

**ANDERSON KILL & OLICK, P.C.**

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# **Minimizing/Avoiding Liability in Port Construction Projects**

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Port Administration and Legal Issues Seminar

The Westin St. Francis Hotel  
San Francisco, CA  
April 15, 2011

# Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

# Whither Construction?

- Construction is
  - Nasty
  - Messy
  - Dangerous
  - Expensive
  - Unpredictable
- So why would a rational person engage in all of the risks of doing this?



# To Get to the Other Side

- For one thing...

These guys are coming.  
Some of them are  
here already.

There are not many  
ports—especially on  
the East and Gulf  
Coasts—that can take  
them.



# For Another Thing...

- Climatic Change means
  - Higher Sea Levels
  - Lower Lake Levels
  - Severe Weather
- Ports will need to spend proportionately more on protection and less on expansion even while expanding to meet rocketing demand



# So Build We Must

- And not just on the East and Gulf Coasts.
- West Coast Ports have to keep pace or lose market share.
- Great Lakes Ports must grow, too.
- Intermodal construction is critically important and can tap into expanded funding sources.



# Hinterlands

- Many exports come from far away.
- Many imports are destined for far away.
- Not directly a “Port Construction Risk” but still important.
- Port facilities have to be responsive to evolutions in transportation generally.



# Politics, Funding and Things That Go Bump!

- You don't have to take sides—Red, Blue or Green—to recognize that there is a strain of mania in American Politics.
- These days, government spending seems to have a “surveyor’s mark” drawn on its face.





# Scope of This Presentation

## Out of Scope

- Political Risk
  - Every port authority has to satisfy some legal/political regime of the need for the project.
  - I assume that those barriers have been satisfied.
- Financing Risk
  - I also assume that you have figured out how you're going to pay for the project.

## In Scope

- Contracts
  - Allocate now or litigate later
- Insurance
  - When things go wrong, make someone else pay for it.
- Regulatory Risk
  - Just because the politicians say you can build it doesn't mean they'll leave you alone while you do.
- Privilege

# The Tools of Counsel

- Contracts
  - We write contracts.
  - Contracts transfer the *legal* risk of non-completion from Owner to Contractor.
  - There are risks that a contract cannot remove.
- Insurance
  - We are not insurance brokers.
  - We are risk managers...who use contracts as a tool to allocate risks.
  - We help to specify insurance requirements, vet wrap-up programs and help enforce compliance.
- Compliance
  - We guide our clients through the regulatory morass



# How Many Contracts Does It Take?

- How many contracts will the Owner Award?
  - Single EPC/Design Build?
  - Construction Manager with authority over multiple parallel projects
  - Independent contracts with **clearly** defined authority to coordinate the works
  - Separate contract with lead designer to handle all architectural and engineering
  - Multi-prime contracts for a single job
- These all have their place, but must be selected carefully



# Contracts

## Many Models

- Methods of Contract Award
  - Sealed Bids based on 100% documents
  - Sealed Bids based in incomplete documents
  - Negotiations based on design documents
  - Construction Management
  - Design-Build/EPC
- Methods of Compensation
  - All-inclusive Lump Sum
  - Cost Plus
  - Cost Plus with Guaranteed Maximum Price
    - With/Without Cost Savings Incentive

# Contracts

## Many Models

- Conventional Relationships
  - Owner hires lead design professional, specifying program and constraints
  - Lead designer hires other consultants
  - Lead Professional issues design documents
  - Owner uses design documents as basis for hiring contractor
  - Contractor hires subcontractors to do most of the work.
- Other Methods
  - Owner hires all designers directly
    - Lead designer assembles final bidding package
    - Project will benefit from an early buildability review
  - Multi-Prime Contractors
    - Major trades hired without GC
    - Owner takes responsibility for coordination and overall quality assurance

# Contracts

## Many Models

- EPC/Design-Build
  - Single point of responsibility
  - Reduced formality in designer-constructor instructions fosters teamwork, efficiency, flexibility
  - Insurance is problematic
    - Most EPC insurance excludes the construction risk
  - Control is reduced
    - Owners don't get to review the detailed schematics and design development documents
- Conventional Construction
  - Architect/Engineer team tells constructors what to build
  - Submittals and reviews enhance quality control
  - When things go wrong, parties blame each other instead of taking ownership and finding a solution
  - Rogue contractors
    - Build EXACTLY what the A/E team designed
    - Play the Change Order game
    - Prepare claims for lost efficiency before they set foot on site

# Concerns of Counsel



- Financial Uncertainty
  - The “lump sum” contract might not be all inclusive.
  - The “guaranteed maximum” price is probably not the last word.
  - Change is the only constant in construction.
  - Change in the Work can be very expensive. So can contractor errors and design mistakes.
  - Contractors will also assert claims for “surprising” field conditions and “incompletely” specified work.

