



CONSTRUCTION RISK MANAGEMENT

NONPHYSICAL LOSS TO UNBUILT PROPERTY

by Tracy A. Saxe and David G. Jordan¹

Builders risk insurance is unique in that it insures property undergoing fundamental change during the policy period. The covered risk on the date of project commencement (usually an empty plot of land) is vastly different from the risk insured on the date of project completion (a finished structure). The insured property is a work in progress consisting of three separate segments: (1) the part of the project that has been completed, (2) the part that is being worked upon, and (3) the part that is not yet begun. Consequently, builders risk insurance covers the on-site building materials and components that are being moved around, assembled, and put into place.²

Losses involving the repair or replacement of physically damaged portions of the project and lost or damaged materials and equipment are the most common types of covered builders risk claims. Some builders risk policies also cover certain additional expenses, including “soft costs” (additional costs associated with project delays), “debris removal” costs, and compensation for the loss of valuable papers and records. (See sec-

tions VII.A and VII.B for more on coverage provided for physical damage to property and soft costs, respectively.) However, an important yet seldom contemplated issue concerns the applicability of builders risk coverage for losses regarding the “unbuilt” (or future-work) portion of the project. These losses pertain to the higher costs required to complete future work that are *caused by* damage to the project’s completed property and/or work-in-progress.

This article provides an overview of the nature of the unbuilt exposure and the poten-

¹For biographical information on Mr. Saxe and Mr. Jordan, see the Contributing Authors section of this reference.

²See *Village of Kiryas Joel Local Dev. Corp. v. Ins. Co. of N. Am.*, 996 F.2d 1390, 1392 (2d Cir. N.Y. 1993) and *Fireman’s Fund v. Structural Sys. Tech., Inc.*, 426 F. Supp. 2d 1009 (D. Neb. 2006):

“Builders risk” insurance is a unique form of property insurance that typically covers only projects under construction, renovation, or repair.... The purpose of builder’s risk insurance is to compensate for loss due to physical damage or destruction caused to the construction project itself. A policy of insurance containing a “builder’s risk” clause or clauses should be construed reasonably and if uncertain in meaning, in favor of the contention of the insured so as to cover if possible a risk obviously sought to be insured. [Id. at 1025. quoting *Ira S. Bushey & Sons v. America Ins. Co.*, 142 N.E. 340, 341-42 (N.Y. 1923)]

tial coverage afforded for this type of loss under builders risk insurance policies. Unfortunately, there is very limited caselaw to date that directly addresses this point, which makes drawing definitive conclusions difficult. Two courts that did address this exposure arrived at different conclusions. These two decisions are reviewed at the end of this section.

The Unbuilt Exposure

When a construction project suffers property damage, it must be repaired or replaced, thereby creating a strain upon the time and resources allotted to the work that has not yet commenced. The result is that subcontractors and suppliers must juggle their schedules and resolve conflicts with other commitments to complete the project. The strain on time and resources created by the physical damage often translate to higher costs on the noncompleted portion of the project. The impact can be particularly acute when the loss is caused by a natural disaster, such as a hurricane, earthquake, or other force of nature. In such cases, the demand for labor and materials to rebuild or repair a large number of similarly affected properties often exceeds the supply, which drives costs up. Damage to building materials designed to perform certain construction tasks, if not readily replaceable, can also drive up costs if the contractor/insured is forced to undertake an alternative method of construction that is more costly and time-consuming. The pivotal coverage question is whether these higher costs, which stem directly from covered property damage, are covered under builders risk insurance.

Builders Risk Coverage Analysis

Builders risk insurance is nonstandardized coverage, which means that the policy lan-

guage varies from one form to the next, often significantly.³ However, while there is no common policy form, the majority of builders risk policies condition coverage upon the presence of the three following criteria: (1) a "loss" to (2) "covered property" (3) caused by a "covered cause of loss."⁴ Whether coverage exists for the higher costs of the unbuilt project segment requires an examination of each of these criteria.

Are Higher Costs of the Unbuilt Project Segment a "Loss"?

