Insurance Coverage (and Potent Potables)

Diana L. Winfrey, Esq.
Selman Breitman LLP
Los Angeles, California 90025
dwinfrey@selmanlaw.com

Robin Leibrock
State Auto Ins Company
Columbus, Ohio

Jayne Skrzysowski Pittman
Conroy Simberg
2 South Orange Ave Ste 300
Orlando, Fl 32801
Tel 407 649 9797
jpittman@conroysimberg.com

Diana L. Winfrey, Esq., is a partner in the Los Angeles office of Selman Breitman LLP. Diana represents insurance companies in coverage and related matters, with an emphasis on construction defect cases involving multiple primary and excess policies, as well as OCIP (Wrap Up) policies. Diana's practice also includes coverage analysis for first- and third-party general liability, aviation and products liability claims. In addition to addressing insurance coverage issues, she counsels clients regarding underwriting and issues related to the drafting of policy language and endorsements, as well as claims handling and other business practices. Diana has over 20 years of experience in construction, both from a defense and insurance coverage standpoint, providing a unique ability to evaluate coverage claims from a global perspective.

Robin Leibrock joined State Auto in May 2017 as Director of Specialty and Personal Lines Large Loss Claims. Her team at State Auto handles large litigated commercial and personal lines claims including construction defect claims. She came to State Auto from Century Surety Company/Meadowbrook Insurance group where she served as Vice President of Specialty Claims. Robin has over 17 years of industry experience. She began her industry career as a claims specialist handling medical malpractice and legal malpractice claims. She also held positions as Claims Attorney handling litigated claims and Managing Attorney managing a

litigation team before moving on to create and develop both a construction unit and professional liability unit for Century/Meadowbrook. Those groups later developed into the specialty claims group and expanded to include construction, environmental, professional liability, medical malpractice, public entity, excess/umbrella and educators claims. Robin is a licensed attorney in the State of Ohio where she practiced law for more than 7 years. Robin is a member of DRI's Construction Law Committee. Robin is also a former adjunct professor for Columbus State Community College where she taught insurance law, litigation and business law.

Jayne Skrzysowski Pittman is a Florida Board Certified Construction lawyer at the Florida law firm of Conroy Simberg. She is the managing partner of the Orlando office as well as the firm's Chair of the Construction Practice Group, where she specializes in the practice of construction law defending general contractors, subcontractors, manufacturers, suppliers and design professionals in complex construction defect litigation, and products liability cases in civil, federal and arbitration venues. She also represents carriers at mediation on insurance coverage issues relating to construction litigation to include additional insured recovery and indemnification demands from general contractors and owners. She is a graduate of the University of Miami School of Law and a member of the Florida Bar and United States District Court for the Middle District of Florida. She is currently serving as a member of the Florida Bar Construction Certification Committee. Mrs. Pittman is a U.S Army veteran serving 1997-2003 at Fort Bragg, North Carolina.

Insurance Coverage is not only for the insurers but to successfully resolve a complex construction claim with multiple parties all members of the team from the insured, personal counsel, defense counsel and adjuster need to have knowledge of what coverage is available for the loss.

This session is intended to present the basics of coverage as well as some trouble spots such as “burning limits” in a fun game presentation.

I. Types of Insurance Policies

There are a variety of types of liability insurance, e.g. general liability, professional liability, and builder’s risk. Liability coverage can be written on an "occurrence" basis (which requires for potential coverage that the triggering event (whether the happening of specified injury or damage or the commission or an act, error or omission, occur during the particular policy period) or a "claim first made and reported basis" (which requires for potential coverage that the claim for damages against your client be first made against your client and reported by your client to the insurer during the policy period; an extended reporting period may apply).

There are a variety of types of liability insurance:

- Commercial General Liability;
- Professional Liability, e.g., Errors and Omissions (many commercial general liability policies exclude coverage for claims for professional liability);
- Builder’s Risk (Course of Construction) (sometimes, damage to property during construction is not covered under the commercial general liability policy, the Builder’s Risk policy covers damage to the owner/contractor’s property);
- Environmental / Pollution (site-based, or contractor-based) (most commercial general liability policies contain pollution exclusions of some variety – claims for pollution, e.g., fungus, or damage during construction, such as from an oil or gas spill, may be covered under these policies);
- Subcontractor Default Insurance (covers damages when a subcontractor is defaulted by a general contractor)
- Surety Bonds
- Employment Liability / Immigration
- Workers Compensation
- WRAP or OCIP/CCIP policies (covering large commercial or residential projects)
- Drone Insurance / Cyber Insurance

General Liability is the foundation of construction insurance, which is intended to cover most of what can go wrong during and after construction. The other types of insurance may cover what is excluded under the general liability policy.

