6 Construction Insurance

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I. [6.1] INTRODUCTION

There are three major construction risks that can arise in claims for damages being made against the owner, the general contractor, one or more of the subcontractors, and one or more of the design professionals. These risks are (a) bodily injury, (b) physical damage to property, and (c) defective construction. Any party responding to such claims may need to protect itself from liability by the use of indemnification, limitation of liability, or insurance.

The attorney for any party in the construction process must consider each of these risks when reviewing, drafting, and negotiating construction or design contracts for a client. Only by appreciating the exposure generated by each of these risks can the attorney select the proper indemnification, limitation of liability, and insurance provisions that should protect the client.

II. RISKS

A. [6.2] Bodily Injury

Although innocent bystanders can be injured or killed during construction of a building or other structure, most bodily injury claims in construction arise from either injury to or death of construction workers at the construction site. Since the employer is protected from suit by the Workers' Compensation Act (Compensation Act), 820 ILCS 305/1, *et seq.,* injured construction workers and the administrators of the estates of construction workers look to other parties in the construction process to recoup the damages sustained by the injured party or heirs of the deceased worker. *Kolacki v. Verink,* 384 Ill.App.3d 674, 893 N.E.2d 717, 722, 323 Ill.Dec. 445 (3d Dist. 2008) (Compensation Act was bar to recover against employer).

The liability of a general contractor, subcontractor, owner, or design professional for injury or death of a construction worker is based on common-law negligence theories for design professions. Negligence claims are often referred to as malpractice or professional liability claims. The essential elements of a negligence cause of action are "the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach." *Ward v. Kmart Corp.,* 136 Ill.2d 132, 554 N.E.2d 223, 226, 143 Ill.Dec. 288 (1990). *See Radtke v. Schal-Bovis, Inc.,* 328 Ill.App.3d 51, 764 N.E.2d 1249, 262 Ill.Dec. 132 (1st Dist. 2002). In construction cases, the courts generally focus on whether the defendant owes the plaintiff a duty of care to protect the plaintiff from harm. The courts usually weigh the defendant's contractual responsibility for safety at the work site and the defendant's degree of control over performance of the work.

In a negligence case, the plaintiff must show evidence that can be used by the court to determine whether the defendant owes a duty of care to the plaintiff. *Radtke, supra,* 764 N.E.2d at 1252. However, the court determines whether the duty exists. *Schoenbeck v. DuPage Water Commission,* 240 Ill.App.3d 1045, 607 N.E.2d 693, 695, 180 Ill.Dec. 624 (2d Dist. 1993).

Generally, the courts follow the RESTATEMENT (SECOND) OF TORTS §414 (1965), to determine whether the defendant had enough control over construction to find that the defendant

owed a duty of care to the plaintiff. *Larson v. Commonwealth Edison Co.,* 33 Ill.2d 316, 211 N.E.2d 247, 253 (1965). In addition, the courts also have used premises theories to find a duty of care. See RESTATEMENT §§343, 343A; *Genaust v. Illinois Power Co.,* 62 Ill.2d 456, 343 N.E.2d 465, 472 (1976); *Deibert v. Bauer Brothers Construction Co.,* 141 Ill.2d 430, 566 N.E.2d 239, 243, 152 Ill.Dec. 552 (1990).

Generally, contractors and design professionals are independent contractors. Accordingly, the party hiring the contractor or design professional is not vicariously liable for their negligence. *Shaughnessy v. Skender Construction Co.,* 342 Ill.App.3d 730, 794 N.E.2d 937, 941, 276 Ill.Dec. 687 (1st Dist. 2003). However, the Illinois courts have adopted RESTATEMENT §414 to determine when the hiring party may be responsible for the negligence of an independent contractor.

RESTATEMENT §414 states:

> **One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.**

RESTATEMENT §414, cmt. c, provides the definition of "retained control":

> **In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendation which not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such retention of right of supervision that the contractor is not entirely free to do the work in his own way.**

The courts generally hold that retention of the right to stop the work for safety reasons results in a finding that the defendant has retained sufficient control over the work in order to impose a duty of care. *Schoenbeck, supra,* 607 N.E.2d at 694; *Tsourmas v. Dineff,* 161 Ill.App.3d 897, 515 N.E.2d 743, 113 Ill.Dec. 758 (1st Dist. 1987); *Haberer v. Village of Sauget,* 158 Ill.App.3d 313, 511 N.E.2d 805, 110 Ill.Dec. 628 (5th Dist. 1987); *Ryan v. Mobil Oil Corp.,* 157 Ill.App.3d 1069, 510 N.E.2d 1162, 110 Ill.Dec. 131 (1st Dist. 1987). In addition, courts have found sufficient retention of control in the following: *Grillo v. Yeager Construction,* 387 Ill.App.3d 577, 900 N.E.2d 1249, 326 Ill.Dec. 1002 (1st Dist. 2008) (construction contract provided that general contractor was responsible for safety precautions); *Garcia v. Wooton Construction, Ltd.,* 387 Ill.App.3d 497, 900 N.E.2d 726, 326 Ill.Dec. 829 (1st Dist. 2008) (general contractor retained control over operation of piece of equipment involved in accident); *Clifford v. Wharton Business Group, LLC,* 353 Ill.App.3d 34, 817 N.E.2d 1207, 288 Ill.Dec. 557 (1st Dist. 2004) (general contractor still retained control under "premises theory" of liability); *Bokodi v. Foster Wheeler*

Robbins, Inc., 312 Ill.App.3d 1051, 728 N.E.2d 726, 245 Ill.Dec. 644 (1st Dist. 2000) (general contractor retains right of supervision such that subcontractors are not entirely free to do their work in their own way).

The courts have found that a party may owe a duty of care to an injured construction worker if it superintends the entire project, relying on RESTATEMENT §414, cmt. b, which provides as follows:

> **The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractors to do so.**

Under RESTATEMENT §414, cmt. b, the defendant's actual or constructive knowledge of the subcontractor's unsafe work methods or a dangerous condition is a precondition to direct liability. *Cochran v. George Sollitt Construction Co.*, 358 Ill.App.3d 865, 832 N.E.2d 355, 295 Ill.Dec. 204 (1st Dist. 2005).

