How to Draft a Construction Contract Insurance Provision

Patrick J. O’Connor, Jr.*

I. INTRODUCTION

Crafting reasonable and appropriate construction insurance provisions requires the practitioner to be familiar with design and construction risks as well as the insurance products available to address them. Fortunately, there are standard agree-

*Patrick J. O’Connor, Jr., is a Fellow of the American College of Construction Lawyers and a Partner in the firm of Faegre Baker Daniels, Minneapolis, Minnesota. He is the co-author of Philip L. Bruner and Patrick J. O’Connor, Jr., Bruner & O’Connor on Construction Law.
ments with good insurance provisions. The American Institute of Architects (AIA) publishes a General Conditions Document (Document A201-2007) that addresses insurance and bonds in Article 11. Article 11 of the AIA General Conditions Document is a good starting point for any practitioner charged with drafting a construction contract insurance provision.  

II. Description of Coverages

A key provision of any insurance provision is a description of the insurance coverages required by the parties. The AIA clause, at least with respect to the contractor’s liability insurance, goes about this by describing the risks or claims against which the contractor must protect itself through insurance. Paragraph 11.1.1 of the General Conditions Document identifies eight “claims” against which the contractor must secure and maintain insurance. The eight “claims” for which coverage must be secured are:

- Claims under workers’ compensation and other similar employee benefit acts;
- Claims for damages because of bodily injury to contractor’s employees;
- Claims for damages because of bodily injury to persons other than the contractor’s employees;

See AIA A201-2007 document. Article 11 of the AIA General Conditions Document is entitled “Insurance and Bonds.” While the title suggests equal treatment of these two topics, more than 90% of this nearly three-page article is devoted to insurance.

For a paragraph-by-paragraph discussion of the insurance article in the 1997 edition of the AIA General Conditions Document, see Bruner & O’Connor on Construction Law §§ 5:209 to 5:236.

A close reading of these eight “claims” reveals that, while some are fashioned in terms of the actual risks sought to be covered, others are a bit more circular insofar as their scope is defined in terms of particular insurance coverages. Compare § 11.1.1.2, Claims for Damages Because of Bodily Injury, Occupational Sickness or Disease, or Death of the Contractor’s Employees (which implicates employer’s liability and workers’ compensation coverages) to § 11.1.1.8, which requires coverage for “[c]laims involving contractual liability insurance applicable to the Contractor’s obligations under § 3.18 [the indemnity provision]” (which implicates general liability coverage containing the insured contract exception to the standard contractual liability exclusion).


See Bruner & O’Connor on Construction Law § 11:80.
• Claims for damages insured by usual personal injury liability coverage;
• Claims for damages, other than to the work itself, because of injury or destruction of tangible property (including loss of use resulting therefrom);
• Claims for damages because of bodily injury or property damage arising out of the ownership or use of a motor vehicle;
• Claims for bodily injury or property damage arising out of completed operations; and
• Claims involving contractual liability insurance applicable to the contractor’s indemnity obligations.

Section 11.1.2 of the AIA General Conditions Document requires the contractor’s liability coverages to be maintained without interruption from the date of commencement until the date of final payment. The contractor’s completed operations coverage is to be maintained until the expiration of the period for correction of work or as otherwise specified in the Contract Documents. Requiring a specific duration for completed operations coverage is perhaps a result of the AIA form permitting the contractor to secure liability coverage on either an occurrence or claims-made basis. Few contractors purchase general liability coverage on a claims-made form, as the occurrence form is readily available and responds better to latent progressive injury. It is common for construction insurance provisions to mandate that general liability coverage be secured on an occurrence form.

A. Contractor’s Liability Insurance

The insurance coverages indirectly specified via these “claims”

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6See Bruner & O’Connor on Construction Law § 11:188.
7See Bruner & O’Connor on Construction Law §§ 11:81 to 11:90.
8See Bruner & O’Connor on Construction Law §§ 11:296, 11:297.
9This duration obligation is not likely to be met through any endorsement to the CGL policy in place at time of project commencement as there is no readily available vehicle to accomplish this under an occurrence policy form. Because the coverage trigger under the occurrence form is the timing of the injury, the most direct way to ensure completed operations coverage for the one-year correction of work period (AIA A201-2007, § 12.2.2.1) is to extend the policy period out to cover the correction period. But this is equivalent to purchasing a multi-year rather than an annual policy. See Bruner & O’Connor on Construction Law §§ 11:175 to11:187. Under a claims-made form there is the option of purchasing “tail” coverage to meet this obligation, but there is no analog under the occurrence form. See Bruner & O’Connor on Construction Law § 11:284. One way to view this completed operations obligation is simply as an agreement to purchase similar coverage upon the expiration of the existing policy.
are: (1) workers’ compensation insurance; (2) employer’s liability insurance; (3) general liability insurance; and (4) automobile liability insurance. Workers’ compensation insurance, not surprisingly, is required to cover “[c]laims under workers’ compensation . . . and other similar employee benefit acts.” Employer’s liability insurance addresses “[c]laims for damages because of bodily injury . . . of the contractor’s employees.” In other words, employer’s liability insurance addresses employee bodily injury risks not otherwise covered under workers’ compensation insurance. Automobile liability insurance, as one might expect, addresses “[c]laims for damages . . . arising out of ownership, maintenance or use of a motor vehicle.” General liability insurance responds to the remaining “claims.” For example, claims for “personal injury” are addressed under Coverage B of the standard commercial general liability (CGL) policy form. A “personal injury” claim that arises from time to time between construction participants is defamation. On the whole, however, the vast majority of construction risks covered by the CGL policy fall under Coverage A—the bodily injury and property damage coverage grant. Claims for injury or destruction to tangible property, bodily injury claims to non-employees, claims arising out of “completed operations” and claims involving contractual liability insurance all fall under the standard CGL policy form. Even claims related to property damage to the “work itself” may be, depending upon the specific circumstances and governing law, covered under the CGL policy notwithstanding the contractual carve out under § 11.1.1.5.\(^\text{10}\)

So what is missing?\(^\text{11}\) That depends. Does the job present unusual pollution risks?\(^\text{12}\) If so, is the work in a jurisdiction that restricts the CGL policy’s pollution exclusion to traditional environmental exposures, or more broadly interprets it to cover all manner of activity, including construction operations?\(^\text{13}\) If the latter, then some form of pollution liability coverage is probably

\(^{10}\) AIA Document A201-2007, § 11.1.1.5 (“Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom . . . .”) (Emphasis added.).

\(^{11}\) The AIA provision addresses the owner’s liability insurance in one sentence: “The Owner shall be responsible for purchasing and maintaining the Owner’s usual liability insurance.” AIA Document A201-2007, § 11.2. The “usual” liability insurance may not be enough where the owner is undertaking a major renovation project. See Bruner & O’Connor on Construction Law §§ 11:81 to 11:83, 11:87, 11:100 to 11:105.

\(^{12}\) See Bruner & O’Connor on Construction Law §§ 7:89 to 7:105.

\(^{13}\) See Bruner & O’Connor on Construction Law §§ 11:113 to 11:138.
in order (it may well be prudent to secure it in any event). Is the contractor expected to perform design work? If so, it is advisable to explore requiring the contractor to secure and maintain some form of professional liability insurance.

Does the construction present any peculiar explosion, collapse or underground hazards? If so, the common restrictive endorsements addressing those risks (often designated “X, C & U” endorsements) need to be avoided. One such endorsement, Insurance Services Office (ISO) CG 21 42, takes away coverage for specified locations and operations, whereas the other, CG 21 43, excludes coverage for all locations and operations, except those locations and operations specified.

### B. Property Insurance

The contractor’s liability insurance is only part of the picture. The planned improvement also needs to be protected against common perils such as fire, windstorm, and the like. The traditional property insurance product covering structures undergoing construction activities is the builder’s risk policy. The AIA insurance article calls for the owner to purchase and maintain property insurance. While this is the most common approach, it is not universal. On some construction projects, the contractor is responsible for purchasing the property or builder’s risk insurance. Both the owner and contractor have an interest in securing appropriate property coverage. But as it is the owner that pays for the coverage, and under most delivery approaches (except perhaps for certain turnkey projects), it is the owner that owns the property during the construction process, the customary approach is for the owner to secure the property coverage. Where the construction involves renovations or additions to an existing structure there is an added incentive for the owner to secure the property coverage on the new improvements as it is important to coordinate the coverages on the existing structure with those responding to the new improvements.

