

Insurance Considerations for a Catastrophic Workplace Accident

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DESIGN > CONSTRUCTION > OPERATIONS

Discussion Outline

- Claim Scenarios and Coverage Basics
 - What insurance is needed to protect against catastrophic claims?
- Roles and Responsibilities
 - Who is on my side and who is against me?
- Pre-Loss Planning
 - What should I do to prepare for an incident?
- Incident Response
 - What do I do if the tragedy happens?
- Claim Adjustment Process
 - How do I deal with the insurance after the incident?

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Claim Scenario 1

Damage to the Project

2007 Dubai Marina Construction Wall Breach from "Dubai Construction Update"

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Claim Scenario 1 Coverage Review

Property Damage during construction resulting from contractor's negligence.

Coverage Issue	Owner Coverage Builder's Risk General Liability	GC Coverage General Liability	Sub Coverage General Liability
Coverage	Damage to Project	Legal Liability for Damage	Legal Liability for Damage
Insured Status	First Party Property or Claimant/3rd Party on GL	Additional Insured Status on Sub's GL policy	Third Party Property Damage
Major Exclusions	Faulty Workmanship, Subsidence	Care, Custody, Control	PD to that particular part
Waiver of Subrogation	Can't Recover from Contractors (waived)	Waived if allowed by policy and prior to loss	Waived if allowed by policy and prior to loss
Deductible	May be charged to Contractor	Pay a portion if required by Contract	Pay a portion if required by Contract

Key: Usually there is faulty workmanship so must establish resultant damage theory.

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Claim Scenario 2

Third Party Property Damage

Seattle Post-Intelligencer photos of 2006 Crane Collapse in Bellevue, WA

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Claim Scenario 2 Coverage Review

Third Party Property Damage

Coverage Issue	Owner Coverage General Liability	GC Coverage General Liability	Crane Owner Contractors' Equipment	Crane Operator General Liability
Coverage	Tender to GC unless Owner negligent	Tender to Crane Operator or Sub unless GC negligent	Damage to Crane (unless insured by other party)	Legal Liability for Damage
Insured Status	Claimant/3rd Party	Additional Insured on Crane Operator's GL	First Party or Third Party if Operator/Rigger is negligent	Third Party Property Damage
Major Exclusions/Issues	Limit from GC/Subs may not be adequate	Limit. Negligence question	On hook exclusion for CCC and third party exclusion	Limit may not be adequate, property in CCC
Defense	Defended by GC's/Operator's insurer as AI	Defended by Operator's insurer unless "sole negligence"	Defended by Operator's insurer unless "sole negligence"	Will pay for Own defense through GL
Indemnity	GC/Operator indemnifies unless "sole negligence"	Operator indemnifies unless "sole negligence"	Operator indemnifies unless "sole negligence"	Indemnifies GC

Key: Preservation of failed part(s) is key to investigation and liability theory.

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Claim Scenario 3

Damage to Project
Third Party Property
Multiple Injuries or Death



2006 Phoenix Convention Center Collapse, from City of Phoenix website

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Claim Scenario 3 Coverage Review

Multiple parties with severe bodily injury and property damage during construction. Sue Owner and GC for third party liability.

Coverage Issue	Owner Coverage General Liability	GC Coverage General Liability	Sub Coverage General Liability
Coverage	Tender to GC but put insurers on notice also	Tender back to Sub but put insurers on notice also	3rd Party PD or Contractual Liability coverage
Insured Status	Insured or Additional Insured (contractors' GL)	Most likely not an AI for sub's work	GC and Owner only AI during construction (not after completion)
Major Exclusions/Issues	Limits adequacy, put Excess on notice	Limit adequacy, cross litigation, liability theory	Limit adequacy, cross litigation, liability theory
Defense	Defended by GC's Insurer as AI	Defended by Sub's Insurer as AI	Will pay for Own defense
Indemnity	GC/Sub indemnify unless "sole negligence" until limit exhausted	Sub indemnifies unless "sole negligence" until limit exhausted	Indemnifies GC to extent of limit

Key: Coordinating insurer investigations and avoiding conflict of interest among attorneys and experts.

