

10 insurance tips for contractors and developers

By **TODD C. HAYES**

Harper Hayes PLLC

Developers and contractors need to be particularly savvy about risk these days as they face one of the most difficult economies in recent memory. Every penny counts, and making sure risks are insured could be the key to survival during these troubled times.

The last thing a developer or contractor needs to worry about is the viability of its insurance coverage. One of the most cost-effective and time-saving actions a developer or builder can take is to ask a broker or attorney to review their insurance policies before a claim arises to ensure that there are no gaps in coverage.

Along those lines, here are 10 tips aimed at maximizing contractors' and developers' insurance coverage:

1 It's the damage that matters. Most commercial general liability (CGL) policies cover the insured's liability for property damage, as opposed to just bad construction. So if a third party sues you because a wall that was supposed to be white is gray, it's unlikely your CGL policy will cover the cost to repaint the wall. But be aware — the property damage need not be something as dramatic as an explosion. If, for example, the wall is gray because of

a chemical decomposition in the paint, that decomposition may qualify as property damage, triggering coverage under a CGL policy.

2 Timing is everything. Most CGL policies cover property damage only if it occurs during the policy period (regardless of when the resulting lawsuit occurs). That means if you get sued in 2009 for damage that occurred in 2006, the 2006 policy is the relevant one. So don't throw away old policies.

3 Think small. Liability policies typically cover damage to non-project property (so called "resulting damage," such as a broken window at a building neighboring the project). But what about damage to the project itself? The typical

CGL policy excludes — while the project is under way — only damage to "that particular part" of the project on which the policyholder is working. So if you incur a loss during construction, think small: The more narrowly you characterize "that particular part" of the project on which you were working, the greater the covered damage.

4 Don't make AI coverage an afterthought. Many developers and contractors know to ask for "additional insured" status, but then don't pay attention to the details. Before the project starts, get a copy of the actual AI endorsement — some courts say those "certificates" are worthless. Once you get the endorsement, make sure the coverage matches what your contract requires. If



Hayes

post-completion lawsuits are a concern, the contract should ideally call for "completed operations" AI coverage. The AI coverage should be "primary and non-contributory." Finally, if a claim occurs, send a tender (i.e., a request for policy benefits) directly to the AI insurer. And don't let it treat you like a second-class citizen — some courts have held that if the AI endorsement triggers coverage, then the AI insurer must defend the entire lawsuit against the additional insured.

5 Tender early (and intentionally). Most liability policies have conditions clauses that require policyholders to give their liability insurer prompt notice of lawsuits and/or lawsuit-triggering events. Failing to comply can result in a loss of coverage, so it's best to tender early. But first consider whether you really want that policy to respond (e.g., do you want to preserve limits, using another available policy instead?). A recent Washington case says that a policyholder can selectively tender, choosing only to trigger certain policies where others might also afford coverage.

6 Get made whole first. If your liability insurer pays to resolve a case on your behalf, the insurer steps into your

shoes for purposes of seeking reimbursement from third parties (i.e., it subrogates). But these subrogation rights are "last-dollar" — the insurer gets the money only after you're first made whole. That means that any third-party recovery should first go to pay your deductibles, additional overhead and other uninsured losses. Only then does the insurer get the balance.

7 Don't forget builder's risk insurance. A construction dispute that devolves into finger-pointing among lawyered-up owners and contractors might have been avoided by a simple claim under a builder's risk policy. Before going to war with other project participants (and your respective liability insurers), consider whether everyone should seek coverage under a builder's risk policy.

8 Separate the insureds. Most liability policies have a separation of insureds clause, which requires the policy to be read separately as to each entity insured under the policy. That means Insured 1 might still have coverage even though Insured 2's claim has been denied.

9 Read your wrap. Are you insured under an owner- or contractor-controlled insurance program/wrap-up policy? Better read it — your CGL policy may exclude coverage for projects insured under a wrap, and the wrap might have pitfalls. Are the limits enough to insure everyone? Are "completed operations" losses covered? Does it afford coverage through the applicable statute of limitation?

10 Don't believe everything you read. Insurer denial letters often tell developers and contractors things like "CGL policies don't cover faulty workmanship," or lawsuits aren't covered if the plaintiff is suing for breach of contract. Neither statement is true in Washington.

At Harper Hayes, principal Todd Hayes represents contractors, developers, homeowners and other policyholders in insurance coverage litigation, construction defect litigation and appeals. He has litigated cases regarding nearly every type of insurance policy available, including directors and officers, commercial general liability, builder's risk, malpractice and property.