The AIA General Conditions Document provides the following requirements for the owner’s property insurance:

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14 See Bruner & O’Connor on Construction Law § 11:318.
15 See Bruner & O’Connor on Construction Law §§ 11:286 to 11:295.
16 See Bruner & O’Connor on Construction Law §§ 11:211 to 280.
• It is to be written on a “builder’s risk/all-risk” or equivalent policy form;\textsuperscript{18}
• It is to be in the amount of the initial contract sum, plus value of subsequent contract modifications and cost of material supplied or installed by others (the total value of the entire project);
• Is to be written on a replacement cost basis without optional deductibles;\textsuperscript{19}
• It shall insure against the perils of fire (with extended coverage), theft, vandalism, malicious mischief, collapse, earthquake, flood and windstorm;\textsuperscript{20}
• The coverage shall extend to not only the permanent improvements but also false work and temporary buildings;\textsuperscript{21}
• Debris removal (including demolition occasioned by legal requirements) is specified;\textsuperscript{22}
• Physical loss or damage due to testing and start-up is required;\textsuperscript{23}
• Soft costs coverage for compensation to the architect and contractor for services and expenses required as a result of an insured loss is to be provided;\textsuperscript{24} and
• Work stored offsite and work in transit is covered.\textsuperscript{25}

Coverage is to stay in place until final payment has been made or until no person or entity other than the owner has an insurable interest in the property, whichever is later. If the owner is expected to occupy a portion of the project before final payment, the property insurer must consent to the occupancy and the owner and contractor must take reasonable steps to obtain consent or otherwise take no action with respect to partial occupancy that would cause cancellation, lapse, or reduction of insurance.

If the owner does not intend to purchase property coverage or if it intends to acquire coverages less inclusive than that required under the AIA document, the owner is required to inform the

\textsuperscript{18}\textit{See} Bruner & O’Connor on Construction Law § 11:211.10.
\textsuperscript{19}\textit{See} Bruner & O’Connor on Construction Law § 11:270.
\textsuperscript{20}\textit{See} Bruner & O’Connor on Construction Law §§ 11:224 to 11:228.
\textsuperscript{22}\textit{See} Bruner & O’Connor on Construction Law § 11:253.10.
\textsuperscript{23}\textit{See} Bruner & O’Connor on Construction Law § 11:253.10.
\textsuperscript{24}\textit{See} Bruner & O’Connor on Construction Law §§ 11:253 to 11:268.
\textsuperscript{25}\textit{See} Bruner & O’Connor on Construction Law § 11:219.10.
contractor of its intention before the commencement of the work. The contractor may then secure the requisite insurance at the owner’s expense. The owner bears all reasonable costs resulting from its failure or neglect to purchase and maintain the required insurance.26

The AIA General Conditions insurance article also requires the owner to purchase boiler and machinery insurance as “required by the Contract Documents.” This coverage, if required, covers insured objects during installation and until final acceptance by the owner. When should boiler and machinery insurance be mandated? This insurance is a special type of property insurance designed to cover boilers, other pressurized vessels, and any machinery that generates electric power. The coverage comes in two general types: (1) standard comprehensive coverage, which applies to all objects except production machinery; and (2) extended comprehensive coverage, which applies to all objects including production machinery. A substantial portion of the premium collected is for inspection services rather than loss prevention. The coverage not only responds to injury to the insured object but also to the surrounding area if damaged by explosion or fire caused by the insured object. Some forms of this coverage also respond to business loss occasioned by the malfunction or loss of use of the insured machinery. Sometimes the coverage is referred to as “breakdown insurance.” This insurance should be considered for any industrial project or other construction undertaking that involves significant machinery.27

Any coverage gaps here? Once again, the AIA clause calls for rather comprehensive coverage. Nevertheless, there are insurable exposures potentially left uncovered. One of the most significant is the loss occasioned by the inability to use the completed improvement at the time expected because of an insured peril or cause of loss. The AIA General Conditions leaves it to the owner’s

26Contractors sometimes will purchase builder’s risk “floater” policies that are not project-specific, but cover property damage at any project undertaken by the contractor. These “floater” programs may fill coverage gaps not otherwise insured by a specific builder’s risk program, but they often operate on an excess basis by providing coverage only after the limits of the project-specific coverage are exhausted.

27Unless the same insurance company issues both the builder’s risk and boiler and machinery coverage, the parties should consider requiring the carriers to add a joint loss settlement agreement to their policies. This prevents disagreement between them as to which policy should respond to a particular loss and in what amounts. When both policies are appropriately endorsed, each insurer pays one-half of the disputed amount, pending resolution of the issue between the insurers.
discretion to purchase insurance that responds to loss of use of the owner’s property due to fire or other hazards, however caused.\textsuperscript{28} This clause further states that the “Owner waives all rights of action against the contractor for loss of use of the Owner’s property, including consequential losses due to fire or other hazards however caused.” Given this waiver, it is important for the owner to evaluate whether it should insure against this exposure (or strike the waiver and the consequential damage waiver at \$ 15.1.6, as well).\textsuperscript{29} The coverage that responds to this risk is business interruption insurance.\textsuperscript{30}

III. Drilling Down on General Liability Insurance

While general liability coverage is more uniform than property coverage, given the prevalent use of standard CGL ISO forms, the trend of recent years is toward less uniformity. The prevalent use of endorsements which alter the underlying coverage afforded by the basic ISO general liability coverage form has led some owners to become more specific about describing required coverages. One approach is to specifically identify the minimum coverages required. A sample listing might include some or all of the following:

1. Premises and operations;
2. Independent contractor liability (including contingent liability);
3. Completed products and operations liability (specifying the number of years after completion of the work it is to be in force);

\textsuperscript{28}AIA Document A201-2007 § 11.3.3.

\textsuperscript{29}Striking these provisions is not likely to be “cost-free.” The decision to forego insurance covering this business interruption expense and eliminating the contract provisions which place this risk with the owner inevitably makes the project financially more risky for the construction team. Just how this will factor into pricing involves multiple factors including overall market conditions, the contractors’ subjective evaluation of the risk, and whether there exist reasonable mitigation alternatives. The absence of this coverage also makes the undertaking more risky for the owner. While the owner may have recourse against the contractor for a fire loss or other covered loss caused by the contractor or its subcontractors, many property losses are unrelated to construction activities—if a tornado destroys the construction site and the owner incurs delay damages, this optional coverage would come in very handy. Moreover, recovery from the construction team for delay is less efficient, particularly if litigation is required, than from a property carrier. This inefficiency can stop a rebuilding effort where the owner’s financial resources are insufficient to proceed in the absence of a recovery.

\textsuperscript{30}See Bruner & O’Connor on Construction Law §§ 11:255 to 11:265.
4. Contractual liability insurance (blanket coverage broad form);
5. Personal injury liability, including coverage for employees and advertising injury;
6. Broad form property damage liability insurance (including completed operations);
7. Blanket X, C, and U coverage;
8. Railroad protective liability insurance;

Another approach, which can be used in combination with identifying particular coverages for specific risks, is to prohibit specific endorsements which restrict or eliminate coverage. This approach has gained favor as the standard CGL policy has become laden with restrictive endorsements. These provisions set a baseline by requiring the minimum scope of coverage in terms of a basic ISO coverage form, such as Insurance Services Office Form CG 0001 (written on an occurrence rather than claims-made form). Once the basic coverage form is specified, it is possible to enumerate the prohibited exclusions or restrictive endorsements. These may include:

1. **Damage to work performed by subcontractors exclusion.** This exclusion eliminates the subcontractor exception to the completed operations work exclusion. The endorsement used on a blanket basis is CG 22 94, and the one for site-specific jobs is CG 22 95.\(^3\)

2. **Exterior insulation and finish systems exclusion (CG 21 86).**\(^3\) This exclusion eliminates property damage coverage arising from EFIS employed on the project.

3. **Amendment of insured contract definition endorsement (CG 24 26).** This exclusion reduces the policy’s contractual liability coverage for incidents that are the sole fault of the indemnitee. A more restrictive contractual liability endorsement known as the limited contractual liability endorsement, CG 21 39, takes away all coverage for tort liability assumed by the named insured (indemnitor).\(^3\)

4. **Silica exclusion.**\(^3\) This exclusion eliminates bodily injury coverage for silica exposures.