In some builders risk policies, the term "loss" is defined liberally (if at all) as "accidental loss and accidental damage."⁵ Under a broad definition such as this, it is reasonable to conclude that building costs due to property damage constitute a loss. Therefore, insofar as these costs are "accidental" as opposed to "intentional," the "loss" component should be satisfied.

However, other builders risk policies require the loss to be both direct and physical for coverage to apply. The policies usually contain language in the insuring agreement such as "we will pay for *direct physical loss* to covered property from any covered

³See *IRMI Glossary of Insurance and Risk Management Terms*, available at www.irmi.com/online/insurance-glossary/default.aspx.

⁴See, e.g., *Harbor Cmty., LLC v. Landmark Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 59179 (S.D. Fla. Aug. 4, 2008) (quoting Landmark Amer. Ins. Policy Coverage Form, #LHQ334573); *Oceanside Pier View, L.P. v. Travelers Prop. Cas. Co. of Am.*, 2008 U.S. Dist. LEXIS 37755 (S.D. Cal. May 6, 2008) (quoting Traveler's Ins. Co.'s builder's risk provisions); *Phillips Home Builders v. Travelers Ins. Co.*, 700 A.2d 127, 128 (Del. 1997).

⁵Zurich Sample Builder's Risk Form 40471. See also *Stagl v. Assurance Co. of Am.*, 245 Ga. App. 8, 10 (Ga. Ct. App. 2000). Notably, most builders risk policies contain no definition of the term "loss."

cause of loss.”⁶ (Emphasis added.) This language arguably requires a closer relationship between the physical loss to the existing property and the increased costs to the unbuilt portion.⁷ Coverage under such a provision would therefore hinge upon whether the higher costs are considered to be connected to, or distinct from, the physical repair and replacement costs incurred by the insured.

Does the Loss Involve “Covered Property”?

It is conceivable that disagreements may arise as to whether damage to the unbuilt portion of the project involves a loss to “covered property,” or more specifically, whether this project segment is considered property at all. The following definition of covered property illustrates this point:

Covered Property—Property of every kind and description that you own or are liable for that is intended to become a permanent part of the building or structure described in the declarations.⁸

Certainly it is true that the unbuilt project segment is “intended to become a perma-

⁶See, e.g., American Association of Insurance Services (AAIS) Builders’ Risk Coverage Form IM 7050.

⁷See, e.g., *Great N. Ins. Co. v. The Benjamin Franklin Fed. Savings & Loan*, 793 F. Supp. 259 (D. Ore. 1990) (Costs of asbestos removal were not considered a direct physical loss because the building itself was undamaged):

In this case, the policy language ... uses the term “direct physical loss.” There is no evidence here of physical loss, direct or otherwise.... The only loss is economic. The policy, by its own terms, covers only direct physical loss. The inclusion of the terms “direct” and “physical” could only have been intended to exclude indirect, non-physical losses.

⁸Ace Ins. Co. Builder’s Risk Policy Form BB-5W60b

nent part of the structure.” However, because this project segment only exists conceptually at the time of the loss, it is not entirely clear whether it is technically considered property the insured “owns” or is “liable for.” The argument for coverage is that the built and unbuilt components of the project are not specifically distinguished under the policy definition of “covered property” and, therefore, the latter portion must be included. Moreover, the unbuilt segment appears to fit within the broad term “property of every kind.” The argument against coverage is that something that does not yet exist is not property. Given the nonspecific nature of the language, the pro-coverage position is in keeping with the widely adopted premise that uncertainties of policy language are construed in the insured’s favor.⁹

A narrower definition of “covered property” may present a greater challenge to coverage. For example, if “covered property” is defined to involve a physical object, such as in the sample provision directly below, an argument can be made that the unbuilt segment falls outside of the definition.

