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Construction & Insurance Conference

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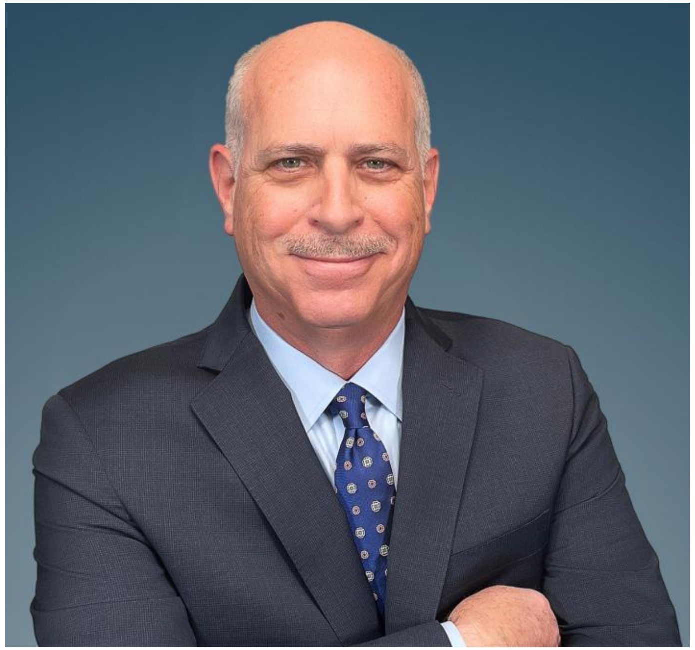

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CONFERENCE AGENDA

- 2:00 – 2:10 p.m. / Welcome and Remarks
- **2:10 – 3:00 p.m. / Getting it Write: Contracting and Risk Transfer before Construction, by Jason Kosek and Joshua Zelen**
- **3:00 p.m. – 3:30 p.m. / Subcontractor Default Insurance: A Primer on Claims and Coverage, by Richard Brown, John Dorsey, Esq. and Tim Rice**
- 3:30 – 3:40 p.m. / break
- **3:40 p.m. – 4:30 p.m. / Maximizing Builder's Risk Recoveries for Covered Losses During Construction, by Dennis Artese, Jeryn Koritzinsky and Christopher Brophy**
- 4:30 – 4:40 p.m. / break
- **4:40 p.m. – 5:30 p.m. / Getting Insurance Coverage for Defects and Other Claims after Construction, by Ethan Middlebrooks and James Goodridge**
- 5:30 – 6:30 p.m. / Cocktail Reception

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AK Construction and Insurance Conference

Getting it Write: Contracting and Risk Transfer Before Construction

Jason Kosek
Joshua Zelen

January 28, 2026 / 2:10 – 3:00 p.m.

Jason Kosek

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Jason Kosek is a shareholder in Anderson Kill's New York office. He assists clients in a broad array of issues, including insurance coverage, regulatory, FCPA, labor law, negligence, nuisance, trespass, products liability and breach of contract, with a focus on construction and regulatory matters.

In construction matters, Jason has represented owners, general contractors, subcontractors, suppliers and materialmen in all phases of business and construction matters, including liens, contract negotiation and disputes, construction defect litigation and transactional matters. He has experience in complex litigation matters, including defects, delays and design professional malpractice. Jason serves as an outside general counsel to a variety of companies in the construction industry.

His insurance coverage experience includes disputes over construction claims relating to additional insured status, Directors and Officers claims, and business interruption claims. Jason's recent articles address Mechanic's Liens and an analysis of the insurance coverage implications stemming from the Surfside Condominium collapse.

In regulatory matters, Jason has represented clients served with SEC subpoenas and has extensive experience working with the Department of Justice in federal FCPA cases, as well as with federal and state regulators in antitrust cases.

Jason's insurance recovery experience includes drafting complaints seeking declaratory relief for policyholders; drafting and arguing discovery and summary judgment motions; drafting appellate briefs; and managing all aspects of litigation, including discovery and depositions.

While in law school, Jason was a Volunteer Student Intern with the United States Attorney's Office, Southern District of New York where he wrote appellate briefs for the Second Circuit as well as conducted research on plea agreements and mutual mistakes. He was Associate Editor of the Fordham Journal of Corporate & Financial Law (Volume XX), as well the recipient of the Archibald R. Murray Public Service Award.

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Joshua A. Zelen

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Joshua A. Zelen is an attorney in Anderson Kill's New York office. He focuses his practice in commercial litigation with an emphasis on insurance recovery, exclusively on behalf of policyholders.

Joshua represents corporate policyholders in a wide range of coverage matters, and has experience with first-party property loss, cyber insurance, employment practices liability insurance, directors & officers liability insurance, and other claims-made professional liability insurance. Josh has helped secure millions of dollars in recoveries for corporate clients in both litigation and pre-litigation matters.

While attending Fordham University School of Law, Joshua worked as a summer associate at Anderson Kill. During his time at Fordham, he was an Associate Editor of Fordham Journal of Corporate & Financial Law. Joshua authored a note which was published in Volume XXVII of the Journal. He was also a member of the Dispute Resolution Society, ABA Domestic Arbitration Competition Team, where he won first place at the ABA Law Student Division National Arbitration Competition.

Joshua previously interned at the United States Bankruptcy Court for the Eastern District of New for Justice Louis A. Scarcella and in the New York Supreme Court, Suffolk County for Justices Cheryl A. Joseph and Randall C. Hinrichs.

AVOID Act

- **On December 19, 2025, Governor Kathy Hochul signed the Avoiding Vexatious Overuse of Impleading to Delay (AVOID) Act into law, which will have a significant impact on third-party practice and risk transfer assessment in New York state. This law amends CPLR Section 1007 to impose strict time limits on the commencement of third-party complaints and is set to take effect on April 18, 2026 (120 days after enactment).**

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AVOID Act Changes

- **WHAT CHANGED**
- **Before the AVOID Act**
  - Defendants could add third parties anytime before Note of Issue
  - Strategic delays through belated impleader
  - Wait-and-see approach to identifying liable parties
  - No urgency due to ripeness doctrine
- **Key Change:**
  - CPLR Section 1007 now establishes rigid deadlines for third-party actions
- **After the AVOID Act**
  - 60-day deadline for contractual claims
  - 60 days from discovery for non-contractual claims
  - Cascading timelines for successive impleader
  - Limited extensions (max 30 days)
- **Impact:**
  - Forces immediate identification and comprehensive indemnification analysis

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Cascading Timeline Framework

- **60 DAYS – First-Tier Third-Party Claims**
  - Contract-based: 60 days from defendant's answer
  - Non-contractual: 60 days from discovery of liability
- **45 DAYS – Second-Tier Impleader**
  - 45 days from service of first third-party answer
- **30 DAYS – Third-Tier Impleader**
  - 30 days from service of second third-party answer
- **20 DAYS – Subsequent Impleader**
  - 20 days for any additional tiers

Each deadline runs from service of the immediately preceding third-party answer

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The Ripeness Doctrine Problem

- **The Fundamental Conflict:**
  - The Act forces defendants to bring unripe claims within 60 days or forfeit impleader rights
- **Established Precedent**
  - No rigid deadlines, courts focused on fairness and prejudice
- **Strategic Reality:** Owners and GCs must commence third-party actions knowing claims aren't yet ripe

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Strict Limits & Exceptions

- **Extension Limitations**
  - Courts may grant extensions up to 30 days maximum
  - No filings more than 12 months after answer without court approval AND plaintiff consent
  - No third-party practice after Note of Issue filed
  - Post-Note of Issue filings face mandatory severance or dismissal
- **Exceptions: Grave Injury & Unknown Employers**
  - Third-party actions against plaintiff's employer permitted beyond deadlines when:
  - Seeking contribution/indemnification for grave injury (WCL §11), OR
  - Employer's identity was unknown until after deadlines expired
- **Timeline:** File within 120 days | Requires plaintiff and court consent

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Tips and Pointers

- Request complete project directory at kickoff of project.
- Require updates to project directory within 48 hours of new company being added.
- You must be able to identify all potentially liable parties, or you may lose the opportunity
- Require that Owner's maintain their own insurance

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Scope of Work Conflicts

- Ambiguous work descriptions in contracts
- Contradictory or inconsistent plans and specifications
- Misinterpretation of contract requirements
- Differing expectations about work to be performed

How a Judge looks at SOW disputes

- **Primary Analysis: Contract Language**
  - Courts begin with the plain language of the agreement
  - Clear, unambiguous terms control the outcome
- **Secondary Considerations Applied When:**
  - Contract is silent on the disputed issue
  - Relevant provisions are ambiguous or unclear
- **Extrinsic Evidence Courts May Consider:**
  - Parties' course of dealing and business history
  - Industry custom and standard practices
  - Context surrounding contract formation
  - **CONTRACT LANGUAGE MATTERS MOST.**

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What is a Scope of Work

- The SOW is the project's blueprint, it defines scope, expectations, and responsibilities.
- Poor SOWs lead to disputes, delays, and cost overruns, great SOWs ensure success
- If a subcontractor signs a contract that says their scope is everything per plans and specs that falls under this trade, then there cannot be an argument about the inclusions and exclusion from their quote once the project starts. As mentioned before the contract language controls.