5. **Habitational exclusionary endorsements.** The wave of

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\(^3\)See Bruner & O’Connor on Construction Law §§ 11:105, 11:150.10.
\(^3\)See Bruner & O’Connor on Construction Law § 11:139.
\(^3\)See Bruner & O’Connor on Construction Law §§ 11:108 to 11:112.
\(^3\)See Bruner & O’Connor on Construction Law § 11:135.
litigation involving defects in residential construction has caused many insurers to attach “habitational” endorsements designed to exclude coverage for claims arising out of residential construction. These endorsements are manuscript rather than developed by the ISO.35

6. **Broad employee exclusions.** Carriers, of late, have been adding independent contractor exclusions that broaden the definition of who is an “employee” for purposes of restricting coverage. Depending upon the wording of the exclusion, injuries to workers who would normally not be considered the insured’s “employee” for purposes of an “employee” exclusion are nevertheless made so for purposes of the exclusion. This creates a coverage gap if the insured’s workers’ compensation or employer’s liability coverage does not extend to such independent contractors.36

7. **Prior injury exclusions.** These exclusions can take a number of different forms. Some are crafted around a “known loss” concept.37 Others simply flow all progressive property damage into one policy period, similar to how loss of use without physical injury coverage is handled.38 These exclusions, seek to alter which policy responds to property damage losses caused by an occurrence that results in injury over a number of policy periods.39

8. **Roofing exclusions.** Insurance policies deal with roofing risks in a number of ways. Sometimes the risks sought to be excluded are those associated with “hot” application techniques. These applications create a fire hazard that some insurers wish to avoid. Poorly-worded roofing exclusions, however, can create mischief.40

**IV. Commercial General Liability Checklist**

The following is a CGL checklist that may provide some assistance in issue spotting:

- Occurrence (CGL) policy form—limits of coverage (per occurrence/aggregate)

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35 See Bruner & O'Connor on Construction Law § 11:150.20.
36 See Bruner & O'Connor on Construction Law § 11:149.10.
37 See ISO CG 00 57 09 99—referred to as a “Montrose” endorsement.
38 All loss of use where there is no physical injury is deemed to occur at the time of the “occurrence” that caused it. See Bruner & O'Connor on Construction Law § 11:89.
39 See Bruner & O'Connor on Construction Law § 11:150.
40 See Bruner & O'Connor on Construction Law § 11:140.
Deletion of selected contractual liability exclusions

Completed operations and products liability coverage

Broad form property damage coverage broadened

Pollution coverage for jobsites

Notice of occurrence amended

No exclusion of explosion, collapse, or underground damage

Personal injury liability coverage (remove Exclusion No. 4)

Limits of liability

General aggregate limit considerations

Per-project aggregate and per-locations

Broad form named insured endorsement

Blanket additional insured if required by contract

Blanket waiver of subrogation if required by contract

Verified broad form liability extensions included

Additional insured/protective liability requirements

Policy dates consistent with umbrella/excess liability coverage

Owned or non-owned watercraft liability coverage

Owned or non-owned aircraft liability coverage

Limits of liability consistent with excess/umbrella requirements for underlying coverage

Joint venture (past and present)

Residual wrap-up coverage

Coverage for newly-formed entities

Advance notice of cancellation/non-renewal

**V. Drilling Down on Property Coverage**

Unlike general liability insurance, property coverage, particularly builder’s risk insurance, is written on a manuscript basis. Most policies are written on inland marine, rather than com-

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41 See Bruner & O’Connor on Construction Law §§ 11:108 to 11:112.
42 See Bruner & O’Connor on Construction Law §§ 11:103, 11:103.10.
44 See Bruner & O’Connor on Construction Law § 11:188.
45 See Bruner & O’Connor on Construction Law § 11:153.
46 See Bruner & O’Connor on Construction Law §§ 11:192 to 11:196.
47 See Bruner & O’Connor on Construction Law §§ 11:151 to 11:172.
48 See Bruner & O’Connor on Construction Law § 11:143.
49 See Bruner & O’Connor on Construction Law § 11:146.
50 See Bruner & O’Connor on Construction Law § 11:324.
mmercial property, forms. There are common threads to this coverage but insurers frequently create coverages, exclusions, terms and conditions unique to them. What the policy affords can be driven by any number of factors from market dynamics to an insurer’s internal risk retention concerns. One seldom encounters references to standard builder’s risk coverage forms in construction insurance provisions. The ISO, however, publishes a standard form Builder’s Risk policy form, CP 00 20 04 02 (2001). It is worthy of study, for it explains how certain coverages work through examples, contains a number of additional coverages and conditions, and describes how an under-insurance penalty works.

There are a number of property insurance issues worth considering, depending upon the nature of the project. These include:

1. **Insureds.** The policy should name the owner and all contractors and subcontractors of every tier as insureds (as well as mortgagees and lenders who have a financial interest in the project).

2. **Duration of Coverage.** Uncertainty regarding project completion can generate coverage disputes. Industrial projects, such as power plants and other industrial facilities, often have extended testing and commissioning processes with interim acceptances. If this is the case, the builder’s risk policy should be coordinated under these circumstances so that it does not prematurely terminate. Where the policy contains a specific date of termination, it places an administrative burden on the insureds to make sure that coverage is extended in the event of project delay. If the construction calls for phased completion with partial occupancy, the

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51 See Bruner & O’Connor on Construction Law § 11:213.
52 See Bruner & O’Connor on Construction Law § 11:220.10.
53 Ambiguity with respect to policy inception can also create problems. See Cameo East Corp. v. National Fire Ins. Co. of Hartford, 52 A.D.2d 797, 383 N.Y.S.2d 355 (1st Dep’t 1976) (denying coverage because construction had not commenced); Ira S. Bushey & Sons v. American Ins. Co., 237 N.Y. 24, 142 N.E. 340 (1923) (destruction of shipbuilding materials by fire covered after the materials were delivered and shaped for construction, even though not yet incorporated as part of the construction work); Bosecker v. Westfield Ins. Co., 724 N.E.2d 241 (Ind. 2000) (coverage for renovation and repair of existing structure measured from start date of policy rather than date of commencement of actual construction work).
54 See Hospital Service Dist. No. 1 of Plaquemines Parish v. Delta Gas, Inc., 141 So. 2d 925 (La. Ct. App. 4th Cir. 1962) (insured’s failure to extend builder’s risk policy to final completion resulted in denial of coverage for course-of-
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policy should be crafted to afford coverage through these periods.\(^5\)

3. **Coverage for Maintenance/Warranty Work and Post-Completion Property Damage.** While “maintenance period” coverage for post-completion, construction-related damage is not common in the United States, some foreign insurers offer such coverage, which has become a standard coverage under the Marine Builder’s Risk policy available in the United Kingdom.

4. **Covered Property.** It is common for builder’s risk policies to exclude certain property that might well be within the scope of a construction undertaking. For example, landscaping, sidewalks, driveways, and other exterior construction may be excluded.\(^5\) If these features figure prominently, then they should be addressed as part of contract negotiations.

In 1990, Willis Corroon Corporation conducted a study on builder’s risk insurance. The findings are instructive

- Brokers and underwriters arranging the insurance program often had not seen the project documents.

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\(^5\) Care must be taken with respect to ensuring that the builder’s risk coverage does not terminate before the permanent property policy is in place. Builder’s risk policies are not uniform as to when coverage ceases. Various coverage cessation triggers are employed, including:

- A specified date—the expiration or termination of the policy.
- Acceptance of the completed project by the owner.
- Completion of the project.
- The point at which the insured’s insurable interest ends.
- Some specified number of days (60 or 90 are common) after completion of the project.
- Upon occupancy.

Just when a project is complete can be subject to debate. Builder’s risk policies may or may not define completion. As a consequence, there can be disagreement over whether this cessation “trigger has been pulled.” See Fireman’s Fund Ins. Co. v. Millers’ Mut. Ins. Ass’n, 451 F.2d 1140 (10th Cir. 1971) (Policy stated that coverage ceased once the project was complete, accepted by the owner, and the insured’s insurable interest had ceased, where only one item remained to be corrected, which was of a “de minimis nature,” the project was complete and coverage ceased.); American & Foreign Ins. Co. v. Allied Plumbing & Heating Co., 36 Mich. App. 561, 194 N.W.2d 158 (1971) (apartment building was not complete at time of fire, even though some tenants had moved into the apartments, because there was “still a great deal of work to be done” on the building).

It was common for the insurance policies not to comply with the insurance requirements of the contract documents.

Property owners and operators, in general, were better served by placing insurance on their construction risks with their normal property insurance company.

Contractors, in general, were better served by special builder's risk policies.

Most policies did not cover hot testing, boiler explosion, machinery breakdown, or electrical injury.

Stand-alone builder's risk policies provided little, if any, coverage for indirect loss (business interruption, extra expense, delayed opening, and soft costs).