Covered property is defined as: a. Structures (including foundations, additions, attachments, permanent fixtures, and materials and supplies), fixtures, equipment, machinery and similar property which will become a permanent part of the structure described in the declarations or schedule, while under construction, reconstruction/erection, fabrication or repair at the premis-

⁹See, e.g., *Standard Constr. Co. v. Maryland Cas. Co.*, 359 F.3d 846, 854 (6th Cir. Tenn. 2004) (“ambiguous insurance contracts, and, in particular, ambiguous language limiting coverage, are construed in favor of the insured.”).

es described in the declarations of schedule.¹⁰

One view of this provision is that the policy merely requires that the project, as defined in the policy declarations page, be under construction at the time of the loss for the “covered property” requirement to be satisfied. In that case, “covered property” would include both the built and unbuilt portions of the project. However, another interpretation is that the policy requires the damaged property to be considered a “structure” that is “under construction.” Whether the unbuilt portion of the project satisfies the latter reading of the definition of “covered property” is not entirely clear. Can something that has not yet begun to be built be technically considered “under construction”? To illustrate that this is not a cut and dried question, consider a situation where a project is to be completed in phases, such as a condominium development. Suppose a covered loss in phase 1 results in an increase in the cost of the yet-to-begin phase 2. Can phase 2 be considered property “under construction”? Again, since the policy could have articulated the desired result, insureds can argue that the ambiguity should be read against the insurer.

Is There a Covered Cause of Loss?

Assuming that higher building costs involve a “loss” to “covered property,” the final coverage issue—whether such loss is caused by a covered cause of loss—could be the most difficult to determine. For example, one policy form defines covered cause of loss as: “Risk of direct physical loss to covered property, except those

causes of loss listed in the exclusions.”¹¹ Under this definition, an insured must establish that the direct cause of the increased costs of completing the unbuilt portion of the project is a direct physical loss, or risk of such loss, to the project.

Insofar as the repair of physical damage to the project is at the root of the higher costs on the unbuilt portion, the “covered cause of loss” condition would appear to be met. However, there are other factors to consider when assessing the cause of increased building costs. Natural market forces for labor and materials, or costs attributed to meeting agreed-upon deadlines (i.e., expediting costs) could likewise be cited as the proximate reason for the increase in building costs. Given these and other factors often associated with higher than expected costs (e.g., project overruns, redesign etc.), establishing property damage as the direct cause, when required by the policy language (as opposed to a secondary cause), could be a point of contention between the insurer and policyholder.

Certain policy provisions that arguably restrict or exclude coverage may also be raised. One exclusion in particular that could act as a basis of denial is the “consequential damages” exclusion. Commonly found in builders risk policies, the consequential damages exclusion removes coverage for certain tangential, or indirect, losses sustained in connection with a loss of covered property, as demonstrated in the following sample provision:

This policy does not cover any loss due to delay, loss of use, loss of market, or any other consequential loss,

¹⁰This language was present in the case of *Women in Military Serv. for Am. Mem'l Found. v. Hartford Fire Ins. Co.*, 215 F.3d 1324 (4th Cir. Va. 2000).

¹¹Zurich Builder's Risk Coverage Form, Form 40471, Revised 11-2002.

except to the extent insurance is specifically provided under this policy.¹²

An insurer could argue that higher costs associated with the completion of the unbuilt portion of the project are consequential to actual damage to the property, rather than direct damage. Consequential damages, as suggested from the definition provided above, typically concern losses involving “*delay, loss of use and loss of market*” which are often understood as loss of profits rather than increased building costs.¹³ Each of these types of losses is examined further below.

Delay

While significant property damage frequently results in a delay of completion, higher construction costs pertaining to the unbuilt project segment may or may not be considered to be due to delay.¹⁴ Increased costs attributed to certain expenses, such as extended carrying costs and contractual pen-

alties for untimely completion, could be categorized as delay damages, which are commonly thought of as nonphysical damages.¹⁵ In contrast, higher costs associated with completing the unbuilt project segment usually involve actual hard construction costs, which are associated with the physical work. While delay may play a factor in the overall higher cost to complete the project work, the increase in the cost of finishing the job is actually attributable to the property damage sustained. Said another way, the direct cause of the higher building costs is the property damage sustained at the project; in the absence of such damage there would be no delay and no increased building costs.¹⁶

Finally, the claim of increased costs can be completely unrelated to delay. For example, the higher costs of building materials may occur whether or not the project is prolonged. It is possible that the project could remain on schedule in spite of the damage sustained yet still result in higher costs to the unbuilt project segment (because the price of materials has risen, or the method of construction must be changed). Therefore, while it is possible that the higher building costs under some circumstances could fall within the ambit of a consequen-

¹²Another sample exclusion provides:

Consequential loss, damage or expense of any kind or description including but not limited to loss of market or delay, liquidated damages, performance penalties, penalties for non-completion, delay in completion, or non-compliance with contract conditions, whether caused by a peril insured or otherwise....

