

Ten Tips for Pursuing Insurance and Bond Claims After Construction Accidents

By Finley Harckham



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After major construction accidents, developers and contractors understandably shift into high gear in an effort to get the project moving forward again. At the same time, however, care must be taken to preserve the right to recover under insurance policies and bonds, and to pursue claims effectively. By following a few basic tips, insureds can recover the benefits they need to prevent an accident from causing financial ruin.

1. Identify all insurance policies that might provide coverage.

After a construction accident, all of the parties on the project should be asked to turn over all of their insurance policies for the period in question; so notice can be given with respect to all potential coverage and a thorough coverage analysis can be conducted. Collecting all of the policies can be a daunting task since major construction projects typically involve numerous parties, and each may have several property and liability insurance policies in addition to an owner- or contractor-controlled insurance program (OCIP, CCIP) for the entire project.

The policies obtained by developers, contractors and subcontractors may provide coverage not only for the named insured, but also for other parties working on the project. Insurance policies often provide coverage to any party who the insured is contractually required to name as an additional insured. Moreover, contractors and engineering firms often have separate lines of coverage for construction operations and profes-

sional liability, and both should be analyzed. The construction contracts and certificates of insurance often provide a good starting place in the search for policies.

2. Give prompt notice to insurance companies.

After all of the property and liability policies have been identified, they must be reviewed to determine their notice requirements. The initial review is not the time to make a decision on which policies to claim under. Rather, notice should immediately be provided for all policies that could potentially provide coverage for existing losses and liability claims, and any potential claims that can be reasonably anticipated.

Also, many policies require notice not only of losses or claims, but also of "occurrences," "accidents," "events" or "circumstances" which could give rise to a claim. Failure to promptly comply with notice requirements can result in a forfeiture of coverage if the insurance company has been prejudiced by delay.

With respect to coverage claims arising out of an accident, prejudice might be found if notice is not given in time for the insurer to evaluate the site before cleanup and repairs begin, so do not delay in providing notice.

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3. Strictly comply with contractually mandated procedures for terminating contractors and claiming under bonds.

A major construction accident might result in the need to make claims under performance and payments bonds, which have their own unique sets of requirements. A major accident may be so financially devastating to a contractor or subcontractor that it is unable to continue to perform. Also, a decision might be made that a company that caused a major accident lacks the competence to finish the project. If for these reasons or others the decision is made to replace a contractor or subcontractor, care must be taken to comply with all requirements of the construction contracts and bonds. Terminating a company without proper notice could constitute a breach of contract and, more importantly, a breach of a condition precedent to a surety's obligations since bonds often require compliance with all contractual rights of the contractor.

Also, many surety bonds require a waiting period after notice of intent to terminate before a contractor can be dismissed. Failure to comply with such requirements can result in a forfeiture of all rights under the bond. For example, it is unlikely that a surety can be compelled to pay for a replacement contractor or subcontractor if it was not given proper notice of default and termination, and afforded an opportunity to select a replacement to complete the project. So, before taking action against contractors or asserting claims under performance bonds, review the construction contracts and bonds carefully and comply with all of their requirements.

4. Assemble an insurance recovery team with all of the necessary expertise.

Successfully pursuing coverage for losses and claims arising out of construction accidents requires collaborative effort from a team whose expertise includes loss quantification, contract and policy interpretation, and negotiation with insurance adjusters. Some expertise may be found in an in-house risk manager, or in a company's scheduling and accounting functions. Outside help may also be needed from brokers or public adjusters who provide claims preparation services, or from legal counsel who can advise on the numerous coverage issues that will undoubtedly arise out of the many aspects

of major losses and the interplay between a number of insurance policies. Counsel can also assist in negotiations with insurers, particularly if an impasse is reached and there is a need for an implied or explicit threat of legal action.

The need for a team may at first seem like overkill, but without the right expertise many policyholders sell themselves short and end up with recoveries that are far smaller than they are entitled to. Although many insureds deal with a single loss adjuster working for the insurance companies, that person is undoubtedly just the face of a team that includes appraisers, lawyers and accountants, all skilled in keeping insurance claim payouts as small as possible. To effectively compete, policyholders need to have a team that matches the other side's skill set.

5. Obtain a thorough coverage analysis.

Construction insurance and bond claims often involve complex issues that require a thorough analysis at the beginning of the claim preparation process. All but the simplest claims should be evaluated by coverage counsel to ensure that all possible coverage in all potentially triggered policies and bonds have been thoroughly considered. A professional analysis will not only identify coverage, but also help the policyholder to present its claim in a way that maximizes the recovery and avoids pitfalls. Every claim presents its own issues, but some of the common questions that must be addressed include:

1. Whether damages resulting from an accident that involved faulty workmanship constitute an "occurrence," that triggers coverage under general liability policies;
2. The order in which policies are triggered to pay where a claim involves insurance issued on multiple lines of coverage;
3. Whether, and to what extent, loss mitigation costs are covered;
4. The scope of coverage under insurance for "soft costs";
5. Whether there has been a "collapse" that triggers coverage or exclusions;
6. The priority of recovery when multiple parties claim under the same policies; and
7. Whether surety bonds cover delay damages caused by the accident.



6. Be proactive in setting a timetable for claim resolution.

Policyholders must be proactive to avoid a claim adjustment process that resembles an endless nightmare. Decide on a reasonable deadline for resolving all aspects of a claim — and tell the insurance company that an agreement must be reached by that date.