Because of the potential liability of a party to the construction process under RESTATEMENT §414, the attorneys for each party involved in the construction should review the contracts for their respective clients to assure that no language is included in the contract that could expose that party to liability under §414. Of course, subcontractors may not be able to avoid imposition of liability under RESTATEMENT §414, and their subcontracts may contain specific language placing safety responsibility on them. However, the attorneys for owners, general contractors, and design professionals may be successful in keeping language that could create liability under RESTATEMENT §414 out of their clients' contracts.

An owner or a contractor also may be held liable for injuries to a construction worker as a possessor of land. RESTATEMENT §343A(1) states:

> **A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.**

In *Clifford, supra*, 817 N.E.2d at 1214 – 1215, the court held that RESTATEMENT §343A applied to the potential liability of a contractor owning the premises on which a construction worker was injured when he fell through a floor opening while attempting to hold up a collapsing wall.

For negligence actions, Illinois has adopted the concept of contribution among tortfeasors. See Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01 *et. seq.; Skinner v. Reed-Prentice Division Package Machinery Co.,* 70 Ill.2d 1, 374 N.E.2d 437, 15 Ill.Dec. 829 (1977). Under this doctrine, the liability to the plaintiff is apportioned among the defendants pro rata, based on the degree of negligence of each defendant. Further, defendants may join the employer of the plaintiff as a third-party defendant, seeking contribution from the employer. *Pavelich v. All American Homes, Inc.,* 239 Ill.App.3d 173, 606 N.E.2d 859, 179 Ill.Dec. 1027 (2d Dist. 1992); *Virginia Surety Co. v. Northern Insurance Company of New York,* 224 Ill.2d 550, 866 N.E.2d 149, 310 Ill.Dec. 338 (2007). However, the liability of the employer is limited to the amount of workers' compensation due the plaintiff. *Kotecki v. Cyclops Welding Corp.,* 146 Ill.2d 155, 585 N.E.2d 1023, 166 Ill.Dec. 1 (1992).

The plaintiff's employer may waive its right to limit its liability to the defendants to the amount of the workers' compensation due the plaintiff. Although the employer may not specifically waive its right to limit its liability, mere statements that the employer will bear the obligation of safety of its employees may amount to a waiver of the employer's right to limit its liability. *Herington v. J.S. Alberici Construction Co.,* 266 Ill.App.3d 489, 639 N.E.2d 907, 203 Ill.Dec. 348 (5th Dist. 1994). In addition, indemnification agreements under which the employer is the indemnitor have also been interpreted as a waiver by the owner of this right. *Braye v. Archer-Daniels-Midland Co.,* 175 Ill.2d 201, 676 N.E.2d 1295, 222 Ill.Dec. 91 (1997).

In the typical suit to recover damages for injuries sustained in a construction work-site accident, the plaintiff usually names the owner, the general contractor, and the subcontractors as defendants. The plaintiff may also name the architect and other design professionals as defendants. Then, the defendants invariably file contribution actions against other parties to the construction process — including the plaintiff's employer — alleging that the negligence of each was also a proximate cause of the plaintiff's injuries.

When such a suit is filed, the commercial or general liability insurers defend the owner, the general contractor, and the subcontractors. The architect and other design professionals are defended by their professional liability insurers. The employer should be defended under the employer's liability part of its workers' compensation insurance policy.

If the employer's insurer concludes that the employer has waived its right to limit its liability, then the insurer may either (1) defend the employer under a reservation of rights, or (2) deny coverage for the claim. Under such circumstances, the employer may not have any insurance policy to defend it or pay any of the damages that may be awarded the defendants in their actions against the employer. In *Christy-Foltz, Inc. v. Safety Mutual Casualty Corp.,* 309 Ill.App.3d 686, 722 N.E.2d 1206, 243 Ill.Dec. 137 (4th Dist. 2000), the court held that the waiver by the employer of its right to limit its protection under *Kotecki, supra,* was an intentional act. Since the insurance policy excluded coverage for intentional acts, the court concluded the employer was not covered by the policy.

B. [6.3] Property damage

During construction, property may be physically damaged by the negligence of one of the participants in the process or by other causes, such as fire or weather. Frequently, the property

that is damaged is work under construction. Accordingly, one of the participants in the process usually bears the responsibility to procure insurance to cover physical damage to the property under construction. Frequently, that party purchases a builders risk insurance policy. These policies are discussed in §6.16 below.

Damage to adjacent structures during construction is another source of claims for physical damage to property. For such claims, the owner, general contractor, and subcontractors involved in construction or rehabilitation of the building project are defended by their commercial or general liability insurers for any claims arising from damage to an adjacent structure. The architect and other design professionals are defended by their professional liability insurers.

Equipment of contractors or third parties also may be damaged during the construction process. Frequently, such equipment is covered by a property damage insurance policy. The party who damaged the equipment should be covered by some form of liability insurance (either a commercial or automobile policy is applicable), depending on how the accident occurred.

C. [6.4] Defective Construction

During or after the construction process, part of the work may be defective. The work can be defective due to a design error or omission, faulty construction, or a combination of both. The plaintiff is usually the owner who may sue the architect, other design professionals, and the general contractor for damages resulting from the defective design or defective construction. If suit is filed, the architect and other design professionals are defended under their professional liability policies. However, the general contractor and subcontractors may not have coverage under their general liability policies.

In Illinois, contractors may not have any insurance coverage for defective construction. Under the standard commercial liability policy, insurers provide insurance for "occurrences." An "occurrence," as defined in ¶13 of §V of the ISO Commercial General Liability Coverage Form CG 00 01 12 04 (2003), is

> **an accident, including continuous or repeated exposure to substantially the same general harmful conditions.**

To determine whether a contractor's commercial liability policy covers a defective construction claim, the court should first determine whether there has been an occurrence. *Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*, 358 Ill.App.3d 34, 831 N.E.2d 1, 294 Ill.Dec. 478 (1st Dist. 2005). Illinois courts generally hold that mere defective construction is not an occurrence under a commercial liability policy because there has not been an accident, thus denying contractors coverage for such claims. *CMK Development Corp. v. West Bend Mutual Insurance Co.*, 395 Ill.App.3d 830, 917 N.E.2d 1155, 335 Ill.Dec. 91 (1st Dist. 2009); *Stonebridge Development Co. v. Essex Insurance Co.*, 382 Ill.App.3d 731, 888 N.E.2d 633, 321 Ill.Dec. 114 (2d Dist. 2008); *Viking Construction, supra; Monticello Insurance Co. v. Wil-Freds Construction, Inc.*, 277 Ill.App.3d 697, 661 N.E.2d 451, 214 Ill.Dec. 597 (2d Dist. 1996); *Indiana Insurance Co. v. Hydra Corp.*, 245 Ill.App.3d 926, 615 N.E.2d 70, 185 Ill.Dec. 775 (2d Dist.

