



CONSTRUCTION
SUPERCONFERENCE
2021

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THE ROLE OF INSURANCE IN RESOLVING COMPLEX CONSTRUCTION DISPUTES

Session 18
Tuesday, December 7, 2021
2:30 – 3:45 pm ET

Panelists

- Amy Iannone, Insurance & Risk Management, DPR Construction
- David Hodnett, SVP, Chief Legal Officer, Balfour Beatty
- James Donahue, Chief Counsel Litigation, HDR, Inc.
- Brian Dugdale, Partner, Varela, Lee, Metz & Guarino, LLP

Moderator

- Paul Varela, Partner, Varela, Lee, Metz & Guarino, LLP

Introduction

- As the trend towards bigger and more complex construction projects continues, the insurance products that cover these projects have evolved with them. Contractors need to worry about more than just how their insurance will cover a later construction defect claim.
- When design and construction disputes erupt over time and money, parties are now, more than ever before, looking to insurance to fund the payouts. This session shall explore how subcontractor default insurance, OCIP/CCIP, CGL, builders' risk, excess umbrella, professional liability policies and other more specialized insurance products, can all come into play in forging a path to resolution.
- The panel shall educate attendees on issues including primary v. excess coverage, the snare of insurance sub-limits and SIRs.

I. Setting the Stage for Insurance on Construction Projects



Setting the Stage

- Projects are increasing in size and complexity
- Post-completion liability tails are getting longer
- More procurement model variation beyond design-bid-build = expanding insurance universe
 1. Design Build
 2. EPC
 3. IDP
 4. PPP
 5. Risk Pools

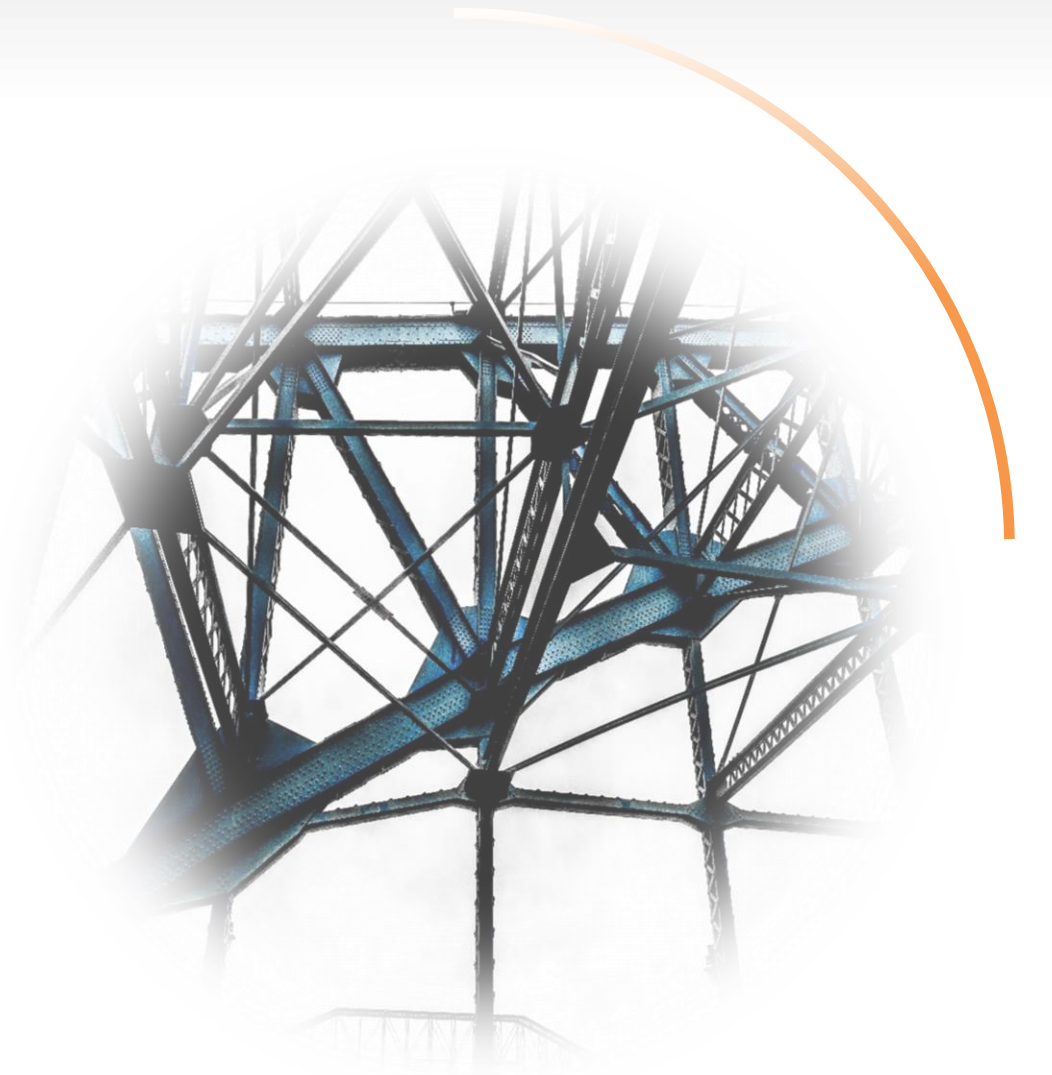
Setting the Stage

- Negatives of Surety Bonds
 - inflexible/standard terms
 - limited relief
 - inefficient process and statutory constructs
 - interplay with general indemnity agreements

Setting the Stage

- Evolving Insurance Products
 - creative/specialized coverage
 - unique to procurement model, project, site, etc.
 - tailored to fit the needs of the parties