Stand-alone builder's risk policies generally contained fewer restrictions on perils covered and property covered.\(^{57}\)

VI. Builder's Risk/Installation Floaters Checklist

The following is a checklist for builder's risk issues that may be of relevance depending upon the nature of the project:

- Broad all-risk perils in lieu of specific coverages
- Valuation—replacement vs. actual cash value\(^ {58}\)
- Coverage applicable to all work, including Differences In Conditions (DIC) exposures
- Coverage for materials and equipment in transit
- Coverage for flood damage
- Earthquake/earth movement coverage\(^ {59}\)
- Deductibles/self-insured retentions applicable\(^ {60}\)
- Co-insurance requirements, if any\(^ {61}\)
- Report of completed values or gross receipts requirements
- Territorial coverage limitations
- Complete and accurate names of insureds
- Joint venture issues
- Termination of coverage issues
- Adequacy of limits and sublimits in relation to values\(^ {62}\)
- Advance notice of cancellation/non-renewal


\(^{58}\) See Bruner & O'Connor on Construction Law §§ 11:269 to 11:276.

\(^{59}\) See Bruner & O'Connor on Construction Law § 11:247.

\(^{60}\) See Bruner & O'Connor on Construction Law § 11:11.

\(^{61}\) See Bruner & O'Connor on Construction Law § 11:258.

\(^{62}\) See Bruner & O'Connor on Construction Law § 11:228.10.
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- Coverage for off-site storage
- Scaffolding and false work coverage
- Temporary structures, foundations and excavation sites
- Materials and supplies, including fences
- Testing coverage
- Water damage—back-up and seepage
- Freezing
- Debris removal
- Delayed opening coverage
- Design error or faulty workmanship (and ensuing loss exceptions)
- Performance guarantee, efficacy
- Force majeure
- Sinkhole
- Type of collapse coverage

VII. Contractor’s Equipment Floater Coverage

Because most builder’s risk policies exclude contractor equipment, it is not uncommon for construction insurance provisions to require the contractor to secure adequate insurance on its equipment. This particularly is so where the use of certain equipment is critical to insuring timely completion. The property coverage responding to this risk is an equipment floater that protects covered equipment no matter where it might be used. This is a form of inland marine insurance. Because equipment floaters often exclude crane equipment and equipment principally used underground, it can be important to directly address such equipment in the insurance provision if it is critical to the progress of the work. The following is a contractor’s equipment floater checklist:

- Broad all-risk perils in lieu of specific coverages
- Complete and accurate inventory of equipment
- Blanket limit of liability

63 See Bruner & O’Connor on Construction Law § 11:253.20.
64 See Bruner & O’Connor on Construction Law § 11:240.
65 See Bruner & O’Connor on Construction Law § 11:239.
66 See Bruner & O’Connor on Construction Law § 11:313.
67 See Bruner & O’Connor on Construction Law §§ 11:231 to 11:234.
68 See Bruner & O’Connor on Construction Law § 11:315.
69 See Bruner & O’Connor on Construction Law § 11:250.
• Valuation on replacement cost or actual cash value
• No coinsurance
• Provision for newly acquired equipment
• Automatic coverage for rented equipment
• Protection of lessor's interest, including loss of use
• Automatic coverage for newly acquired equipment
• On-premises coverage
• Equipment in transit
• Equipment at jobsites
• Deductibles applicable
• Consideration of alternative deductible levels and premiums
• Reported value requirements, if any
• Territorial coverage limitations/foreign operations
• Coverage for newly acquired entities
• Joint venture issues
• Advance notice of cancellation/non-renewal
• Boom coverage
• Rental cost reimbursement
• Mobile equipment
• Overturn of equipment.

VIII. Additional Insured Coverage

The AIA General Conditions Document requires the contractor to provide additional insured coverage under its general liability policy to the owner, the architect, and the architect's consultants.\(^7\) The language is rather minimal, but tracks the 2004 ISO additional insured endorsements.\(^8\) In this regard, the scope of additional insured coverage is “for claims caused in whole in part by the contractor’s negligent acts or omissions.”\(^9\) The AIA provision also splits the coverage between ongoing operations (“during the contractor’s operations”) and “completed operations.” The additional insured coverage afforded the architect and the architect’s consultants is only for claims during ongoing operations. The owner is the beneficiary of both ongoing and completed operations coverage.

It is common for construction contract insurance provisions to devote a good deal of language to the additional insured coverage

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\(^7\) See Bruner & O'Connor on Construction Law § 11:270.
\(^8\) AIA Document A201-2007, § 11.1.4.
Some additional requirements or issues encountered are:

1. **Coverage must be primary and non-contributory.** This requirement is sufficiently prevalent to have caused the ISO in 2013 to create a specific endorsement addressing it. Endorsement CG 20 01, Primary and Non-contributory Other Insurance Endorsement, meets the requests made by insurers and agents to introduce an endorsement to expressly state that coverage provided to an additional insured is done so on a “primary and non-contributory” basis, as many construction contracts require it. The endorsement revises the “other insurance” clause to indicate that coverage is “primary and non-contributory” provided the additional insured is a named insured on other insurance applicable to them and a written contract or agreement has been entered into by the insured stating the insured’s policy will be “primary and non-contributory” and it will not seek contribution from any other insurance available to the additional insured. If the additional insured coverage is not clearly delineated as primary and non-contributory, the additional insurer might have a basis for seeking contribution from the additional insured’s primary CGL carrier.76

2. **Elimination of any cross-suits exclusion.** The “cross-suits” or “insured vs. insured” exclusion can create a direct conflict with additional insured coverage. A “cross-suits” exclusion eliminates coverage for claims by one insured against another. These provisions are common in certain types of insurance, such as Directors & Officers Liability insurance. They are less common, but not to the point of being unusual, in policies issued to contractors. They can create problems for the named insured in cases where an injured employee sues the additional insured. In such circumstances, it is not uncommon for the additional insured to seek indemnity from the named insured. A cross-suits exclusion, if enforced, would eliminate coverage for the claim against the named insured.77

3. **Elimination of any privity requirement.** A standard feature of additional insured coverage is that the obligation to provide the coverage must arise from a written agreement. For the most part, this condition creates few issues. More

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76 See Bruner & O’Connor on Construction Law § 11:159.
77 See Bruner & O’Connor on Construction Law § 11:160.20.
recent endorsement language, however, adds a wrinkle by requiring the named insured and additional insured to be in privity. An endorsement containing this language does not comply with the AIA General Conditions agreement, which requires the contractor to provide additional insured coverage to not only the owner, with whom it is in privity, but also to the architect and the architect’s consultants. There is no privity between the contractor and the architect or its consultants and, as a consequence, the contractor would be in breach of this obligation if the additional insured endorsement its insurer employed contained a privity condition.78

4. Broad additional insured coverage. Additional insureds prefer the “good old days.” In this regard, it is not unusual for owners and general contractors to require additional insured coverage under old (and often no longer commercially available) endorsement forms. A favorite form is CG 20 10 11 85. The “85” refers to the year the endorsement was issued. In this case, over a quarter century ago. This form uses the “arising out of” rather than the “caused in whole or in part” coverage trigger. The “arising out of” language has been the subject of much litigation over the years, with courts adopting either “broad” or “narrow” positions regarding the coverage afforded.79 While insureds with a certain amount of market power may be able to secure an “85” endorsement, many cannot. Perhaps in recognition of this fact, contract language often will state that the 85 form “or its equivalent” is required. Whether there is an actual “equivalent” commercially available today is open to debate, but ISO forms CG 20 10 10 01 (ongoing operations) and CG 20 37 10 01 (completed operations) combine to provide as

78 Endorsement Form CG 20 33 amends the “who is an insured” provision to add as an additional insured any person or organization for whom the named insured is performing operations when the parties have agreed in writing in a contract that such person or organization will be added as an additional insured. As written it is possible that this endorsement will not afford coverage to third parties notwithstanding a contractual commitment to do so. A new CG 20 38 endorsement is intended to provide additional insured status to those parties whom the named insured is obligated in writing in a contract or agreement to name as an additional insured under its policy. Thus, CG 20 38 broadens coverage to non-privity situations. See Bruner & O’Connor on Construction Law § 11:152.20.

