

# Builder's Risk/ Wrap Up Liability

Presented by: MGB Claims Consultants



# What is Builder's Risk?

- ▶ First Party coverage typically purchased by Project Owner, General Contractor (GC) or Project Manager (PM)
  - ▶ Intent is to cover a "Project" during the Course of Construction
  - ▶ Can also be used for additions, renovations to existing structures
  - ▶ Builder's Risk = Course of Construction
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# Builder's Risk vs. Property

- ▶ Property policies often include Builder's Risk coverage as part of the All Risk Policy, and not as a stand alone cover. Generally limited to dollar value or time frame.
  - ▶ Builder's Risk may also provide the following coverages:
    - Soft Cost Coverage
    - Transit Coverage
    - Delayed Start Up (DSU)/Advanced Loss of Profits (ALOP) Coverage
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# Preliminary Investigation

- ▶ Understanding of Project:
  - Contractual relationship between all parties; engineers, architects, GC/PM, subtrades
  - Values used to determine project valuation
  - Status of construction; original timelines/current timelines, how are they tracking project schedules, how much is the financing for and with whom
  - Are there agreements in place for the end of the project; leases executed, Purchase & Sale Agreements and what are the penalties for not achieving?

# Imperative Investigation

- ▶ Cause & Origin – similar to Property Investigation
  - Coverage:
    - Do any of the policy Conditions & Exclusions apply?
    - Are there any Sublimits applicable?
    - Part of the new construction or existing structure?
  - Subrogation:
    - Manufacturers' Defects?
    - Design Errors?
    - Subcontractors (recent case)

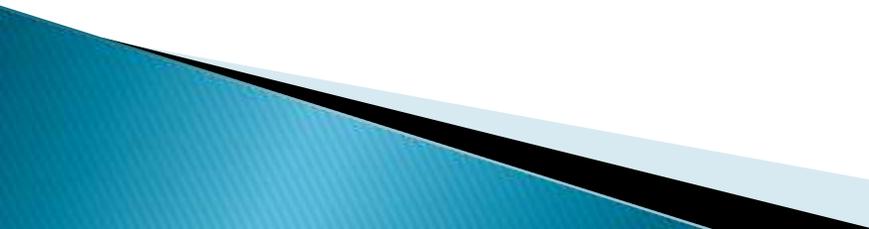
# Investigation Continued

- ▶ Scope of Physical Damage Repairs:
  - Repairs done through a Change Order
  - Measurement of scope up until date of loss
  - Is loss of warranty physical damage?
  - Retention of “clerk” to assist in measuring the repairs done on a Time & Material basis
  - Maintaining relationships with; owner, contractors, subcontractors, consultants

# Investigation Continued

- ▶ Review of all Pertinent Contracts:
    - Owner & GC/Construction Manager
    - Subcontracts
    - Consultants
    - Purchase & Sales Agreements
    - End Users
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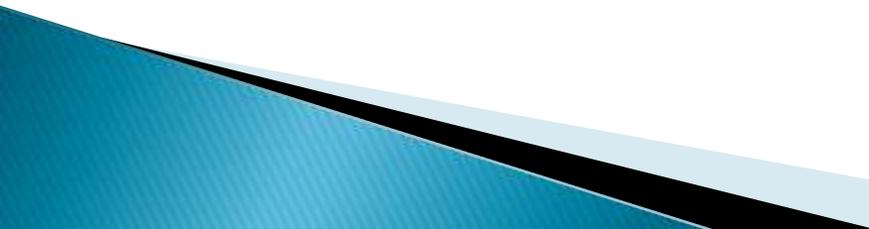
# Investigation Continued

- ▶ Pertinent Contract Terms & Conditions
    - “Normal Profit and Overhead”
    - Does contract have unit rates for Change Orders?
    - Does contract have limitations to Change Orders?
    - Hold Harmless Agreements
    - Overtime Rates & Usage?
    - Subcontractor Liquidated Damages for Potential Soft Cost/DSU Credit
    - Insurance Requirements
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# Hard Costs – Covered

