

Construction Builder's Risk and CGL Insurance: Scope of Coverage, Covered Losses, Exclusions, AI Endorsements

Mitigating Construction-Related Disputes; Key Challenges for Claims Under Builder's Risk vs. CGL Coverage

WEDNESDAY, JANUARY 29, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Robert V. Closson, Shareholder, **Hirsch Closson**, San Diego

Dawn A. Silberstein, Partner, **Wilson Elser Moskowitz Edelman & Dicker**, San Francisco

Timothy R. Sullivan, Practice Group Chair - Insurance Coverage And Bad Faith Litigation / Partner,
McCormick Barstow, Fresno, Calif.

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Robert V. Closson



Shareholder
Hirsch Closson
bclosson@hirschclosson.com
619-233-7006

Following graduation from law school in 1986, Mr. Closson initially served as a multi-lines claims representative with an insurer before entering private practice in 1987. For the past 33 years he has concentrated his AV rated practice almost exclusively in insurance coverage litigation and appeals, and the rendering of coverage opinions for insurers and insureds. His insurance practice has involved the property and casualty fields of commercial and personal lines policies with an emphasis on construction defect, intellectual property, business litigation and environmental claims. His clients have included insurers, risk retention groups, builders, subcontractors, and trade associations.

Dawn A. Silberstein



Partner

Wilson Elser Moskowitz Edelman
& Dicker

dawn.silberstein@wilsonelser.com

415-625-9255

Ms. Silberstein has more than 15 years of experience representing insurance carriers and policyholders in litigation involving third-party liability and first-party property coverage claims. She started her practice representing homeowner associations in construction defect litigation and as corporate counsel before transitioning to construction defense and then to coverage. Since joining Wilson Elser, she has expanded her practice to include defense of real estate and financial/insurance professionals.

Timothy R. Sullivan



Mr. Sullivan's practice focuses on insurance coverage and bad faith. In addition to over 25 jury trials, he has also tried numerous bench trials involving breach of contract and declaratory relief. Mr. Sullivan has often spoken at training seminars for both insurance professionals and lawyers on subjects pertaining to insurance and trial practice. He has also written chapters on property insurance, liability insurance, errors and omissions insurance, title insurance and bad faith for six treatises published by CEB and is the Consulting Editor for CEB's new book on Property Insurance.

Practice Group Chair - Insurance Coverage
And Bad Faith Litigation / Partner

McCormick Barstow

Timothy.Sullivan@mccormickbarstow.com

559-433-1300

Builder's Risk and Liability Coverage

ROBERT V. CLOSSON

Hirsch Closson

DAWN A. SILBERSTEIN

Wilson Elser

TIMOTHY R. SULLIVAN

McCormick Barstow

HIRSCH CLOSSON

A PROFESSIONAL LAW CORPORATION



What is Builder's Risk (BR)?

First party insurance coverage for project under construction. Also called “course of construction” insurance. Does not afford liability coverage.

Three Key Elements:

1. **Loss from Direct Physical Loss**
2. **To Covered Property**
3. **Caused by a “Covered Cause of Loss”**

Covered Cause of Loss

“All Risk” – Risks of loss not specifically excluded are covered. Insurer has the burden to prove a specific provision expressly excludes coverage for the loss.

“Specified/Named Peril” – Only those risks specifically named are covered. Burden is on the insured to prove loss is due to a “Covered Cause of Loss.”

CAVEAT: “All Risk” is a Misnomer

“The label ‘all risk’ is essentially a misnomer. All risk policies are not ‘all loss’ policies; all risk policies ... contain express written exclusions and implied exceptions which have been developed by the courts over the years.”

Ingenco Holdings, LLC v. Ace American Ins. Co. (9th Cir. 2019) 921 F.3d 803, 814 fn. 9.

The term “all risk” has been said to be somewhat misleading.”

Doherty v. Allstate Indemn. Co. (E.D. Penn. 2017) 2017 W.L. 1283942 at *16.

“While it is true that ‘all risk’ is an accepted term of art in the insurance industry [cite], we do not agree that a false impression can never be conveyed by use of the term.”

Omni Metals, Inc. v. Poe & Brown Of Texas, Inc. (Tex. App. 2002) 2002 W.L. 1331720, at *5.

