

- In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 3.18.1 ***shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.***

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Why "unlimit" the indemnity?

- That language is in response to cases such as *Kotecki v. Cyclops Welding*, *Hankins v. Pekin Insurance*, and *Briseno v. Chicago Union Station* in Illinois.

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The Employer / Sub says...

- "It's MY employee that got hurt."
- "His sole remedy is a Worker's Compensation action."
- "He can't go to court."
- "I don't have a general liability exposure..."
- "To the employee or anybody else..."

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The Owner and GC say...

- "But WE'RE not the employer. You are."
- "WE'RE being sued in court, you're not."
- "We've asked you to indemnify us for losses that we suffer."
- "Your employee's claim is a 'loss' to us, so you need to indemnify us."
- "If we get hit for big, big damages, YOU need to pay it."

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The *Kotecki v. Cyclops* Protection

Valentino, "Let the Broker Be(a)ware."

- "In *Kotecki* the court held that an employer's maximum liability in a third-party suit for contribution is limited to an amount no greater than its liability to its employee (the plaintiff) under the Workers' Compensation Act."

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The *Kotecki v. Cyclops* Protection

Valentino, "Let the Broker Be(a)ware."

- "This balance allowed non-employer defendants, such as manufacturers or general contractors, to recover limited contribution from the employer, but still gave the employer benefit of the limited liability protection of the Workers' Compensation Act."

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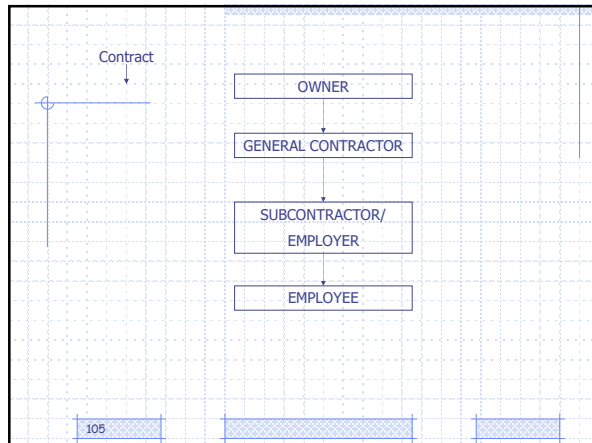
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The *Kotecki* Waiver

- The clauses of
 - "Thou shalt indemnify me" and
 - "Thou shalt fully insure the project"
- Are construed as being waivers of the protections afforded by the *Kotecki* decision.
- Waivers have been tacitly validated as recently as January of 2007.

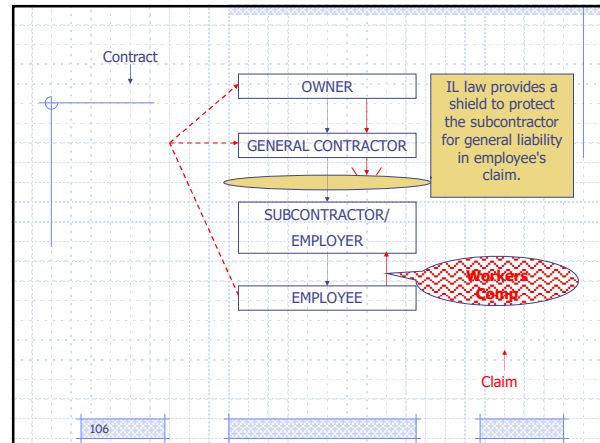
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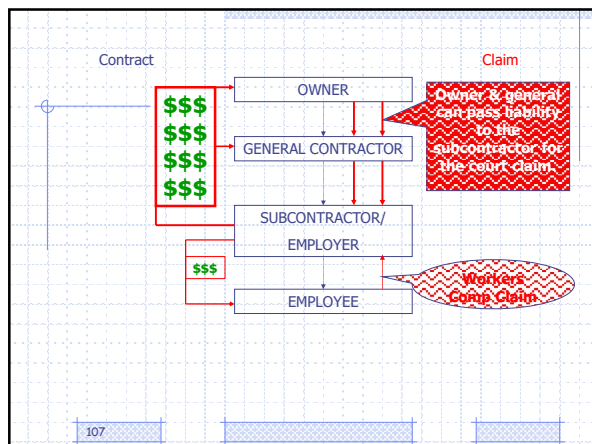
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What to Do...

- The key issue from a risk management standpoint is to
 - Review agreements to see if they contain a waiver of the protection afforded by the *Kotecki* decision, AND
 - Seek clauses which make the insurance the sole and exclusive remedy as between the contracting parties, AND
 - Check to see if the agreement having the waiver is otherwise an "insured contract" for purposes of CGL coverage.

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Again, remember...