# Contracts

## Cost Control

- Incomplete Design Documents
  - Establish realistic contingencies and police them scrupulously
- Lump Sum
  - Beware of change orders, field conditions, lost efficiency claims
  - Beware of allowances
- Cost Plus
  - Define reimbursable and non-reimbursable costs fairly but firmly
- Consider “no damage for delay” clauses
  - Written approval for all extras
  - Consider negotiated risk transfer for field conditions
- Early notice of claims
- Waiver of Consequential Damages



# Concerns of Counsel



- Squabbles over the Contract
  - Even if the parties are dealing in good faith, there can be disagreements about what's required.
  - Ambiguity can creep in through many lapses and disguises.
  - “Standard” forms tell the court or arbitrator to harmonize the terms where possible, but they are silent about how to resolve a true conflict.
  - Better to mandate the “greater quantity, higher quality and/or sooner completion” of the Work.
- Utilize contract writers experienced in construction, not commercial real estate

# Contracts

## Suggested Practices

- Bid Packages should be complete
  - Include the entire contract form in the package
  - An accepted bid should not be followed by negotiations
  - Hold a pre-bid conference or solicit comments on bid package before bids are due
  - Circulate changes in bid package by addendum
- Vet the Bids
  - Secure detailed bid sheets even if lump sum bids required
    - Ensure completeness of bid
    - Useful when negotiating change orders
  - If the contractor is bidding a 3% markup for overhead and profit, ask yourself how he intends to stay in business
  - Surety bonds are just licenses to sue

# Contracts

## Suggested Practices

- The contracts are the place to establish insurance requirements
  - Constructors need liability insurance, including marine insurance if they are working from vessels
  - Constructors should name owners as additional insured parties
  - Owners need property insurance as well as their own liability coverage
- Designers need insurance
  - Professional liability is not covered by CGL or Marine Liability Insurance
  - Notoriously under-insured
    - Consider Project Policies
    - Consider Owners' Protective
- Insurance Wrap-Up Programs
  - Package policy covers everything

# Contracts

## Suggested Practices

- Designers need insurance
  - Professional liability is not covered by CGL or Marine Liability Insurance
  - Notoriously under-insured
    - Consider Project Policies
    - Consider Owners' Protective Policies
- ***Do not make Owner an Additional Insured on Professional Liability Insurance***



# The Tools of Counsel

- Contracts
  - Contracts establish conditions for payment
  - Retainage of a portion of money earned keeps the contractors working and can pay for repairs
  - Money is the lifeblood of construction, but withholding can result in liens
  - The contract conditions have to create incentives to get the work done without strangling the trades



# Contracts with Incomplete Design

- These principles do not apply to Design-Build/EPC Contracts
- When identifiable portions of the design cannot be finalized, it is common to adopt an “allowance”
  - Allowances are not “mini-GMPs”
  - They cover only the differential cost of materials
- Construction Managers frequently submit proposals “recognizing” that the design is still in development
  - CM is supposed to include allowances in the budget to account for changes
  - It can be impossible to hold the CM to the proposed budget if the changes are “substantial”
  - Incomplete designs often mandate substantial amounts of “value engineering,” also known as cost-cutting

# Unusual Contract Models

- Design-Build Subcontracting
  - Potentially significant portion of the work being performed without design development
  - Complicates coordination of design and work, especially with fully-designed components
  - Quality control problematic due to less-formal arrangements within design-build team
  - Mandatory engineering submittals must be required but establishing control points is itself an engineering function

# Contract Take-Aways

- Contracts establish the scope of work, requirements for timing and quality and establish ground rules
- Contracts determine when a constructor or designer is entitled to be paid...and when an Owner is entitled to hold money back
- Contract is just a tool to get the project built

**IT'S ABOUT THE PROJECT, NOT THE CONTRACT**



# Regulatory Risk

- EPA Compliance
  - Air
  - Water
  - “General Conformity”
- Davis-Bacon
  - State Prevailing Wage
- ADA
- Project Labor Agreements
- Set-Asides



# EPA

- National Clean Diesel Campaign
  - Grants for retrofits still available
  - SmartWay Program still in effect.
  - Energy Dept. and EPA still extend grants to State programs with pass-throughs to users.