II. Identifying Coverage Available to Your Client

Defense or personal counsel should meet with the insured to determine that the proper entity is listed or otherwise included as an insured in the insurance policy for the claim. In addition, each defense counsel should obtain a complete coverage history for the insured from the project to the present if the insured is still in business with copies of the certificates of insurance as well as complete copies of policies. Also, defense counsel should review for potential Additional Insured endorsements as well as if a general contractor insured review pertinent contracts of subcontractors to see if they agreed to name the client as an "additional insured" under its liability insurance.

Always remember that the certificate is not evidence of Additional Insured status and the actual Additional Insured endorsement attached to the policy is required to determine actual coverage potential.

Tender the Claim!

If a tender is not timely made, there may be consequences. General liability policies typically prohibit voluntary payments. A typical provision is included in the General Liability Conditions, as follows:

1. Duties In The Event Of Occurrence, Offense, Claim Or Suit

* * *

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.

The prohibition against voluntary payments includes, for example, defense fees and costs, as well as other expenses incurred with respect to the investigation of the alleged damages or injuries. Many states enforce this provision, and relieve an insurer from reimbursing or paying for any defense fees or costs incurred prior to tender. If you do not tender to the insurer right away, your actions may result in your client/the insured, being deprived of benefits under the policy.

III. Is Coverage "Occurrence" Based, or Claims-Made?

An important aspect in knowing which policies may potentially provide coverage is whether the policies are "occurrence" based, or "claims" made. Liability coverage can be written on an "occurrence" basis (which requires for potential coverage that the injury or damage result from an "occurrence", generally defined as an "accident", with the injury or damage taking place

during the policy period), or a "claims made" or "claims made and reported basis" (which requires for potential coverage that the claim for damages against your client be first made during the policy period, or that the claim for damages against your client be first made and reported during the policy period, respectively).

Specifically, claims-made policies afford potential coverage for claims made against the insured during the policy period, whereas occurrence-based policies afford potential coverage for "bodily injury" and "property damage" occurring during the policy period and for injury arising out of specified "personal and advertising injury" offenses committed during the policy period. Because there might be a pertinent claims-made policy, it is a good idea to always tender to the liability insurer on the risk at the time the claim was first made against your client.

When the liability coverage is "occurrence" based, the Insuring Agreement may provide, in pertinent part: "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. We will have the right and duty to defend any 'suit' seeking those damages. . . .This insurance applies to 'bodily injury' and 'property damage' only if: (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and (2) The 'bodily injury' or 'property damage' occurs during the policy period." The standard "occurrence" definition is: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

For trigger of coverage purposes under standard "occurrence"-based liability coverage, it is the "bodily injury" or "property damage", and not the conduct, that caused that injury or damage, that must occur during the policy period. The triggering event is the happening of the injury or damage about which the particular claimant complains.

In many construction defect cases, the "bodily injury" or "property damage" will occur during more than one policy period such that the coverage afforded by more than one "occurrence"-based policy may apply. You will need to know the applicable state's trigger of coverage approach concerning injury or damage that continues during more than one policy period. The most often applied trigger of coverage approaches applied by the various states include: continuous, manifestation, exposure and injury in fact.

**It is important to understand whether you are dealing with a claims-made or occurrence policy. You want to make sure that you tender/report a claim to the appropriate carrier. If you are dealing with a claims-made policy and the claim isn't timely reported within the policy period or any applicable tail coverage, there may be no coverage for the claim.

IV. Deductibles/Self Insured Retentions

Is the coverage is subject to an applicable deductible or self-insured retention ("SIR"), and if so, how can you help your client comply? Check the ROR and/or the policy to see if the coverage afforded is subject to an SIR that must be satisfied before the coverage could apply, or whether it is subject to a deductible, which may not be payable until after settlement or judgment.

The Deductible

General rule: Insurance policies written with deductibles provide that the insurer will pay the defense and indemnity costs in connection with a covered suit, and then charge or bill back the deductible amount to the insured. The responsibility for the defense and settlement of each claim rests solely with the insurer, which therefore maintains full control of the entire claim process.

The SIR

Policies written with SIRs may place a responsibility for suit payment and settlement on the shoulders of the insured. While language may vary, the insured is typically required to pay the defense and other allocated expense costs, as well as indemnity payments, until the amount of the retention is paid, after which the insurer assumes full responsibility for the claim or suit.