5. **Coverage sculpted by anti-indemnity laws and related legislation.** Many states have “anti-indemnification” laws that prohibit provisions in construction contracts that require a party to indemnify another party against liability for the other party’s own negligence or fault. A few states extend this prohibition to contract provisions requiring a party to provide additional insured coverage to another for the other’s own negligence. These developments have led the insurance industry to develop new ISO language that restricts additional insured coverage “to the extent provided by law.” This new language is intended to sync the endorsement to the law. It is also intended to clarify that the coverage afforded to the additional insured will not be broader than that which the named insured is required to provide by contract. Whether it actually does this only time will tell. For example, if the contract calls for $2 million of coverage but the policy under which the additional insured is afforded coverage has limits of $5 million, is the “only to the extent provided by law” language sufficient to limit the coverage afforded the additional insured to $2 rather than $5 million? This is an open question.

6. **Exclusion of professional additional insureds.** Even in cases where the named insured is able to secure additional insured coverage for non-privity entities, there may be resistance to providing such coverage to professionals, such as architects and engineers.

On occasion the contract may permit the contractor to provide an Owners’ and Contractors’ Protective Liability Insurance (OCP) policy in lieu of additional insured coverage under the contractor’s CGL policy. Care must be taken to carefully examine the OCP

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80 See Bruner & O’Connor on Construction Law §§ 11:167 and 11:168.
81 See Bruner & O’Connor on Construction Law § 11:163.
82 See Minn. Stat. § 337.05(b), which reads:
A provision that requires a party to provide insurance coverage to one or more other parties, including third parties, for the negligence or intentional acts or omissions of any of those other parties, including third parties, is against public policy and is void and unenforceable.

83 See ConsensusDocs No. 410, Standard Design-Build Agreement and General Conditions Between Owner and Design-Builder, § 11.5.2.2 (2011) (“The Design-Builder shall provide an Owners’ and Contractors’ Protective Liability...”)
policy. While OCP coverage has the added benefit of making available to the additional insured separate coverage limits, some policy forms do not respond to general supervisory risks.

IX. Subrogation Waivers

In contrast to additional insured coverage, the AIA devotes a good deal of language to waivers of subrogation. The AIA General Conditions Document contains five paragraphs pertaining to this subject. The primary provision is § 11.3.7, which sets forth the scope of the waiver, the principal elements of which are:

- The owner and contractor mutually waive all rights against each other and their subcontractors, sub-subcontractors, agents and employees;
- The waiver extends to the architect, its consultants and any separate contractors of the owner as described in Article 6 (as well as their subcontractors, sub-subcontractors, agents and employees);
- The waiver covers damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to § 11.3 or other property insurance applicable to the Work;
- The owner and contractor, as appropriate, shall require similar waivers from the architect and its consultants, separate contractors and subcontractors;
- The waiver is effective notwithstanding any separate duty of indemnification, contractual or otherwise;
- The waiver is effective even if the owner has failed to pay the insurance premium;

See Bruner & O'Connor on Construction Law § 11:166.

See Bruner & O'Connor on Construction Law §§ 11:192 to 11:197.

It is hard to imagine when it would be appropriate to secure waivers from these entities, particularly the design professionals, as they are unlikely to suffer loss for which property insurance will respond.
• The waiver is effective whether or not the person or entity had an insurable interest in the property damaged.\textsuperscript{87} Paragraph 11.3.5 extends the subrogation waiver to adjacent property if the owner separately insures the adjacent property.\textsuperscript{88} The owner acts as a fiduciary in adjusting the loss.\textsuperscript{89} As a fiduciary, the owner has the power to adjust and settle a loss with insurers unless one of the parties in interest objects within five days after occurrence of the loss to the owner's exercise of this power.\textsuperscript{90}

Beyond the AIA's coverage of the subject, a few additional issues arise from time to time. They include:

1. Whether the waiver should be extended to suppliers;
2. Whether the waiver should apply only to the property policy expressly required under the parties' agreement rather than to "other property insurance applicable to the Work";
3. Whether the waiver should be triggered upon the actual recovery of insurance proceeds rather than "to the extent covered by property insurance" required under the parties' agreement;\textsuperscript{91}
4. Should the waiver extend to any of the contractor's policies?\textsuperscript{92}

\textsuperscript{87} AIA Document A201-2007, § 11.3.7.
\textsuperscript{88} AIA Document A201-2007, § 11.3.5. Both §§ 11.3.5 and 11.3.7 state that the "policies shall provide such waivers of subrogation by endorsement or otherwise." It is not entirely clear what this language is intended to achieve. Presumably any such waiver would either be provided in the policy or "otherwise." As the insurer has no greater right than the owner or contractor, the waiver is effective upon the execution of the construction contract. It behooves the parties to make sure that the policy does not contain a prohibition against pre-loss subrogation waivers. Arguably, the waiver in the face of such a policy prohibition exposes the insured to a breach of cooperation claim. The strength of such a claim is open for debate, given the prevalence of these waivers in construction contracts.
\textsuperscript{89} AIA Document A201-2007, § 11.3.8. The owner's obligation as a fiduciary extends to giving a bond upon request for proper performance of its duties. AIA Document A201-2007, § 11.3.9.
\textsuperscript{90} AIA Document A201-2007, § 11.3.10.
\textsuperscript{91} This inquiry is addressed in part to the issue of who is to bear the risk of insurer insolvency.
\textsuperscript{92} Liability insurers generally do not seek subrogation as their policies respond to fault. Paying policy proceeds on behalf of an insured because it committed a wrong does not generate particularly travel-worthy shoes within which to step to pursue subrogation. Nevertheless, in certain circumstances, such as where the insurer has paid more than the amount of damages attributable to
5. Does the waiver apply to deductibles?  

6. Should the waiver be conditioned upon the parties securing similar waivers from their subcontractors and consultants?  

Issues can arise as to the effect of failing to secure such waivers from others in the contracting chain. The parties may well wish to make it clear that any such failure has no effect on the subrogation waiver.

X. Coverage Limits

The limits of coverage are determined on a project-by-project and policy-by-policy basis, presumably based on some rational assessment of the risks involved. The general approach, which follows the ACORD certificate of liability insurance form, calls for the parties to make decisions with respect to the following limits of coverage:

- General Liability Insurance
  - Each Occurrence $________
  - Damage to Rented Premises $________
  - Medical Expense (Any One Person) $________

The insured’s fault because of joint and several liability, subrogation might be appropriate. As for any property policy secured by the contractor to cover its equipment, a subrogation waiver might well be appropriate.

93Deductibles, in contrast to self-insured retention (SIR) amounts, generally are paid by the insurer, who then seeks recovery of the deductible from the named insured. Self-insured retentions, on the other hand, are levels of loss that the insured bears and the carrier has no responsibility for losses within the SIR. Unless the contract addresses deductibles elsewhere, the waiver of subrogation should address the question of deductibles. The owner makes the decision on the size of deductible to carry. Large deductibles significantly diminish the value of the coverage and, by extension, the subrogation waiver, for the contractor. If one views this as a matter of choice, extending the waiver to deductibles makes sense. On the other hand, if one views the waiver from the perspective of who bears the loss—if an insurer, then the waiver operates; but not if the burden falls on the owner, then excluding deductibles from the waiver appears appropriate. The AIA General Conditions insurance provision addresses the question of deductibles in § 11.3.1.1 by stating that “[i]f the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.”

Construction contracts seldom set out a dollar amount as the coverage limit for the property or builder's risk insurance. Usually the contract requires the policy to be for the total value of the improvements on a replacement cost basis. Notwithstanding this contractual requirement, it is quite common for property policies to contain numerous sublimits. There are sublimits for loss caused by specific perils, such as flood or earthquake. Other sublimits apply to specific coverages such as debris removal, covered property in transit, loss occasioned by ordinance or law, pollution clean-up, temporary structures, and landscaping.

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95 See AIA Document A201-2007, § 11.3.1.
96 See Bruner & O'Connor on Construction Law § 11:211.10.
It is important to coordinate insurance with any contractual limitations of liability. Contractual limitations of liability are common in construction contracts involving large projects. These provisions limit the contractor’s liability by placing a cap on the damages that may be sought from it. The cap may be calculated in a number of different ways. It is not unusual for these liability limitation provisions to contain a carve out for insurance.\textsuperscript{97}

It is important to clearly draft the extent of the insurance exception. There are two principal ways to go about this. The conservative approach is to define the insurance exception in terms of the actual coverages required under the contract. If the contract requires the contractor to secure $3 million (per occurrence) in general liability coverage and that is the policy that responds to a particular loss, the extent of the applicable limitation of liability insurance exception is $3 million. The other way to go about this is to characterize the insurance carve-out in terms of the coverage available to the contractor. Under this approach, where the contractor maintains a practice CGL policy with aggregate limits of $100 million and per-occurrence limits of $5 million, then the carve-out is $2 million greater than that afforded under the more conservative approach, notwithstanding the same $3 million contractual commitment.\textsuperscript{98} There arguably is a third approach which defines the insurance exception in terms of the amounts actually recovered rather than the available coverage. This approach places the risk of carrier insolvency and compromised limits on the owner.