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AIA Contract

- The AIA broadly defines “Work” to mean “the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations.”
- AIA contracts seek to protect the architect and owner, know that going into negotiation.
- ConsensusDocs was created and developed in 2007 under the leadership of 20 organizations in the architecture, engineering, and construction (A/E/C) industry through a coalition effort with one goal: to transform construction by developing contracts and documents that protect the best interests of the project.

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Work Under Protest

- **AIA A201 Requirements:**
  - Contractor must proceed with work despite disputes (§ 15.1.3)
  - Cannot stop work due to disagreement over scope or payment
  - Owner maintains right to direct continued performance
  - Preserves claims through written notice and documentation

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SOW Issues

- Follow the contract’s provisions for filing claims, document all work performed under protest
- Be ready to establish why the work is not included in your scope of work
- Statute of limitations, when does it begin to run, if your work is tied to substantial completion, then the SOL period will remain open longer than anticipated.

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Components of a Clear and Comprehensive Statement of Work (SOW)

- A statement of work includes all elements necessary for successful project completion, including the scope of the work to be done and what is not included; the timeline of when the work is to be completed; and any applicable legal or regulatory requirements.
- Additionally, an SOW should include details regarding deliverables required from the contractor, payment terms between both parties, and quality standards. Here’s a full list:
- Governance
- Scope of Work

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Components of a Clear and Comprehensive Statement of Work (cont.)

- Deliverables
- Timelines
- Cost of Project(s)
- Additional Project Requirements
- Overview of Project
- The Scope of Work defines exactly what needs to be accomplished for the project to be considered complete. This includes services or tasks that must be completed, as well as those which are outside of the scope and will not be fulfilled by either party. The timeline sets deadlines for each task or milestone and outlines when payment will be made for those milestones. It is important that this timeline is clear and realistic so that all involved understand expectations around completion dates.

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Practice Pointers To Draft Better Scope of Work Clauses

- **PRACTICE POINTERS TO DRAFT BETTER SOW CLAUSES –**
- **Subcontractors should exclude vague terms from SOW provisions, such as: - "All related materials" - "All related items" - "As typical of those in the trade" - "All work shown in the plans and specifications" - "All work required by the general contract"**

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Practice Pointers To Draft Better SOW Clauses (cont.)

- Including all work usually performed by the trade
- As are usually performed or furnished in connection with such work
- The subcontractor is required to furnish and perform whatever is necessary to make a functioning system, regarding of whether provided for in the contract
- Detailed tasks, deliverables, and boundaries (what’s included/excluded).
- Example: “Includes foundation, framing, and HVAC; excludes landscaping.”
- Start/end dates, key deadlines (e.g., “Phase 1 complete by 6/1/26”).

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Practice Pointers To Draft Better SOW Clauses (cont.)

- Who does what (e.g., “GC oversees subs; Owner provides permits”).
- Example: “Subcontractor to supply all materials per specs.”
- Payment Terms Schedule, amounts, conditions (e.g., “10% upon mobilization, 90% post-inspection”).
- What specs?
- What amounts? Reference other agreements if possible
- Change Order Process
- How to handle scope changes (e.g., “Written approval required within 48 hours”).

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Force Majeure AIA Language

- **§ 8.3.1**
  - If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

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How Court's Interpret Force Majeure Clauses

- In New York, Force Majeure is interpreted narrowly. *Kel Kim Corp. v. Cent. Mkts.*, Inc., 70 N.Y.2d 900, 902 (1987) (holding that force majeure defense is narrow and excuses nonperformance "only if the force majeure clause specifically includes the event that actually prevents a party's performance").

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Force Majeure (cont.)

- **Events not specifically listed in a force majeure clause may still trigger the clause See, e.g., Constellation Energy Servs. (1st Dep't. 2017).**
- **If the clause provides a specific list of events and includes a broad catch-all, the clause applies only to events of the same general kind or class as those specifically listed. See, e.g., *Team Mktg. USA Corp. v. Power Pact, LLC* (3d Dept. 2007), (the phrase "for any reason" did not encompass events outside the general kind or class of those specifically listed, such as "strikes, boycotts, war, Acts of God, labor troubles, riots, and restraints of public authority.")**

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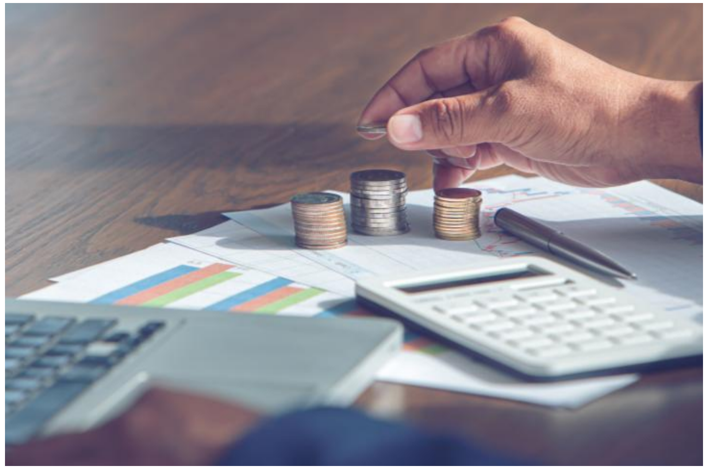
Supply Chain Delays

- **Current Issues:**
  - **Delays:** Construction projects are experiencing setbacks due to supply chain disruptions, which make it challenging to secure the necessary materials and equipment.
  - **Project Cancellations:** In some cases, supply chain issues have escalated to the point where projects are canceled because construction companies cannot obtain the resources needed to proceed.



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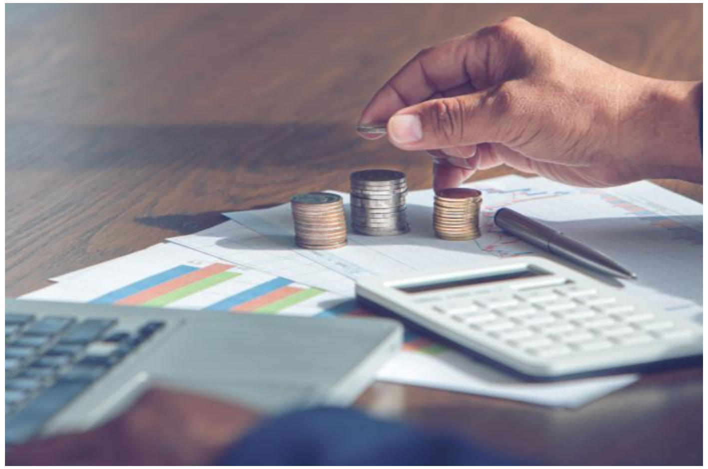
Supply Chain Delays (cont.)

- **Current Issues:**
  - **Shift to Local Suppliers:** To mitigate reliance on global supply chains, construction companies are turning to local suppliers. However, this approach has limitations, as local sources may not always be equipped to meet the demand or provide the required materials.
  - **Natural disasters**, labor strikes, or political instability can also impact the availability of raw materials, leading to supply chain bottlenecks.



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Avoiding Ordering From Countries Where Tariffs Are Found

- For example, the importer of steel may choose to cancel the order with a company in a country subject to the tariff and switch to another company in a country where the tariffs do not apply.
- Owner must sign documents supporting this decision, waiving liability for delays.

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How to Mitigate Supply Chain Delays?

- **Mitigating Supply Chain Delays**
  - To minimize the impact of supply chain delays, construction projects can implement various strategies, such as:
  - Building buffer time into schedules to account for potential delays.
  - Sourcing materials from multiple suppliers to reduce dependence on a single vendor.
  - Improving communication with suppliers for better visibility into lead times and potential issues.

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Worker Shortages

- **National Association of Home Builders (NAHB)**
  - Estimates that the industry will need to hire 2.17 million new workers from 2024 to 2026, or about 60,000 new hires per month in 2024.
- **Associated Builders and Contractors (ABC)**
  - Estimates that the industry will need to hire 501,000 new workers in 2024 to meet demand.

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Ways to Avoid Potential Worker Shortages

- **Apprenticeship Programs;**
- **Outreach to Schools and Vocational Program;**
- **Improve Working Conditions and Employee Benefits;**
- **Maintain a Pool of On-Call Workers;**
- **Recruit from broader populations**
  - women, veterans, legal immigrants.

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Partial Payment Language

- Partial payments must include this language:
- **The Contractor shall obtain a partial lien waiver from every Subcontractor it makes payment to.**

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Mechanic’s Lien

- A mechanic’s lien is a legal tool (technically, a security interest in real property) that contractors and subcontractors can use to try to obtain payment for labor or materials that improve real property. Filing a mechanic’s lien may give the contractor or subcontractor important leverage because it makes a subsequent sale of the property subject to the lien, requiring payment before clean title can transfer.