The SIR differs from a deductible because the insured performs all the functions normally undertaken by the insurer for a claim or suit within the SIR, including claims adjusting and audits, funding and paying claims, and complying with applicable state and federal laws and regulations. Significantly, you have to look at the particular SIR provisions (which are found in the policy and which may be included in the ROR, if one has been issued) to determine: **Who can satisfy the SIR**? Must the named insured pay the amount of the SIR? Can another insured? Can another insurer satisfy the SIR?

What does the endorsement say about the kinds of payments by that count towards satisfaction of the SIR? Do only payments towards settlements or judgments count? What about defense costs?

Further, know whether more than one SIR will have to be satisfied in order for the liability coverage afforded by the policy to apply. And, look at whether the SIR applies "per claim," "per occurrence" or otherwise? In addition, if there are different deductibles and/or SIRs applicable to multiple policies, will the insured have to separately satisfy each? Answer: It depends on the terms of each policy and applicable state insurance law.

Finally, defense counsel should assist their client in documenting that the amount of the SIR has been properly satisfied by keeping up to date records regarding payments of damages and, if applicable, defense costs, and submitting these records and receipts to the insurer.

V. Duty To Defend

Generally, the carrier's analysis for the duty to defend involves the review of the complaint and the insurance policy by looking at the plain language of the policy sometimes known as the "eight corners rule": 4 corners of the insurance policy and 4 corners of the complaint *Chestnut Assoc v. Assurance Co*, 17 F. Supp 3d 1203, 1209 (M.D. Fla 2014); *Wisznia Co. Inc v. General Star Indemnity Co*, (5th Cir Louisiana 2014). If there are amended complaints filed, then the amended allegations control the insured's duty to defend, *Nationwide Mutual Fire Insurance Co v. Advanced Cooling and Heating*, 126 So. 2d 385, 287 (Fla 4th DCA 2013). States vary in their analysis of duty to defend, including, *inter alia*, when information outside of the "eight corners" may be considered, especially in the context of affording coverage. It is important to understand how policies, including the duty to defend, are interpreted in your state.

Under Florida law, insurance coverage is available to the insured during each policy period in which damage is alleged to have, in fact, happened. The most recent cases interpreting latent defect construction damage in Florida have uniformly held that the injury-in-fact trigger applies to such losses. *Trovillion Const. & Development, In v. Mid-Continent Cas. Co.*, 2014 WL 201678 (M.D. Fla. Jan. 17, 2014); *Axis Surplus Ins. Co v. Contravest Constr. Co.*, 23 Fla. L. Weekly Fed. D. 279 (M.D. Fla. June 5, 2012); and *Johnson-Graham-Malone, Inc. v. Atlantic Casualty*, 18 Fla. L. Weekly Supp. 870a (Fla. April 29, 2011). In the west, Supreme Court of Oregon held that the subcontractor's liability insurer had a duty to defend when a complaint alleges claims where liability could be reasonably interpreted to arise from the subcontractor's ongoing operations performed for the general contractor *West Hills Development Co v. Chartis Claims, Inc*, 360 OR. 650 (Oregon 2016).

V. Burning Limits – Don't Get Burned!

Burning Limits policies have many different monikers, with some conjuring up some frightening images, but they all refer to the same concept:

- Burning Limits;
- Eroding Limits;
- Wasting Limits;
- Defense-Within-Limits;
- Self-Consuming;
- Self-Liquidating;
- Self-Reducing;
- Cannibalizing; or
- Exhausting.

When reviewing a new claim or suit, review the reservation of rights letter or the policy to determine whether you are dealing with a Burning Limits Policy. If you are, you will have special considerations which must be addressed early, and throughout the pendency of the matter.

Specifically, in a Burning Limits policy, the indemnification limit is reduced dollar for dollar by defense costs until zero is reached and the duty to indemnify and the duty to defend are then terminated. *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909 (Cal. 1997).
Provisions which transform a policy into a "Burning Limits" policy are often found in commercial lines policies, professional liability policies, directors and officers policies, WRAP (OCIP/CCIP) policies, or in excess policies. However, any type of policy may contain these provisions.

Burning Limits policies can raise significant issues for the insurer, the insured, as well as a third-party claimant or plaintiff.

- Plaintiff may become aware of the Burning Limits through discovery, e.g., Construction Defect Litigation Form Interrogatories in California specifically ask

whether the indemnity limit of the insurance policy is diminished by the cost of defense.
Or, the insured, in conferring with defense counsel and the insurer,
may elect to otherwise advise plaintiff's
counsel of the Burning Limits.