\textbf{XI. Excess And Umbrella Coverage}

The typical construction contract has little to say about these

\textsuperscript{97} The theory being that, as the owner has paid for insurance, it should have access to it. Just how compelling this rationale is varies from project to project.

\textsuperscript{98} This analysis assumes no coverage issues nor applicable deductibles/SIRs. As this simplified example reveals, these insurance exceptions can be a challenge to draft. See Musgrove v. Southland Corp., 898 F.2d 1041, 1043 (5th Cir. 1990) (“Citgo’s purchase order contract with LCE obligated LCE to provide comprehensive general liability insurance of \textit{not less than} $1 million per occurrence for itself and Citgo. Because the International policy covers only those losses in excess of $1 million, that policy does not afford the coverage that LCE’s contract with Citgo required.”); Forest Oil Corp. v. Strata Energy, Inc., 929 F.2d 1039, 1045 (5th Cir. 1991) (“Forest clearly was not obligated under the agreement to provide such excess insurance. It was only required to provide insurance with \textit{not less than} $100,000/$300,000 primary coverage (and the American primary policy wholly fulfilled any such obligation). Thus, Strata was not an insured under the Southern excess policy and, therefore, was not entitled to the benefits of that policy.”) (emphasis added).
coverages. The AIA General Conditions Document is a case in point. There is no reference to either excess or umbrella insurance. 99 This is largely due to the fact that, with the exception of “contractual liability insurance” and “completed operations” (both part of the standard CGL form), the AIA clause identifies the exposure to be covered rather than specific policy types. Excess (and, to a lesser degree, umbrella) coverage does not uniquely respond to any specific risk. Instead, the policy responds to covered risks at loss thresholds beyond those in the primary layer. Given this relationship between primary general liability insurance and excess insurance, it is not uncommon for construction contracts to expressly state that CGL policy limits can be satisfied by any combination of primary general liability and excess insurance.100

On large projects (or smaller projects with large exposures), the general liability coverage losses are more likely to be satisfied in the excess layer than by the primary policy. Yet, construction contracts contain little or no guidance as to the requirements for excess or umbrella coverage. On occasion, the contract will state that the excess policy shall be secured on a “follow form” basis.101 This simply means that the excess policy shall contain the same exclusions and coverage conditions as the underlying primary policy. In reality this is often not the case. A host of challenges can arise with respect to securing appropriate excess or umbrella insurance:

1. Excess policies that contain significantly different exclusions and conditions than the primary policy (in other words, they follow the form at a distance);

99 These policies perform similar functions—providing additional layer(s) of protection above primary limits. The term “umbrella” refers to a number of features common to this form. It can act as excess to more than one primary coverage (e.g., auto and general liability). These policies are also more likely to “drop down” to fill gaps in underlying coverages than pure excess policies, which respond upon exhaustion of underlying coverage. Some umbrella policies do not “follow form” of the primary, but are stand-alone policies. Other umbrella policies contain a “broad as primary” endorsement that allows the umbrella to follow the primary form(s) without excluding any of the umbrella’s extra coverages.

100 See ConsensusDocs No. 410, Standard Design-Build Agreement and General Conditions between Owner and Design-Builder, § 11.2.2 (2011) (“Employers’ Liability, Business Automobile Liability, and CGL coverage required under subsection 11.2.1 may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by Excess or Umbrella Liability policies.”).

101 See Bruner & O’Connor on Construction Law § 11:300 and 11:300.10.
2. Excess policies misidentify underlying coverages; 102
3. Follow form endorsement converts umbrella to excess coverage; 103
4. Follow form endorsement is secured notwithstanding contract requirement for “broad as primary” endorsement; 104
5. Higher-level excess policies fail to specify the same underlying coverage; 105
6. The “follow form” excess coverage contains “notwithstanding anything to the contrary” language applied to any inconsistencies between the excess and primary policies, with the excess governing. 106

102 This can be a problem because excess coverage does not attach until the scheduled underlying policies are exhausted. If the excess coverage “rides above” more than one underlying policy then confusion can arise as to when coverage attaches. See Bruner & O’Connor on Construction Law §§ 11:304, 11:304.10 and 11:304.20.

103 Umbrella policies often provide greater coverage than the underlying primary policy. Therefore, attaching a “follow form” endorsement to an umbrella policy creates confusion, as it suggests narrower coverage is afforded than should be the case.

104 This creates a similar problem to the follow form endorsement attached to an umbrella policy—namely coverage is unintentionally narrowed. “Broad as primary” endorsements are unique umbrella provisions that provide a number of coverage enhancements including preventing exclusions in the underlying policy from affecting the umbrella coverage. The “follow form” endorsement, however, has the opposite effect by narrowing coverage to that provided by the primary policy.

105 In this case, the “tower of coverage” begins to wobble as coverage layers fail to add up. One variation on this theme is where higher excess policies follow lower umbrella policies rather than the primary policy. Another variation is where some excess policies will follow the “most restrictive” underlying policy.

106 In this situation, the “follow form” coverage is a mere illusion except in the rare instance where the excess policy terms mirror the underlying coverage. UnitedHealth Group Inc. v. Columbia Cas. Co., 836 F. Supp. 2d 912, 2011-2 Trade Cas. (CCH) ¶ 77731 (D. Minn. 2011), where the drafters of the excess policies committed a number of sins. The court’s frustration was apparent:

This is a difficult case. The main problem with this case is that it centers on an insurance policy that is terribly written. As noted, Lexington was the primary insurer during the relevant time period, and all nine of the excess insurers, to one degree or another, followed form to the Lexington policy. Unfortunately, though, the thirty-page Lexington policy is not a standard policy that would be familiar to litigators and judges. Instead, the Lexington policy was negotiated—provision-by-provision—by United and its many insurers. In negotiating the policy, the parties borrowed from other policies, but they did so with little thought as to how the provisions they were borrowing would work together when combined within a single policy. And, when the parties took pen in hand to write their own provisions, they drafted those provisions poorly, often leaving the Court and the attorneys who are now representing the parties to wonder what the negotiators could possibly have had in mind. In short, then,
XII. Umbrella/Excess Liability Checklist

The following is an umbrella/excess liability insurance checklist that may be of relevance depending upon project specifics:

- Complete and accurate schedule of underlying primary liability policies
- Complete and accurate answers to all umbrella policy application questions
- Pay on behalf of or indemnity contract
- Minimum underlying primary liability limit requirements
- Defense costs in addition to the limit of liability
- Status of following-form excess limitations, if any:
  - Contractual liability
  - Completed operations liability
  - Care, custody or control property damage
  - Explosion, collapse, or underground damage
  - Blasting, if any
  - Fire legal liability
  - Broad form property damage
- Status of wrap-up exclusions or limitations
- Joint ventures (past and present)
- Punitive damages exclusion
- Discrimination
- Asbestos exclusion or following-form
- Notice of occurrence amended

the policy is a mess, chock full of provisions that are unclear, provisions that are clear but absurd, and provisions that are clear but contradicted by other provisions that are just as clear.

UnitedHealth Group Inc. v. Columbia Cas. Co., 836 F. Supp. 2d 912, 915, 2011-2 Trade Cas. (CCH) ¶ 77731 (D. Minn. 2011). Following a poorly-drafted primary policy, as one might expect, can create problems for an excess carrier. In this case, the excess insurers argued that it would be absurd for them to provide the coverages set forth in the underlying policy as it was essentially nonsense. The court, however, had little sympathy for the excess insurers:

And yet these insurers agreed to follow form (more or less) to the Lexington policy. Given that the insurers committed the senseless act of agreeing to the entire Lexington policy, it is hard to take seriously their argument that it would have been senseless to agree to a particular provision within that policy. The “senselessness” bridge was crossed long ago. Clearly, these insurers did not read the Lexington policy carefully—or, if they read it carefully, they simply did not care that the plain language of many provisions of the policy made them responsible for risks that insurers ordinarily do not assume.


107See Bruner & O’Connor on Construction Law § 11:301.
• Primary defense when not covered by underlying policies
• Amount of self-insured retention
• Comparison of personal injury liability definitions with commercial general liability policy
• Owned or non-owned aircraft liability coverage
• Owned or non-owned watercraft liability coverage
• Employee benefit liability coverage
• Foreign operations
• Policy dates consistent with underlying policies
• Coverage for newly-formed entities
• Consideration of higher limits of liability in view of primary aggregate limits
• Advance notice of cancellation by carrier
• Broad form named insured
• Residual wrap-up
• Contractor’s limitation endorsement for property damage limitations and professional exclusion.