# EPA

- Safe Water
  - Regulation of Dredging
  - Maintenance dredging is “exempt” but you still have to place material somewhere.
  - Old sites are being closed.
  - New Sites require many clearances.
  - EPA has a helpful guide at <http://cfpub.epa.gov/npdes/stormwater/swppp.cfm>



# Stormwater and Construction

- Storm Water
  - Construction increases the likelihood of pollution from stormwater runoff.
  - Development and implementation of stormwater discharge control indispensable for permits



# Davis-Bacon

- Federal law mandates payment of “prevailing wage” for public works funded by USG
- Best practices include requiring certified payrolls as part of backup documentation for every payment application
- Failure to keep records current can interrupt the flow of money, sometimes increasing financing costs and causing delays



# Prevailing Wage

- Some states have their own prevailing wage laws
- Prevailing wage laws often represent a compromise with organized labor in 'right to work' states
- Lack of labor peace can complicate your whole day



# ADA

- Americans with Disabilities Act is an obvious concern in passenger terminals
- But it also factors into many other design details, such as accessibility for handicapped port personnel



# Organized Labor

- Labor peace becomes even more important when there are collective bargaining agreements to comply with
- Project Labor Agreements are an alternative approach that is favored by the USG





# Project Labor Agreements

- Negotiated between Owner/Developers and unions before work begins
- Supersedes collective bargaining agreements
- Applies to all successful bidders on Project
- Hiring is a mixture of retained “core” employees and union halls



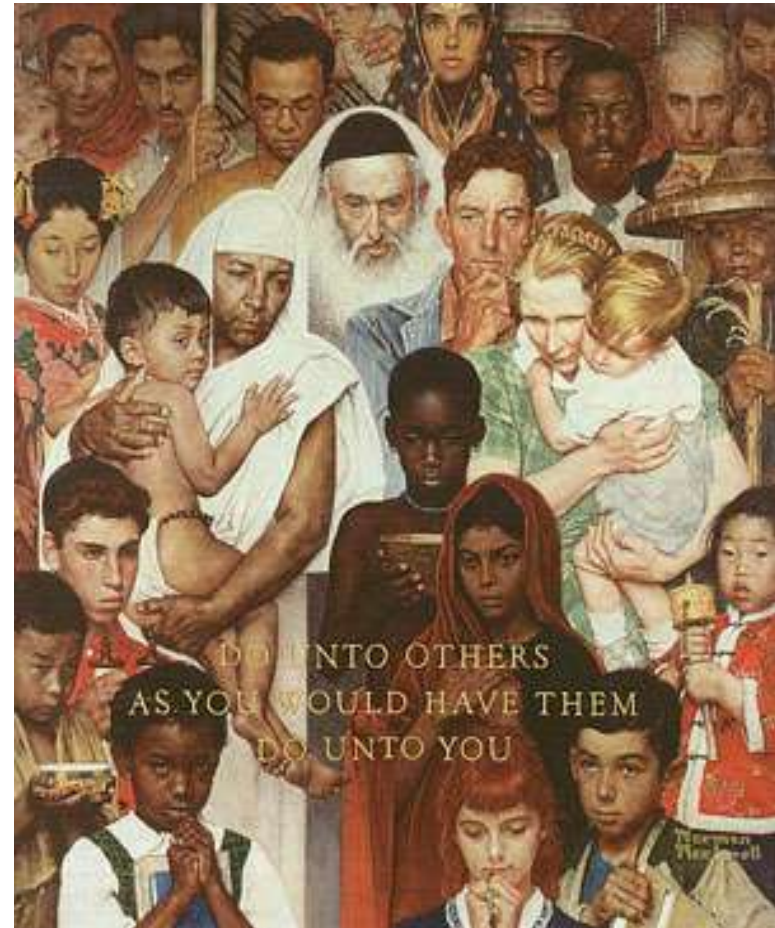
# Project Labor Agreements

- The Port of LA has a well-publicized PLA program
  - Anti-strike/Anti-Lockout
  - Extensive apprenticeship programs
  - standardized work rules for all covered trades
  - a uniform dispute resolution mechanism
  - prevailing wages and benefits
  - most labor hired through local union hiring halls
- ***Labor Peace prevents delays***



# Set-Asides

- Disadvantaged Business Enterprises
  - Black
  - Hispanic
  - Native American
  - South Asian/Pacific
  - Asian/Pacific
  - Women
- DBE Certification Firms
  - Vet them carefully
- 10% Rule of Thumb
  - But the Devil is in the details
  - Review government requirements carefully and comply scrupulously



# INSURANCE

- When things go wrong, use other peoples' money to pay to fix it
- Insurance companies are in the business of supplying that money, though sometimes they need **encouragement**
- If you are paying for insurance, you should have at least an idea what you bought



# INSURANCE:

## The great divide

### First Party Insurance

- Resembles collision/comprehensive coverage on a car
- Pays regardless of fault
- Pays the Owner of the Property
- Upland improvements can be covered with “Commercial Property Insurance”
- Wharves, docks, piers, bridges, dams, etc. call for Marine Insurance
- “Easy” to Underwrite