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Who Can File

- In New York, a mechanic's lien may be filed by a "contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman [...] who performs labor or furnishes materials for the improvement of real property." New York Lien Law § 3. New York courts have expanded this list to include others who provide services for improving real property, such as an architect, engineer, or surveyor.

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Filing Deadlines

- **In New York, for private property, the mechanic's lien must be filed within eight months after the Lienor's work is completed. N.Y. Lien Law § 10. If the work was performed on a single-family dwelling, the mechanic's lien must be filed within four months of the last day work was performed. N.Y. Lien Law § 10. For a public project, the Mechanic's lien must be filed no later than 30 days after the entire public improvement is completed and accepted by the owner. N.Y. Lien Law § 12. Failing to timely file a lien will result in a loss of lien rights.**
- **In New York, generally, a lienor must commence foreclosure on their mechanic's lien within 365 days of filing the mechanic's lien by starting a lawsuit to force the sale of the property.**

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Willful Exaggeration

- Section 39-a of the Lien Law sets forth the penalty for willfully exaggerating a lien:
- The Court may declare the lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner and/or contractor.
- The damages include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon.

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If A Lien Is Willfully Exaggerated

- The lien will be deemed invalid only upon proof of willful exaggeration
- Willful exaggeration requires deliberate intent to overstate the lien amount
- A merely incorrect lien amount ≠ prima facie evidence of willful exaggeration
- **Intent must be proven**

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Slander of Title - Mechanic's Lien

- **Elements Required:**
  - False statement affecting title to real property
  - Publication (filing of lien)
  - Malice
  - Special damages (actual pecuniary loss)

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Slander of Title: High Bar to Clear

- **What Must Be Proven:** ✗ False lien filed with malice (knowledge of falsity) ✗ Actual financial damages (not speculative) ✗ Direct causation between lien and loss
- **What's NOT Enough:** ✓ Disputed lien amount ✓ Good faith disagreement over scope ✓ Mere inconvenience or cloud on title
- **Bottom Line:** Honest dispute ≠ slander of title

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Why Transfer Risk?

- He who has control over the risk should bear the risk
- Cost
- Unknown conditions
- Probability v. Cost
- Other considerations

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Contractual Risk Transfer

- What are your goals when you negotiate and sign a contract?
- Where does risk fit into the puzzle?
- Important rule to keep in mind: a party seeking contractual indemnification must prove itself free from negligence. To the extent its negligence contributed to an accident, it cannot obtain indemnification. *Ortiz v. Nat'l Grid Servs. Inc.*, 77 Misc. 3d 840 (2022); *Vega v. FNUB, Inc.*, 217 A.D.3d 1475 (2023).

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Contract Provisions Relating to Risk Transfer

- Indemnity
- Limitation of liability
- Waiver of subrogation
- Insurance requirements
- Additional Insured Requirements

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Indemnity Agreement

- **What does it do**
  - Shift costs or defense and obligations to pay to the indemnitor (the party indemnifying)
- **Sample language**
  - Service Provider shall defend, indemnify and hold harmless Client … from and against any and all claims, demands, suits, judgments, losses, liabilities, damages, costs or expenses of any nature whatsoever… caused solely by…

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Contract Provisions Relating to Risk Transfer – What To Look For

- **Indemnity agreements**
  - Whether it is enforceable
  - Types
  - Maximizing enforceability of an indemnity agreement.

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Indemnity Agreement – Practical Considerations

- **Scope of the indemnity**
  - Definition
- **State Laws**
  - Anti-Indemnity Statutes
  - Choice of law

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The Problem

A construction agreement containing an indemnification clause requiring the promisor (subcontractor) to indemnify the promisee (general contractor) in relation to liability arising out of injuries caused by the negligence of the promisee is against public policy and unenforceable. **Potter v. Bongiovanni, Inc.**, 707 N.Y.S.2d 689, 690 (3d Dept. 2000).

Such an indemnity clause, however, is enforceable where the owner or general contractor is found to have been free from negligence, and liability is merely imputed or vicarious. **Id.**; see also **Brown v. Two Exchange Plaza Partners**, 556 N.Y.S.2d 991, 994 (1990).

What New York Prohibits

NY General Obligations Law § 5-322.1 provides:

"A covenant, promise, agreement or understanding in, or in connection with . . . a contract or agreement relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable."

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The Buck Stops Here

A construction agreement containing an indemnification clause requiring the promisor (subcontractor) to indemnify the promisee (general contractor) in relation to liability arising out of injuries caused by the negligence of the promisee is against public policy and unenforceable. **Potter v. Bongiovanni, Inc.**, 707 N.Y.S.2d 689, 690 (3d Dept. 2000).

Such an indemnity clause, however, is enforceable where the owner or general contractor is found to have been free from negligence, and liability is merely imputed or vicarious. **Id.**; see also **Brown v. Two Exchange Plaza Partners**, 556 N.Y.S.2d 991, 994 (1990).

Partial Indemnification

But, the Court of Appeals held in **Brooks v. Judlau Contracting Inc.**, 11 N.Y.3d 204 (2008) that a contractual duty to indemnify "to the fullest extent permitted by law" limits rather than expands a promisor's indemnification obligation.

Thus, the "to the fullest extent permitted by law" language will permit a general contractor, even one that is partially negligent, to pursue contractual indemnification and recover for damages caused by a subcontractor's negligence.

Types of Indemnity Agreements Broad Form

- **Indemnitor indemnifies indemnitee for**
  a) indemnitor's sole negligence;
  b) indemnitee's sole negligence; and
  c) joint negligence of indemnitor & indemnitee
- **Irrelevant which party is at fault.**
- **Goal:** Wholesale transfer of risk to indemnitor.
- **Reality:** May be difficult to enforce

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Types of Indemnity Agreements *Intermediate*

- Indemnitor assumes all risk of loss with some exceptions
- Indemnitor indemnifies for its sole negligence and joint negligence
- Conflict arises where dispute as to whether indemnitee is solely negligent
- May have to litigate fault

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Intermediate Indemnity Agreements

- Sole negligence of the indemnitee is not included (only applies if indemnitee is 100% negligent)
- If indemnitor is even 5% negligent, owes indemnity
- Standard Form AIA

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Simplified Version

- **“and not caused solely by indemnitee’s negligence without any contributory negligence or fault of the indemnitee, its employees or agents”**

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Limited Form Indemnity Agreement

- **Comparative fault**
- **Limited by % responsibility**
- **Lingo: “but only to the extent caused by negligent acts of the indemnitor” (and other similar limiting language)**

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Is The Indemnity Agreement Enforceable?

- **Choice of law / anti-indemnification statutes**
- **Intentional acts**
- **Carefully draft provision and contract**
- **What about settlement & defense?**

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Issues

- Only as good as the financial condition of the party who agrees to indemnify
- Indemnity agreement does not give you direct rights under an insurance policy
- Is the indemnity obligation limited to "available insurance"?
- What about obligation to defend – who selects counsel
- What is the financial condition of the indemnitor?
- Choice of law – enforceability varies by state

Questions & Answers

THANK YOU

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AK Construction & Insurance Conference

Subcontractor Default Insurance: A Primer on Claims and Coverage

Richard W. Brown
John Dorsey
Tim Rice

January 28, 2026 / 3:00 p.m. – 3:30 p.m.

DISCLAIMER

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

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Richard W. Brown focuses his litigation practice exclusively on insurance coverage disputes on behalf of policyholders. He has recovered millions of dollars for clients under a wide range of insurance policies, including commercial property, builders risk, directors and officers, marine, and cyber risk coverage.

Richard has litigated issues of first impression in multiple jurisdictions, including a New York Court of Appeals decision addressing the scope of additional insured coverage and a federal case involving recovery of defense costs in declaratory judgment actions.

He represents policyholders nationwide across the construction, power and energy, and real estate industries, advising clients ranging from regional contractors and investment firms to multinational renewable energy companies. In addition to active litigation, Richard counsels insurance brokers and corporate clients on risk management programs, insurance procurement, and contract and indemnity provisions.

Richard holds a Juris Doctor and Master of Business Administration from Quinnipiac University and previously worked at PricewaterhouseCoopers and as corporate counsel for the international franchisor of SUBWAY Restaurants. He is a 2022 Connecticut Legal Awards Unsung Hero honoree.

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John comes to Graham, a Marsh agency, to advise clients after nearly 20 years of practicing law with a focus on construction, real estate and other commercial matters. His career includes time working as in-house counsel at several ENR 400 contractors, where he managed contract disputes, litigation, contract negotiations, subcontractor procurement and risk management.

His professional background includes a decade in private practice managing matters throughout the United States. Early in his law career, he also served as an Assistant Attorney General with the Massachusetts Attorney General's Office, where he litigated construction and other cases. His legal experience also includes serving as an adjunct faculty member at the Drexel University Construction Management Program and the Temple University SBD Center's Construction Program. He is active in several construction industry trade groups.

