



CLYDE&CO

# Risk, responsibility and dispute avoidance

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CIVL 402

# Agenda

- Contractual allocation of risk
  - Keep it simple
  - Beware 'Defend'
  - Dispute avoidance
  - Types of insurance applicable to construction project
- Commercial General Liability (CGL)
  - Property insurance
  - Builders' risk insurance
  - Wrap-up liability insurance
  - Professional liability insurance (E&O)

# Contractual allocation of risk

## **Contracts – always your first line of defence**

Risk is transferred from one contracting party to another by:

- Limitations of liability
- Warranties and guarantees
- Indemnities
- Limit liability as to amount (available insurance or fees)
- Time (two years after completion of services)
- Parties (report cannot be relied upon by third parties)

Ideally, risk should be allocated to the party that can insure it at lowest cost

# Keep it simple

*Tilden Rent-A-Car v Clendenning* (1978) 83 D.L.R. (3d) 400 (Ont.C.A.)



In the case at bar, Tilden Rent-A-Car took no steps to alert Mr. Clendenning to the onerous provisions in the standard form of contract presented by it. The clerk could not help but have known that Mr. Clendenning had not in fact read the contract before signing it. Indeed the form of the contract itself with the important provisions on the reverse side and in very small type would discourage even the most cautious customer from endeavouring to read and understand it. Mr. Clendenning was in fact unaware of the exempting provisions. Under such circumstances, it was not open to Tilden Rent-A-Car to rely on those clauses, and it was not incumbent on Mr. Clendenning to establish fraud, misrepresentation or non est factum. Having paid the premium, he was not liable for any damage to the vehicle while being driven by him”.

# Beware 'Defend'

## *UDC-Universal Development v CH2M Hill, 181 Cal.App. 4th 10*

"[CH2M Hill] shall indemnify ... UDC ... from and against any and all claims ... to the extent they arise out of or are in any way connected with any negligent act or omission by [CH2M Hill]. .. [and CH2M Hill] agrees, at his own expense, and upon written request by UDC ... to defend any suit, action or demand brought against UDC on any claim or demand covered herein"

- UDC sued by purchasers for alleged construction defects and third-partied CH2M Hill citing the above clause
- The court found none of the defects were due to negligence on the part of CH2M Hill – so no indemnity
- **But** the obligation to defend was found to be independent of the duty to indemnify and CH2M Hill was responsible for UDC's defence costs
- Many consultants would not have insurance or resources to cover such an obligation
- **Moral:** make sure your contractual allocations of risk fit the available insurance
- Seek professional advice from broker/lawyer



# Dispute avoidance

## Communication:



Communicate  
with your client!



50 per cent of cases  
are about failures to  
communicate



Define your scope  
of work



Beware 'scope  
creep'



Say what you are  
not doing

# Types of insurance applicable to construction projects

- Commercial General Liability (CGL)
- Property Insurance
- Builders' Risk Insurance
- Wrap-up Liability Insurance
- Professional Liability Insurance (E&O)

Note: all policies are subject to deductibles, limits and exclusions.



# Commercial General Liability (CGL)

- Common policy carried by most businesses
- Liability policy –covers the insured's liability to others due to accidents:
  - eg bucket of concrete dropped on passing truck

## Exclusions (what it does not cover)

- 'Your work product', 'workmanship' and 'own property'
- Not intended to be insurance against defective work, although damage resulting from defective work is covered



# Property insurance

**Insures tangible property against ‘perils’ or ‘all-risks’: eg flood**



Exclusions (what it does not cover)

- ‘Wear and tear’, ‘latent defects’, ‘faulty materials, workmanship or design’
- Some specific exclusions: eg earthquake

# Builders' risk insurance

- Specific type of property insurance applicable to contractors (also known as 'Course of Construction' since it generally applies only during construction)
- Arises because the project, while not owned by the contractor, is 'at the contractor's risk' during construction
- Insures damage to the project property, including temporary structures such as shoring, formwork and scaffolding

## Exclusions (what it does not cover)

- Construction delays, defects, weather
- Note that some policies have specific exclusions: eg collapse due to excavation and/or shoring

# Wrap-up liability insurance

- Single project-specific policy covering all parties' liability
- Insures owner, contractor, subcontractors and consultants
- Usually applies during construction and for specific period afterward
- Provide consistency in coverage and avoids cross-claims

## Exclusions (what it does not cover)

- Like CGL policies, excludes 'your work product', 'workmanship', 'resulting damage' coverage is narrower than CGL, since the whole project is the work product

# Professional liability insurance (E&O)

- This coverage is excluded from most other policies
- Covers negligent acts or omissions by professionals
- Provides defence and indemnity
- 'Claims made' policies respond to claims for work done in the past
- Must report 'claims' you know about to the policy in force when the claim is made



# Professional liability insurance (E&O)

- Material non-disclosure voids insurance
- All employees, officers, directors are usually insured also
- A 'claim' can be:
  - Your discovery of an error, despite no actual claim being made
  - Advice that someone hold you responsible for a loss
- If in doubt – report
- You may have a professional obligation to tell others if you discover you have made a mistake; work with your insurer
- 'Practice' E&O policies are not specific to the project and limits may be eroded by these claims



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480

Partners

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2,400

Lawyers

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5,000

Total staff

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3,200

Legal professionals

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60+

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