### Third Party Insurance

- Resembles liability insurance on a car
- Indemnifies policyholder against legal liability toward third parties
- Pays the cost of investigating and defending against claims
- “Daunting” to Underwrite
- Statutory Insurance

# First Party Insurance

- Builders Risk Insurance is the bedrock of risk management
- It protects the project under construction
  - Because insurance on maritime construction is “marine” insurance, it protects against “all risks”
  - ***Pays regardless of fault***



# Property Insurance

- First Party Insurance is based on things you paid for
- So you have a rough idea how much to insure it for
- But sometimes that's not enough



# Time Value

- Property insurance pays the cost of replacing the damaged or lost property
- But how long is it going to take to get the replacement done?
- Lost shipments of materials could have a long lead time for replacements





# Time Value

- There are many events that can suspend operations on a site
- Major casualties may result in Stop Work Orders and restricted access to the site
- “Business Interruption” insurance *may* be able to help



# Time Value

- Two basic kinds of business interruption coverage
  - business income and
  - extra expense.
- New buildings don't have a track record for making profits, so proving the loss is hard
- But if you have expenses that would not have occurred otherwise—replicating the field office, for example—there may be coverage for that, too.
- Usually requires casualty to the insured property, but an additional coverage—*Contingent Business Interruption*—can address this



# Soft Costs

- There are all the costs that result from a casualty loss other than bricks and mortar and contractor's fees
- Legal, accounting, adjustment, architectural and engineering redesign



# Other Costs

- Increased Cost of Construction
  - Relate to changes in law that rarely impact on construction
- Demolition
  - The insurance will not pay more for demolition and debris removal than 25% of the amount paid for the building loss
  - The payment comes out of the insurance you need to rebuild the
  - Works



# Time Value is Insurable

- Some marine builders risk policies provide coverage for “penalties” due to late completion
- Careful drafting is needed because the law frowns on contractual penalties—“liquidated damages” are permitted
- Have a “Plan B”



# Plan B

- Some losses require a change of plans
  - Change of Materials
  - Change of design
  - Additional architectural and engineer expenses
- Coverage for these kinds of expenses can be included in builders risk insurance (“Soft Costs”)



# Builders Risk Insurance

- First Party Property Insurance
- What is the Covered Property?
- What are the Covered Causes of Loss?
- How much will be paid?
- When?



# Builders Risk

- Who's Covered?
- One approach is to name one party—the Owner, General Contractor or Construction Manager—as the insured
- Construction Contract would provide for insured party to receive losses in trust for other interested parties, with a Power of Attorney to adjust the entire loss
- Bonds may be required to guaranty faithful handling of the funds





# Builders Risk

- Alternatively, the policy may provide that all parties with an interest—Owner, General Contractor, Construction Manager, Subcontractors and Material Suppliers—are insured “as their interest may appear”



# Builders Risk

## Trouble with Multiple Insureds

- More parties' consent needed to settle
- More opportunity for misconduct
  - Misstatement or withholding of information by an insured is much more serious than puffing by a loss payee: the whole policy can be cancelled



# Builders Risk

## Multiple Insureds

- Some contractors think that being named as an insured protects against subrogation
- Subrogation is a hoary and often misunderstood subject
- Subrogation allows a builders risk insurance company to “step into the shoes” of the insured after the claim is paid



# Builders Risk Subrogation

- “Waiver of Subrogation” is an often-seen provision in construction contracts—and often mishandled
- Some contract writers simply provide that the parties waive all subrogation rights against each other



# Builders Risk

## Subrogation

- That clause does not always work, because the contract parties are not the ones with subrogation rights to waive
- It's the insurance company that has the right of subrogation, so the Court can hold that the waiver clause accomplishes nothing