1993); *Diamond State Insurance Co. v. Chester-Jensen Co.*, 243 Ill.App.3d 471, 611 N.E.2d 1083, 183 Ill.Dec. 435 (1st Dist. 1993); *Bituminous Casualty Corp. v. Gust K. Newberg Construction Co.*, 218 Ill.App.3d 956, 578 N.E.2d 1003, 161 Ill.Dec. 357 (1st Dist. 1991).

The courts have also denied coverage for defective construction under commercial liability policies for other reasons. *See Viking Construction, supra,* 831 N.E.2d at 9, 16 – 17 (cost of repair of defective construction is not property damage); *State Farm Fire & Casualty Co. v. Tillerson*, 334 Ill.App.3d 404, 777 N.E.2d 986, 991, 268 Ill.Dec. 63 (5th Dist. 2002) (liability policy covers contractor's tort liability, not liability for economic loss for breach of contract). Illinois courts have also denied contractors insurance for defective claims based on the business risk exclusions of the commercial liability policy. *Monticello Insurance, supra; Home Indemnity Co. v. Wil-Freds, Inc.*, 235 Ill.App.3d 971, 601 N.E.2d 281, 175 Ill.Dec. 884 (2d Dist. 1992).

Despite Illinois cases stating that a contractor has no insurance coverage for a mere construction defect, a general contractor may have coverage for a defect, if its policy includes broad form property damage coverage. This coverage (see *e.g.,* ISO Commercial General Liability Coverage Form CG 00 01 12 04 (2003)) contained typically, in "exclusion j," provides that the general contractor may be covered for defective construction of its subcontractors under certain circumstances. Exclusion j generally excludes coverage for the contractor's property and work. However, exclusions j(5) and j(6) contain two exceptions for damages caused by the contractor's subcontractors.

Exclusion j(5) states that if the property damage arises from a subcontractor's operations, the damage is covered except as to that "particular part" of the property on which the subcontractor is working at the time. As an example, if an electrical subcontractor accidentally causes a fire that burns down the building, the damage will be covered, except for that particular part of the property on which the electrician was working. However, this coverage is excess to any applicable builders risk coverage.

Exclusion j(6) provides coverage for property damage of the defective work of the insured's subcontractor, but only to the extent the claim arises under "completed operations" coverage.

Thus, defective construction, a significant risk in the construction, may not be covered by the contractor's commercial liability insurance policy. Further, builders risk policies usually do not cover damages arising from mere defective construction. Accordingly, both the owner and the contractor face exposure to economic losses for which they will have to pay. Naturally, the owner can seek to recoup the cost of repair of defective construction from the contractor. However, if the contractor does not have adequate resources to pay for the damage, the owner is without effective recourse.

Even though under Illinois law the standard general liability policy does not insure against mere defective construction, a performance bond may be a source of reimbursement.

III. [6.5] ALLOCATION OF RISK

Because accidents can happen during construction causing serious injury or even death to construction workers or damage to the property under construction, each party wants to assure that the other parties have adequate insurance protection. Further, each participant in the construction process attempts to place as much risk as possible on the other parties to minimize its own liability in any lawsuit and to minimize the cost of its own insurance premiums. Risk can be allocated through insurance, indemnification, and limitation of liability.

Construction contracts usually contain provisions specifying that the general contractor is to maintain specific insurance coverage. The standard contract forms of the American Institute of Architects (AIA) specify types of risks against which the contractor should insure. However, the AIA forms do not specify types of policies or monetary limits. Many owners, even when using the AIA forms, require the general contractor to maintain specific policies with specific monetary limits. Typically, the owner requires the general contractor to maintain commercial liability, umbrella liability, workers' compensation, employers liability, and automobile liability policies.

As part of their efforts to pass as much risk on to the contractor as possible, owners usually require the general contractor to name the owner as an additional insured under the contractor's commercial and automobile liability policies. Under the standard liability insurance policies, if the owner is sued for negligence as the result of an accident at the jobsite, the owner is defended and indemnified for any loss under two insurance policies — the owner's liability policy and the contractor's liability policy.

Owners are beginning to require — when they are named as additional insureds on the contractor's policies — that this be on a "primary and noncontributory" basis. Under such provision, if the owner is sued for negligence because of an accident at the jobsite, the contractor's insurer should defend and indemnify the owner for its entire loss, up to the limits of the contractor's policy. Using such endorsements, owners attempt to pass the risk for their negligence arising from accidents to the contractor's insurance. However, insurers are rewriting their additional insured endorsements to limit coverage to the additional insured's vicarious liability.

Under the AIA standard contract forms, the owner maintains the builders risk policy. However, many contractors prefer to procure such coverage, and thus many construction contracts require the general contractor to provide the builders risk coverage. Regardless of who procures the policy, the owner, contractors, and subcontractors are each usually insured by the builder's risk policy.

After the owner passes as much of the insurance burden as possible to the general contractor, the typical general contractor then passes that burden to its subcontractors. Since the owner requires the general contractor to list the owner as an additional insured under the general contractor's liability policies, the general contractor, in turn, requires its subcontractors to name both the owner and the general contractor as additional insureds under the subcontractors' liability policies.

Because construction workers injured at the jobsite are usually employees of subcontractors, the automatic bar, preventing injured employees from suing their employer in order to receive workers' compensation benefits, is not very effective. 820 ILCS 305/11. Since subcontractors frequently must list both the owner and general contractor as additional insureds under their liability policies on a primary and noncontributory basis, the subcontractors end up paying for the insurance that defends and indemnifies the owner and the general contractor for injuries to their employees at the work site.

A. [6.6] Indemnity

Although the participants in the construction process invariably include indemnification provisions in their contracts, such provisions are no longer an effective tool because of the Construction Contract Indemnification for Negligence Act (Indemnification Act), 740 ILCS 35/0.01, *et seq.* Under the Indemnification Act, indemnity provisions in construction contracts under which the indemnitee is held harmless for its negligence are unenforceable. *Braye v. Archer-Daniels-Midland Co.*, 175 Ill.2d 201, 676 N.E.2d 1295, 222 Ill.Dec. 91 (1997). However, an insurance provision in a contract requiring the indemnitor to procure insurance for the benefit of the indemnitee does not violate the statute. *Jandrisits v. Village of River Grove*, 283 Ill.App.3d 152, 669 N.E.2d 1166, 218 Ill.Dec. 640 (1st Dist. 1996).