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Roles & Responsibilities

Beware of Sharks in the Water



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Primary Roles

- Insureds (Owner/Contractors)
 - First Party in case of Builders Risk or Property Insurance
 - Negligent Party in terms of Liability Insurance
 - Could be multiple negligent parties (General Contractor, multiple Subcontractors)
- Third Parties
 - Parties suffering damage or injury due to negligence of an Insured
- Insurer(s)
 - Insurance Company paying the claim and/or defense

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Key Participating Roles

- Insurance Agent/Broker
 - Facilitates process and should advocate a coverage position for client
- Public Authorities
 - First responders/OR-OSHA have control of site during response and investigation
- Claim Adjusters/Experts (retained by Insurer)
 - Access to site after Public Authorities
 - Insureds must cooperate with Adjusters/Insurer Reps and Insurer Reps must cooperate with Public Authorities

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Key Participating Roles

- Attorneys
 - Retained by Insurer but represent Insured
 - May be several Attorneys representing potentially negligent parties
- Medical Providers
 - Insured should manage the response, to the extent possible within HIPAA and other laws
- Restoration/Emergency Contractors & Suppliers
 - May be retained by Insurers or required by Public Authorities
 - Site access should be restricted and controlled

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Pre-Loss Planning

Pre-Loss Planning and Crisis Readiness effect claim recovery and response



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Consider Types of Incidents

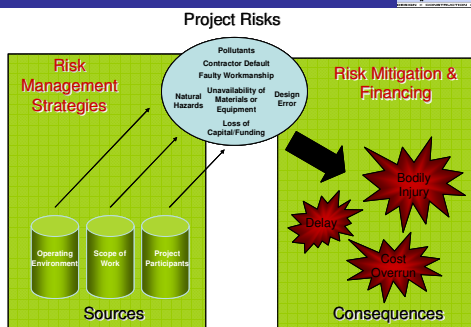
What is a Catastrophic Incident?

Anything that can cause major disruption to the project

- Collapse
- Cave-In
- Falls (including Falling Objects)
- Natural Disasters
- Single Severe Injury or Fatality
- Pollution Event

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Identify and Manage Risk



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Review Insurance Coverage

- Owner Coverage (Builders Risk, OCIP, Pollution)
- Design Team Coverage (Professional Liability)
- General Contractor Coverage (Builders Risk, General Liability, Surety Bonds)
- Subcontractor Coverage (General Liability, Workers Compensation)

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Beware of Coverage Issues

- Builders Risk – Subsidence exclusion, resultant damage wording, temporary structures, claim reporting conditions
- General Liability – Damage to owned/controlled property, reporting provisions, professional liability exclusion, impaired property
- Excess Liability – Concurrency with primary General Liability, reporting provisions

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Claim Handling Instructions

- Meet with General Liability Insurer at beginning of project or policy period
- Determine Claim contacts and reporting provisions – establish Claim Handling Instructions
- Identify Panel Counsel and Experts – make sure no conflicts exist
- Meet with Medical Providers (occupational medicine clinic for workers comp claims)

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Develop Emergency Plan



- Every project should have an Emergency Response Plan
- Meet and review Plan with participants (responding Fire Dept, Medical clinic, insurance representatives)
- Share with all Tiers of contractors (consider making it a contractual requirement)

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Emergency Plan



- Emergency Response Plan should include appropriate portions of Claim Handling Instructions
 - Claim Reporting Forms
 - Claim Reporting Number
 - Panel Counsel contact and instructions (to retain privilege)
 - Broker/Agent Contact
- Other Emergency Response Plan Essentials
 - Site Security/Lock Down Procedures
 - Witness Interview Procedures
 - Media Management
- Contingency Plan with emergency equipment suppliers (insurance may fund this if pre-determined)

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Drill/Table Top Exercise



- Large or Difficult Projects
- Include Insurance Representatives and Project Management/Superintendents
- Include First Responders
- De-Bug the Emergency Response Plan