- The AIA 2007 changes have made "additional insured" status EXPLICIT for Owners, Architects and consultants.
- The AIA's comment about the expanded additional insured status is:
 - "It has become common industry practice..."
 - "This practice saves legal expenses...by consolidating defense costs under one insurance policy."

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Indemnity, A/Is, and Certs

Additional Insured with P/COH: Additional Insured – Owners, Lessees or Contractors – Completed Operations

- ISO Form 20 37 07 04
- Modified in July, 2004
- "'Who Is An Insured' is amended to include . . . as an additional insured the person(s) or organization(s) shown in the Schedule...."

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Indemnity, A/Is, and Certs

Additional Insured with P/COH:

- ". . .but only with respect to liability for 'bodily injury' or 'property damage' caused, in whole or in part, by 'your work' at the location designated and described in the schedule of this endorsement performed for that additional insured *and included in the 'products-completed operations hazard'.*"

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Indemnity, A/Is, and Certs

Additional Insured without P/COH:

- Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization
- Also modified July, 2004
- ISO Form 20 10 07 04

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Indemnity, A/Is, and Certs

Additional Insured Without P/COH:

- Additional Insured status, but
- Only for injuries "...caused, in whole or in part, by..."
 - Your acts or omissions; or
 - The acts or omissions of those acting on your behalf;
 - in the performance of your ongoing operations for the additional insured(s)..."

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Indemnity, A/Is, and Certs

The ACORD Certificate family:

- 23 Leased Autos
- 24 Certificate of Property Insurance
- 25 Certificate of Liability Insurance
- 27 Evidence of Property Insurance

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Indemnity, A/Is, and Certs

OLD Form 25

- Should any of the above described policies be cancelled, [the issuing insurer] **will endeavor to mail** ___ days written **notice**...But failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.

NEW Form 25

- Should any of the above described policies be cancelled...**notice will be delivered in accordance with the policy provisions.**

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Indemnity, A/Is, and Certs

The ACORD Certificates are:

- Limited by their terms
- Designed to be a "snapshot"
- Speaking as of the day they were issued
- NOT supposed to create a "motion picture" of ongoing obligations

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Indemnity, A/Is, and Certs

ACORD 25 – limitations:

- "This certificate is issued as a matter of information only..."
- "It confers no rights upon the certificate holder..."
- "This certificate does not amend, extend, or alter the coverage afforded by the policy..."

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Indemnity, A/Is, and Certs

ACORD 25 – limitations:

- "The insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies."
- "Aggregate limits shown may have been reduced by paid claims."

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Indemnity, A/Is, and Certs

ACORD 25 – additional insureds:

- "If the certificate holder is an additional insured, the policy(ies) must be endorsed."
- "A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s)."

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Indemnity, A/Is, and Certs

Do ACORD disclaimers work?

- Yes.
- *Pekin v. American Country* (1991)
- Policy language (manuscripted exclusion) trumps certificate

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Indemnity, A/Is, and Certs

Do ACORD disclaimers work?

- Loss payee clause of policy trumps erroneous certificate
- *Lu-An-Do, Inc. v. Kloots* (1999)
- On personal property claim by mortgagee

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Indemnity, A/Is, and Certs

Do ACORD disclaimers work?

- Yes.
- *U.S. Pipe and Foundry v. U.S. Fidelity and Guaranty* (1974)
- Failure to notify of cancellation
- No liability for carrier
- For 1100 lawsuits from an explosion

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Indemnity, A/Is, and Certs

Do ACORD disclaimers work?

- Yes.
- But only if YOU don't modify them.
- What happens if "endeavor" to notify is stricken from the form in the *Pipe* case?

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Indemnity, A/Is, and Certs

- Do ACORD disclaimers work? Agents have the authority to bind the company.
- *Dumenric v. Union Oil Co.* (1992)
- Including binding them through issuance of certificates.
- So...would the 1100 explosion suits be covered?

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Indemnity, A/Is, and Certs

Do ACORD disclaimers work?

- Possibly... Part 1. The carrier is left without the ability to deny coverage.
- Part 2. The carrier unable to deny coverage may look to the agent who issued the certificate that stopped the coverage denial.
- Part 3. The result is an errors and omissions loss.

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Indemnity, A/Is, and Certs

Do ACORD disclaimers work?

- Bill Wilson, Ret. Director of the Virtual University for IIABA writes, "NEVER, EVER modify an ACORD certificate or policy form."
- "The odds are real, REAL good that you have no authority to do so in your agency/company agreement ..."
- "[A]nd/or doing so is illegal in your state."

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Indemnity, A/Is, and Certs

Do ACORD disclaimers work?

- ACORD says:
 - "Agents or brokers should not change any provisions on this form without prior consent of the issuing company."
 - The certificate is not designed to
 - Waive rights
 - Amend a policy
 - Attach an endorsement.