Despite the Indemnification Act, indemnity provisions still have a place in construction contracts. Under such a provision, the indemnitee may be able to recoup its defense costs from the indemnitor if the indemnitee's negligence did not proximately cause the damage sustained by the injured party. In essence, such a provision makes the indemnitor an "insurer" with absolute liability.

B. [6.7] Limitation of Liability

Under a limitation of liability provision, a party can limit its liability to a fixed monetary amount. For example, architects often limit their liability to the monetary limits of their professional liability insurance coverage. Contractors often limit their liability to the amount of the contract price or a percentage thereof. However, the design professional and contractor can limit their liability only to the other party to the contract. Limitation of liability provisions do not affect the rights of persons who are not parties to the contract.

Exposure to consequential damages for breach of contract is a significant risk to any participant in the construction process. A major source of this exposure is late completion of the project. Accordingly, contractors frequently include waiver of consequential damages provisions in their contract forms. The AIA contract documents contain a mutual waiver of consequential damages. See, *e.g.*, AIA Document A201, *General Conditions of the Contract for Construction* §15.1.6 (2007).

Construction contracts that contain such waiver provisions may include a provision for liquidated damages in the event the contractor misses the contractual completion date. Both the owner and contractor may prefer such a provision because damages for delay may be difficult to

quantify. Accordingly, they may agree on a daily, weekly, or monthly fixed amount if the contractor delays completion of the project. Of course, contractors attempt to cap the total amount of the liquidated damages.

C. Basic Insurance Policies

1. [6.8] Commercial General Liability

The principal policy for owners and contractors is the commercial general liability (CGL) policy, often referenced as the "general liability policy." Today, most insureds are covered by a standard CGL form written and published by the Insurance Services Office, Inc. (ISO), an insurance industry trade group. The first standard form was issued in 1940, and subsequent forms were issued in 1943, 1955, 1966, 1973, 1986, 1988, 1996, 1997, 2001, and 2003. The ISO also publishes numerous endorsements for the standard general liability policy to cover various insurance alternatives.

The standard policy contains the following:

a. declarations page — contains the identity of the insurer, the name and address of the primary insured, the policy period, the monetary limits of the policy, the amount of the deductible, and a schedule of forms;

b. insuring agreement — states that the insurer will defend and indemnify the insured for suits filed against it arising from bodily injury and physical damage to property;

c. exclusions — state what is not covered (*e.g.*, claims of injured employees of the insured);

d. conditions — state the general requirements of the contract, such as the obligation of the insured to notify the insurer of claims and suits; and

e. endorsements — limit or add additional coverage to the insuring agreement.

The 2003 standard policy form states as follows with "we" referring to the company providing the insurance:

SECTION I — COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We 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. ISO Commercial General Liability Coverage Form CG 00 01 12 04 (2003) (ISO CGL Form).

"Bodily injury" is defined in ¶3 of §V of the ISO CGL Form above as

bodily injury, sickness or disease sustained by any person, including death resulting from any of these at any time.

The standard extended bodily injury endorsement expands the definition and provides that bodily injury includes "any intentional act or at the direction of the insured which results in bodily injury, if such injury arises from the use of reasonable force for the purpose of protecting persons or property." Scott C. Turner, I INSURANCE COVERAGE OF CONSTRUCTION DISPUTES §6.22, p. 6-64 (2009).

"Property damage" is defined by ¶17 of §V of the ISO CGL Form above as either

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.

"Personal and advertising injury," as defined by ¶14 of §V of the ISO CGL Form, means

injury, including consequential "bodily injury" arising out of one or more of the following offenses:

a. False arrest, detention, or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy . . .

d. Oral or written publication, in any manner, of material that slanders or libels . . .

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

a. [6.9] Additional Insureds

Most construction contracts contain provisions stating that one party insures the other party (or parties) under certain of its insurance policies. Usually, the contract between the owner and the general contractor contains a provision requiring the general contractor to name the owner and other parties as additional insureds under the contractor's commercial general liability and automobile liability insurance policies.

Of course, the general contractor then passes the insurance burden to its subcontractors. General contractors typically require their subcontractors to name the general contractor, the owner, and other parties as additional insureds under the subcontractors' liability insurance policies, usually on a primary and noncontributory basis.

There have been several attempts to redefine the insurer's obligation to the additional insured. These ISO efforts are the result of court decisions that have expanded additional insured coverage beyond that which the insurance industry considers fair. Insurers want to limit coverage of the additional insured for negligence of the insured, and many insurers want to limit coverage for vicarious liability of the additional insured arising from acts or omissions of the named insured. Accordingly, the parties to the construction process must be aware of the substance of the commonly used additional insured endorsements. Also, many attorneys now specify, by ISO document number, the endorsement to be used. Further, the parties to the contract should be aware that the typical additional insured endorsement requires, in order for the coverage to be enforceable, that a written contract must contain the requirement for a party to be listed as an additional insured. *United States Supply Co. v. Zurich American Insurance Co.*, 386 Ill.App.3d 88, 896 N.E.2d 425, 324 Ill.Dec. 639 (1st Dist. 2008); *Clarendon America Insurance Co. v. Aargus Security Systems*, 374 Ill.App.3d 591, 870 N.E.2d 988, 312 Ill.Dec. 544 (1st Dist. 2007).

Some contractors erroneously require the owner or other party to be covered by the general contractor's liability policies as an additional *named* insured. All parties to a construction contract should use the term "additional insured," not "additional *named* insured." If a party is listed as an additional named insured under the policy, then the additional named insured also becomes liable for payment of the premiums. In addition, use of this term may negate certain coverages that the additional insured has under general liability policy.

b. [6.10] Exclusions

The number of exclusions differs among the different ISO commercial liability policy forms. In addition, many exclusions are contained in endorsements that are added to the policy. The most significant exclusions are as discussed below:

Expected or intended injury exclusion. The general liability policy covers claims arising from negligence. It does not cover injuries arising from intentional acts. Rowland H. Long, 1 THE LAW OF LIABILITY INSURANCE §1.08 [2] (2009).

