Insurance Coverage in Light of The New AIA Form A201

By

Shamus P. O'Meara
Dale O. Thornsjo
Morgan A. Godfrey
Attorneys at Law
Johnson & Condon, P.A.
Minneapolis, Minnesota

I. Introduction.[1]

Construction contracts are some of the most detailed and condition-laden instruments an attorney may face in practice. These documents usually contain numerous provisions which require parties to obtain insurance other than the type normally obtained. In addition, these documents many times create certain obligations to indemnify which are normally not present in common law.

Many construction and design professionals utilize the American Institute of Architects (AIA) pre-printed contract forms for their contracting needs when addressing new building projects, remodeling, grading, roof repair/replacement, and a variety of other projects. A typical construction project often utilizes the AIA's A201 form, the General Conditions of the Contract for Construction.[2] Depending on its design needs, the Owner may also contract with an Architect by utilizing the AIA B141 form, the Standard Form of Agreement Between Owner and Architect. These forms impose numerous obligations on the contracting parties, among which are certain requirements to indemnify parties to the construction contract, and to obtain

---

[1] This presentation is intended to overview possible issues involved with the new AIA form A201. The views expressed are not necessarily those of the clients of Johnson & Condon, P.A. or of the authors.

[2] American Institute of Architects (AIA) A201 form (1997 ed.). All AIA copyrighted material has been reproduced with permission of the American Institute of Architects under license number 108818, which expires on May 6, 2000. FURTHER REPRODUCTION IS PROHIBITED. AIA Documents are periodically revised; care should be taken to determine whether a current version of the document is involved. Copies may be purchased from the AIA. The text of the document is not "model language," and should not be used in documents without permission of the AIA.

specific types of insurance. These contractual obligations can greatly impact on the ultimate risk retained or transferred by the parties when property damage or personal injury occurs during construction. In addition, application of Minnesota's Anti-Indemnification Statute, Minn. Stat. §337.01 et seq., could render certain bargained-for changes to the A201 form meaningless unless those changes are accompanied by additional changes to additional parts of the form to complement the desired single modification.

This presentation addresses the types of insurance coverages available to parties who utilize the AIA 201 form in a typical construction project, how indemnification provisions may impact the extent of insurance required or risk retained or transferred by a contracting party, some of the coverage issues which arise out of the construction contract relationship, and some suggestions which may help the practitioner in addressing or responding to these issues.

II. Paragraph 11.1: Contractor's Liability Insurance Procurement Obligation.

Article 11 of the 1997 A201 form sets forth the Contractor's and the Owner's obligations to procure insurance. Subparagraph 11.1.1 requires the Contractor to purchase liability insurance to protect *the Contractor* from a series of enumerated claims "which may arise out of or result from *the Contractor's operations* under the Contract and for which the Contractor may be legally liable . . . ." The enumerated claims include, but are not limited to, those:

1) for damages because of bodily injury to any person other than the Contractor's employees;

2) for damages because of injury to or destruction of tangible property other than to the Work itself;

3) for bodily injury or property damage arising out of completed operations; and

4) involving contractual liability insurance applicable to the Contractor's obligations under the Indemnification provisions of the contract.

A. Commercial General Liability Insurance (CGL).

Contractors typically fulfill Paragraph 11 insurance obligations by procuring a Commercial General Liability (CGL) policy. Since the 1940s, general liability policies have typically utilized forms drafted and revised from time to time by the Insurance Services Office ("ISO") and its predecessors. CGL coverage pays "all sums which the insured shall become legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an occurrence . . . ."[3] An "occurrence" is defined as "an accident, including continuous or repeated exposure to conditions which results in bodily injury or property damage . . ."[4]

The CGL policy is designed to cover the risks normally associated with the insured's premises and operations. In the construction context, the policy responds if the insured causes bodily injury or damage to property other than that which is the insured's "work" or "product." The purpose of such insurance is to provide protection for personal injury or property damage

---

[3] This language can be found in the 1973 Insurance Services Office (ISO) general liability form. However, it has remained essentially the same in subsequent revisions.