- ▶ Property Owned by Insured or Others if value included in limit of coverage
  - ▶ Property to enter into a Project of construction, installation, reconstruction or repair described on Dec Sheet
  - ▶ Includes the following; temporary structures, scaffolding, hoarding or expendable materials and supplies required for Project
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# Hard Costs – Not Covered

- ▶ Existing Structures unless specifically insured  
*Medicine Hat College v. Starks Plumbing & Heating Ltd. (2008) Alberta Court of Appeal*
  - ▶ Contractor's tools and equipment
  - ▶ Land or Land value except excavations as part of the project
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# Soft Costs

- ▶ Typical Coverages:
  - Interest
  - Taxes
  - Marketing
  - Commissions
  - Fixed Operational & Maintenance Costs
  - Sometimes – Standby Costs

# Soft Costs

- ▶ Ongoing Soft Costs as a direct result of the insured loss – Have to have a detailed understanding of the projected timeline.
  - ▶ Were they on schedule at the time of loss?
  - ▶ If they were behind schedule, how can you measure the actual delay due to the “insured event”
  - ▶ What other factors may affect delays, eg. Strikes, weather?
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# Soft Costs – Documents Required

- ▶ Project Schedules
- ▶ Financing contracts
- ▶ Tax assessments
- ▶ Contracts with consultants; realtors, marketing firms,
- ▶ Contracts already in place with all stakeholders
  - eg. Tarion Warranty

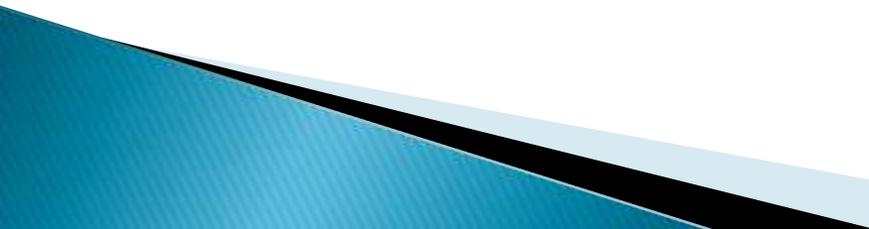
# Soft Costs Mitigation

- ▶ Overtime to complete repairs
  - ▶ Any Liquidated Damages assessments against involved parties, eg subcontractor that caused damages?
  - ▶ Incentives to stakeholders – not Liquidated Damages
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# Delayed Start Up / Advanced Loss of Profits

- ▶ DSU / ALOP are Business Interruption wordings
- ▶ Purchased by Project Owner and not GC or PM
- ▶ Indemnity Period measurement is similar to measurement of Soft Cost Claim, ie identifying delay specifically related to insured loss

# DSU / ALOP Investigation

- ▶ Claim is based on projections of what the business would have experienced had the loss not occurred – how reasonable are these projections?
  - ▶ Does the Insured have any experience in a project like this?
  - ▶ How did previous projections compare to actual results?
  - ▶ Investigation has to be broad – are there any papers by economists, investment bankers etc?
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# Subrogation

- ▶ All contractors are protected against subrogation if the value of their work is included in the Sum Insured. How was the Sum Insured arrived at? (Exception: *Brookfield Homes v. Nova Plumbing & Heating Ltd (2010) Ontario Court of Appeal*)
- ▶ Engineers /Architects typically not protected. Was any of their involvement related to the loss?
- ▶ What if a contractor does some of the design work?
- ▶ Was there a manufacturing defect in a product that led or contributed to the loss?