See *Zurich Am. Ins. Co. v. Keating Bldg. Corp.*, 513 F. Supp. 2d 55, 70 (D.N.J. 2007).

¹³See, e.g., Richard Kremplec, Q.C., *Property Damage Claims Under Commercial Insurance Policies*, § 41.40 (2007).

¹⁴See, e.g., *Gemma Constr. Co. v. City of New York*, 246 A.D.2d 451, 453 (N.Y. App. Div. 1st Dep’t 1998) (“delay damage claims seek compensation for increased costs ... whether the costs result because it takes longer to complete the project or because overtime or additional costs are expended in an effort to complete the work on time,” *quoting Corinno Civetta Constr. Co. v. City of New York*, 67 N.Y.2d 297, 313–314, 502 N.Y.S.2d 681, 493 N.E.2d 905 (1986)).

¹⁵See, e.g., *Terra-Adi Int’l Dadeland LLC v. Zurich Am. Ins. Co.*, 2007 U.S. Dist. LEXIS 14620 (S.D. Fla. 2007).

¹⁶Insofar as a claim for higher costs of the unbuilt property segment is categorized as delay, the policyholder may potentially have a “soft cost” coverage claim. Soft costs, when covered, are typically added to a builders risk policy by endorsement or extension. However, they are often subject to a lower policy sublimit. Examples of “soft costs” include “interest on borrowed money; realty taxes; advertising and promotional expenses; architects, engineers and consultant fees; administration expense; legal and accounting fees; and insurance premiums.” *Terra-Adi Int’l Dadeland, LLC v. Zurich Am. Ins. Co.*, 2007 U.S. Dist. LEXIS 14620 (S.D. Fla. Mar. 1, 2007).

tial damage exclusion for delay-related losses, there are many potential scenarios which arguably make this exclusion inapplicable.

Loss of Use

Loss of use typically involves the loss of revenue or lost profits associated with the inability to utilize the insured property.

Loss of profits has ... been recognized as an appropriate measure of the damages resulting from loss of use when the anticipated profits can be proved to a reasonable, although not necessarily absolute, certainty.¹⁷

As can be inferred from the above passage, the claim for increased building costs does not seem to implicate a loss of use exclusion because it does not involve the loss of profits associated with the inability to use the property. Instead, as mentioned, it is a claim that ties directly to costs of constructing the insured project.

Loss of Market

Loss of market concerns the inability to utilize the construction project or money damages associated with a market that otherwise would have existed but for the property damage. “[M]arket” refers to the geographical or economic extent of commercial demand for any particular product,

¹⁷*Northern Petrochemical Co. v. Thorsen & Thorshov, Inc.*, 211 N.W.2d 159, 166 (Minn. 1973). See also *Manson Growers Coop. v. Mutual Svc. Cas. Ins. Co.*, 229 F.3d 1158 (9th Cir. 2000) (Holding that physical damage to apple packing facility, including damage to apples, was covered under property policy, but lost profits associated with inability to sell undamaged apples at peak time, due to packaging delays caused by physical damage, were subject to policy’s loss of use exclusion.).

and generally refers to a more or less identifiable group of prospective purchasers seeking a particular type of product offered by a more or less identifiable group of sellers.”¹⁸ For example if the construction involves an apartment structure, the market for renters may be reduced because potential tenants choose other apartments during the period of delay.

As with “loss of use,” “loss of market” does not appear to have a logical connection to a claim for higher construction costs for the unbuilt portion of the project.