[4] This definition is also contained in the 1973 form. Again, for purposes of this paper, it has remained substantially the same.

caused by the work or product only, and not for the replacement or repair of the work or product. Historically, replacement or repair of the insured's work or product is a risk associated with the insured's business, and not something insurable under a CGL policy. Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229 (Minn. 1986); Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am., 323 N.W.2d 58, 62-64 (Minn. 1982); Ebenezer Soc'y v. Dryvit Sys., Inc., 453 N.W.2d 545, 548 (Minn. Ct. App. 1990) (liability policies intend to protect third parties who suffer damage to person or property).

For example, in a roof replacement project, if a Contractor negligently fails to provide proper temporary weather protection resulting in water damage to areas below the roof in the existing structure (e.g., non-Work areas), the CGL policy would come into play to provide coverage for this damage. The Contractor's CGL policy would cover the Contractor's liability for damages to non-work property resulting from its negligent performance.

In addition to limiting coverage for the Contractor's work or product, the "Business Risk Doctrine" also precluded the Contractor from coverage even if much of the actual construction was performed by Subcontractors. Knutson Constr. This rationale was based on the assertion that the Contractor, not the insurer, controls the risk associated with the project. Id., 396 N.W.2d at 234. Therefore, these risks should be reflected in the price of the Contractor's "work" or "product," and not the price of the insurance. Sphere Drake Ins. Co. v. Tremco, Inc., 513 N.W.2d 473, 477 (Minn. App. 1994).

The scope of the Business Risk is contractually embodied in the CGL policy's exclusions. By 1973, these exclusions read as follows:

"This insurance does not apply to:

(n) property damage to the named insured's product arising out of such products or any part of such products;[5]

(o) property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of material, parts or equipment furnished in connection therewith . . . ."[6]

The term "work" was not defined in the 1973 coverage form. Ogburn, *An Overview of Insurance Coverage Issues in Construction Defect Cases*, CONSTRUCTION LAW, DEFENSE RESEARCH INSTITUTE, March 1999 57, 63. Therefore, in 1986, the ISO form was amended in part to include the following "Work" definition:

---

[5] This is Exclusion K in the current CGL form.

[6] This is Exclusion L in the current CGL form.

"Your work" means

a. Work or operations performed by your or on your behalf, and

b. Material, parts or equipment furnished in connection with such work or operations.

'Your Work" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a or b above."

Apparently, the purpose of adding the definition was to confirm the current understanding of the term's meaning, and not to change the concept. Ogburn, *supra*.[7]

In addition to adding a "work" definition, the exclusion was modified by the addition of an exception to the "work" exclusion. The current ISO form "work" exclusion reads as follows:

"[This insurance does not apply to]

l. 'Property damage' to 'your work' arising out of it or any part of it and included in the products-completed operations hazard."

---

[7] The A201 form defines "Work" in a similar fashion as "the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. * * *"

> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."

(emphasis added). "Thus, the plain language of the exception provides that damage to 'your work' *is covered if the damage results from the work performed by a subcontractor.*" O'Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 104 (Minn. Ct. App. 1996)(emphasis added). In other words, with this simple change, liability insurance coverage may now be available to protect a Contractor from claims asserted by third persons which relate to the Contractor's "work," but which is also considered the Subcontractor's work.

This coverage, however, is still subject to the original insuring language recited above. An occurrence may exist where the conduct involved is "perhaps negligent," but which does not rise to the level of reckless or intentional conduct. Ohio Cas. Ins. Co. v. Terrance Enters., Inc., 260 N.W.2d 450, 452-53 (Minn. 1977). However, when the damages result from conscious faulty workmanship or other "improper performance of [the Contractor's] construction contract,' an occurrence will not be established. Johnson v. AID Insurance Co. of Des Moines, Iowa, 287 N.W.2d 663 (Minn. 1980). Cf. Western National Mut. Ins. Co. v. Frost Paint and Oil Corp., 1998 W.L. 27247 (Minn. App., April 14, 1998)(court, in a non-construction context, states that "faulty workmanship alone does not constitute an occurrence").