Where did the “All Risk” policies go?

You may have trouble finding an “All Risk” BR policy. It may be called “Open Perils” or “Special Perils.”

Causes of Loss –Special Form, CP 10 30 04 02

A. Covered Causes of Loss

When Special is shown in the Declarations, Covered Causes of Loss means Risk of Direct Physical Loss unless the loss is:

1. Excluded in Section B., Exclusions; or
2. Limited in Section C., Limitations;

that follow.

Just like “Comprehensive General Liability” policies became “Commercial General Liability” policies. They didn’t even have to change the initials CGL!

Who are typically covered by BR?

- Owners
- Contractors
- Subcontractors
- Sub-subcontractors
- Others (Lienholders, Lenders)

The Owner is typically the named insured, while others such as contractors, subcontractors, and financial lenders can be added as additional named insureds.

Who buys BR, and what must they buy?

AIA Document A-101™-2017 EXHIBIT A: Insurance and Bonds

§A.2.1 General. Prior to commencement of the Work, **the Owner shall secure the insurance.**

...

§A.2.3.1 . . . property insurance written on a **builder's risk "all-risks" completed value** or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis.

§A.2.3.1.1 Causes of Loss. . . . shall not exclude the risks of fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, floor or windstorm. The insurance shall also provide coverage for ensuing loss or resulting damage from error, omission, or deficiency in construction methods, design, specifications, workmanship, or materials.

§A.2.3.1.3 . . . Owner shall continue the insurance . . . **until expiration of the period for correction of the Work** set forth in Section 1.2.2. of the General Conditions [generally, **one year after date of Substantial Completion of the Work or designated portion thereof**]

A.2.3.1.4 Deductibles and Self Insurance. . . . **Owner shall be responsible for all loss not covered because of such deductible or retentions.**

What is **typically** covered under BR?

Builders Risk Coverage Form: CP 00 20 10 12:

We will pay for direct physical loss of or damage to the Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

Businessowners Property Coverage Form: BP 00 03 01 10:

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

Building and Personal Property Coverage Form: CP 00 10 06 07

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

What is **Covered Property** under BR?

Buildings or building alterations during the course of their construction.

Foundations.

If situated within 100 feet of the premises, fixtures and machinery used to service the building and materials and supplies used in the construction.

If there is no other insurance applicable, coverage for temporary structures built or assembled on the site, including scaffolding, cribbing and construction forms.

What **optional coverages** are available?

Optional Coverages:

Loss of Use, Business Interruption, and Delay in Completion coverage, to reimburse the Owner for loss of use of the Owner's property, or the inability to conduct normal operations due to a covered cause of loss.

Ordinance or Law coverage, for the reasonable and necessary costs to satisfy the minimum requirements of the enforcement of any law or ordinance regulation the demolition, construction, repair, replacement or use of the Project.

Expediting Cost coverage, for the reasonable and necessary costs for the temporary repair of damage to insured property, and to expedite the permanent repair or replacement of the damaged property.

Extra Expense coverage, to provide reimbursement of the reasonable and necessary excess costs incurred during the period of restoration or repair of the damaged property that are over and above the total costs that would normally have been incurred during the same period of time had no loss or damage occurred.

Civil Authority coverage, for losses or costs arising from an order of a civil authority prohibiting access to the Project, provided such order is the direct result of physical damage covered under the required property insurance.

Ingress/Egress coverage, for loss due to the necessary interruption of the insured's business due to physical prevention of ingress to, or egress from, the Project as a direct result of physical damage.

Soft Cost coverage, to reimburse the Owner for costs due to the delay of completion of the Work, arising out of physical loss or damage covered by the required property insurance: including construction loan fees; leasing and marketing expenses; additional fees, including those of architects, engineers, consultants, attorneys and accountants, needed for the completion of the construction, repairs, or reconstruction; and carrying costs such as property taxes, building permits, additional interest on loans, realty taxes, and insurance premiums over and above normal expenses.

Typical Exclusions

Faulty Workmanship

(Ensuing Loss Exception)

Earth Movement

Concurrent Causation

Sue and Labor

Business Interruption

Cost of Making Good (or “Betterment”)

Business Income Coverage - Indemnity

What period of time will the BR policy cover for business income losses?