Contractual liability exclusion. Contractual liability means liability assumed by the insured under a contract. It is most often applicable to indemnity provisions of contracts that are entered

into by the insured. Generally, the exclusion states that the policy does not cover claims arising from liability assumed in a contract or agreement. However, in §I, Coverage A, ¶¶2.b(1) and 2.b(2) of the ISO Commercial General Liability Coverage Form CG 00 01 12 04 (2003), there are two exceptions stating the exclusion does not apply to liability

> **(1) That the insured would have in the absence of the contract or agreement; or**
>
> **(2) Assumed in a contract or agreement that is an "insured contract".**

Insured contracts include lease of premises, certain easement or license agreements, a railroad sidetrack agreement, certain indemnity obligations arising from municipal ordinances, elevator maintenance agreements, and certain agreements to assume the tort liability of a third party or pay for bodily injury or property damages to a third party, but only to the extent

> **liability that would be imposed by law in the absence of any contract or agreement.** §V, ¶9.f of ISO CGL Form.

Pollution exclusion. This is often referred to as the "absolute pollution exclusion" and was adopted for use in the general liability form by the ISO in 1986. Prior to adoption, certain pollution claims were covered by the general liability policy. However, in 1986, the ISO rewrote the exclusion so that no pollution claims are covered by the standard policy. Today, many contractors are able to cover their exposure to pollution claims by buying an environmental liability insurance policy.

Workers' compensation exclusion. Since general liability is designed to defend the insured against tort claims of third parties, workers' compensation claims of its employees are excluded. Naturally, the contractor can insure against claims by purchasing a workers' compensation insurance policy.

Employer's liability exclusion. This provision excludes coverage for employees who are injured arising out of and in the course of their employment. This exposure can be covered by the employer's liability part of the employer's workers' compensation policy. In addition, this exclusion does not apply to claims of employees arising from "insured contracts."

Property owned exclusion. This exclusion states that claims for the property damage to the insured's owned property are excluded. Obviously, such claims should be covered by the insured's property damage policy. However, claims arising from the actions of additional insureds related to insured-owned property are not covered by this exclusion.

Property occupied exclusion. This exclusion applies to property under lease or other arrangements whereby the insured is given use of a designated property for a period of time. As stated in an ISO circular:

Exclusion applies only to property which is formally occupied over a specific period of time for a specific purpose, as in the case where a general contractor is given the exclusive use of an area in a building as headquarters for his construction operations. ISO Circular General Liability GL 79-12, *Broad Form Property Damage Coverage Explained* (Jan. 29, 1979).

Occupied property should be covered by some form of property damage insurance, such as builders risk insurance in the case of construction.

This exclusion states that the quality of the insured's product or work is not covered by the policy. This a business risk and the commercial general liability policy does not cover business risks.

Damage to impaired property exclusion. Again, this is an exclusion under which the insurer seeks to exclude certain business risks from coverage. Under §I, Coverage A, ¶2.m of the ISO CGL Form, this exclusion excludes

Damage to Impaired Property Or Property Not Physically Injured

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

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work; or

(2) A delay or failure by your or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

Damage to your product exclusion. Under §I, Coverage A, ¶2.k of the ISO CGL Form, this exclusion states as follows (with "your" referring to the named insured):

k. Damage to Your Product

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

This exclusion applies to products, not buildings.

Work performed exclusion. This exclusion excludes another business risk that the insurance does not cover. It applies to the work of contractors. It states in part:

> **This insurance does not apply to:**
>
> *** * ***
>
> **j. . . . "Property damage" to:**
>
> *** * ***
>
> **(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.** §1, Coverage A, ¶2.

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Performing operations exclusion. This exclusion reads in part:

> **This insurance does not apply to:**
>
> *** * ***
>
> **j. . . . "Property damage" to:**
>
> *** * ***
>
> **(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property.** *Id.*

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This provision applies to a typical construction project. The contractor usually does not own the property on which the building is constructed. This language excludes any coverage for damage to the work under construction or the underlying fee. However, this damage can be covered by a builders risk insurance policy, under certain circumstances.

Faulty workmanship exclusion. This exclusion applies to any work of a contractor that

> **must be restored, repaired or replaced because "[**the**] work" was incorrectly performed on it.** §I, Coverage A, ¶j(6) of ISO CGL Form.

This is another business risk that the general liability policy does not cover.

Completed operations exclusion. This exclusion excludes coverage for damage to the insured's completed work. However, 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.** §*I*, Coverage A, ¶*l* of ISO CGL Form.

This exception for the work of subcontractors is of major benefit to general contractors and subcontractors that hire sub-subcontractors. Under such circumstances, the policy covers defective work of the subcontractors at both levels. This exclusion and its exception apply to property damage arising during the policy period, regardless of whether the work was performed before or during the policy period. Thus, for maximum protection, the insured must continue obtaining policies that have the same exception covering the work of the subcontractors.

Explosion, collapse, and underground hazard (XCU) exclusion. This exclusion may be negated by the purchase of coverage for these hazards by endorsement.

Professional services exclusion. Design liability is excluded from coverage of the general liability policy. Design professionals can cover their exposure by procuring a professional liability insurance policy.

Mold exclusion. Many commercial liability insurance policies contain this exclusion.

Although the exclusions above are the most important exclusions for contractors, some of the gaps created by these exclusions can be closed by the contractor's obtaining additional policies (*e.g.*, workers' compensation and builders risk insurance). Also, in addition to these exclusions, there are others that may be added to the general liability policy by endorsement.

The important point to be garnered from an analysis of these common exclusions is that the insurance industry does not want to cover business risks. The industry considers construction quality to be a business risk. Accordingly, even if the insured is able to successfully argue that the construction defect is an "occurrence," the insurer can probably use one or more of the business risk exclusions to deny coverage. Also, keep in mind that for completed operations, defective work of a subcontractor may be covered if the insured is a contractor that employed the subcontractor responsible for the defective work.

c. [6.11] Conditions

Although there are several conditions in the commercial general liability policy form, the most important condition is the provision requiring notice of claim or suit. Paragraph 2 of §IV of the ISO Commercial General Liability Coverage Form CG 00 01 12 04 (2003), provides in part:

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim.

*** * ***

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

*** * ***

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

Even though the insuring agreement states that the insurer will defend the insured only if it is named as a party to a lawsuit, this condition requires the insured to notify the insurer of not only suits, but also claims and occurrences that may give rise to a claim. The reporting requirement also applies to any additional insureds.