B. *Katzner* Lessons on the Interaction Between Indemnification Agreements and Contractor CGL Coverage.

Historically, parties to a construction contract employed indemnification provisions to insulate themselves from liability related to the contract. The supreme court has held that properly crafted indemnification

provisions are enforceable to protect indemnitees from their own fault. Johnson v. McGough Constr. Co., 294 N.W.2d 286, 287-88 (Minn. 1980); Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc., 281 N.W.2d 838, 842 (Minn. 1979). Such agreements are analyzed under a "strict construction" standard which prohibited indemnification for one's own fault unless the agreement clearly and unequivocally demonstrated such an intent. See, generally, the court's discussion in Katzner v. Kelleher Const., 545 N.W.2d 378 (Minn. 1996).

The ability to enforce these indemnification provisions was statutorily altered as of 1984 with the passage of Minn. Stat. Ch 337. As of that date, negligent builders, contractors and design professionals could no longer force other construction professionals to be contractually liable for the indemnitee's fault unless the indemnitor contractually breached its duty to procure insurance, and the ultimate claim arose within the scope of the non-obtained insurance. Minn. Stat. §§ 337.02, 337.05, subd. 1, 337.05, subd. 2; Seward Housing Corp. v. Conroy Bros. Co., 573 N.W.2d 364 (Minn. 1998), Holmes v. Watson-Forsberg Co., 488 N.W.2d 473, 475 (Minn. 1992). These statutory changes appeared to intend to shift the risk of loss from the construction professionals (or their insurers), to a specific insurance policy which (hopefully) contemplated the specific risk at issue with the project.

In Katzner, the court addressed whether an indemnification provision was sufficiently broad to indemnify an at-fault party. 545 N.W.2d 378. The court determined that the Katzner indemnification provision was ambiguous; therefore, the at-fault party seeking indemnification could not rely on the provision to protect its interests as the provision did not clearly and unequivocally demonstrate an intent to indemnify the at-fault indemnitee. 545 N.W.2d at 382.

Because the Katzner court found the indemnification provision ambiguous, the court did not need to address another factor which must be

met before it will enforce indemnification agreements. In addition to the application of a "strict construction" to the language, an indemnification agreement will be enforced only if there is a temporal and geographic, *or* a causal, nexus between the Contractor's work and the injuries or damages at issue. Anstine v. Lake Darling Ranch, 305 Minn. 243, 249, 233 N.W.2d 723, 727 (1975), overruled on other grounds, Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 838, 840 n. 4 (Minn. 1979).

> A temporal nexus exists between the contractor's work and the injury or damage where the injury or damage occurs while in the preparation of, or the process of, the work; the temporal nexus ceases after the completion of the work. Seward Housing, 573 N.W.2d at 368; Fossum v. Kraus-Anderson Const. Co., 372 N.W.2d 415, 418 (Minn. Ct. App. 1985).
>
> A geographic connection exists between the injury or damage and the Contractor's work when the injury or damage is sustained on the job site, regardless of its cause. Fossom, 372 N.W.2d at 417-18 (citing Christy v. Menasha Corp., 297 Minn. 334, 211 N.W.2d 773 (1973)).
>
> Alternatively, a casual nexus exists when, "but for" the work, the injury or damage would not have occurred. National Hydro Systems v. M.A. Mortenson, 529 N.W.2d 690, 693 (Minn. 1995).

Either nexus, geographic and temporal, *or* causal, allows indemnification. Anstine, 305 Minn. at 249, 233 N.W.2d at 727.