XIII. Workers’ Compensation and Employer’s Liability Insurance

Although this coverage is a major expense for contractors, construction law practitioners spend little time addressing it.\textsuperscript{108} Many construction contracts do little more than mandate the coverage by name. Perhaps this is to be expected, given that all states require a majority of employers to secure and maintain workers’ compensation coverage and the limits are statutorily mandated. Nevertheless, there are a few items worthy of consideration:

1. Is a waiver of subrogation by the workers’ compensation carrier required?
2. Are any of the contractor’s employees subject to the Longshoreman and Harbor Workers Act or any other maritime law or act? If so, coverage should be broadened to provide adequate protection.
3. How is the contractor to document coverage?
4. Is there a concern that the contractor has inappropriately characterized employees as independent contractors?

The following checklist may be relevant, depending upon the nature of the project:

• Employer’s liability limits

\textsuperscript{108} For a general discussion of the coverage, see Bruner & O’Connor on Construction Law §§ 11:298 and 11:299.
• Review alternate rating plans, captive, self-insurance, deductibles, etc.
• Coverage applicable to all but monopolistic fund states
• Application of the Defense Base Act
• Voluntary compensation coverage
• Status of executive officers or partners
• Status of U.S.-based employees sent outside the country
• Foreign employees
• Aircraft endorsement
• Repatriation expense
• Federal employers’ liability coverage
• Stop-gap employers’ liability coverage
• Workers’ compensation deductibles, where permitted
• Joint venture issues, including experience rating and pricing
• Labor classifications and audits
• Overtime charges
• Owner-controlled, contractor-controller, or other wrap-up programs, if applicable
• Experience Rating Modifier
• Broad form named insured
• Coverage for newly-formed entities
• Notice of cancellation terms
• Blanket waiver of subrogation if required by contract.

XIV. Professional Liability Insurance

If the contractor is providing professional services and, in particular, if it is providing such services beyond what is customarily performed in connection with typical “means and methods” activities, the parties should discuss the need for some form of professional liability insurance. At one end of the spectrum, the contractor performs all or most of the design work, such as under a design/build delivery model. In this case, it may be relevant to determine whether the design services are to be furnished by the design/builder itself or by an architect or engineer acting as a consultant to the design/builder. The Design-Build Institute of America (“DBIA”) makes such a distinction when setting forth the design/builder’s insurance requirements.109 In either case, the parties are required to make an election: (1) is the professional liability policy to be written on a project-specific basis; or (2) is

the coverage to be afforded under the insured’s practice policy? Project-specific policies provide separately-designated limits, but at a price. The DBIA Insurance Exhibit sets forth the following requirements for professional liability insurance:

1. If coverage is provided by a design consultant, the only permissible exclusion, limitation or restriction with respect to construction means, methods and techniques is one that applies only to their implementation by the design consultant or any sub-consultant. Moreover, the exclusion is permissible only if such entities are not performing any construction activities. The exclusion, however, cannot restrict or limit coverage for the design of construction means and methods. Moreover, the general liability policy issued to the insured(s) providing professional services shall contain no professional liability exclusions (or restrictive endorsements) except for ISO endorsements CG 2279 or CG 2280, or their equivalent. Endorsement CG 2279 defines “professional services” so as to not encompass services within construction means, methods, techniques, sequences and procedures employed by a contractor in connection with its operations (and thus are not excluded). Exclusion CG 2280 is meant for design/builders and allows an exception for construction work performed by a contractor or on its behalf. These exclusions are more narrowly tailored than CG 2243, which excludes coverage for liability, arising out of the rendering or failure to render any professional services by a contractor or an engineer, architect or surveyor who was either employed by the contractor or performing work on its behalf.

2. If coverage is provided by the design/builder, the policy cannot contain any restriction or limitation pertaining to construction means and methods except that the policy can exclude coverage for such claims, where and only to the same extent as coverage is provided by the design/builder’s valid and collectible commercial general liability/umbrella excess liability policies.

3. Any exclusion, limitation, or restriction related to products or product design must be modified to provide coverage for goods or products installed.

4. The faulty work exclusion can only apply to the work self-performed by the design consultant or design/builder.

5. The policy must provide coverage for damages resulting from delays and cost overruns resulting from the rendering or failure to render professional services.

6. Waiver of subrogation is to be provided in favor of design/builder and owner, if commercially available.

7. Any coverage required to be maintained after final payment is to be specifically set forth in the insurance exhibit.

110 DBIA-Insurance Exhibit at §§ 1.1.3(A) & 1.1.3(B).

111 Moreover, the general liability policy issued to the insured(s) providing professional services shall contain no professional liability exclusions (or restrictive endorsements) except for ISO endorsements CG 2279 or CG 2280, or their equivalent. Endorsement CG 2279 defines “professional services” so as to not encompass services within construction means, methods, techniques, sequences and procedures employed by a contractor in connection with its operations (and thus are not excluded). Exclusion CG 2280 is meant for design/builders and allows an exception for construction work performed by a contractor or on its behalf. These exclusions are more narrowly tailored than CG 2243, which excludes coverage for liability, arising out of the rendering or failure to render any professional services by a contractor or an engineer, architect or surveyor who was either employed by the contractor or performing work on its behalf.
8. Professional liability coverage shall be retroactive to the date that professional services first commenced.

9. If the professional liability coverage is provided on a project-specific basis it shall include an extended reporting period of an agreed-upon number of years beyond the date of substantial completion.

10. All claims-made policies, including professional liability coverage, must: (a) permit reporting of circumstances that could give rise to a claim; and (b) provide coverage for post-expiration claims resulting from such circumstances.\footnote{For a discussion of how the retroactive date operates under a claims-made form as well as extended reporting or tail coverage, see Bruner & O’Connor on Construction Law §§ 11:283 and 11:284. For a discussion of various professional liability coverage issues, see Bruner & O’Connor on Construction Law §§ 11:286 and 11:295.}

The ConsensusDocs Standard Agreement Between Design-Builder and Design Professional requires the design professional to secure and maintain professional liability insurance on either a practice policy or project-specific coverage form as elected by the parties.\footnote{ConsensusDocs No. 420, Standard Agreement Between Design-Builder and Design Professional, § 7.2.4 (2011).} Additional coverage requirements include:

1. A limitation on the amount of the deductible as elected by the parties with the design professional being responsible for paying all deductibles.

2. The professional liability insurance shall contain prior acts coverage sufficient to cover all services performed by the design professionals. “These requirements” (presumably the prior acts coverage) shall continue in effect for a designated number of years after the date of substantial completion.\footnote{ConsensusDocs No. 420, Standard Agreement Between Design-Builder and Design Professional, § 7.2.4 (2011). For a discussion of “prior acts” coverage or the elimination of a retroactive date condition, see Bruner & O’Connor on Construction Law §§ 11:282, 11:283 and 11:291.}

3. The design professional is required to supply the design/builder with a copy of its professional liability policy (in addition to a certificate of insurance evidencing the required coverages).

4. The policy may not be cancelled or modified without 30 days’ prior written notice to the design/builder.

5. The design professional and its carrier shall notify the design/builder within 30 days of any claims made or loss expenses incurred against the professional liability policy.
6. The design/builder has the right to notify the carrier of any claim against the policy.

7. The professional liability coverage shall continue in effect for a designated number of years following final payment to the design professional.\textsuperscript{115}

The following is a professional liability checklist:

- Blanket program or single project
- Claims made
- Notice requirement
- Policy territory
- Negligence requirement
- Scope of covered services
- Extended reporting provision (one to three years)
- Defense included or in addition to limits
- Faulty workmanship modified
- Pollution
- Subrogation issues
- Punitive damages
- Disputes over professional negligence
- Warranties\textsuperscript{116}
- Indemnity
- Discrimination
- Insured vs. insured exclusion
- Consequential damages exclusion.

\section*{XV. Pollution Liability Insurance}

Given the unpredictable coverage afforded construction pollution exposures under the CGL policy,\textsuperscript{117} it is often prudent for the construction team to secure pollution liability insurance.\textsuperscript{118} There are many types of pollution-related insurance policies. Some of the more common forms include:

- Pollution legal liability insurance

\textsuperscript{115}ConsensusDocs No. 420, Standard Agreement Between Design-Builder and Design Professional, § 7.2.5 (2011). If taken literally this is difficult to achieve where coverage is afforded under a practice policy. Securing a project-specific “tail” under a practice policy is a difficult feat. It is probably best construed as a contractual commitment to continue to purchase similar coverage in the future. If a project-specific policy is secured, it must address these post-completion loss exposures.