Prior to working as an attorney, he served as the Deputy Communications Director for Boston Mayor Tom Menino, and as an Assistant Commissioner for the Boston Inspectional Services Department, the agency charged with regulating construction, zoning and other industries in Boston.

John earned a Bachelor of Science from Boston University and was captain of the varsity rowing team. He earned his Juris Doctor degree at Suffolk University Law School.

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Tim Rice joined the Graham Company in 2021 where he concentrates on new business development within Construction and Healthcare industries. He is responsible for the design of comprehensive insurance programs and risk management strategies for large & complex clients. He is an active member of the General Contractors Association GCA of NY, Construction Industry Council and Building Contractors Association of Westchester & Hudson Valley.

Prior to joining the Graham Company, Rice worked for Stryker and Ethicon in the Medical Device Industry for 15 years holding positions in Sales and Sales Leadership. Rice received his Bachelor of Arts Degree from the University of Richmond where he played baseball as a varsity athlete for 4 years. He was drafted by the Pittsburgh Pirates in 2004 and signed as a free agent with the Kansas City Royals in 2005. Tim remains active in the University of Richmond athletic community where he helps fundraising and networking events.

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TODAY'S AGENDA

- **Overview of Subcontractor Default Insurance**
  - ***The Who, What, When and Why of SDI Coverage***
- **SDI Coverage Pitfalls & Opportunities for Enhancement**
- **Market Trends & Alternatives for Managing Subcontractor Default Risk**

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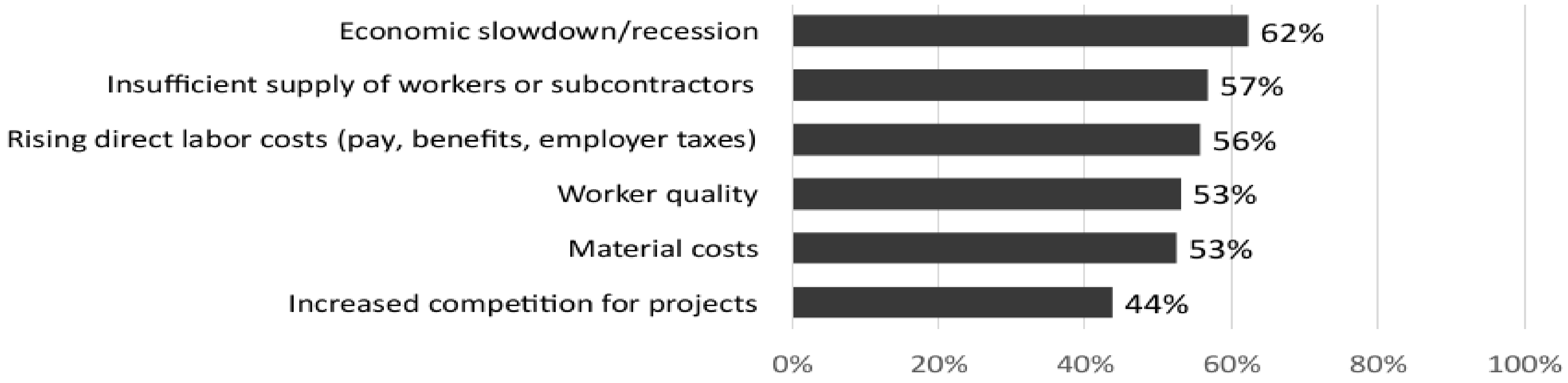
The Why…

Anticipated default risk 5x through 2030

Firms' major concerns for 2026

% of respondents who listed as a major concern:



16 | Source: AGC 2026 Outlook Survey; 951 total respondents

The Who…
Contractors increasingly rely upon SDI

Coverage – SDI is broader than Surety bonds:
- Indirect/Consequential Damages, attorneys fees and costs
- 2 to 10-year tail on coverage
- Full limits apply to any one loss

Control – SDI affords the GC greater control over the project:
- Control over the default process = ability to keep job on schedule
- Selection of enrolled or prequalified subcontractors
- Ability to enroll subs who may have exhausted bond line

Capital – SDI can be advantageous for a GC's finances:
- SDI saves .6% average vs traditional Surety bonding
- Ability to utilize SDI as a profit-center in addition to fee
- SDI can help save bond capacity

Owners see advantages in Contractors' use of SDI

- **Time Element:** SDI supports maintenance of construction schedule by providing timely financial resources to contractor
- **Mitigation of reputational risk and risk profile exposure**
- **Mitigate known project risk.** Subcontractor default is a present risk on every project - especially in an expansionary period. The product can also help Improve competition amongst subs
- **Expanded coverage:** completed operations to cover defects, coverage of direct and indirect damages

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SDI Coverage vs. Performance Bonds

- **1st Party Coverage** = Policy issued to General Contractor, not the Sub
- ***Control, Control, Control***

  ***GC Controls Enrollment* -** GC determines qualification of subs (Bonds require subcontractor prequalification by underwriter)
  ***GC Controls Claims* -** GC defaults sub, GC submits "satisfactory" proof of loss and support and is reimbursed for loss (Bonding company controls the process and can elect remedy).
- ***Efficiency***
- ***Deductibles/SIRs***

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SDI Program Structure

- **Carrier** and **Insured** share co-pay layer
- **Insured** must exhaust retention in addition to paying premium
- **Carrier** reimburses remainder of loss up to limit
- **Standard deductibles used with SDI have created significant use of captive structures to manage SDI deductibles**

Example:

- Loss of $5,000,000
- Retention: $1,000,000
- Co-Payment: 10% of $5,000,000
- GC pays $1,000,000 + $500,000 = $1,500,000
- Insurer pays $3,500,000
- Program Cost 1.5% of Projects Subcontractor Value
- Premium + % for Pre-funded Losses= Program Cost
- No losses= Profit

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What is SDI Coverage?

- Covers GCs for **"defaults of performance"** committed by **subcontractors or suppliers** (for covered subcontracts/PO agreements) at **scheduled projects.**
- Covers cost of rectifying subcontractor's failure to fulfill its obligations under contract, such as cost of hiring another subcontractor to complete the work **(Direct Costs),** and certain ancillary costs resulting from default, such as impacts on other trades, legal fees, etc. **(Indirect Costs).**
- Triggered by notice of **"Default of Performance"**

Subcontractor Default Insurance (SDI)
First party policy
Indemnifies contractor
for direct and indirect costs
related to a subcontractor default

Direct costs: Performance, payment, replacement, legal, delay damages

Indirect costs: Extended overhead, delay damages, productivity impact

Coverage Pitfalls…

Project Contingencies & Impact on Coverage

Where the construction contract between the Insured and the Owner of the Scheduled Project provides for project contingency funds and certain funds are allocated or otherwise designated for contingent use with regard to a certain trade(s) or subcontract(s), then such allocated or otherwise designated project contingency funds will be included in the calculation of Loss as outlined under Section G.4. above. The amount of such funds will be subtracted from the amount the Company otherwise would be obligated to pay hereunder relative to a Default of Performance and will reduce the amount of Loss indemnified under this Policy to the extent such allocated or otherwise designated project contingency funds are used in connection with a Default of Performance.

Standard in many SDI policies to exclude coverage for items that would be covered by funds available through the Contractor's contingency line item

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Subcontract Loss Multiplier/Cap

Subject to Section F.2. above, the most we will pay for any one Loss will be the lesser of: (1) the Single Loss Limit of Insurance stated in Item 3.(b) of the Declarations; or (2) the Variable Loss Limit Multiplier, stated in Item 3.(c) 1. of the Declarations, times the Subcontract Amount.

Beware of this not always obvious coverage limitation!

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Beware of "Other Insurance" Provisions

Overly broad "Other Insurance" provisions can frustrate key purpose of SDI Coverage, which is swift relief.

Ex. Coverage "null and void" if other ins. exists:

Other Insurance

*If other valid insurance exists to protect, insure, or indemnify the Insured from and against any loss, damage, cost, or expense that may constitute a Loss, then **this Policy shall be null and void and shall not provide any coverage for the specific risks or hazards that otherwise are covered by such other valid insurance**, unless and until the coverage provided by such other valid insurance is completely exhausted.*

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Insurer's Right of Recovery –
Clawback of Payments

- Improper Termination/Default or even Partial Default of Subcontractor = ***Trigger of Clawback***
- Insurer's pursuit of Subrogation Action = ***Conflict of Interest***
- Arbitration of Default – Arbitrator(s) often take "split-the-baby" approach. Results in partial default = ***Partial Clawback***

Avoid mandatory arbitration provisions within Subcontract!