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Design professionals

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First, a little law:

- Defective Specifications
 - Prepare plans and specs
 - Workable and not defective
 - Claims by Owner for defective specifications
 - Breach of Contract
 - Negligence
 - What if you are not the owner?

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First, a little law

- The Spearin Doctrine: the Implied Warranty of the Adequacy of the Specifications [US v. Spearin, 248 U.S. 132 (1918)]
- The Spearin Doctrine is used as both sword and shield

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First a little law:

"[T]he insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that if the specifications were complied with, the sewer would be adequate."

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First, a little law:

The *Spearin* doctrine

1. Needs only inaccuracy – not negligence or fraud
2. Cannot be evaded with disclaimers
3. Cannot be rendered inapplicable based on knowledge or expertise
4. Can be limited if there is a breach of the duty to make pre-award inquiries

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First, a little law:

The Spearin doctrine may depend on whether it is a design or a performance specification:

- **Design** Specifications are exact dimensions, materials, specific services, and designs; no substitution
- **Performance** Specifications are more discretionary and focus on end result

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Law and Insurance:

- Is a construction manager's risk primarily a design exposure (a professional malpractice policy) or is it primarily a general business exposure (a CGL exposure)?
- Are there other policies that are "in play"?
- Is there "additional insured" status?

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Law and Insurance:

- 2009 decision – Regal Construction v. Nat'l Union (New York courts)
- Construction manager was an additional insured under the GC's policy...
- ***"...only with respect to liability arising out of the [GC's] operations performed for the [CM]."***

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Law and Insurance:

- Employee slips and falls on a painted joist
- CM seeks coverage under GC's policy; insurer refuses
- Court reads the "arising out of" language broadly
- The work was within GC's scope of work, so it was sufficiently connected to trigger AI status.

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Design Professional Insurance Issues

- Definition of "Covered Services" or "Covered Acts"
- Declarations? Insuring Agreement? Definitions? Endorsement?
- How broad is it? What if engineering work is subcontracted?

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Design Professional Insurance Issues

IRMI Online (1998) suggests:

- Understand the insured's daily activities
- Review the form and the endorsements
- Negotiate the policy – request removal of exclusions as needed
- Look to the specialty market

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Design Professional Insurance Issues

- Past Personnel: does the policy cover past owners, partner, officer, director or employee while acting within the scope of their duties?
- Future Personnel: does the policy cover individuals who join the insured organization? Does it require notice?
- Will the policy respond for acts committed by either outside the policy period?

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Design Professional Insurance Issues

Two major options:

- Defense Cost Coverage **within** Policy Limits
- Defense Cost Coverage **in Addition to** Policy Limits

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Design Professional Insurance Issues

Pros and Cons of Defense Coverage in Addition to Policy Limits:

- Pros: Defense in addition to limits gives a longer leash to defend against questionable claims
- Cons: Unlimited defense costs do not impose discipline on all parties involved

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Design Professional Insurance Issues

A third option? "First-Dollar" Defense Costs Coverage:

- Policy language states that deductible or SIR is payable only on indemnity, not defense.
- Insurer has marketing advantage
- Example: "If the block in the Declarations labeled 'Deductible Applies To: Loss Only' is checked, the insured shall pay the deductible amount set forth in the Declarations for each loss. The deductible does not include claims expenses."

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Design Professional Insurance Issues

Retroactive Dates:

- A retroactive date is an "occurrence" limitation residing inside a claims-made policy
- The general theory is that the event – the act, error or omission – has to occur after the retroactive date (without regard to when the claim is made) for coverage to apply.

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Design Professional Insurance Issues

Retroactive Dates:

- The opposite of a retroactive date is a professional liability policy providing "full prior acts" coverage
- Retroactive dates are being used more and more aggressively, particularly in the arena of lawyers professional liability insurance.
- The rationale is to prevent coverage for known losses, to prevent stale claims, or long lag time claims.

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Subs and suppliers and risk management

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Risk Management for the Subcontractor or Mat. Supplier

According to AGC, subcontractors and others downstream resist A/I endorsements because:

- Defects occur from multiple causes
- Multiple defects can occur simultaneously
- Each party should bear its own consequences (as a matter of liability AND insurance).

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Risk Management for the Subcontractor or Mat. Supplier

How do subcontractors resist the exposure?

- Use standard contract modifications or addenda.
- Refuse to execute contracts, but perform the work.
- Modify the contract form.
- Legislative solutions.

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Risk Management for the Subcontractor or Mat. Supplier

How do subcontractors resist the exposure?

- Not very well. None of those are perfect solutions.
- Encourage subcontractors and material suppliers to use their own forms whenever possible.

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