III. Risks That Owners and General Contractors Want to Protect Against



Risks to Protect Against

- Catastrophic Events Beyond the Control of the Parties
- Major Subcontractor Defaults
- Delays and Cost Overruns from Design Errors/Omissions
- Unknown Environmental/Site Conditions
- Third-Party Liability

III. Common Types of Insurance Products on Major Projects

*PROS &
CONS*



Insurance Products *PROS & CONS*

- **Wrap Policies – OCIP and CCIP**
 1. Single source
 2. Impact on subcontractor insurance coverage

- **CGL**
 1. Liability Policy
 2. Limited Coverage
 3. Defects

- **Builder's Risk**
 1. Property Insurance
 2. Non-Liability
 3. Coverage for Delay

Insurance Products *PROS & CONS*

- Subcontractor Default Insurance
 - Enrollment
 - Limited Recovery of Indirect Costs – Sublimit
 - Limited Array of Insurers
 - Processing Times
 - High Deductible

Insurance Products *PROS & CONS*

- E&O Coverage
 - PSPL – Project Specific Professional Liability policy
 - Design Practice Programs
 - Professional Services
 - Often Low Limits Relative to Harm
 - Eroding Limits
 - No Additional Insured
 - Processing Times

Insurance Products *PROS & CONS*

- Excess Umbrella Layer Insurance
 - Follow form
- Other/Specialty Coverage
 - COVID Insurance

IV. Navigating Key Issues



Navigating Key Issues

- One Loss Covered by Multiple Policies
- Multiple Policies in Play – Single Insurer
- Coverage Scope/Policy Interpretation
- Interplay Between Contractual Liability vs. Insurance Coverage
- Indemnification/Third Party Liability

Navigating Key Issues

- **Builder's Risk**
 - Costs increasing
 - Understanding sub-limits (e.g. flood); may need DIC coverage if Owner buying and will not modify
 - Same for Owner soft cost coverage – verify coverage is sufficient for project type
- **London Engineering Group (“LEG”) coverage as endorsement to BR policies (expanded coverage for defects not insured by traditional policies)**

Navigating Key Issues

- Professional Liability
 - Project specific policies
 - ▼ “excess” exclusion in professional’s practice policy
 - ▼ insured vs. insured exclusion.
 - Rectification coverage
 - Owner/Contractor protective policies/issues as first line coverage or DIC.
 - ▼ Owner/Contractor gets 1st party coverage
 - ▼ Will kick-in if underlying practice policy no longer available

Navigating Key Issues

- Subcontractor coverage issues
 - Limits
 - Restrictive endorsements
 - Design-Assist

Navigating Key Issues

- General: carriers more aggressively denying claims
 - Estimating software – generally unrealistic regarding costs
 - Extended duration costs heavily contested – expensive consultants often needed to prove true cost
 - Professional liability carriers argue percentage of damages should be expected from E&O, push multiple occurrences into single claim subject to per claim limit, and demand contributions from insureds to settle

Navigating Key Issues

- SIRs
- Litigating with Carriers and “Panel Counsel”
- Reinsurance/Insured Insurers
- Who has settlement authority – insured vs. insurer?

V. Fact Patterns for Discussion



Hypothetical 1:

During construction, Subcontractor improperly/negligently installs pipe that bursts, causing property damages and massive delays.

Talking Points:

When is defect discovered?

Damage to other work?

Coverage for delay?

Builder's Risk vs. CGL vs. SDI

Hypothetical 2:

During construction, structural error discovered that shuts down the Project, and requires massive rework.

Talking Points:

Type of procurement?

Adequate limits?

Contractual liability of engineer?

Negligence required?

Hypothetical 3:

Design-Build Contractor asserts E&O claims against Designer valued at \$10 million, along with contractual claims (non-E&O), valued at \$3 million. Designer asserts counterclaim for contract balance and scope changes valued at \$2 million. Contractor discovers very strong evidence of \$5 million in E&O damages for certain line items only. Designer seeks coverage from Carrier under \$7.5 million declining limit E&O policy for all E&O claims up to policy limit; Carrier assigns counsel to join Designer in defense of Contractor's claims. Parties mediate and attempt to negotiate three-way global settlement, including insurance coverage for Contractor's strongest E&O claims, resolution of Contractor's non-E&O claims, and inclusion of valid offsets for Designer's counterclaims.

Talking Points:

What does the E&O policy cover?

Who controls settlement for Designer and carrier and who should carrier lean on?

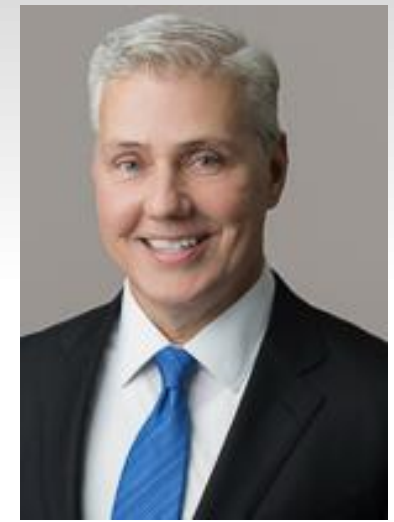
What impact does the declining limit have?

Who bears greatest risk of litigating?

Structuring the settlement - who writes the checks and how can valid offset be captured?

- Here the Carrier wrote a check to Contractor and Contractor wrote a smaller check to Designer.

Paul Varela. Esq.



(703) 454-0170

pvarela@vlmglaw.com

www.vlmglaw.com



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METZ &
GUARINO LLP

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