Other SDI Coverage Issues

- **Project Type** – Power Plant/ Power & Energy Projects
- **Project Value** – Minimum and Maximum Requirements
  (Watch out for change order impacting subcontract amounts)
- **Project Duration Restrictions**
  (Watch out for delays/extensions)
- **Professional Liability Exclusions**
- **Bodily Injury Exclusions** – no coverage for losses "indirectly" caused by BI
- **Residential Exclusions** – Mixed Use project contractors should pay particular attention

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Opportunities for Enhancement of Coverage

At placement or renewal (to the extent market allows)

Seek to enhance SDI policy language, including:

- ✓ Removal of Contingency payments from calculation of Loss;
- ✓ Seek clarification as to what constitutes "satisfactory" proof of loss;
- ✓ Negotiate enhancements to subrogation and "other insurance" clauses;
- ✓ Avoid subcontract multiplier caps (or seek higher multiple of subcontract value)
- ✓ Seek to remove/modify binding arbitration provision
- ✓ Seek to remove/limit Bodily Injury exclusion to losses "directly" caused by BI

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Alternatives for Managing Default Risks…
PROJECT-SPECIFIC SDI: New Middle Market product

- **Written on project-specific basis for projects with at least $25M in subcontract value**
- **Utilizes smaller policy limits ($2.5M or 125% of subcontract amount)**
- **Up to $5M per loss / $10M aggregate (varies by project size)**
- **Subject to a maximum of 1.25x the subcontract amount**
- **Insured selects coverage level up front: 80%, 85%, or 90% of actual loss sustained**
- **1 year tail calculated on a per subcontract basis**
- **Uses a percentage of loss retention model: i.e.: no fixed deductibles or copay layer**

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Captive structures:
Enhancing profit opportunity for SDI

- $1M Deductible 'insured' through captive structure set up by contractor to pay out deductible amounts, if any.
- Rental or single-parent captives often used after set up by contractor
- Contractor's pre-funded reserves earn investment income and captive provides tax benefits.
- Loss Fund/Deductible is often pre-funded in rate amount charged for program.
- Provide opportunity to increase for the SDI program's profitability.

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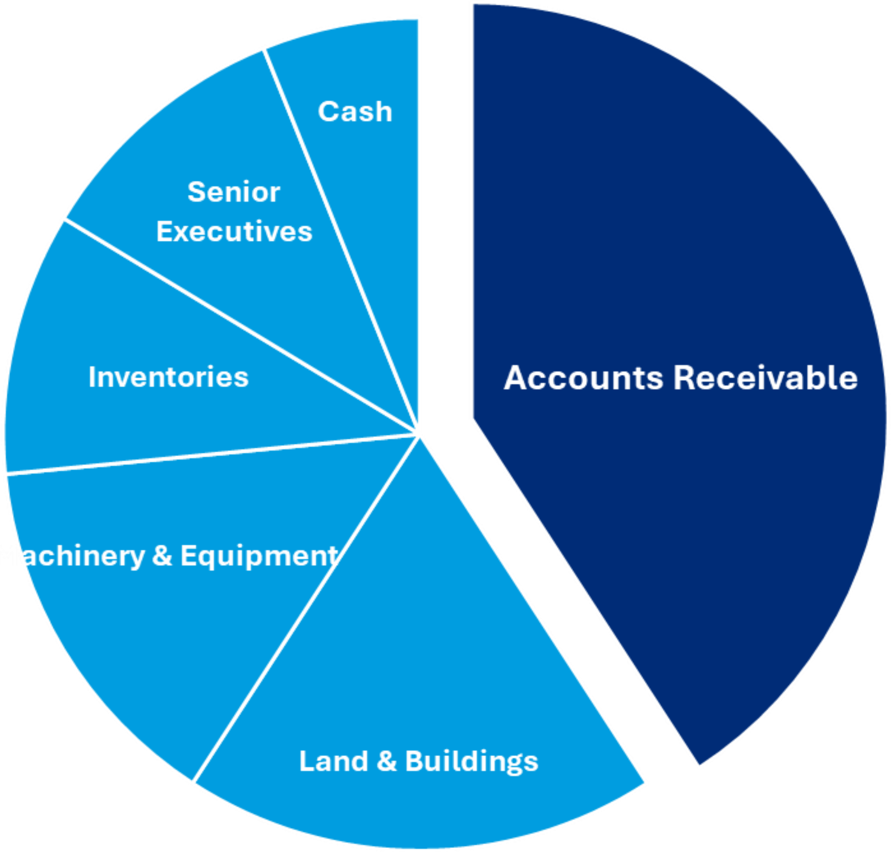
Upstream Risk Mitigation:
Trade Credit Insurance

- Trade Credit protects against **slow payment** and **non-payment** that are an inherent part of the construction industry
- Turns A/R into a secured asset adding available collateral resource
- The largest portion of a businesses' assets is their incoming cash from clients (their AR)
- TCI is data backed to support decisions in any economy

Insured vs. Uninsured Assets



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Questions & Answers

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10 MINUTE BREAK

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AK Construction and Insurance Conference

Maximizing Builder's Risk Recoveries for Covered Losses During Construction

Dennis J. Artese
Christopher Brophy
Jeryn Koritzinsky

January 28, 2026 / 3:40 - 4:30 p.m.

Dennis J. Artese

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Dennis Artese is an Equity Shareholder in the New York office of Anderson Kill. He is co-chair of the firm's Construction Industry practice group. He also co-chairs the firm's Climate Change and Disaster Recovery practice group.

Dennis's national practice concentrates on all types of insurance recovery litigation, with an emphasis on securing insurance coverage for property and business interruption losses stemming from natural disasters and other perils as well as for construction-related first-party property losses and third-party liability claims.

Dennis has substantial experience in all phases of litigation, arbitration and property insurance appraisals, and has recovered hundreds of millions of dollars of insurance proceeds on behalf of policyholders in connection with a variety of property, builder's risk, commercial general liability, umbrella and excess liability, D&O, E&O, EPLI, crime, and political risk insurance claims.

Dennis is the General and Climate Change Insurance Editor of the *Journal of Emerging Issues in Litigation*. He has been recognized by **Super Lawyers** for Insurance Coverage since 2012. He also has been recognized by **Legal500 US** for Insurance Advice to Policyholders and singled out as being a "superb lawyer and subject-matter expert."

Christopher Brophy

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Christopher Brophy is a managing director in BRG's Disputes and Investigations segment with over 30 years' experience assessing damages. He is a CPA and is based in New York.

He has extensive experience assessing damages for commercial and residential real restate projects, including those in construction. Some of his work is directly for policyholders who have an insurance claim resulting from insured losses, such as hurricanes, water damage, fires, floods, etc. His team focuses on the business interruption or lost profit component, but also assists with the details of a property damage claim. He also serves as a testifying expert for matters in litigation and arbitration.

For construction matters involving an assessment of the delay in completion, he often works with BRG's Construction Practice.

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Jeryn Koritzinsky

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Jeryn Koritzinsky is an Associate Director in BRG's construction practice, assisting clients with insurance claim preparation and growing a real estate advisory practice focused on ground-up construction and renovations. She manages project schedules for high end properties throughout the country.

With over 15 years in the industry, she worked for a large construction company before transitioning to a consulting and advisory role. She has advised on insurance claims related to floods, hurricanes, fires, and internal water damage. Her team works on assembling the property damage component of a BI claim as well as quantifying the delay components.

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Builder's Risk Agenda

I. What does Builder's Risk Insurance cover?

II. How do we measure the construction delay?

III. What are the common areas of dispute?

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Builder's Risk Coverage - Primer

- **Property Insurance for Construction Projects**
- **Typically purchased by Owner, but protects GC as well**
- **Key Coverages:**
  - All Risk Property Damage at replacement cost value, including reasonable OH&P
    - Typically includes materials and equipment on site intended to become a permanent part of the project
    - Expediting and Extra Expense
  - Time Element Coverages (Delay in Opening)
    - Soft Costs
      - Interest on construction loans, RE taxes, A&E fees, lease renegotiation costs, advertising expenses, insurance premiums
    - Delay in Opening - Rental Value / Business Income
      - Period of Delay – typically based on schedule slippage from projected completion date to actual completion date caused by covered event

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I. What does Builder’s Risk Insurance cover?

A. Hard Costs

B. Soft Costs

C. Delay in Opening

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I. What does Builder's Risk Insurance cover?

Hard Costs

Covered Property, as used in this Coverage Part, means the following types of property. This property may be your property or the property of others.

a. Property which will or has become a permanent part of the project described in the Declarations, while such property is at the job site described in the Declarations;

b. Temporary structures, meaning scaffolding, construction forms, falsework, cribbing and other temporary structures at the job site described in the Declarations, when a Value of Temporary Structures is shown in the Declarations.

I. What does Builder’s Risk Insurance cover?

Soft Costs

… means any of the following additional expenses that are over and above the expenses you would otherwise incur in the completion of the project:

1. Interest
2. Taxes
3. Advertising Expense
4. Renegotiation Expense
5. Architect Expense
6. Insurance Expense
7. Legal and Accounting Expense

I. What does Builder's Risk Insurance cover?

<u>Delay in Opening</u>

Lost Gross Earnings BUSINESS INCOME, CONTRACTUAL PENALTIES AND EXTRA EXPENSE

a. As used in this Coverage Part:

(1) Business Income means:

a. Net income (net profit or loss before income taxes) that would have been earned or incurred; and

b. Continuing normal operating expenses incurred, including extended general conditions. But Business Income does not include any incentive bonus which would have been received if the project had been completed ahead of schedule.