Financial losses can extend beyond the point in time when damaged property is repaired (period of restoration)

Extended Indemnity period could prove essential to financial survival

Who's on First?

It may be the BR policy:

- 1) BR pays without regard to who is at fault. The primary focus should be to make repairs as quickly as possible - - especially if Business Interruption coverage may be triggered. In contrast, the initial focus of a CGL insurer is to find someone else at fault.
- 2) The “Other Insurance” condition in a CGL policy makes the CGL coverage excess to BR coverage. The CGL insurer will usually refuse to pay if there is BR coverage available.
- 3) If the BR policy is project specific, payments under that policy will not adversely effect the annual insurance program. Payments under a CGL policy negatively influence a contractor's loss history, often for years.
- 4) The Owner (or other party who procured the BR policy) has a contractual obligation to initiate a claim under the BR policy when a loss occurs; failure to do so could be a breach of contract.

Practice Tips

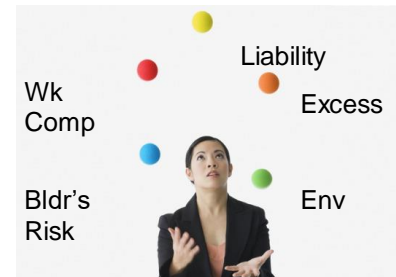
What to tell your clients before they purchase BR

- Obtain the broadest form of coverage available/reasonable.
- Policy should cover the owner, contractors of all tiers, and mortgagees.
- Carefully consider the period of coverage required.
- Consider adding specific endorsements to cover identifiable risks of loss that may be unique to the project.
 - Cranes
 - Underground tunnels/parking structures
 - Blasting/Tunneling
 - Demolition

What is an OCIP?

An OCIP, Owner Controlled Insurance Program or Wrap-Up

- Centrally procured and managed;
 - Builder's Risk
 - Workers Comp
 - Commercial Liability
 - Excess Liability
 - Environmental
- Owner controls costs rather than costs passed to owner by contractors through the contract price
- Potentially covers all contractors and subcontractors
- Eliminates cross-suits
- Project specific coverage ("Designate Project")



- Owner control:
 - Ability to obtain insurance coverage and limits otherwise unavailable for a construction project
 - Implementation of consistent risk control and claims management measures for the entire project
- Unified Program
 - All contractors properly insured (source of recovery for owner)
 - Buying clout can lead to broader coverage
 - Control over costs by avoiding duplicate coverage and minimizing transaction costs of multiple carriers

Commercial Construction

- Cost Savings
 - Reduction in premiums through “bundled” coverage
 - Consolidated claims management
 - Single insurer legal defense
 - Risk control
 - Increased limits



- Owner Control of Insurance and Risk Management
 - Owner Selects Carrier(s) (reduces risk of carrier insolvency)
 - Owner sets limits (Increased limits available)
 - Owner controls coverage (reduces risk of surprise exclusions)
 - Consistent risk control and claims management





- Non-Enrolled Sub with Wrap Exclusion
- Gap Between the end of Bldr’s Risk and start of CGL
- High SIR or Deductible
- “Designated Project”
 - Narrowly Defined
- Pollution
- Professional Liability
- Cross-Suits Exclusion
 - Eliminates claims between enrolled contractors
 - Should exclude the First Named Insured (owner)



I have to pay what?

ISO Wrap Exclusion

The policy does not apply to liability arising out of ongoing operations or completed operations

“...as a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved.

This exclusion applies whether or not the consolidated (wrap-up) insurance program:

- (1) Provides coverage identical to that provided by this Coverage Part;
- (2) Has limits adequate to cover all claims; or
- (3) Remains in effect.”