# Builders Risk

## Subrogation

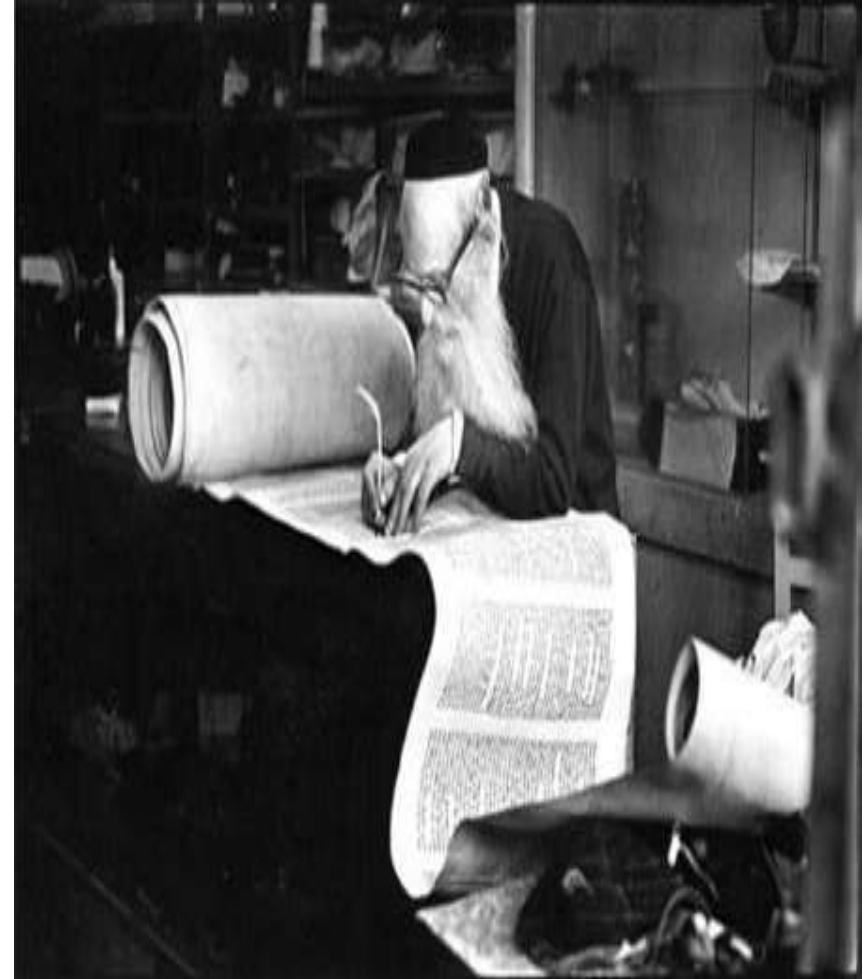
- So what does work?
  - Construction contract provides that the parties waive the right to assert claims against each other for losses that are covered by insurance
  - That way, when the insurance company steps into the shoes of the insured party, it acquires no rights because the insured party waived them



# Builder Risk

## Subrogation

- The insurance policy says that if the insurance company pays, they take over your rights and you must not impair those recovery rights
- But it also says you can waive those recovery rights as long as it is written and signed before the loss occurs
- ***Get it written down***



# Builders Risk Subrogation

- Why Waive Subrogation?
  - Removes incentive for people to point fingers and blame
  - Keeps focus on recovery from loss and building the project
  - Financial impact is remote and unpredictable





# Builders Risk Subrogation

- Why avoid waiving subrogation?
  - Some people just don't like to waive anything
  - Some waivers produce severe upcharges in premium
    - Waiving subro against an architect or structural engineer or geotechnical engineer makes for a headache
    - Some policies are voided by this waiver, because the permission-to-waive subrogation excludes those professions

RTFP

Read the *friendly policy*

# Builders Risk Subrogation

- This brings us back to naming multiple insured parties
- There is a rule of law that says an insurance company cannot sue its own insured for losses covered by the policy
- Architects and such expect to escape subrogation liability this way if they cannot secure a waiver of subrogation



# Builders Risk

## Subrogation

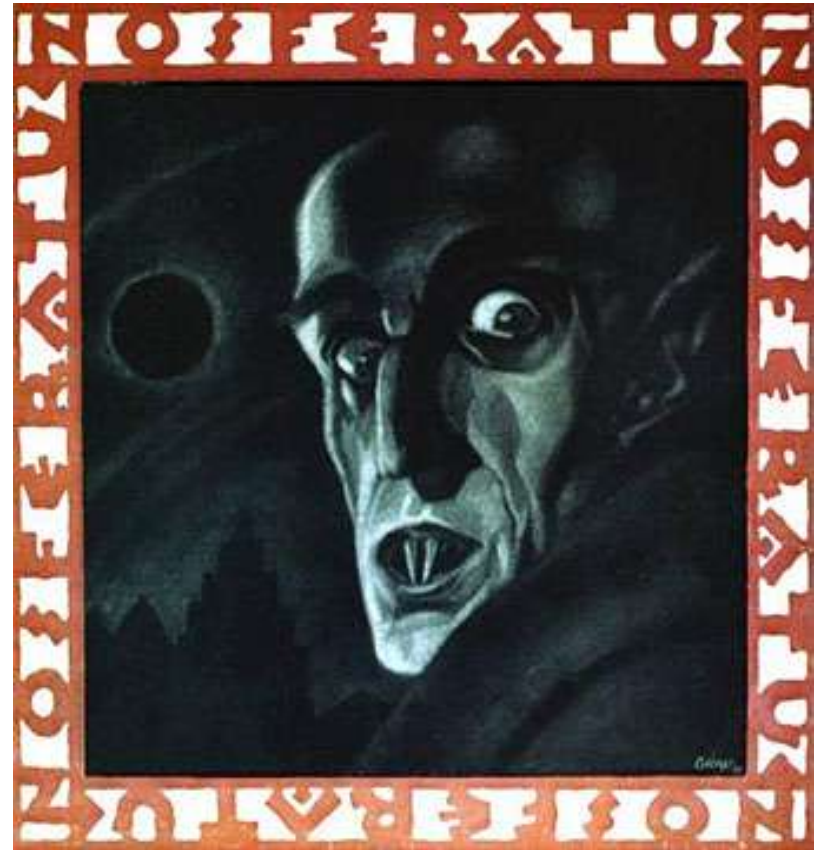
- The “AIMA” Trick
  - Insurance companies will try to name other interested parties as “additional insureds as their interest may appear”
  - This means, for example, that a plumbing subcontractor is an additional insured for the work he did ***on the plumbing system***