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I. What does Builder’s Risk Insurance cover? (cont.)

(2) Contractual Penalties means amounts which, under the terms of your written project contract with the project owner, you are required to pay to the project owner due to a delay in the completion of the project in accordance with the contract specifications for the project.

(3) Extra Expense means necessary and reasonable additional expenses you incur to avoid or minimize a delay in the completion of the project described in the Declarations. This includes additional expenses incurred to make temporary repairs to, and expedite the permanent repair or replacement of, Covered Property that is damaged by a Covered Cause of Loss, such as overtime and the additional cost of express or other means of rapid transportation.

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I. What does Builder's Risk Insurance cover?

Example of Policy Wording – Business Income

"We will pay the actual loss of 'Business Income' you incur or for which you are contractually obligated as the contractor during the 'period of delay in completion'. Loss of 'Business Income' must result from a Covered Cause of Loss at a covered 'project(s)', which delays the completion of the 'project(s)' beyond the 'planned completion date'.

Example of Policy Wording – Rental Value

"We will pay the reduction in 'Rental Value' you incur or for which you are contractually obligated as the contractor during the 'period of delay in completion'. Such reduction in 'Rental Value' must result from a Covered Cause of Loss at a covered 'project(s)', which delays the completion of the 'project(s)' beyond the 'planned completion date'.

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II. How do we measure the construction delay?

- When was project expected to be complete before the incident?
- When was the project completed?
- Were there any other reasons that the project would have been delayed?
  - Often a significant area of dispute.
- Often requires Construction Experts to assess the delay through detailed critical path analysis.

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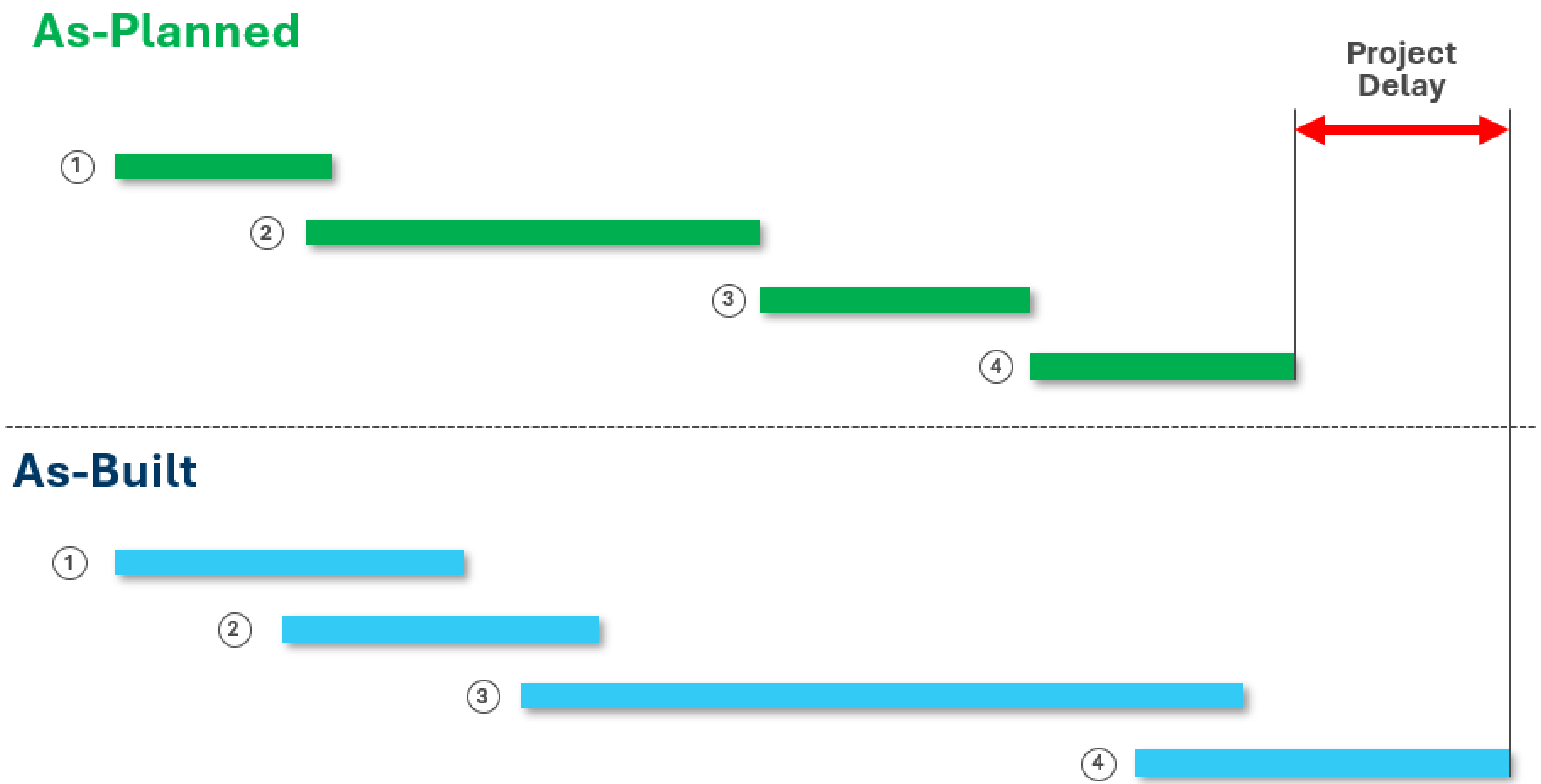
II. How do we measure the construction delay?
Common Schedule Analysis Methodologies

- **As Built Analysis**
- **Impacted As Planned**
- **Collapsed As Built**
- **Time Impact Analysis**
- **Windows Analysis**

- **Dependent on Documentation Available:**
  - Was the CPM Schedule Maintained?
  - Are there monthly updates?
  - Do the updates accurately reflect what occurred on the project?
  - Is an As-Built Record Available?
  - May be specified by contract

II. How do we measure the construction delay?

As-Planned v. As-Built Analysis



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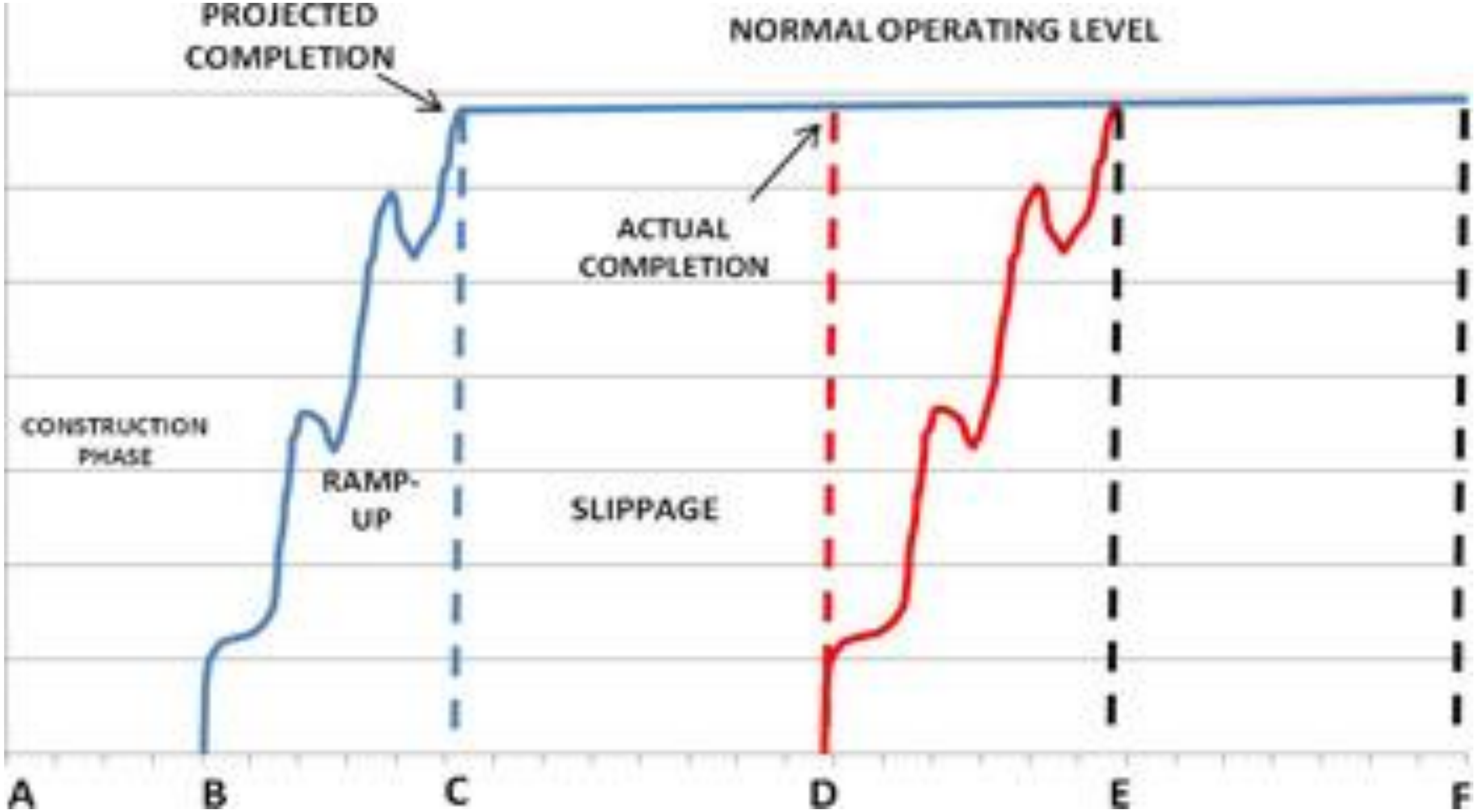
II. How do we measure the construction delay?



