



# The Hazards of Carrier-Specific Manuscript Language: Ohio Casualty's Off-Premises Property Damage and Contractors' E&O Endorsements

By Theresa A. Guertin & Eric M. Clarkson

Risk transfer in the construction industry depends heavily on industry-standard insurance language. Insurance provisions in subcontracts typically reference ISO standard insurance terminology or endorsements in order to guarantee (or, at least, attempt to secure) coverage for upstream parties. The contract may require, for example, that a subcontractor maintains general liability insurance on a "current ISO occurrence form," and name upstream parties as additional insureds, and both parties will have a general understanding of what that entails for purposes of risk transfer.

Problems arise, however, when insurance companies stray from standard language, especially on issues that go to the heart of construction risk transfer. In some instances, provisions that track ISO language may contain subtle changes that seem to meet the contractual insurance requirements. Upon closer scrutiny, it could significantly change how a policy will respond to a given claim. Given the extent of potential liability arising from construction projects, if the insurance programs intended to back up risk transfer and indemnity agreements do not respond as expected, all the potentially liable parties may be left in the lurch.

SDV has recently encountered language in commercial umbrella policies issued by Ohio Casualty Insurance Company (a Liberty Mutual subsidiary) which raise significant risk transfer concerns: an Off-Premises Property Damage endorsement, and a Contractor's Errors and Omissions endorsement. These endorsements appear unobjectionable, initially, but a closer analysis suggests that they could have serious repercussions for risk transfer with respect to specific claims.

## **Off-Premises Property Damage – CG 88 72 12 08**

Ohio Casualty's "Off-Premises Property Damage Including Care, Custody or Control" endorsement purports to afford coverage for certain risks that are typically excluded under general liability policies by modifying specific ISO standard exclusions. This form is sold as something similar to an installation floater, by narrowing or removing exclusions j(4), j(5), and j(6) to provide coverage for property damage to products being installed by the insured. Unfortunately, the changes made by the endorsement are not restricted from affecting the rest of the policy's provisions. Rather, the form adds provisions to subsections of CG 00 01 10 13 in an attempt to reshape coverage.

The most concerning provision of this endorsement simply adds the following exclusion to the policy: "This insurance shall not apply to . . . '[p]roperty damage' . . . to property included in the 'products-completed operations hazard.'" Without qualification, this exclusion completely bars completed operations coverage for property damage losses. Surely, as the endorsement purports to create coverage, this is not the intent, but the drafting does not limit the exclusion's application to the extension of coverage it attempts to create.

There certainly may be trade contractors whose operations do not pose significant completed operations risk, and for such a company, this provision might never give rise to any concern. Regardless, this provision almost certainly runs afoul of a subcontractor's contractual obligation to provide completed operations coverage. For a construction defect claim, the language of CG 88 72 12 08 gives Ohio Casualty the ability to argue that the policy was not intended to provide any completed operations coverage at all. This is clearly not the expected result, as the upstream parties would be forced to incur unnecessary litigation costs and expenses to pursue contractual indemnity against the subcontractor.

## **Contractors Errors & Omissions – CU 89 44 08 17**

Another troublesome endorsement found on Ohio Casualty policies is the "Contractors Errors & Omissions" exclusion. This endorsement purportedly excludes coverage only for the insured's defective workmanship, and it does track various exclusions within standard ISO primary policies. However, this form modifies the language in subtle ways that could completely disrupt risk transfer for construction defect claims.

Generally, ISO standard policies provide coverage for damages because of "property damage" caused by an "occurrence," which is, in turn, limited by specific exclusions. However, the exclusions carve out certain exceptions which are critical to satisfying the parties' contractual expectations. For example, exclusion excludes coverage for "property damage" to "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it," but makes an exception for completed operations coverage. Similarly, exclusion bars coverage for "property damage" to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard,' except "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." Upstream parties expect that their subcontractors'

insurance policies will maintain these critical exceptions since these profoundly impact whether they may be entitled to additional insured coverage for completed operations property damage claims.

Ohio Casualty's endorsement uses wording similar to that found in the ISO standard exclusions but eliminates the important exceptions for completed operations found in exclusion and for subcontracted work found in exclusion. Furthermore, it eliminates coverage for any claim arising out of "contractor's errors or omissions," which is very broadly defined as "an 'insured's' negligent act, error or omission while acting within the 'insured's' operation resulting in the failure of 'your work' to perform the function or serve the purpose intended after completion." Clearly, these modifications vitiate any potential coverage the named insured or the additional insureds might have for property damage claims arising from the subcontractor's operations.

Given the non-standard language and the direct implications on construction risk transfer, an upstream party would be justified in refusing to accept insurance coverage endorsed with such an exclusion. The litigation costs associated with construction defect claims or accidents are substantial enough, never mind when coverage litigation must be initiated due to unexpected complications with risk transfer.

## Conclusions

Some insurance and risk management programs address these issues upfront by requiring submission of detailed insurance information from subcontractors before they can commence work on a project. Unfortunately, many projects rely on incomplete information or inaccurate representations of adherence to the contractual insurance requirements. Other projects may simply not have the resources to perform comprehensive reviews of all of their subcontractors' relevant insurance programs. However, it is evident that investing the time to carefully examine insurance provisions like the ones cited above may pay back ten-fold in the long run.

For more information, contact Theresa A. Guertin at [tag@sdvlaw.com](mailto:tag@sdvlaw.com) or Eric M. Clarkson at [emc@sdvlaw.com](mailto:emc@sdvlaw.com).