Of the three categories of consequential damages discussed, “delay” seems to be the most relevant to an increased project cost claim. Yet even the applicability of a delay exclusion is questionable at best, given that higher costs are more a result of the property damage and can be completely independent of the fact that the project will take longer than anticipated to finish. And while consequential damages are not confined to the three mentioned categories of losses, the apparent disconnect between higher building costs and these three types of claims suggests that the application of a consequential damages exclusion, while possible, is far from certain.

Examining Caselaw

A review of caselaw provides informative guidance as to how coverage issues might be examined and interpreted by the controlling legal authority. Two recent cases have shed some light on the issue of coverage in the builders risk policy for the higher costs of completing the unbuilt segment of a damaged project. In *Zurich Am. Ins. Co. v. Keating Bldg. Corp.*, 513 F. Supp. 2d. 55

¹⁸*Borton & Sons, Inc. v. Travelers Ins. Co.*, No. 18100-6-III., 2000 LEXIS 93 at *5 (Wash. Ct. App. 2000).

(D.N.J. 2007), the issue of coverage for increased building costs was examined by a New Jersey court. In *Keating*, the court considered the appropriate recovery under a builders risk policy for damages related to the collapse of a parking garage that was under construction at the Tropicana Hotel and Casino in Atlantic City. In particular, the court addressed the issue of whether the builders risk policy covered the increased cost of construction for the unbuilt portion of the parking garage.

The insurer argued that the increased costs for the unbuilt segment were not covered because they did not concern the repair of damaged property, but rather were directly attributable to the project delay caused by the collapse. The court disagreed and determined that the policy did not limit coverage to that portion of the project being worked upon by the insured at the time of the loss, and thus found that the plaintiff's increased costs claims were covered:

[T]he Policy does not restrict coverage only to the area of the Project where the accident occurred. To the contrary, the Policy insures physical damage to the insured property at the "Insured Project." The Policy defines the "Property Insured" to include all property used to construct the "Insured Project" and "Insured Project" as "the work which the Insured is contractually obligated to perform in accordance with the contract documents." The "work" referenced in this definition is defined as the "construction of a 27 Story - 350' High Multi-[U]se Non-Combustible Building."¹⁹ *Zurich's argu-*

¹⁹This language appears to be equivalent to the "covered property" provision that has been previously discussed. As mentioned, builders risk policies are not uniform, and therefore, the fact that the *Keating* policy is worded somewhat differently is not surprising.

*ment that the Policy's Valuation Clause*²⁰ *limits coverage to only repair costs, and not increased costs to complete construction of undamaged property, are [sic] unpersuasive.* The Policy's Valuation Clause states that the Policy covers only costs to "repair or replace the property lost or damaged at the time and place of loss with materials of like kind and quality less betterment...." However, *the Court finds that from the perspective of an ordinary insured reading the Policy—the perspective from which this Court must view the language of the Policy, ... the term "property lost or damaged" as a result of the collapse refers to the entire structure, not simply to the location of the collapse.*²¹ (Emphasis added)

The *Keating* court further opined upon the application of the consequential damages exclusion, which Zurich argued barred coverage for increased building costs. Specifically, the insurer argued that this exclusion denied coverage for damage "caused directly or indirectly and/or contributed to, in whole or in part by consequential loss, damage or expense of any kind or description including but not limited to ... penalties for non-completion, delay in completion, or non-compliance

²⁰A valuation clause is a policy provision in a property or inland marine policy that specifies the basis of indemnification when property is destroyed (*IRMI Glossary of Insurance and Risk Management Terms*). An insurer may argue that because valuation is based upon the cost of repair/replacement of the damaged property that the policy does not contemplate coverage for the increased construction costs associated with the unbuilt project segment. The flaw with this rationale is that a valuation clause is neither a grant of coverage provision nor an exclusion. Thus it does not properly serve as an indicator of what is covered or uncovered.