The 1997 A201 form's Indemnification provision (Paragraph 3.18.1) imposes an indemnification obligation on a Contractor which cannot be read as broadly as the at-fault indemnitee sought to read the Katzner

indemnification provision. First, the scope of the indemnification only extends to damages, losses or expenses which are not covered by any PIMPL insurance procured pursuant to Paragraph 11.3 (see discussion below). Second, the agreement to indemnify only extends to the Contractor's (or its Subcontractors, agents or anyone working "downstream" from them) fault. Therefore, this provision should not run afoul of the indemnification prohibitions set forth in Minn. Stat. § 337.02 as Paragraph 3.18.1 does not seek to have the Contractor indemnify an Owner for the Owner's fault.

This discussion is relevant in an insurance context as Katzner also addressed the scope of a contractual provision to procure insurance which would protect against claims "which may arise out of or result from the Contractor's operations under the Contract." 545 N.W.2d at 380. The Katzner court held this obligation did not impose a requirement to provide specific insurance coverage for the benefit of others (such as an at-fault Owner) as set forth in Minn. Stat. § 337.05, subd. 1. Therefore, even if the Katzner indemnification provision was broad enough to indemnify the at-fault indemnitee, the provision could not be enforced as the scope of the insurance procurement obligation did not require the procurement of insurance to benefit the at-fault indemnitee. 545 N.W.2d at 382.

The Katzner insurance procurement obligation is similar to the Contractor's obligation under the 1997 Form A201's Paragraph 11.1 to purchase "insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract . . . ." Therefore, it is likely that the obligation imposed on the Contractor by Paragraph 11.1 will not be broad enough to expose the Contractor to a breach of contract claim for failure to procure specific insurance coverage for the benefit of others as contemplated by Minn. Stat. § 337.05, subd. 1. In other words, since the obligation to procure insurance in the A201 is not the type contemplated by Minn. Stat. § 337.05 subd. 1, the Contractor will be able to enjoy the benefit of the anti-indemnification

provisions of §337.02, even if the Owner bargained for a modification in the scope of the indemnification provision.

C. Practice Pointers.

The AIA Forms are utilized nationwide, and are not tailored to Minnesota's particular statutory scheme to transfer a project risk to a contemplated insurer. Therefore, the best way to take advantage of the protections afforded in Ch. 337 is to modify the requirements in Paragraphs 3.18 and 11.1 to fit the statutory framework of Ch. 337.

In addition, Owners have an ability to ask to be named as an additional insured under the Contractor's CGL policy. The requirement for the Contractor to name the Owner as an additional named insured may be imposed as a supplemental condition to the A201 form. This approach provides the Owner with an inexpensive means to maximize protection through additional liability coverage, as well as access to possible excess coverage. The disadvantage rests with the insurers of the Owners Contractors who may be faced with conflicting other insurance clauses, and who may not be allowed to subrogate against an at-fault Contractor. These conflicts may be avoided by requiring the Contractor to endorse its CGL coverage to provide that its coverage is primary and non-contributing over any coverage the Owner may have for the loss.

Also, if the supplemental conditions expand the scope of the contractual indemnification obligation under Paragraph 3.18.1 to a point which would otherwise be unenforceable under Minn. Stat. § 337.02 but for the accompanying agreement to procure insurance, Contractors (in addition

to actually procuring the agreed-to §337.05 subd. 1 insurance) should confirm their CGL coverage includes coverage for "insured contracts."[8]

III. Paragraph 11.2: Owner's Liability Insurance Procurement Obligation.

Paragraph 11.2.1 of the A201 form requires the Owner to purchase and maintain its "usual liability insurance." The Owner's existing CGL coverage satisfies the usual liability insurance requirement. However, care should be taken to ensure that the Owner has appropriate coverage in place for construction operations at its premises in addition to the Contractor's CGL coverage, to guard against large losses.