\textsuperscript{116}See Bruner & O'Connor on Construction Law § 11:292.

\textsuperscript{117}See Bruner & O'Connor on Construction Law §§ 11:113 to 11:138.

\textsuperscript{118}See Bruner & O'Connor on Construction Law § 11:318.
Commercial pollution legal liability insurance

“Cleanup cost cap” or “stop loss” or “cost containment” insurance

Contractors’ pollution liability and errors and omissions insurance.

Most of the coverages are written on a claims-made form. To the extent that Contractors’ Pollution Liability Insurance is available on an occurrence-based form (it is one of the few environmental policies with an occurrence form version), at a commercially reasonable rate, it is preferred over the claims-made form.\(^{119}\)

The obvious coverage for the contractor to secure is a Contractors’ Pollution Liability policy. This insurance provides coverage for bodily injury and property damage (including clean-up) from pollution conditions arising out of covered operations performed by the insured or its agents on another’s real property. These policies also may afford coverage for pollution arising out of professional services rendered by the contractor or its agents. The coverages are available on either a practice basis or a project-specific form. Project-specific coverage is preferable for projects with significant pollution exposures, as there are dedicated limits for covered project losses.

Contractors’ pollution liability is often coupled with an errors and omissions coverage part. As is the case with all E&O insurance, this coverage part is written on a claims-made basis and is structured to cover a consultant’s failure to discover contamination during a Phase I or Phase II audit. The policy also responds to negligent design of a remediation system. This coverage part plays a limited role in construction activities.

The following is a checklist for pollution coverage:

- Admitted vs. non-admitted carrier\(^ {120}\)
- Insured’s consent required for emergency response expense?
- Are off-site conditions covered?
- Are legal defense costs available?
- Coverage for mold?
- Coverage for punitive damages resulting from pollution liability?

\(^{119}\)For a discussion of the advantages and disadvantages between these forms, see Bruner & O’Connor on Construction Law §§ 11:281 to 11:285.

\(^{120}\)Many states require insureds to secure coverage from admitted insurance companies, unless coverage is not available from the admitted insurance market. Selecting coverage from an admitted insurer provides the policyholder protections not afforded from the surplus lines market, such as access to State Guaranty Funds in the event of carrier insolvency, and does not require the policyholder to pay surplus lines taxes and fees.
• Coverage for transportation pollution liability and non-owned site disposal?
• Coverage for pollution incidents created by loading or unloading vehicles?
• Coverage for generation, transportation, storage or disposal of pollutants?
• Coverage for government-mandated clean-up operations?
• Rectification coverage?
• Agency and at-risk construction management covered?
• Coverage with joint ventures with design firms?
• Definition of “bodily injury” expanded to address environmental exposures?
• Definition of “property damage” expanded to include diminution in value of real property?
• Coverage for environmental indemnity?
• Exclusion for insured’s owned, leased, or operated property?
• Is the insurance primary or excess to other potentially available coverage (e.g., CGL insurance)?
• Is notice of a claim “as soon as practicable” or “immediate”?
• Severability or separation of insureds provision where more than one insured afforded coverage?
• Natural resource damages covered?

XVI. Carrier Financial Thresholds

The AIA provision does not place any restrictions on the insurers that may provide property insurance except they must be “lawfully authorized to do business in the jurisdiction in which the project is located.” The AIA is agnostic when it comes to insurer financial integrity. The contractor’s liability insurance may also be secured from any company or companies “lawfully authorized to do business in the jurisdiction in which the project is located.” It is not uncommon for parties to specify minimum financial thresholds for carriers. Perhaps the most common method for accomplishing this is to specify a specific financial-strength rating published by A.M. Best. Best’s Financial Strength Ratings (FSR) represent the company’s assessment of an insurer’s ability to meet its obligations to policyholders. The FSR rating scale includes six “secure” ratings:

• A++, A+ (Superior)
• A, A- (Excellent)

121 AIA Document A201-2007, § 11.3.1.
XVII. Evidence Of Coverage

Many insurance provisions require the contractor to provide evidence that it has secured the required coverages. This is done most frequently by requiring the submission of a “Certificate of Insurance.” An ACORD certificate is the form of choice. The AIA General Conditions Document states:

Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days’ prior written notice has been given to the Owner. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment as required by Section 9.10.2 and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section 11.1.2. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness.\(^{123}\)

Given that these certificates are actually poor vehicles for evidencing the existence of coverage, it is remarkable that parties place as much reliance on them as they do.\(^{124}\) Given the limited evidentiary value of certificates of insurance, owners are

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\(^{123}\) AIA Document A201-2007, § 11.1.3.

\(^{124}\) The forms generally are filled out by an insurance broker, who may or may not have authority to bind the insurer. The form, and in particular the ACORD form, expressly disavows any ability to bind the insurers identified on the face of the certificate. For example, ACORD Form 25 (2001/08) states:

**THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFER NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.**

As for the description of the afforded coverages, the form states:

**THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.**

Thus, the certificate is a representation by the party responsible for its completion, that the coverages described (in general terms only) in the certificate have been issued. As one New York court put it:
with increasing frequency giving themselves the option to request the production of the policies themselves in addition to a certificate. The standard forms have yet to follow suit.\textsuperscript{125}

Another common feature of the standard contract forms is the requirement that the owner be afforded thirty days’ notice before any coverage cancellation or non-renewal occurs. The standard forms diverge a bit on who is responsible for providing this notice. The DBIA Insurance Exhibit places the obligation on the design/builder:

\begin{quote}
Design-Builder shall provide owner with prior written notice of any cancellation or non-renewal of the design consultant’s practice policy and shall include in the design consultant agreement a provision requiring the design consultant to give the Design-Builder thirty (30) Days written notice of any cancellation or non-renewal.\textsuperscript{126}
\end{quote}

By contrast, the ConsensusDocs and AIA contract forms require the policies contain a provision mandating the 30-day notice.\textsuperscript{127}

This obligation is more likely honored in the breach than

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\item \textsuperscript{125}See AIA Document A201-2007, \textsuperscript{11.1.3}; ConsensusDocs No. 415, Standard Design-Build Agreement and General Conditions Between Owner and Design/Builder, \textsuperscript{10.2.4} (Nov. 2009) (“Prior to commencement of the Work, Design/Builder shall furnish the Owner with certificates evidencing the required coverage.”); DBIA Document No. E-Ins-I, \textsuperscript{3.1.1} (2d ed. 2010) (“Design/Builder shall furnish to owner a copy of all Certificates of Insurance showing the Owner as additional insured as set forth above.”).
\item \textsuperscript{126}DBIA Document No. E-Ins-I, Insurance Exhibit: Design-Builder’s Insurance Requirements, \textsuperscript{1.1.2(A)} (2010).
\item \textsuperscript{127}See AIA Document A201-2007, \textsuperscript{11.1.3} (“The certificates and the insurance policies required by this section 11.1 shall contain a provision that coverages afforded under the policies will not be cancelled or allowed to expire until at least thirty days’ prior written notice has been given to the Owner.”); ConsensusDocs No. 415, Standard Design-Build Agreement and General Conditions Between Owner and Design-Builder, \textsuperscript{10.2.4} (Nov. 2009) (“The policies of insurance required under Subparagraph 10.2.1 shall contain a provision that the coverage afforded under the policies shall not be cancelled or allowed to expire until at least thirty (30) days prior written notice has been given to the Owner.”). It is a big vague as to whether these provisions require the insurer to provide the notice or if notice is to be provided by the insured. Given the interests the insurer has in cancelling coverage, particularly if the insured has failed to pay the requisite premium, it is unlikely that the provision would leave
\end{itemize}
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otherwise as insurers are loathe to take on the administrative burden of providing notice of cancellation or non-renewal to anyone other than the named insured.\textsuperscript{128} 

\textsuperscript{128} It to the insured to trigger the notification condition upon which cancellation depends.

\textsuperscript{128} After 2009, the ACORD form changed its language with respect to notice of cancellation. The old text stated that the insurer will “endeavor” to mail written notice to the certificate holder named on the form. The new text states: “Should any of the above-described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.” This change is in keeping with the overall philosophy that the ACORD form does not change or alter the obligations of the parties to the insurance contract.