# Wrap Up Liability

- ▶ A Third Party policy to protect the project against liabilities to Others for “injury and damage”.
- ▶ Faulty work excluded –only resulting damages covered

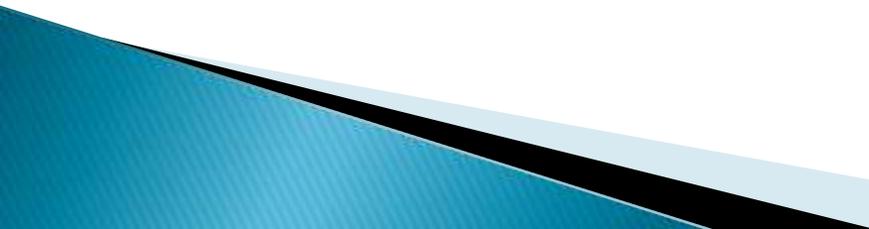
# Protected Parties

- ▶ Typically Developers, General Constructors, subcontractors,
  - ▶ Typically not protected:
    - Engineers
    - Architects
    - Surveyors
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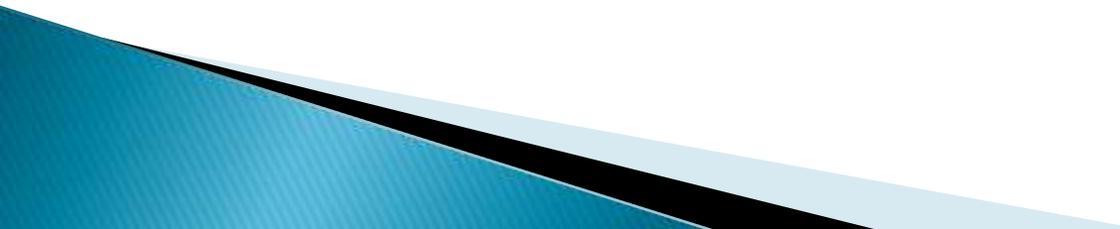
# Wrap Up/CGL

- ▶ Wordings between the two policies (Wrap Up/CGL) are similar. Covers damage to Third Parties for:
  - ▶ Personal Injury
  - ▶ Bodily Injury
  - ▶ Property Damage
- ▶ Completed Project Work similar to Completed Ops found in CGL wording – typically limited in time as stipulated in policy & does not cover the proximate cause – only resulting damages

# Wrap Up/CGL

- ▶ Intent is to avoid disputes between parties and provide coverage to all parties
  - ▶ However, in some instances, coverage may not apply under the Wrap Up.
  - ▶ In those instances, the negligent contractor's CGL may pick up damages which may fall through the cracks of the Wrap Up, eg. No Completed Ops Coverage under the Wrap Up
  - ▶ Therefore, we usually suggest all parties be notified
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# Builder's Risk/Wrap Up

- ▶ Wrap Up excludes the Project which is typically covered by Builder's Risk during construction. Once the Project is turned over, Builder's Risk ceases coverage but, the Wrap Up may extend under Completed Operations Coverage for resulting negligent damages to the Project.
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# Wrap Up “Twists & Turns”

- ▶ Project may become Third Party property after the turnover (OCIP vs. GC purchased)
  - ▶ Damage to other subcontractor’s property (“Severability” Clause)
  - ▶ Subcontractor designs some of the project – are they protected?
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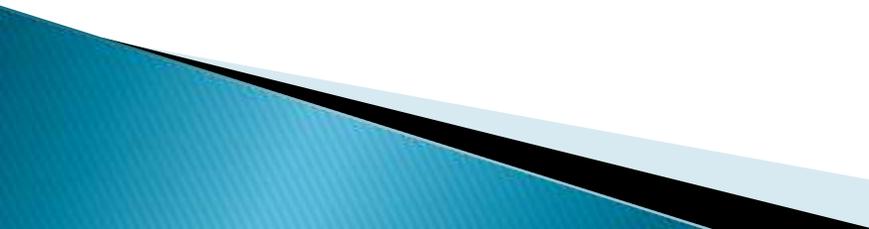
# Case Study #1 – Call a Doctor

- ▶ Expansion of a hospital to include a new wing attached to the old wing. Work includes renovations of the old wing including new flooring, paint etc.
  - ▶ Site works contractor hits an existing water main causing damage to the water main, water damage to the new site including mud washed in damaging the forms, water into the old facility damaging old finishes and new finishes and damages to another contractor's equipment
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# Case Study #1 continued