III. What are the common areas of dispute?

1. **Quantum Disputes**
    - Should ramp-up be considered in lost rents?
    - Did incident impact operations after reopening?
    - Inclusion of Soft Costs

2. **Construction Disputes**
    - What are the costs to repair?
    - What is the time to complete repairs?
        - Concurrent delays

III. What are the common areas of dispute?

3. Coverage Disputes - Faulty Workmanship / Design Defects / LEG1,2,3 Exclusions

- LEG1, LEG2, and LEG3—define the scope of insurance coverage for defective design, plan, specification, materials, or workmanship in construction projects.
  - LEG1 = most restrictive; full exclusion
  - LEG2 = middle ground; excludes repair of the defect itself but covers resulting damage
  - LEG3 = broadest coverage; covers original defect and all resulting damages; excludes only costs to improve the original, defective portion.
    - "Improve" found ambiguous in *De Moya Joint Venture v Ace Am. Ins. Co.*, 713 F Supp 3d 1260 (S.D. Fla. 2024) ("[I]f something broken gets fixed, hasn't that thing been improved?")
- Judicial trend: narrowly interpret faulty design/workmanship exclusions
  - Courts consistently distinguish between excluded costs to repair defective work itself and covered consequential damages to other property
  - LEG3 provisions are interpreted as coverage-expanding endorsements

III. What are the common areas of dispute? (cont.)

3. **Coverage Disputes -** Faulty Workmanship / Design Defects / LEG1,2,3 Exclusions

- Ensuing Loss – Mixed Approaches
  - *Gardens Condominium v. Farmers Insurance Exchange*, 2 Wash. 3d 832 (2024) (broad interpretation, holding that "resulting loss exception to faulty workmanship exclusion revives coverage even if the faulty workmanship exclusion would otherwise deny it.")
    - Ensuing loss exception "does not state that the covered cause of loss must be independent from the faulty workmanship or that it cannot be a natural consequence of faulty workmanship."
    - No anti-concurrent causation provision
  - *Cincinnati Insurance Company v. Ropicky*, 415 Wis. 2d 1 (2024) ("water damage ensuing from a defective roof is covered as an ensuing loss, but the exclusion for faulty construction excludes coverage to repair the roof")
  - *Cf TMW Enterprises, Inc. v Fed. Ins. Co.*, 619 F. 3d 574 (6th Cir. 2010) (coverage for water infiltration resulting from defective construction of exterior walls "would create a virtual, if not complete, exclusion of the exclusion.")
    - "[I]t should come as no surprise that the botched construction will permit the elements—water, air, dirt—to enter the structure and inside of the building and eventually cause damage to both. [Policyholder's] chain of reasoning—that water technically was the final causative agent of the damage, as opposed to the faulty construction, that "water damage" is not specifically excluded from the policy, that coverage accordingly applies—essentially undoes the exclusion.

Questions & Answers

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10 MINUTE BREAK

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AK Construction and Insurance Conference

Getting Insurance Coverage for Defects and Other Claims after Construction

Ethan W. Middlebrooks and James A. Goodridge

January 28, 2026 / 4:40 p.m. – 5:30 p.m.

DISCLAIMER

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

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Ethan W. Middlebrooks is a Shareholder in Anderson Kill's New York office, where he concentrates his practice in insurance recovery, exclusively on behalf of policyholders. He is a member of the firm's Construction Group and Climate Change and Disaster Recovery practice group.

Ethan has assisted policyholders nationwide with insurance recovery on a range of matters, with an emphasis on third-party and first-party claims involving construction losses, and first-party property and business interruption claims. Ethan's practice also encompasses matters involving D&O liability, educational management liability, and public officials' liability, as well as non-insurance construction and business litigation. His clients include companies in the real estate, construction, energy, and hospitality industries.

Ethan has been recognized by **Super Lawyers** as a Rising Star since 2023 and by **Benchmark Litigation's** 40 and Under List.

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James A. Goodridge is an attorney in Anderson Kill's New York office. He focuses his practice on commercial litigation and insurance recovery, and regularly counsels corporate and individual policyholders in coverage disputes in state and federal court.

James' experience includes helping asset management firms pursue defense costs, assisting manufacturers in recovering investigation and remediation expenses, and advising retailers and hoteliers regarding coverage related to multidistrict litigation.

James also routinely represents contractors and developers regarding first-party property losses and third-party liability claims arising from construction-related disputes.

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Goal of Risk Management in Construction

- **To transfer the risk of loss to the party in the best position to prevent or mitigate the loss.**
  - Owners seek to transfer risk to CMs and GCs.
  - CMs and GCs seek to transfer risk to subcontractors.
  - Subcontractors seek to transfer risk to sub-subcontractors, suppliers, etc.
  - Each party insures and bears the risk of loss within their trade and scope of work.
  - This includes insurance coverage for after completion of construction.

Source: lawschooltoolbox.com

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Risk Transfer: Insurance Coverage

- **Goal is to find a way to access other party's insurance.**
- **Starts with the contract:**
  - Indemnification Requirements
  - Insurance Requirements
    - Additional Insured
    - Primary and Non-Contributory
    - Waiver of Subrogation

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Method of Mitigating Losses for Property Damage and Bodily Injury in Construction

- **Obtain Defense and Liability coverage under a Commercial General Liability (CGL) Policy for:**
  - Ongoing operations
  - Completed operations – Mind applicable statutes of limitation or repose!

Source: udallshumway.com

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Insuring Agreement – CGL Policy

- **"We will pay on behalf of the Insured those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."**

- **"Bodily injury" or "property damage" must:**
  - Be "caused by an 'occurrence' that takes place in the 'coverage territory'"
  - And "occur[] during the policy period"

- **Often includes a duty to defend.**

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Exclusion L, The “Your Work” Exclusion

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

CG 00 01 12 07

- **Frequent issue in construction defects claims following project completion.**

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Policy Definition of the Products and Completed Operations Hazard

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

CG 00 01 12 07

- **Post-construction defects claims must fit through this keyhole—but property damage must occur during the policy period.**

- **Start at Declarations Page to ensure policy has this coverage.**

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Case Law – The Near

- **NY:**
  - *Burlington Insurance Company v. PCGNY Corp.*, No. 24-2765 (2d Cir., pending) - TBD
  - *George A. Fuller Co. v. United States Fidelity and Guaranty Co.*, 200 A.D.2d 255 (1st Dep't 1994)
    - Claims of defective construction do not constitute an "occurrence"
    - Court expressed concern of turning CGL policy into a "surety bond"
    - Entire building the "work product" of the general contract and therefore claims of defects by general contractor to any part of building not covered by policy.
- **NJ: *Cypress Point Condo. Ass'n v. Adria Towers*, 226 N.J. 403, 428 (2016) ("In any event, under our interpretation of the term 'occurrence' in the policies, consequential harm caused by negligent work is an 'accident.'")**

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Case Law – The Bad

- **Mass.:** ***Lessard v. R.C. Havens & Sons, Inc.*****, 104 Mass. App. Ct. 572, 576, review denied, 494 Mass. 1109, 244 N.E.3d 1006 (2024) ("Commercial general liability policies provide coverage for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained") (citations omitted)**

- **PA:** ***Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Com. Union Ins. Co.*****, 589 Pa. 317, 335–36 (2006) ("We hold that the definition of "accident" required to establish an "occurrence" under the policies cannot be satisfied by claims based upon faulty workmanship. Such claims simply do not present the degree of fortuity contemplated by the ordinary definition of "accident" or its common judicial construction in this context. To hold otherwise would be to convert a policy for insurance into a performance bond. We are unwilling to do so, especially since such protections are already readily available for the protection of contractors.") (footnote omitted)**

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Case Law – The Good

- **Texas: *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16 (2007) ("'claims for damage caused by an insured's defective performance or faulty workmanship' may constitute an 'occurrence' when 'property damage' results from the 'unexpected, unforeseen or undesigned happening or consequence' of the insured's negligent behavior") (citation omitted).**

- **See also, id. at 10 ("Any similarities between CGL insurance and a performance bond under these circumstances are irrelevant, however. The CGL policy covers what it covers. No rule of construction operates to eliminate coverage simply because similar protection may be available through another insurance product. Moreover, the protection afforded by a performance bond is, in fact, different from that provided by the CGL insurance policy here.").**

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Two Primary Techniques of Obtaining Insurance Coverage From Others for Property Damage After Construction under a CGL Policy:

- **Contractual Liability Coverage**
- **Additional Insured Coverage**

  - **Two Gas Pedals! Not exclusive of one another.**

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Contractual Liability – What is covered? What is excluded?