IV. Paragraph 11.3: Project Management Protective Liability Insurance (PMPLI): The Alternative Insuring Product.

Paragraph 11.3 provides the parties with an alternative liability insurance vehicle for the project. The Owner, at its discretion, may require the

---

[8] CGL policies are designed to provide coverage for certain contractual liabilities of the insured: tort liability of a third-party that the insured has assumed under contract. In Re Liquidation of Excalibur Ins. Co., 519 N.W.2d 494, 497 (Minn. Ct. App. 1994). Structurally, the policy provides this protection by excluding coverage for contractual obligations, except for those certain types of contracts, called "insured contracts." By creating the "insured contract" exception, CGL insurers expressly agree to provide this limited range of contractual liability coverage. See also, Townsend Ford v. Auto-Owners Ins. Co., 656 So.2d 360, 364 (Ala. 1995); Gibbs M. Smith v. U.S. Fidelity, 949 P.2d at 337, 341 (Utah 1997). If the underlying cause of action sounds in tort, and the insured has assumed liability for damages from that tort, the indemnity agreement constitutes an "insured contract," and is not excluded from CGL coverage. Gibson & Associates, Inc. v. Home Ins. Co., 966 F.Supp. 468, 479 (N.D. Tex. 1997).

Contractor to purchase Project Management Protective Liability Insurance (PMPLI Coverage) "as primary coverage for the Owner's, Contractor's and Architect's vicarious liability for construction operations under the Contract." Each of these parties will enjoy co-insured status under the policy.

The coverage provides protection to an insured's direct liability for the "general supervision" of the Contractor's operations. As defined, "general supervision:"

> "includes all activity except preparing designs, drawings, specifications, or taking charge of or control over the means and methods of the 'named contractor's' operations, or in the case of the 'named contractor,' taking charge of or control over the means and methods of the subcontractor's operations. In this context, subcontractor means anyone having a contract with the 'named contractor' to perform a portion of the 'work' at the site."

"Project Management Protective Liability Coverage Form – Coverage for Operations at the Specified Location," form G-127628-A, CNA Commercial Insurance, as quoted in Rudd, *PMPL v. OCP and Additional Insured (cert. AIA A201, 1997)*, CONSTRUCTION LAW, DEFENSE RESEARCH INSTITUTE, March 1999 127, 132.

The potential benefits of such insurance includes coordinated adjustment of claims by one carrier, and less adversity between the contracting parties. If PMPLI Coverage is available for the project (this is new in the market), Paragraph 11.3.2 requires that the contracting parties waive all rights each has against the other (including subrogation claims) except for those to the proceeds of the PMPLI Coverage. PMPLI Coverage is also primary over any other liability coverage. Rudd at 133, 134.

The drawback to PMPLI Coverage is that it is relatively new and untested, and its cost is moderate to high. Accordingly, the availability and specific provisions of such coverage should be thoroughly discussed and addressed through supplementary conditions well before the project begins.

In addition, the PMPLI Coverage limit is an aggregate limit for all insureds, without access to umbrella coverage, which could possibly result in an uninsured exposure to one or more of the insureds in the event of a catastrophic loss.

From the Owner and Architect's perspective, PMPLI Coverage also narrows or eliminates the Contractor's indemnification obligations under Subparagraph 3.18.1. Thus, an Owner using PMPLI Coverage should ensure that appropriate modifications to Paragraphs 3.18 and 11.3 are undertaken to ensure the continued enforcement of the Contractor's contractual indemnification. In addition, the presently available PMPLI policy form does not cover claims for defective design. Architects should thus maintain separate professional liability insurance adequate for such claims when entering into PMPLI insurance contracts. Also, PMPLI policies may not provide the Contractor with the completed operations coverage for bodily injury or property damage that its CGL policy would likely provide, or that the Owner or Architect would be afforded as additional insureds under the CGL. Accordingly, a thorough analysis of the coverage issues raised by the PMPLI Coverage must be done prior to contracting.