Wrap Exclusion Applied

- The policy does not apply if:
 - The loss is **covered** by the Wrap Up
 - The Project is insured under a Wrap Up

I Have A Claim:



Fire During Construction

Liability Coverage

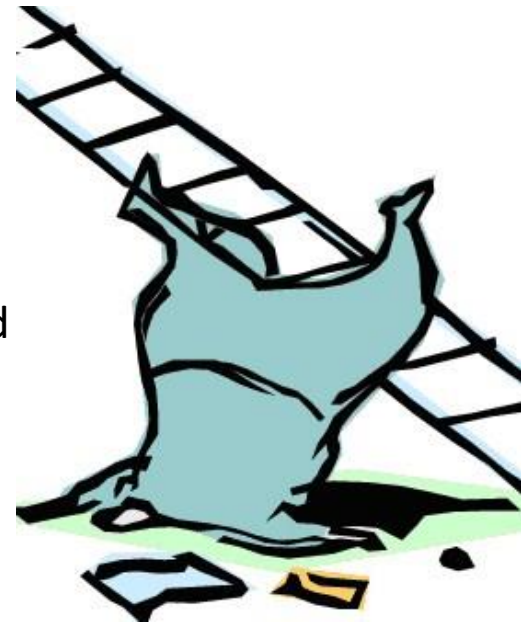
Builder's Risk



Designated Project

Worker Injury During Construction

- Worker's Comp
 - The worker's comp claims are reported to the Wrap administrator
 - Exclusive remedy for claims against enrolled employer
 - Experience Modification Rating follows enrolled employer
- General Liability
 - Claims against other enrolled contractors



Renovation of Existing Structure

- Designate Project = Renovations
 - Roof repair during the winter
 - Storm of the Century
 - Wrap Failed
 - Water and Mold Damage to Existing Structure
 - Wrap Contractor Not Enrolled
 - Policy included Wrap Exclusion
 - CGL Excludes Damage to Ongoing Operations
 - Builder's Risk Excluded Existing Construction
 - Mold/Pollution Policy
 - Rip and Tear Coverage/Emergency Remediation



Commercial General Liability (CGL) Insurance – Comparison to Builders Risk and “Wrap” Coverage

CGL: 3rd party coverage for a specific insured general contractor or developer (Builder) or subcontractor (Sub).
Not usually project specific.

Builders Risk: 1st party “course of construction coverage, beneficiaries are usually the Builder and may include specified Subs. Usually project specific.

“Wrap” / CCIP / OCIP: 3rd party coverage for Builder and enrolled Subs, usually for a specific project.

CGL covers damage a specific Builder or Sub is legally obligated to pay as damages. It is fault based and requires that the insured have breached a duty causing the damage / loss. Because it is fault based payment of benefits may require litigation. Disputes between the named insured (NI) and other parties over causation will delay resolution. Builders Risk and Wrap coverage are often considered solutions to the delay and complications which arise in the context of claims under traditional, non-project specific CGL policies.

- Ongoing Operations coverage will apply to the NI's work on a project which is still in progress.
- Completed Operations coverage (damage within the "products-completed operations hazard" or PCOH) occurs after the NI's work is completed within the meaning of the definition of the hazard.
- In the case of a Sub this can be before the entire project is completed if the NI's work is within the PCOH definition before entire project is complete.
- In the case of a Builder, the entire project may be excluded while operations are ongoing [see, standard exclusions J(5), J(6)], depending upon the law of your state.

Builder is NI: Unless the policy has CCIP / Wrap provisions, Subs will usually not be entitled to coverage. Builder may have right of indemnity / subrogation against Sub(s) who cause damage.

Builder is an Additional Insured (AI) on one or more sub policies: Most Sub additional insured endorsements are triggered by contract requirements between builder and sub to name builder as an AI. Coverage is limited to damage caused by the acts or omissions of the Sub.

Sub is NI: Sub covered subject to exclusion and limitations. Sub / Sub insurer may have rights of equitable indemnity against other Subs which contributed to the damage.

CGL - Bodily Injury Scenarios

- Builders Risk will not typically cover bodily injury (BI).
- OCIP Wrap may cover BI subject to different restrictions
- CGL coverage subject to “Wrap” exclusion where that coverage provided
- Injury to a 3rd Party
 - Subject to rights of indemnity and any subrogation waivers
 - AI coverage for builder may be triggered
- Injury to the sub’s own employee
 - Standard exclusions (d) and (e) – subject to exception for express indemnity under an “insured contract”
 - Look for “action over” or “absolute employee” exclusion endorsements

CGL – Bodily Injury Example

Sub NI employee insured by a falling board dropped by another contractor. Employee sues Builder and another Sub (exclusive remedy precludes direct action against Sub employer). Builder sues NI for express indemnity.