# Builders Risk

## Subrogation

- The rest of the pie—the parts that the plumbing contractor did not build—are claimed to be outside the AIMA property and therefore not covered by the can't-sue-the-insured rule




# Builders Risk

## Subrogation

- Of course we can fight this...
  - In most jurisdictions, the contractor has lien rights that attach to the whole project, or the public funds for the whole project
  - Subcontractors' payments depend on getting the project built, so they have an interest in the whole project



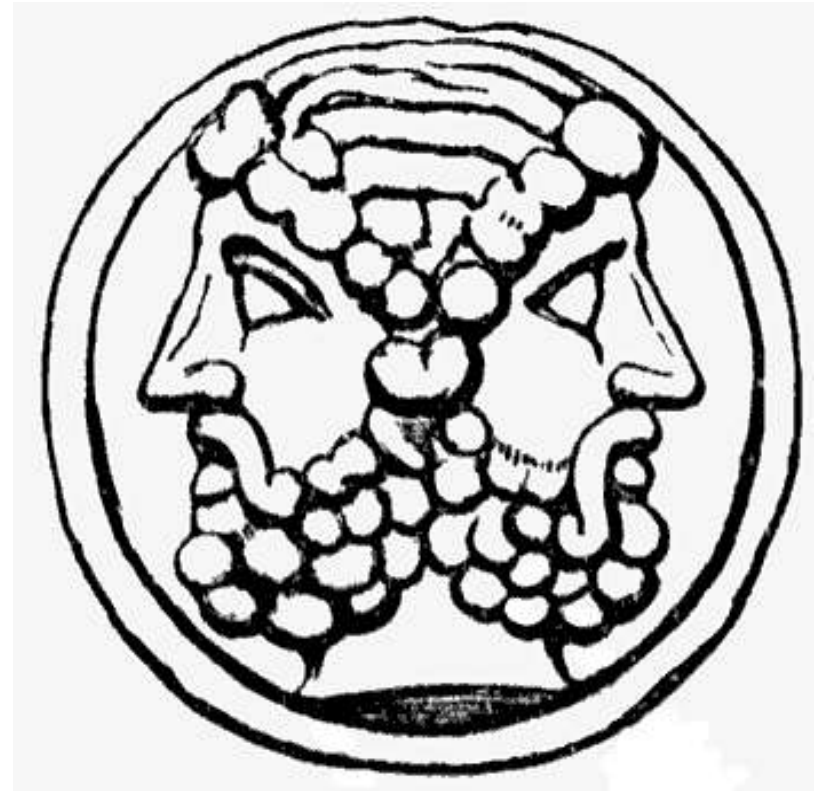
# Subrogation Aches and Pains

- We are already in a lose-lose situation, because resolving this mess is going to call for a lawyer or seven
- Not only will these  leeches suck you dry, but the dispute takes up time and attention away from fixing the problem and building the Works



# Transparency

- Alternative approaches to subrogation waivers on construction projects tend to be half-baked, ineffective or counterproductive
- Trying to shift risks onto an insurer after the insurer has made it clear it's not accepting those risks is not a viable risk management strategy



# There are Alternatives

- Design professionals are notoriously under-insured
  - Owners might include A&E insurance limits as a factor when choosing the team
  - Just paying for more coverage can easily miss the mark
  - But you can procure a Project Policy or Owner's Protective Policy





# Closing the Circle: Who's Covered

- Having multiple insured parties complicates claim adjusting
- Multiplies risk of misconduct by insured that can imperil the whole policy
- Exact design depends on who (Owner or Constructor) is buying the insurance
- Single point of responsibility prevents confusion



# Covered Property

- The project under construction
  - Ensure that description on the Declarations Page is adequate
- Materials and equipment that will become part of the construction
- Fixtures and machinery
- Temporary works used to construct the project



# Covered Causes of Loss

- Some property insurance policies cover a set of “named perils”
- Fire, lightning, wind, civil commotion, smoke, hail, aircraft, vehicles, explosions, riots, vandalism and malicious mischief is a common list