V. Owners & Contractors Protective Liability Insurance (OCP).

Another alternative to fulfilling the Owner's liability coverage requirement is to have the Contractor purchase Owner's & Contractors Protective Liability Insurance (OCP) for the project. This insurance is purchased by the Contractor in the name of the Owner. It covers: 1) the Owner's vicarious liability arising out of Contractor's operations; and 2) direct

liability arising out of the Owner's general supervision of the Contractor's operations.

The advantage of an OCP policy is that it is available in many markets, comes in standard form, and contains separate limits of insurance (unless the Architect is an additional insured). OCP insureds are afforded a guaranteed notice of cancellation. OCP coverage also costs less than PMPLI Coverage and, like PMPLI Coverage, is primary insurance.

OCP coverage for the Owner creates problems, however, for the Contractor. The Contractor is not an additional named insured under the OCP policy. Therefore, the Contractor is exposed to a subrogation claim if the OCP Policy is called upon to respond to a loss arising out of the Work. For example, in North Star Reinsurance Corp. v. Continental Ins. Co., 604 N.Y.S.2d 510 (Ct. App. 1993), the New York Court of Appeals confirmed that the purchase of a protective policy does *not* render a contractual indemnification provision unenforceable. Id. at 514 (*citing* 16 Couch, Insurance 2d §62:187 [rev. ed.]).[9]

Finally, like PMPLI Coverage, OCP coverage does not provide access to umbrella coverage.

---

[9] A Contractor may avoid the OCP insurer's subrogation claim if the OCP insurer is the same insurer who provided the Contractor with its CGL coverage; to permit subrogation in this limited (but possibly common) context would violate the concept that an insurer cannot subrogate against its own insured. See, e.g., Kehoe v. Commonwealth Edison Co., 230 Ill. Dec. 841, 694 N.E.2d 1119 (Ill. App. 1st Dist. 1998).

VI. Paragraph 11.4 Insurance Options

1. Property Insurance (Owner or Contractor).

Paragraph 11.4.1 of the A201 form sets forth the first party property insurance requirements for the project. This paragraph provides that the Owner:

> "shall purchase and maintain . . . property insurance written on a builder's risk 'all-risk' or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. This insurance shall include the interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Project."

Subparagraph 11.4.1.1 contemplates that the "all-risk" or equivalent policy is to cover such perils as fire and physical loss or damage, including theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition requirement by enforcement of any applicable legal requirements, together with reasonable compensation for the Architect's and Contractor's services and expenses required as a result of such insured loss.

Subparagraph 11.4.1.2 allows the Owner, at its option, to inform the Contractor in writing and before construction commencement that it does not intend to purchase the property insurance required under Paragraph 11.4.1. The Contractor may then purchase its own property insurance for the project, and charge the cost of the coverage back to the Owner. This coverage will protect the Contractor's interests, and that of the subcontractors, and sub-subcontractors, if any, in the "Work."

If the Owner fails to purchase the required property insurance, without notifying the Contractor in writing, the Owner essentially becomes the Contractor's surety, and is required to bear all reasonable costs resulting from the lack of property insurance. This can result in a breach of contract claim by the Contractor or Architect for failing to procure the agreed-upon insurance coverage under the contract which would not be considered an "insured contract" under the Owner's CGL policy.

2. Builder's Risk Insurance.

The most common means of satisfying Paragraph 11.4's property insurance requirement is through a Builder's Risk policy. By definition, a Builder's Risk policy provides property loss coverage to the structure, or portion thereof, during the period of time it is under construction. It can be written either as a "named peril" or "all-risk" policy.

A named peril policy is more limited in that it identifies one or more specifically contemplated causes of loss, such as fire, windstorm, and accident. An all-risk policy, on the other hand, is designed to accommodate the difficulty in anticipating all the particular perils that might cause damage to the property undergoing construction. It is therefore much broader, but does contain a number of "peril" exclusions.