²¹See *Zurich Am. Ins.* at 69.

with contract conditions....”²² *Keating* found that the exclusion was inapplicable to the plaintiff’s claim for two reasons. First, it was determined that the “proximate cause” of the higher costs was the collapse of the parking garage, not the resulting delay as Zurich had contended. Second, the court found that the particular examples of excluded damages contained within the consequential damages exclusion were not applicable to the claim of increased costs for the unbuilt portion of the project:

[T]he Court finds that the consequential loss exclusion does not apply to the losses at issue. Here, the Policy lists the specific types of losses that are excluded as “consequential” losses. The types of losses listed in the exclusion—“loss of market or delay,” “liquidated damages,” “performance penalties,” and “penalties for non-completion, delay in completion, or non-compliance with contract conditions”—are purely economic losses that are separate and apart from regular construction costs. Extending the exclusion of “consequential losses” beyond purely economic losses to include regular construction costs incurred to simply finish the Project is unwarranted and impermissible in light of New Jersey law directing courts to interpret exclusionary language narrowly.²³

The Federal District Court for the Southern District of California reached the opposite conclusion. In *Oceanside Pier View, LP v. Travelers Prop. & Cas. Co. of Am.*, No. 07CV117, 2008 U.S. Dist. LEXIS 37755 (S.D. Cal. 2008), the court found that increased costs associated with the unbuilt portion of a construction project were not

covered by the applicable builders risk policy. In *Oceanside*, the court considered the issue of coverage for higher construction costs after a shoring wall gave way, resulting in the necessary redesign and repair of the wall. This process delayed the project and caused the price of completing the remaining work to increase. The plaintiff argued that the higher costs associated with completing the unbuilt portion of the project were compensable builders risk losses. The court disagreed, holding that the Insured’s position did not comport with the plain language of the policy. More specifically, it concluded that such costs (1) did not involve physical injury to covered property (i.e., that the unbuilt project segment did not constitute property under construction) and (2) were governed by the policy’s separate coverage for “Expediting Costs and Additional Costs of Construction Materials and Labor.” Thus the *Oceanside* court’s reasoning was that, given the presence of an insuring provision extending limited coverage for expediting and increased construction costs, the higher costs for the unbuilt project work, which were deemed not to be covered property, must be limited to the coverage afforded under such provision.

[T]he Court finds that the “Builders’ Risk” provisions plainly provide coverage for losses resulting from the direct physical loss of buildings or structures being erected on the Property, but do not include coverage for the increased costs of construction materials and labor to construct never-before constructed portions of the Project. Indeed, *the plain language of the “Builders’ Risk” provisions protect only those buildings, structures, or portions of buildings and structures under construction at the Project, and do not protect against the unforeseen costs to construct never-before constructed*

²²*Id.* at 60.

²³*Id.* at 71.

buildings or structures which may arise as a result of delays. Accordingly, while the “Builders’ Risk” provisions covered—and Defendant paid Plaintiff for—the cost to replace the failed shoring wall in this case, including any increased costs to construction materials and labor which were necessary to reconstruct or replace the shoring wall to its original condition, the “Builders’ Risk” provisions did not and do not cover the increased costs of construction materials and labor which Plaintiff alleges it incurred to complete portions of the Project which were not yet under construction at the time that the shoring wall failure caused the delay....

[Additionally] the Policy specifically includes a provision for the increased costs of construction materials and labor under “Additional Coverages”.... Read in its entirety, the Court concludes that the plain language of the Policy provides limited coverage for increased costs to construction materials and labor for previously un-constructed portions of the Project under the additional coverage for “Expediting Costs and Additional Cost of Construction Materials and Labor,” and not under the “Builders’ Risk” provisions.²⁴ (Emphasis added).

These two cases illustrate the challenges involved with claims for increased building costs and the unbuilt work phase.²⁵ The lack of further caselaw and the fact that there is significant variation in language among builder’s risk policies make it extremely difficult to predict coverage for such claims. The presence or absence of an “additional construction costs” or other clause speaking directly to higher construction ma-

terials costs such as that found in *Oceanside* may prove to be significant in a court’s assessment of coverage.

Conclusion

The amount of time and labor necessary to complete a project has a significant impact on total construction cost. Good management of trade subcontractors and the

²⁵A third case, *Harbor Cmty., LLC v. Landmark Am. Ins. Co.*, 2008 U.S. Dist. LEXIS 59179 (S.D. Fla. Aug. 4, 2008), acknowledged the difficulty associated with determining coverage for the higher future building costs, but ultimately did not decide whether these costs were covered. The case involved a collapse of a condominium building (building # 9) that was in the process of construction. In addition to its coverage claim for damages to the collapsed condo building, the plaintiff further sought coverage for the higher costs incurred to reconstruct other portions of the condo project, alleged to be a direct consequence of the collapse. However, the court determined that there was a lack of evidence provided to connect the collapse of building # 9 to the increased costs of reconstructing the other condo buildings.