# Covered Causes of Loss

- Other policies cover “all risks”
- Even the broadest “all risk” policy has some exclusions, such as war
- “All risk” began with marine insurance and has continued with inland marine and marine construction insurance



# Covered Causes of Loss

- The meaning of “all risk” is in the exclusions
  - Earthquake, mudslide, subsidence
  - Government Action
  - Nuclear Exclusion
  - Pollution Exclusion
  - Water/Flood/Fungus
  - Mechanical Breakdown
- Oddly enough, even when a marine policy excludes a cause of loss, it tends to do it more favorably to the insured than conventional coverage
- Some exclusions have exceptions
  - Freezing damage is not excluded if you do everything practical to keep the heat on

# All Risk Property Insurance

- Some losses are “excluded”
- Particularly important of mechanical breakdown exclusions
- New equipment tends to fail, it at all, early in its life
- Some builders risk policies cover mechanical breakdown that occurs during testing and commissioning...and many exclude that coverage



# All Risk Property Insurance

- Some losses are not covered until the property is securely delivered on site
- To cover the transportation risks, a variety of floater policies are available
- For especially-valuable property, “installation floaters” can cover the property until delivery, installation, commissioning and acceptance are complete.



# How Much is Payable?

- Valuation of the Loss
  - Replacement Cost
  - Actual Cash Value
- Deductibles
- Limits
  - Provides the basis for calculating the premium
  - Beware of Sub-Limits
    - Common on transit coverage and others
    - Small sublimits apply to “property of others”





# How Much is Payable?

- Differing coverage for “Your” supplies and “Supplies of Others” can catch you in a trap
  - Contract-writers can fix this gap *if they know about it.*
- Coinsurance requires that you insure the property for some (high) proportion of its value



# Coinsurance: Why?

- Most losses are partial losses
- The vast majority of losses do not approach the limit of liability
- Policyholder tries reducing coverage so that there is enough coverage for all but catastrophic losses



# Coinsurance: Why?

- Coinsurance Clauses demand that property be insured for 80% or more of its insurable value
- For builders risks, this “Coinsurance Ratio” is increased to 100% through a clause usually labeled “Maintain Sufficient Insurance”



# Coinsurance: How it Works

- Applies only to partial losses
- Assume structure valued at \$1,000,000 is insured for \$500,000 with a \$10,000 deductible
- Assume it sustains a loss valued at \$100,000
- The claim would be paid at \$45,000:  $\$100,000 - \$10,000$  deductible = \$90,000
- $\$500,000 \div \$1,000,000 \times \$90,000 = \$45,000$



# Coinsurance: An Alternative

- Policies can be endorsed to provide for an “agreed value”
- More often seen in contractors’ equipment and personal property coverage, but can be applied to any exposure
- Policyholder and Insurance Company agree on the value of the insured objects **for coinsurance purposes**
- Not a commitment by insurance company to pay the scheduled value for the articles in question, but removes coinsurance



# Conditions

- Notice of Loss must be given to the insurance company as soon as practicable
- Property must be preserved from further loss
- Subrogation
- Misrepresentation
- Cooperation
  - Examination Under Oath
  - Inspection of Records
  - Proof of Claim
- Statute of Limitations



# Builders Risk Takeaways

- Read the friendly policy
- Coordinate contract terms with insurance coverage
- Beware Coverage Gaps
- Remember these policies can be endorsed to tailor them for your project



# Third Party Insurance

- Commercial General Liability
- Marine General Liability
- Marine Legal Liability
- USLHW Insurance
- State Workers' Compensation Insurance
- Pollution Legal Liability





# General Liability

- Protect against legal liability for damages due to personal injury, property damage, and sometimes other “tort” cases
- Provide a legal defense against those claims
- The Commercial General Liability coverage form is the workhorse of third party coverage for construction as well as other commercial activity. The crux of this coverage is found in the insuring clause, in which the insurance company promises
  - to 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.
  - We will have the right and duty to defend the insured against any "suit" seeking those damages.

# Other Peoples' Money

## Other Peoples' Insurance

- Time-honored technique is to make contractors and others name owners as “additional insured” parties
- If successful, the additional insured taps into other peoples' insurance before tapping its own



# Other Peoples' Money

## Other Peoples' Insurance

- Additional insured is treated as if it had its very own insurance policy, except....
- All insured parties are dependent on the same limits of liability
- Additional insured parties can find that the contractor's insurance has been used up by claims from other projects and sites



# Other Peoples' Money

## Other Peoples' Insurance

- Exhaustion can be mitigated by requiring the contractor (or others) to buy insurance with a “per project” or “per location” aggregate
- Some policies limit this with a “policy aggregate:” no matter how many projects, there is still some upper aggregate limit