Builder's Risk policies also address changes in the value of the property as it proceeds from the beginning to end of construction. As the project progresses, the Owner gains an ever greater insurable interest in the Project.

Depending upon the specific policy language, Builder's Risk coverage can end upon the completion of the construction, acceptance of the property by the Owner, or some specified time thereafter. Moreover, the standard policy contains an occupancy clause which requires that the building under construction shall not be occupied without first obtaining the written consent

of the insurer. Failure to obtain such consent can result in the loss of coverage.

Historically, the Contractor has been named as an additional insured on the Builder's Risk policy procured by the Owner. However, more and more Owners are recognizing the need to have the Contractor procure the Builder's Risk coverage for the project, and name the Owner as an additional insured. This concept is recognized in Paragraph 11.4.1.2. There are many reasons for requiring this reversal of the insurance procurement option, including the preservation of the Owner's property insurer's ability to subrogate against the Contractor for damage to "non-work" property. This approach also places additional safety awareness on the Contractor -- the party immediately responsible for construction means and methods, and whose Builder's Risk insurer carries the risk of loss for the building under construction.

In addition, the Owner might contend that certain risks should be borne by the Contractor's property insurance such as tools, equipment, machinery, scaffolding, etc. Because of the changing status and value of the property, the existence of an insurable interest is key to obtaining Builder's Risk coverage. Phalen Park State Bank v. Reeves, 312 Minn. 194, 251 N.W.2d 135 (1977). Without any insurable interest, a party will be unable to invoke coverage under the Builder's Risk policy

C. Waiver of Subrogation Under Paragraph 11.4.7.

Paragraph 11.4.7 addresses waivers of subrogation. This provision states that the Owner and Contractor waive all rights against each other, the Architect and Architect's Consultants, and the subcontractor, sub-subcontractors, agents and employees of each of them, for damages by fire or other causes of loss to the extent covered by the property insurance obtained under Paragraph 11.4, or other property insurance applicable to the

Work. This waiver of subrogation is effective even though the particular party would otherwise have a duty of subrogation, and even if the person did not pay any insurance premium and does not have an insurable interest in the property.

On its face, this provision limits the waiver of subrogation only to the extent that property insurance is available for damage to the "Work" itself. It does not apply to non-work property. Using our temporary weather protection example above, the Owner's insurer would be able to pursue the Contractor or other responsible third parties for the damages to the "non-Work" areas resulting from the failure to ensure the integrity of the roof during construction.

However, if the Owner does not procure Builder's Risk or equivalent coverage for the project as required by 11.4.1 (assuming this requirement is not modified), and instead relies on its pre-existing property coverage to pay for a loss during construction, Minnesota law holds that the Owner has waived its insurer's right of subrogation, regardless of whether the damages can be characterized as "Work," or "non-work," damages. Employers Mutual Cas. Co. v. A.C.C.T., Inc., 580 N.W.2d 490 (Minn. 1998). Thus, it is important for the Owner to consult with its insurer, prior to entering into the construction contract, to understand the insurer's position on this issue, and to determine whether the Owner is risking losing any first-party coverage from that carrier for waiving subrogation.

Finally, naming the Contractor and the Owner to the same policy may impact the insurer's ability to subrogate the rights of one insured against the other under the same policy. Minn Stat. §60A.41(a) states an insurer may not proceed against its insured in a subrogation action where the loss was caused by the non-intentional acts of the insured.

VII. Conclusion

Several insurance products are available to parties contracting in the construction area. Complex issues in the construction documents which create unique relationships between the parties require that the parties have a good understanding of the insurance vehicles required under the contract, a prospective determination of the obligations, including indemnification obligations, created by the AIA documents, and an appreciation of the risks which can be modified or eliminated by careful modification of the contract documents with supplemental conditions.