Plaintiff also alleges that ... the “[i]ncreased costs of constructing ... the other structures” are “Covered Causes of Loss” because they were a direct result of the collapse of Building # 9. Compl., P 15. “Covered Causes of Loss” incorporates the term “loss or damage” in its definition. Therefore, in order to determine if an event is a “Covered Cause of Loss,” it is necessary to make a finding concerning whether the demolition of other structures was accidental. However, it is unclear from the pleadings and other supporting materials which other buildings were demolished, why their demolition was undertaken, and why there was a resulting increase in the costs of construction. This Court is therefore unable to determine if ... the increased costs of reconstruction constitutes a “Covered Cause of Loss.” Furthermore, because of the uncertain nature of the causal relationship between the collapse of Building # 9 and the demolition of other buildings and ... the increased costs of their reconstruction, this Court cannot determine if these claims constitute “direct physical loss or damage.”

²⁴See *Oceanside Pier View* at *18–22.

project as a whole reduces the total cost. However, when, during the course of construction, a tightly scheduled project sustains property damage, the future sequencing of the work is significantly impacted, often extending the completion date and creating a greater demand for labor. While these costs are primarily viewed as being associated with the portion of the project that is not yet under construction, they are clearly a direct consequence of the physical loss sustained.

Whether these higher costs are covered losses under builders risk insurance is largely unsettled. A broad interpretation of insurance coverage that is applied by many

state and federal courts would suggest that such losses are covered in the absence of definitive language excluding or limiting coverage for such losses. However, when specific language is present, such as declarations limiting coverage to property that is in existence at the time of the loss, the outcome could be against a finding of coverage. Because builders risk policy language varies greatly from policy to policy, a uniform determination of whether these higher costs are covered is unlikely. As a result, insurers and policyholders have minimal legal guidance to support their respective positions as to coverage for increased costs of completing the unbuilt portion of the project.

Tracy A. Saxe is a partner at Saxe Doernberger & Vita, P.C. in Hamden, Connecticut. He has more than 20 years of litigation experience in insurance coverage issues, the majority of which has involved representation of policyholders. Mr. Saxe has handled cases involving coverage for construction defects, completed operations, product liability, property damage and bodily injury related to mold and asbestos, bodily injury related to construction, "sick building" syndrome, environmental claims, business interruption, employment disputes, patent infringement, contempt, RICO, unfair practices, breach of fiduciary duty, bad faith, and professional malpractice. He is well versed in issues relating to late notice, allocation, subrogation, contribution, indemnification, and the duty to defend.

In addition to his litigation experience, Mr. Saxe has successfully mediated and arbitrated many disputes. He has taught a variety of insurance law courses at Quinnipiac University School of Law and is a frequent lecturer nationally on insurance coverage topics. Mr. Saxe earned his J.D. from Georgetown University Law Center in 1983 and a B.A. in policy studies, magna cum laude, Phi Beta Kappa, from Syracuse University in 1980. Mr. Saxe can be reached at (203) 287-8890 or tas@sdvlaw.com.

David G. Jordan is an associate at Saxe Doernberger & Vita, P.C. in Hamden, Connecticut. He has been a practicing attorney since 1999, the majority of such time focusing his practice in the area of complex commercial litigation. Mr. Jordan has had extensive involvement representing policyholders in a wide array of insurance disputes including construction defect claims, third-party liability claims, first-party property disputes, business interruption losses, and environmental coverage issues.

Mr. Jordan earned his J.D. from the University of Connecticut, School of Law in 1999, where he served as an Executive Editor of the Connecticut Insurance Law Journal, and earned a B.A. in Economics from Fairfield University in 1996. He can be reached at (203) 287-8890 or dgj@sdvlaw.com.