# Other Peoples' Money

## Other Peoples' Insurance

- In order to be an additional insured party, the policy **must** be endorsed
- Looking at a certificate is not enough
  - The certificate has a disclaimer in the upper right-hand corner
  - Even without the disclaimer, the certificate does not disclose exclusions, conditions and other problems



# Other Peoples' Money

## Other Peoples' Insurance

- There are three common endorsements
  - CG 20 10 lists the names of the parties who are additional insureds for a project. This is good, though coverage is limited to “ongoing operations”
  - CG 20 33 is the most common endorsement



# Other Peoples' Money

## Other Peoples' Insurance

- The CG 20 33 is the “automatic” or “blanket” endorsement
  - It tells the policyholder that when it makes a contract that requires the other party to be an additional insured, then that party has that status as long as the contract is signed before the loss takes place



# Other Peoples' Money

## Other Peoples' Insurance

- First problem: you have to jump through extra hoops to prove you're an additional insured
- Second Problem: it does not extend subcontractors' coverage to owner—because the form works only for the party who is signing the contract with the Owner
  - The GC's policy would cover the Owner, but the subcontractors' would not
- Third problem: no completed operations coverage





# Other Peoples' Money

## Other Peoples' Insurance

- Completed operations coverage for an additional insured requires CG 20 37
- Read the friendly policy
  - Some insurance companies use non-standard AI endorsements
  - Some of them provide that you are covered only if you are **vicariously** responsible for the acts and omissions of the policyholder
  - Insurance should cover you for your own negligence, too



# Other Third Party Insurance

## Marine Liability

Marine P&I	CGL
Indemnifies	Pays on behalf of
Coverage only for named events	Coverage for everything unless excluded
Excludes liability to employees (except under Jones Act)	Excludes liability to employees
Defense Costs inside limit	Defense Cost in addition to limit
Medical Payments coverage substantial	Trivial (\$5,000 limit)
Other Insurance handled variably	Other Insurance usually excess

# LIABILITY INSURANCE COMES WITH LIMITS

- Liability policies come with at least two limits
  - Per Occurrence/Per Claim
  - Aggregate
- Policies are often written with limits of \$1,000,000 per occurrence and \$2,000,000 in the aggregate



# Limits of Liability

- Liability policies can be written to cover a party's day-to-day activities and its completed projects
- The first of these is termed "continuing operations" and the second, "completed operations"
- CGL policies can be written without completed operations coverage
- When this coverage is present, it begins when the Project is completed or abandoned with no intention to return
- Completed operations are covered by a separate aggregate limit from ongoing operations
- Completed operations claims must be triggered during the policy period (including renewals)

# Limits of Liability

- You need more insurance?
  - Excess insurance is a layer of insurance that rides on top of your other policies
  - When the first layer is used up, the next layer responds
  - If the excess layer is set up to match the coverage in the first layer, we say that the excess is “following form”
  - But the excess can be completely standalone, so you have to read the policy



# Limits of Liability

- You need more insurance?
  - Excess policies often provide that defense costs are “inside” the limit—lawyer bills use up the insurance
  - Don’t be caught by surprise: RTFP



# Limits of Liability

- You need more insurance?
  - Umbrella coverage can also be purchased
    - Warning: some insurance companies call their pure excess insurance “Umbrella”
    - Don’t trust the label
  - Umbrella coverage has an element of excess coverage



# Limits of Liability

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# Limits of Liability

- Umbrella Coverage
  - But it also provides coverage where there is no underlying coverage (though with a bigger deductible)
  - And it can “drop down” if the underlying insurance has already been exhausted
  - Sometimes, even before it’s exhausted



# Privilege

- Most port authorities have governmental or quasi-governmental powers
- Prompt notice of claims is often required
- Very short statutes of limitations
- Construction Liens are restricted: you can't attach government property
- It's harder to sue public authorities than to sue John Doe. Take advantage of it.



# Sustainability

## A Final Thought About What We Do



### **Economic:**

- Flow of capital among different stakeholders
- Main economic impacts of the organization throughout society (e.g., economic performance, market presence, indirect economic impacts)

### **Social: Labor Practices & Decent Work**

- Employment
- Labor/management relations
- Occupational health & safety
- Training & education
- Diversity & equal opportunity

### **Social: Human Rights**

- Investment & procurement practices
- Non-discrimination
- Freedom of association & collective bargaining
- Complaints & grievance practices
- Security practices

### **Social: Society**

- Community
- Corruption
- Public policy
- Anti-competitive behavior

### **Compliance Social: Product Responsibility**

- Customer health & safety
- Customer privacy

### **Compliance Source: Global Reporting Initiative website,**

<http://www.globalreporting.org/ReportingFramework/G3Online/PerformanceIndicators/>,  
accessed April 20, 2007.

# Thank You

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