Under a conventional liability policy generally only amounts paid in settlement or in satisfying a judgment are within the policy's limits. The costs to defend a claim or suit are separate, and theoretically, open-ended. (*Weber v. Indemnity Ins. Co. of North America* (D. Haw. 2004) 345 F. Supp. 2d 1139). On the other hand, in a Burning Limits policy, defense costs and expenses *reduce* the limits of the policy. Costs can include defense fees and costs, expert or consultant's fees and costs, and any other costs and expenses incurred in defending or even investigating a claim or "suit."

Burning Limits provisions can vary from policy to policy, so it is imperative that you study the breadth and scope of the provisions. KNOW WHAT PROVISIONS YOUR POLICY CONTAINS FOR REDUCING LIMITS! Burning Limits provisions may be found, for example:

- Burning Limits or Defense Within Limits may appear in **bold letters** on the Declarations page of the policy.
- Stand-alone endorsements may provide for Burning Limits.
- The definition of "loss" may be altered to reflect Burning Limits.

Also check the ROR or policy to see if any coverage is provided under a sublimit, and whether the defense fees and costs regarding that particular coverage are subject to Burning Limits. There may be policies where coverage afforded under a sublimit is subject to a Burning Limits provision, but coverage for claims not falling within the sublimit are not subject to Burning Limits, e.g., a Subsidence Endorsement may provide a sublimit subject to Burning Limits.

Handling Claims with Burning Limits Policies present unique challenges:

- Plaintiff's attorneys may face a conflict when they aggressively represent their client, where such vigorous representation may exhaust the policy, leaving no limits for settlement or to satisfy a judgment for their client.
- And, when plaintiffs or their counsel substantially overvalue their case, proceeding under a Burning Limits policy can be challenging. Careful and detailed discussions should be had between the insurer, defense counsel and the insured regarding the possibility of nearly complete erosion of the limits to vigorously defend such a claim, and whether they should discuss early settlement might be preferred so that the limits may be preserved.

Another scenario is where an insured may wish to put on a vigorous defense to protect its name and reputation, but by doing so, there may be little left for indemnity payments, e.g., payment of the ultimate judgment. An insurer, however, has a duty under the policy not only to defend its insured, but also to provide indemnity. Defense counsel must take all steps necessary to ensure

that the insured understands that if the limits are spent or nearly spent in such a vigorous defense, that there may be little if anything left for payment of judgment or settlement.

An insured must be mindful that if it uses all of the limits for defense, the payment of any judgment may fall on the insured, which may not have the money or assets to do so. When defending, defense counsel must keep the insured, as well as the insurer, informed of all defense fees and costs incurred, as well as those which are anticipated to be incurred in the future. Defense counsel should provide a detailed litigation budget, explaining the pros/cons for each item. *NOTICE TO THE INSURED AT EVERY TURN IS IMPERATIVE!*

Defense counsel must maintain close contact with the insured, advising of the status of limits, as well as status of any opportunities to settle. Defense counsel must advise the insured and the insurer of expected expenditures for law and motion, expert retention and discovery, trial costs – including attorneys and expert fees, etc. Defense counsel must also advise, in a timely fashion, of any developments with respect to liability, damages, or other significant changes – including the financial impact of those changes!

Defense counsel must keep the insured informed of the defense costs *as they accumulate*, and the amount of remaining limits. Make sure the insured is informed of all settlement demands, as well as developments in the settlement negotiations. And, give the insured the opportunity to be involved in the settlement negotiations.

And, the insurance adjuster, among other things, must conference with defense counsel early and often, ensuring that the insured is aware of the actual and potential costs of defense throughout the proceedings, monitoring and ensuring that defense counsel does what it must in a Burning Limits situation. The adjuster must ensure that defense counsel understands the consequences of having a Burning Limits policy, such that defense counsel can factor that into their defense strategy, ensure that defense counsel communicates with both the insured and the insurer with respect to the claim, including the remaining limits and the defense strategy for resolution, and ensure that defense counsel provides a thorough evaluation, recommendations for discovery and settlement. If, at any time, defense counsel believes that its potential defense will severely exhaust the limits, defense counsel must inform the insurer and the insured immediately. Defense counsel must avoid inefficiency in its defense of the insured, and not perform tasks which would unnecessarily deplete the limits.

Understand where money is being spent! Not being cognizant of expenditures can be costly!