Although the insuring does not state that the insurer must do anything if notified, insurers ordinarily investigate claims made against the insured or additional insured before suit is filed. In addition, if liability of the insured or additional insured is clear or clearly probable, then many insurers attempt to settle such claims before suit is filed.

Both the insured and additional insured must be aware of the provision requiring each to notify the insured of a suit, claim, or occurrence that may result in a claim as soon as practicable. The failure of either to promptly report to the insurer may result in denial of the claim by the insurer due to late notice. In Illinois, the law on late notice strongly favors the insurer. When determining whether the time elapsed before notice was given was reasonable, courts may consider the following factors:

(1) the specific language of the policy's notice provisions; (2) the degree of the insured's sophistication in the world of commerce and insurance; (3) the insured's awareness that an occurrence, as defined under the terms of the policy, has taken

place; (4) the insured's diligence and reasonable care in ascertaining whether policy coverage is available once the awareness has occurred; and (5) any prejudice to the insurance company. *Berglind v. Paintball Business Ass'n,* ___ Ill.App.3d ___, 921 N.E.2d 432, 441, 336 Ill.Dec. 818 (1st Dist. 2009).

Although not stated in the conditions section of the general liability policy, the insuring agreement provides that the insurer has the sole right to settle any claims or suits.

2. [6.12] Umbrella and Excess Liability Insurance

Most construction contracts require the general contractor or subcontractor to maintain umbrella or excess liability insurance coverage. Such policies provide additional monetary limits of liability for claims covered by the contractor's or subcontractor's primary liability insurance policies. They provide additional insured above the limits of the commercial liability, automobile liability, and employers liability insurance coverages of the contractor or subcontractor.

An umbrella liability policy provides additional coverages beyond those that are contained in the primary policies. As an example, some umbrella policies offer worldwide liability coverage, whereas a primary policy may not. Excess insurance only covers the same risks covered by the primary policies.

There are no standard policy forms for umbrella or excess insurance — as there are for primary commercial general liability insurance. Accordingly, such policy forms vary among insurers and also may vary by policy years for specific insurer.

If the limits for the specific primary or underlying policy are exhausted, then the umbrella or excess liability policy "drops down" to provide coverage. Under such circumstances, these policies also usually provide that the umbrella or excess insurer will assume defense of the claim. In addition, most policies cover claims against additional insureds.

Many construction contracts contain provisions indicating that when the limits of the primary policy are exhausted, the umbrella or excess policy will drop down and provide defense and indemnity to the additional insureds. However, in Illinois, the umbrella or excess policy will not drop down if the limits of the primary policies of the additional insureds have not been exhausted. In these cases, the primary policy of each insured and additional must be exhausted before the umbrella or liability policy drops down.

3. [6.13] Workers' Compensation and Employers Liability Insurance

In Illinois, the Workers' Compensation Act requires employers to provide compensation for employees who are injured in work-related accidents or develop an occupational disease. The formulas for determining payments for lost wages, temporary disability, and permanent disability are provided in the Act. In addition, the employer must pay the injured employee's medical costs. The Act also requires the employer to either carry workers' compensation insurance or obtain approval from the Workers' Compensation Commission to self-insure its workers' compensation exposure. 820 ILCS 305/4(a).

Besides workers' compensation insurance, the standard policies also provide employers liability insurance. Employers liability insurance covers employment-related injuries or illnesses. Although it covers claims of employees, employee relatives, and third parties, employee claims are normally barred by §11 of the Workers' Compensation Act. 820 ILCS 305/11. However, it covers contribution claims filed by third parties against the employer as a joint tortfeasor. *Skinner v. Reed-Prentice Division Package Machinery Co.,* 70 Ill.2d 1, 374 N.E.2d 437, 15 Ill.Dec. 829 (1977). As discussed above, if the employer waives its right to limit its liability under *Kotecki v. Cyclops Welding Corp.,* 146 Ill.2d 155, 585 N.E.2d 1023, 166 Ill.Dec. 1 (1992), then its employer's liability insurer may not owe coverage for any contribution claim arising from the project covered by the contract with the waiver provision. *Christy-Foltz, Inc. v. Safety Mutual Casualty Corp.*, 309 Ill.App.3d 686, 722 N.E.2d 1206, 243 Ill.Dec. 137 (4th Dist. 2000).

Workers' compensation and employers liability insurance are usually contained in the employer's workers' compensation policy. Workers' compensation is referred to as "Part I" of the policy. Employers liability insurance coverage is contained in "Part II" of the policy.

Some construction contracts require the contractor or subcontractors to list the owner and other parties as additional insureds under their workers' compensation insurance policy. Insurers will not do so. Accordingly, such provision should be stricken from construction contracts.

4. [6.14] Automobile Liability Insurance

Since most contractors and subcontractors use motor vehicles for their work, construction contracts normally require them to maintain business automobile insurance. If a motor vehicle accident is related to the work of the contractor or subcontractor, the injured plaintiff may name other parties besides the contractor or subcontractor as parties to its lawsuit to recover damages for injuries. As a result, construction contracts usually require the owner and other parties be listed as additional insureds on the contractor's and subcontractors' automobile liability policies.

5. [6.15] Equipment Damage Insurance

Contractors and subcontractors usually have construction equipment that they use on the jobsite. Such equipment may be covered by a form of property damage insurance. Sometimes, the contractor or subcontractors working on the project will allow other parties working on the project to use their equipment (*e.g.,* scaffolds). Under such circumstances, the other parties may have to agree, in a written document, to be responsible for damage to the equipment and to indemnify the owner of the equipment for any third-party claims arising from the other party's use of the equipment. Thus, other parties using the equipment should be sure that they have insurance to cover these risks.

6. [6.16] Builders Risk Insurance

Damage to the work during construction is a risk that also should be covered by insurance. Typically, this risk is covered by a builders risk insurance policy. However, there is no standard form builders risk policy used by the insurance industry. Thus, the party that purchases the builders risk policy and the parties covered by this policy must be knowledgeable about the

coverage, exclusions, and conditions of the policy. On too many projects, the builders risk policy is not delivered to the party who purchased it until after construction has been started. In addition, the other parties covered by this policy usually do not get copies. Accordingly, to merely require one of the parties by contract to provide builders risk coverage may not be sufficient.