- ▶ The Owner of the project purchased; Wrap Up, Builder's Risk, DSU coverage and maintained an existing All Risks policy on the existing structure
  - ▶ Describe the preliminary investigation and what you would anticipate each policy to cover
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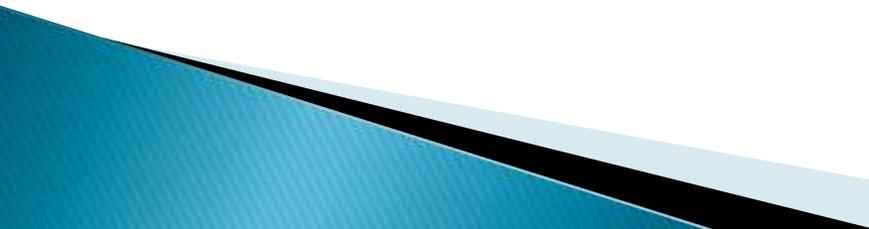
# Case Study # 2 – It is a Gamble

- ▶ Casino in Mississippi in process of expanding and upgrading facility with new barge.
  - ▶ Previously catered to retirees but, now target is upwardly mobile.
  - ▶ 11 casinos along the Gulf Strip incl: Hard Rock, Beau Rivage
  - ▶ Just prior to opening, Hurricane Katrina hits destroying the barge
  - ▶ Insured temporarily opens a small casino in the lobby and bar areas
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# Case Study #2 continued

- ▶ New barge will take 4 years to build
  - ▶ Indemnity period on DSU is 36 months
  - ▶ Insured submits DSU claim based on pre-loss projections presented to the Board of Directors to convince them to make the investment
  - ▶ How do you investigate the DSU loss?
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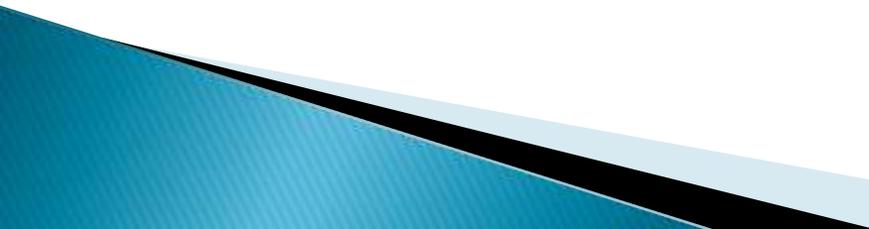
# Case Study # 3 – In The Do Do

- ▶ Expansion of an existing sewage pumping station in “Cottage Country”.
  - ▶ Insured is retained as the General Constructor of the \$2.5 Million project.
  - ▶ The project involves the installation of a new pre-formed concrete wet well down 40 feet below grade.
  - ▶ Sub-contractor retained to blast the pit through the granite to bury the wet well.
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# Case Study #3 continued

- ▶ During a blast undertaken by the Sub-contractor the concussion goes horizontally versus vertically resulting in a concussion fracture to the existing concrete wet wall adjacent to the pit being formed as well as damage and shifting to the below grade pumps and above grade electrical and diesel house.
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# Case Study #3 continued

- ▶ The damage requires temporary mobile pumping trucks to deal with immediate continuation of sewage flow, as well as a temporary pumping bypass to the existing wet well, which is still operating during the course of construction.
  - ▶ Cost incurred for the temporary work is approximately \$260,000.00, with permanent repairs of approximately \$800,000.00.
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# Case Study #3 continued



**Photograph of sewage pumping station site including pit where rock blasters was blasting, existing wet well, existing dry pump can and existing electrical/diesel house.**



**Photograph of concussive blast damage to existing wet well.**

# Case Study #3 continued

- ▶ What Policies of insurance should respond to the loss and why?

# Discussion