- If no “action over” exclusion, coverage for NI liability subject to exception under standard exclusion (e) for “insured contracts”
- All coverage for Builder may be triggered depending upon whether the allegations sufficient to present the potential that Builder is liable for the “acts or omissions” of the NI Sub.
- **Compare** where the employee is injured by a condition for which the Builder may be in part responsible – such as a hole which has not been adequately covered or other condition of the premises.

Merely defective work is not considered PD in many states. Some states may not consider defective workmanship to be an “occurrence.” As a general rule coverage must be triggered by physical resulting damage to tangible property.

Ongoing operations under the standard form is subject to J exclusions. Other exclusions and endorsements may apply depending upon the nature and timing of the damage.

Builder NI: In some states the entire project is considered subject to ongoing operations exclusions J(5) and/or J(6)

Sub NI: Did the NI Sub cause damage only to the work of the Sub and/or the “particular part” of property on which operations being performed, or was damage caused to other property outside the scope of the exclusion?

The effect of uncertainty regarding causation and scope of damage: Disputes will delay a determination of responsibility / coverage and typically preclude quick payment of benefits.

j. Damage To Property

“Property damage” to:

* * *

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

* * *

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products- completed operations hazard”.

[Selected for ongoing operations contrast with Builders Risk / Wrap]

1. Interior of structure damaged by rain (roof incomplete) - May be covered by roofing Sub's CGL if failure to cover during operations and no "open roof" exclusion. Damage to interior not damage to roofing Sub's work or particular part of property on which operations being performed. Damage to roof itself not covered.
2. Fire damage to framing (fire caused by plumber using torch) – Probably covered by plumber Sub's CGL if no torch exclusion
3. Damage to drywall (DW) caused by sheer wall failure (inadequate nailing by combination of framer and DW Sub) – Probably covered by framer Sub CGL. DW Sub CGL probably subject to J exclusions.

- While Builders Risk and Wrap coverage may cover most or all project participants, CGL insurers typically have limited coverage which triggers indemnity and/or subrogation rights. Causation issues and coverage defenses can complicate and delay recovery, making conventional CGL coverage less efficient for addressing in progress operations damage.
- Contracts with Builder may include subrogation waivers which will preclude a CGL insurer from pursuing recovery.
- Express indemnity will usually favor Builder. Variations between states regarding availability of indemnity when Builder may have active or passive negligence.
- In some states an insurer may not seek subrogation from its own insured, which may preclude a Sub CGL insurer from seeking to recover from the Builder if the Builder qualifies as an AI.

CGL Primary / Excess & “Other Insurance” Issues

With Builders Risk: A CGL policy issued to a Sub which is not a beneficiary of the Builders Risk policy may be subject to subrogation. As a general rule “other insurance” clauses will not apply based upon the different nature of the coverages.

With Wrap: Most CGL policies will have a Wrap exclusion or “other insurance” clause making it excess to the coverage specifically procured for the project (check state laws / statutes relative to enforcement). Enrollment delay / split project issues may involve both coverages.

With other CGL policies for Builder or Sub: This will depend upon the law of the state and the coverage trigger(s). Policy language requires pro-rating. Some states enforce excess clauses which do not conflict with primary or pro rata clauses.

CGL Conclusion

- Provided a loss is subject to Builders Risk coverage terms, it is addressed much more quickly under that coverage than CGL.
- CGL coverage is subject to fault based determination which is complicated by individual policy coverage variations, causation, damage limitations on the policy, and conflicting rights of indemnity and/or subrogation.
- To the extent Builders Risk coverage does not apply and liability coverage is the only option, Wrap coverage may be preferable to individual CGL policies issued to the Builder and Subs.



Contact

Robert V. Closson
Shareholder
San Diego, CA
619.233.7006 (Direct)
bclosson@hirschclosson.com

Dawn Silberstein
Partner
San Francisco, CA
415.625.9255 (Direct)
dawn.silberstein@wilsonelser.com

Timothy R. Sullivan
Practice Group Chair – Insurance Coverage
And Bad Faith Litigation / Partner
Fresno, Calif.
559.433.1300 (Direct)
Timothy.Sullivan@mccormickbarstow.com