Most frequently, the builders risk policy covers the owner and each of the contractors working on the project. This includes the general contractor and each of the subcontractors. Thus, if the work is damaged during construction, the parties do not have the right to sue each other for damages resulting from injury to the work because they are insureds under the same policy. Normally, builders risk policies do not cover the work of the design professionals for the project, because the design professionals do not have an insurable interest in the property as they do not construct the structure.

The firms insured under the builders risk policy should be aware of what property is insured by the policy. Normally, the building or structure, while it is under construction, is covered by the policy. Also, equipment and material not yet installed may be covered. The insureds also should determine if damage to a preexisting structure is covered by the policy. For example, the builders risk insurance policy may cover an addition under construction. Under such circumstances, the insureds should analyze the policy to see if damage to the existing building during the construction process is covered by the builders risk insurance policy.

The insureds should further consider the period and duration of coverage under the builders risk insurance policy. Presumably, the date when construction of a project commences should be the start of coverage. However, is it the date when the workers start erecting the building? Or is it the date when material is delivered to the work site? *See Ira S. Bushey & Sons v. American Insurance Co.*, 237 N.Y. 24, 142 N.E. 340 (N.Y.App. 1923) (holding that coverage begins when materials are brought to work site because builder's risk begins).

The completion date of construction should be the end of coverage of the builders risk insurance policy. However, policies offer different definitions of "completion," and the courts have interpreted "completion" differently. Some courts hold that construction is completed and coverage terminated when there has been completion, acceptance, and cessation of interest. *See, e.g., Fireman's Fund Insurance Co. v. Millers' Mutual Insurance Ass'n,* 451 F.2d 1140 (10th Cir. 1971). This idea is similar to the concept of "final completion" contained in many construction contracts. Some courts, on the other hand, hold that construction is complete when the building can be occupied for its intended use. *See, e.g., Cuthrell v. Milwaukee Mechanics Ins. Co. of Milwaukee, Wis.,* 234 N.C. 137, 66 S.E.2d 649 (1951). This is the concept of "substantial completion," also commonly used in construction contracts.

Insureds also should be aware that builders risk insurance policies do not cover faulty workmanship. *See Rivnor Properties v. Herbert O'Donnell, Inc.,* 633 So.2d 735 (5th Cir. 1994). Thus, such policies do not cover the cost of repair of defective construction. *See Allianz Insurance Co. v. Impero,* 654 F.Supp. 16 (E.D.Wash. 1986). *See also Allstate Insurance Co. v. Smith,* 929 F.2d 447 (9th Cir. 1991).

IV. OTHER INSURANCE ISSUES

A. [6.17] Professional Liability Insurance

Professional liability insurance for architects and engineers is discussed in Chapter 2 of this handbook. However, the owner and contractor should be aware that if they are entering into a design-build contract, the contractor also should have contractors professional liability insurance to cover its design exposure.

B. [6.18] Certificates of Insurance

Insurance provisions of construction contracts and subcontracts usually provide that the general contractor and subcontractors furnish certificates of insurance to certain parties. Certificates of insurance list the insurance policies of the contractor and subcontractors with the name of the insurer, the name of each policy, the monetary limits of each policy, and, under the liability insurance policies, which parties are named as additional insureds. The other parties to the contract can review the insurers' certificates to determine whether the general contractor and its subcontractor have procured the coverages required by the contract and subcontracts. The certificates, however, are not insurance policies. If the other parties have questions about any insurance coverage of the general contractor or subcontractor, then they should request certified copies of the relevant insurance policies for review. However, normally, the other parties do not require the general contractor and subcontractor to furnish copies of their insurance policies.

Certificates of insurance are usually issued by the insurance broker for the insured listed on the certificate. The certificates list each insurance policy of the insured by type, issue, and policy number. They also list the coverage for each policy. If additional insureds are covered by any of the policies listed on the certificate, then the certificate identifies these additional insureds.

The parties to the contract should be aware that certificates of insurance are not a statement of the insurance coverage of the company listed on the certificate. The actual statement of coverages is contained in the respective insurance policies, not in the certificates of insurance. *Pekin Insurance Co. v. American Country Insurance Co.*, 213 Ill.App.3d 543, 572 N.E.2d 1112, 157 Ill.Dec. 648 (1st Dist. 1991) (certificate of insurance generally confers no rights; actual policy must be relied on; conflict with certificate did not exist when certificate explicitly communicated that only policy was to be relied on for extent of coverage and exclusions — certificate only served to inform general contractor that it had same insurance coverage as primary insured).

C. [6.19] Waiver of Subrogation

Construction contracts typically contain "waiver of subrogation" provisions. BLACK'S LAW DICTIONARY, p. 1467 (8th ed. 2004), defines "subrogation" as

> **3. The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.**

Thus, if the insurer pays a loss arising from damage to the insured property, the insurer, usually by the insurance contract, has the right to seek subrogation against the party that may cause the

loss for the insurer to recoup the sums it paid to repair or replace the property. Under a waiver of subrogation provision, the parties to the contract attempt to restrict the insurer's right to seek recovery for the loss it paid.

The typical contractual provision states that if property of either party to the contract is damaged, the parties waive subrogation against each to the extent there is insurance coverage. However, such waivers may be unenforceable unless the insurers agree to them. Fortunately, most property damage insurance policies, including builders risk insurance, contain provisions allowing the insured to waive the insurer's right of subrogation. Such waivers have been upheld by the courts. *Village of Rosemont v. Lentin Lumber Co.*, 144 Ill.App.3d 651, 494 N.E.2d 592, 98 Ill.Dec. 470 (1st Dist. 1986).

More construction contracts than in the past require the contractors and subcontractors to waive the right of subrogation for payment of claims arising under a commercial general liability policy. As stated above, under the standard ISO policy forms, the insured cannot compromise the insurer's rights after a loss. However, the standard forms are silent about whether the insured can waive the insurer's right of subrogation before a loss occurs. To be safe, the parties to the construction contract should require the general contractor and subcontractors to obtain waiver of subrogation endorsement forms. Patrick J. Wielinski, INSURANCE FOR DEFECTIVE CONSTRUCTION, p. 330 (2d ed. 2005).

Workers' compensation insurers usually have the right to seek recovery through subrogation for payments they have made to claimants under their policies. *Home Insurance Co. v. Bauman*, 291 Ill.App.3d 834, 684 N.E.2d 828, 225 Ill.Dec. 837 (1st Dist. 1997).