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Incident Response



Common Sense with a Plan



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Protect People First



- Call 911 if Imminent Danger
- Get EMT/First Responders to Injured Parties Safely
- Protect Property from Further Damage
- If Protecting People Requires Changes to Site, Document Condition Before Making Changes

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Claim Notification



- Implement Emergency Response Plan and Claim Handling Instructions
- Put ALL Applicable Insurers on Notice – When in Doubt, put on Notice (especially Excess Liability for Catastrophic Incidents)
- Appoint a Contact Person for Insurers

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Mobilize Investigation Team



- Force Insurer to Get Claim Adjuster/Investigator to Site ASAP (within 2 hours of Incident)
- Connect Separate Insurance Representatives with Each Other and Ask for Coordination
- Notify Attorney and Retain Privilege (through Insurer)
- Chain of Custody of Failed Part(s) is Essential – lock it down after public officials are done

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Emergency Response Plan



- Site Security – Do not Allow Gawkers, Media, Public onto Site
- Witnesses – Be Compassionate but Assure that Statements are Documented before Dismissed
 - If Insurance Investigator can't get to Site, Perform Witness Interview through Emergency Response Team
- Media Management – Single Spokesperson, Make Sure All Workers Understand
- Grief Counseling – Insurer is usually willing to fund this to mitigate future claims

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Cost Tracking



- Set Up Claim Expense Codes to Track Expenses
 - Labor
 - Emergency Equipment/Contracts/Materials
 - Claim Preparation Expenses
 - Additional Expenses
- Ask Insurer for Clarification of Covered Expenses

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Claim Adjustment Process



Play nice



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Blame Game



- Expect the "Blame Game" if multiple parties are involved
- Consider OSHA-Issues as they relate to Negligence Issues
- Beware of Joint Defense (as Additional Insured) when Negligence Issues may not Align

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Site Investigations



- Public Authorities (Fire Dept, OSHA, Police) are First and Have Ultimate Authority
- Insurers and Experts Should Coordinate with Public Authorities and Site Supervision
- Do Not Accept Denial of Your Representative from Site – at least ask for scheduled time and documents
- Discuss with Insurers before Major Changes (demolition, etc.) Occur

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Managing Panel Counsel

- Don't Wait for Litigation to Obtain Counsel (Clear with Insurer in Pre-Planning)
- Remember, Attorney works FOR the Insured, not the Insurance Company – Take an ACTIVE Role
- If Conflict, Ask for New Counsel
- If Defended as Additional Insured, Consider Independent Negligence and Ask for Separate Counsel

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Reservation of Rights/Denial

- Reservation of Rights is a GOOD THING – it shows the Insurer's "Hand" with Respect to Coverage Position
 - Be Responsive to Requests
 - Involve Broker/Agent in Coverage Position
- Don't Accept Claim Denial without Response
 - Insured still has Rights within Policy
 - Make sure Insurer has All the Information

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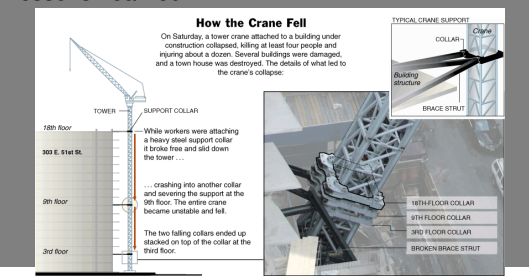
Manage Insurer

- Establish Clear Requirements with respect to Required Submittals/Paperwork
 - Contract Documents
 - Proof of Loss
 - Investigation Reports
- Ask for Timeline once Documents are Submitted
- Set Up Frequent (weekly or monthly) Status Report Meetings with Insurer, Attorneys, Experts

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Conclusions

Lessons Learned



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Final Thoughts

Insurance Considerations for Catastrophic Workplace Accident

- Understand Insurance Obligations and Responsibilities BEFORE the Incident
- Take Charge and Manage the Process – Don't Let it Manage YOU
- Learn from other Incidents and Study Best Practices
- Every Situation Is Unique – It May Have Never Happened Before – So Planning is the KEY

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