- **Excludes liability assumed in a contract (very broad)**
- **Contrast with duties and obligations that arise in law (i.e., tort liabilities)**
- **However, some, but not all, contractual liabilities can be insured**

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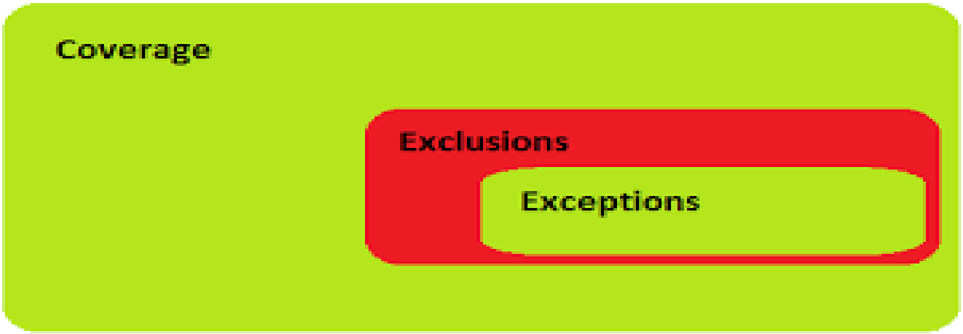
Exceptions to the Contractual Liability Exclusion

- **Two common exceptions:**
  1. The Insured would have had the liability in the absence of a contract or agreement (e.g., in tort); or
  2. The Insured assumed the liability in an Insured Contract, provided the BI or PD occurs subsequent to the execution of the contract



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The Tort Exception

Example:

- GC indemnifies Owner for BI or PD to third parties resulting from its work for Owner
- In the course of its work, GC accidentally sets fire to the building site, which damages neighboring property
- Owner incurs liability to neighboring property owner
- GC's liability to Owner, although contractual, falls within Tort Exception, because GC would have been labile to Owner in tort (i.e., negligence) absent the contract

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The Insured Contract Exception

What's an Insured Contract?

- **Can be a number of specified types of contracts**
- **One we care about:**
  - That part of any other contract or agreement pertaining to the Insured's business under which the Insured assumes the tort liability of another party to pay for Bodily Injury or Property Damage to a third person or organization.
    - Tort liability means a liability that would be imposed by law in the absence of any contract or agreement (e.g., negligence)

Source: qsstudy.com

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"Insured Contract" ISO Definition

9. "Insured contract" means:

   a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

   b. A sidetrack agreement;

   c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

   d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

   e. An elevator maintenance agreement;

   f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Page 12 of 14 © ISO Properties, Inc., 2006 CG 00 01 12 07

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Timing Issue

- **When Can a Contract be Entered into to Qualify for Contractual Liability Coverage**
  - Under most CGL policies:
    - The contract must predate the BI or PD; and
    - The BI or PD must take place during the policy period

Source: hageloh.com

Named Insured vs. Additional Insured

- **Receive same level of coverage as Named Insured except where limited by Additional Insured endorsement**

***Cal-Dive Int'l, Inc. v. Seabright Ins. Co.*, 627 F.3d 110, 114 (5th Cir. 2010)**

  - **"when endorsements . . . add additional insureds to the policy, these additional insureds enjoy the same benefits and are subject to the same restrictions as a named insured absent policy language to the contrary"**

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Benefits of AI Coverage

- Supplements contractual indemnity and may extend beyond limitations on AI's sole negligence
- Defense coverage
- AI often not responsible for payment of premiums, deductibles or retentions
- Lessens impact on own insurance: AI's own policy is excess and remains intact without exhausting limits or impacting loss history

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What does AI Coverage Look Like? (In the Policy)

- Different forms of additional insured endorsements
- ISO Forms
- Manuscript forms
- Pay attention to key language!

Source: perfectlancer.com

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Sample ISO forms

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 10 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG 20 10 04 13 © Insurance Services Office, Inc., 2012 Page 1 of 2

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 37 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location And Description Of Completed Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance**:

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

CG 20 37 04 13 © Insurance Services Office, Inc., 2012 Page 1 of 1

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CG 20 10 V. CG 20 37

- Both forms are scheduled additional insured endorsements
- “your work” in CG 20 37 – refers to a project or tasks performed
- “acts or omissions” in CG 20 10 – refers to actions of people or entities

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Evolution of Standard ISO AI Forms

1985 Broad Form
20 10 11 85 Who is an insured is amended to include "the person or organization shown in the Schedule, but only with respect to liability **arising out of** 'your work' for that insured by or for you." (emphasis added)

1993 Broad Form
CG 20 10 10 93 Who is an insured is amended to include "the person or organization shown in the Schedule, but only with respect to liability **arising out of** your **ongoing operations** performed for that insured." (emphasis added)

2001 Broad Form
CG 20 37 10 01 New "CG 20 13" form created to reinstate completed operations. Who is an insured is amended to include "[the identified persons or organizations,] but only with respect to liability **arising out of** 'your work' at the location designated and described in the [endorsement] performed for that insured and included in tire **products-completed operations hazard**." (emphasis added)

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Evolution of Standard ISO AI Forms

2004 Intermediate Form
CG 20 37 07 04
Who is an insured is amended to include "the identified persons or organizations, "but only with respect to liability for 'bodily injury' or 'property damage' **caused, in whole or in part, by** 'your work' at the location designated and described in the schedule of [the endorsement] performed for that additional insured and included in the **products-completed operations hazard**." (emphasis added)

2013 Limited Form
CG 20 37 04 13

"The insurance afforded to such additional insured only applies **to the extent permitted by law**." (emphasis added)

"If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured **will not be broader than that which you** [the insured] **are required by the contract or agreement to provide** for such additional insured." (emphasis added)

"If coverage to the additional insured is required by a contract or agreement, the most [the insurer] will pay on behalf of the additional insured is the amount of insurance: 1. **required by the contract** or agreement; **or 2. available under the applicable Limits** of Insurance shown in the Declarations; **whichever is less**." (emphasis added)

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Blanket Coverage or Privity of Contract

- **Check the endorsement**
- **“have agreed in writing in a contract or agreement” to add person as AI**
- **Privity of contract may not be required to confer AI status pursuant to a written contract – e,g., CG 20 40 12 19**
- **Whether privity of contract required matters for upstream AI coverage**
    - E.g., *Gilbane Bldg. Co./TDX Const. Corp. v. St. Paul Fire Marine Ins. Co.*, 31 N.Y.3d 131 (2018) (“with whom” vs. “for whom”)

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How to Confirm AI status?

- **ACORD Form/Certificate of Insurance – but beware!**

ACORD®

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER

CONTACT NAME:
PHONE (A/C, No, Ext): FAX (A/C, No):
E-MAIL ADDRESS:

INSURER(S) AFFORDING COVERAGE	NAIC #
INSURER A :	
INSURER B :	
INSURER C :	
INSURER D :	
INSURER E :	
INSURER F :	

INSURED

COVERAGES CERTIFICATE NUMBER: REVISION NUMBER:

THIS IS TO CERTIFY THAT 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. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
	GENERAL LIABILITY						EACH OCCURRENCE	$
	COMMERCIAL GENERAL LIABILITY						DAMAGE TO RENTED PREMISES (Ea occurrence)	$
	CLAIMS-MADE OCCUR						MED EXP (Any one person)	$
							PERSONAL & ADV INJURY	$
							GENERAL AGGREGATE	$
	GEN'L AGGREGATE LIMIT APPLIES PER:						PRODUCTS - COMP/OP AGG	$
	POLICY PRO-JECT LOC							$
	AUTOMOBILE LIABILITY						COMBINED SINGLE LIMIT (Ea accident)	$

- **Obtain copy of Policy with Endorsements; alternatively, Declarations page with list of standard form endorsements**

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Defense coverage for an AI

- **Duty to defend**
  - ✓Found in policy's Insuring Agreement or "Other Insurance" provision.
  - ✓One allegation potentially within coverage
  - ✓"in for one, in for all"
- **Potential liability "caused in whole or in part" by Named Insured's work or operations**
- **Many insurance companies who defend an AI reserve the right to deny coverage for indemnity coverage**

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9. “Other Insurance” Provisions

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

b. Excess Insurance

(1) This insurance is excess over:

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

CG 00 01 12 07

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

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Key Takeaways

- **An “occurrence” need not be construction defects.**
- **Be mindful of the subcontractor exception and applicable case law.**
- **Look for other parties’ insurance:**
  - Contractual Liability Coverage
    - Tort Exception
    - Insured Contract
  - Additional Insured Coverage

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Questions & Answers

THANK YOU

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THANK YOU FOR ATTENDING!

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