D. [6.20] OCIPs and CCIPs

For many years, wrap-up insurance programs have been used in the construction industry. The aim of wrap-up programs is to cover the owner, general contractor, and subcontractors for any third-party claims arising from the project. These programs are designed primarily to handle the claims of injured construction workers in an efficient manner. Insurers and insureds believe that if such claims are covered by one insurance policy — one covering the owner and all the contractors — administration of the claims is less expensive. In addition, they assume that defense costs are lower because one law firm is hired to defend the owner and all of the subcontractors. These programs usually require the owner to procure general liability and workers' compensation insurance policies covering the owner and all the contractors.

Because of the expense of wrap-up programs, they were initially used for major projects requiring more than one year for completion, such as the construction of nuclear power plants in the 1970s. Today, such programs are being used more frequently. However, brokers specializing in setting up these programs believe the wrap-up programs are best used for construction projects costing more than $50 million, although they have been used for some projects as low as $25 million. There are two kinds of wrap-up programs: (1) owner-controlled insurance programs (OCIPs); and (2) contractor-controlled insurance programs (CCIPs).

Under OCIPs, the owner procures the commercial general liability, workers' compensation, employers liability, and umbrella/excess insurance policies. The owner also may purchase builders risk, design professional liability, and environmental liability insurance policies.

Because of the potential for numerous and major accidents in large construction projects, OCIPs usually maintain liability insurance with limits of $50 million or more. However, some programs have been written with limits of $25 million. Further, under an OCIP, individual contractors may be protected by insurance with higher limits than they can obtain on their own. Frequently, the typical trade contractor may be able to get general liability coverage of only $10 million or less.

Besides the advantage of controlling the insurance program for the entire project, owners choose to use OCIPs because they believe there are cost savings. When contractors and subcontractors bid for the work, they are instructed to exclude insurance costs from their bids. They also may be instructed to submit bids including the cost of insurance, but showing the amount of credit for insurance in the event an OCIP is established for the project. Insurance cost savings can run from two to five percent of construction cost. In addition, owners can lower the insurance cost because they are putting together a program with high monetary limits. Unfortunately, there are no published empirical studies that confirm whether there are any cost savings under OCIPs (or CCIPs). See David L. Grenier, *Potential Savings from Owner-Controlled Insurance Programs*, available at www.expertlaw.com/library/business/ocip-savings.html (part of a series of articles discussing owner-controlled insurance programs).

Workers' compensation insurance is a major part of any OCIP because the premiums are substantial and there are many claims, some of which require much attention. Further, in order to minimize the number of work-site accidents, OCIPs emphasize safety by using sophisticated loss-control programs.

Commercial general liability policies used in OCIPs usually have large deductibles or retentions and retrospective rating plans. A major problem with OCIPs is determining who pays the deductible or retention. Should the owner always pay the deductible or retention, or should the contractor(s) who caused the loss pay the deductible or retention? The same issue also arises with payment of the deductible for builders risk claims.

CCIPs use the same approach and insurance policies as OCIPs. General contractors prefer CCIPs because they (1) control insurance for the entire project, (2) are assured their subcontractors have insurance coverage, (3) pass responsibility for payment of any deductibles to the subcontractors who are at fault, and (4) can minimize costly and time-consuming counterclaims.

E. [6.21] Resources

There are a number of publications that are useful to an attorney drafting, reviewing, and/or negotiating construction contracts. The International Risk Management Institute (IRMI) (www.irmi.com) publishes several treatises that are helpful to the practitioner, including the following:

Gibson, Jack P., THE WRAP-UP GUIDE (4th ed. 2006).

Hickman, Ann R., DESIGN-BUILD RISK AND INSURANCE (2d ed. 2008).

Hickman, Ann R. and Jack P. Gibson, CONSTRUCTION RISK MANAGEMENT (updated quarterly).

Malecki, Donald S. et al., THE ADDITIONAL INSURED BOOK (5th ed. 2004).

Wielinski, Patrick J., INSURANCE FOR DEFECTIVE CONSTRUCTION (2d ed. 2005).

Wielinski, Patrick J. et al., CONTRACTUAL RISK TRANSFER (2008).

Another good resource is Scott C. Turner, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES (2d ed. 2009). The second volume of his treatise contains many of the ISO policy forms and endorsements that have been used for construction insurance since 1985. Also helpful are the Fidelity, Casualty & Surety bulletins, available with a subscription at www.nationalunderwriterpc.com/pages/default.aspx.

V. [6.22] INSURANCE PROVISION CHECKLIST

There are numerous issues the scrivener must consider when reviewing and drafting insurance provisions for construction contracts. At the outset, when drafting an insurance provision, counsel should do so only in conjunction with the client's insurance broker. The insurance broker is the expert, and the attorney should rely on this expert's advice. Similarly, when reviewing drafts of construction contracts, the lawyer should be sure the client's broker reviews the insurance provision. Too often, construction contracts contain insurance provisions with requirements that cannot be met by available insurance coverages. The scrivener should endeavor to avoid such oversights.

The points that the scrivener should consider are as follows:

a. Is the project to be covered by an OCIP or a CCIP? If so, what policies should be brought?

b. If an OCIP or a CCIP is not to be used, which policies should be procured by the contractor? Commercial general liability? Umbrella or excess liability? Workers' compensation and employers liability? Automobile liability? Equipment damage? Environmental pollution?

c. Which party will procure the builders risk insurance?

d. What coverages should be procured for the commercial general liability policy? Blanket contractual? Completed operations/product liability? Explosion, collapse, and underground property coverage?

e. Is there a *Kotecki* waiver? *See Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155, 585 N.E.2d 1023, 166 Ill.Dec. 1 (1992). If so, can the general contractor and subcontractors obtain endorsements to their employers liability coverage insuring the *Kotecki* waiver?

f. Does the provision recognize that the contractor's umbrella or excess policy does not drop until the limits of all primary policies for any additional insureds are exhausted?

g. Can the general contractor and subcontractors obtain the limits provided for in the listed policies?

h. Should there be additional insureds listed on the contractor's and subcontractors' policies? If so, who?

i. Should the contractors' policies be primary and noncontributory?

j. Should a pro forma certificate of insurance be attached to the agreement?

k. Has the client's insurance broker reviewed the insurance provisions?

l. Has there been a review of the indemnification provision? Does it comply with the applicable law?

m. Is a waiver-of-subrogation provision needed? If so, has one been provided?

n. If a design-build contract, does the provision specify that the design builder should also have professional liability insurance coverage?