Some policyholders are reluctant to take a hard line with the insurance adjuster for fear of biting the hand that feeds them, but that attitude will only result in a claim being assigned a low priority for resolution. Insurance companies pay claims when they feel compelled to, not based on the quality of the relationship between the adjuster and the policyholder. So, assertiveness in pursuing claims is a good thing.

The deadline should provide the insurance company with sufficient time to evaluate the claim after all relevant information has been submitted. In some states, by submitting a proof of loss the policyholder can trigger a 30- or 60-day deadline in which the insurer must provide a coverage determination. Some insurance companies complain that submitting a proof of loss during their adjustment of a claim is a hostile act. While insisting upon timely payment of a claim should not be viewed as inflammatory, telling the adjuster that they must agree to a schedule for resolving the claim or proofs will have to be filed, can achieve the same result.

Trying to impose a deadline for claim resolution will only work if the insured does everything necessary on its end without delay. Be proactive in providing information to the insurance company. Ask the insurance company adjuster what information he or she will need early in the process, so it can be gathered and provided as soon as possible. Collect and submit loss data as it develops, without waiting to create a complete package involving all aspects of the loss. For example, the period of restoration for a business

interruption loss might be several months, or longer. During that period property loss claims can be submitted and paid.

7. Document everything that happens — and fails to happen — in the claim adjustment process.

One of the best ways to avoid lengthy delays in claim adjustment is to make a written record of everything that happens — and does not happen — and present it to the insurance company adjuster on a regular basis. Insurance companies are notoriously slow in resolving claims because they do not devote the resources needed and they have a financial interest in holding onto money for as long as possible. They are concerned, though, about possible extra-contractual bad faith liability for dilatory claims handling. A simple, matter-of-fact email or letter to the insurance company's adjuster every time a deadline has been missed, a meeting adjourned or a claim payment is late, will make the point that such behavior is not acceptable and that you are making a record that, if necessary, can be used in a bad faith lawsuit.

Also, do not be shy about claiming any losses that result from an insurance company's dilatory handling of a claim. For example, a failure to pay repair costs in a timely manner may extend the time necessary to complete a project, resulting in added soft costs and contractual delay penalties. The insurer may be liable for and should be put on notice as soon as it's apparent that such losses may be incurred.

8. Demand partial payments.

Insurance companies like to pay as little as possible in so-called "advances" on claim payments, and hold as much as possible for a final negotiation after all aspects of a loss have been fully submitted and addressed. This serves two purposes for them. First, they enjoy the time



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value of the money that is ultimately paid out. And second, by leaving a large sum unpaid, they maximize the leverage they have in a final negotiation with an insured that may be desperate for cash. Insureds need not tolerate that approach since they are entitled to partial payments and the undisputed amounts of any claims where the amount of the loss is not agreed on. And, they are entitled to those payments within a reasonable period of time after the losses have been substantiated.

So, each item of loss should be presented to the insurers as soon as it can be proven and quantified, and a request should be made for prompt payment without any delays associated with the time needed to address other elements of the loss. For example, a claim for repair costs incurred in the first month after an accident should not be delayed by waiting to fully calculate a business interruption or delay in opening loss, which may not occur until after the project has been completed. If the insurers will not agree to this approach, consider filing separate formal proofs of loss for each item claimed. Filing proofs will trigger the insurers' obligations under unfair claims handling practices statutes in many states, and is sure to get their attention.

9. Be mindful of legal and contractual suit limitations.

Most property insurance policies and bonds require that any suit against the insurer be commenced within a certain period of time after the commencement of the loss. Typically the period is two years, but some policies require that suits be filed in as little as one year. In many states such provisions are not enforceable if the suit limitation period is shorter than the statutory minimum. However, such statutory overrides often apply only to "policies of fire insurance" and it is unclear whether they apply to losses that are not caused by fire. Law books are full of cases in which insureds have forfeited their insurance coverage because they have failed to commence a lawsuit within the required period. Importantly, some courts will not excuse a late filing on the ground that the parties were still negotiating when the deadline arrived, or even that a business interruption or delay in opening loss had not ended at that time. So, get legal advice on the limitation applicable to your

policies and if it appears that the claim will not be resolved within that period, either obtain a written extension of time from the insurance company or commence a lawsuit.

Some insurance policies also require that formal proofs of loss be submitted within a specific period of time. Often those deadlines are unrealistic and the insurance company's adjuster has no interest in receiving proofs until the claim has been settled. So, get a written agreement from the insurer that the deadlines will not be enforced.

10. Litigation or appraisal?

If a claim cannot be resolved through negotiation, you may have the option of proceeding either to appraisal or litigation. Appraisal is a form of arbitration provided for under many insurance policies that either party can demand be used to resolve disputes over the amount of the loss. It can be a quick and inexpensive way to quantify the claim. However, appraisal is not required and may not be appropriate when there are coverage issues to be resolved. For example, if the parties disagree over whether contractor overhead and profit during a period of reconstruction is covered, the policyholder would be entitled to have that coverage issue decided in court. Appraisers, who typically are in the building trades, generally are not qualified to address such issues. Also, bad faith claims fall outside the scope of an appraisal clause and will have much greater value if placed before a jury. So, the policyholder must carefully consider the options and not necessarily feel compelled to agree to an appraisal simply because the amount of damages is one issue in dispute.

Conclusion

The key to getting insurance claims satisfactorily resolved within a reasonable period of time is for policyholders to take control of the process and to demonstrate a resolve to secure the coverage they paid for. This requires hard work, but it will pay handsome dividends.▲

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