

A Deep Dive: Insurance Under the New AIA Documents and Construction- Related Forms

Charles E. Comiskey

CPCU, CIC, CPIA, CRM, CRIS, CCM, CMIP

President, RiskTech, Inc.

Sr. V.P., Brady Chapman Holland & Assoc., Inc.

Important Note

The content of this presentation is only for the informational use of the reader/participant. Information contained herein is not intended as, nor does it constitute, legal or professional advice, nor is it an endorsement of any source cited or information provided. In no event will RiskTech, Inc. or Brady Chapman Holland & Associates, Inc. be liable in contract or in tort to anyone who has access to the presentation for the accuracy or completeness of the information relied upon in the preparation of this presentation or for the completeness of any recommendations. This presentation does not amend, or otherwise affect, the provisions of coverages of any insurance policy, nor is it a representation that coverage does or does not exist for any particular claim or loss. Coverage depends on the facts and circumstances involved in the claim or loss, all applicable policy provisions, and any applicable law.

Numerous Changes Affecting Insurance-Related Matters

- AIA adopted a much more progressive format
 - Handwringing v. Reality
- Included a number of recommended enhancements, including new format
- Included some requirements that are problematic (a/k/a unlikely to occur)
- Did not include a number of changes that would have been beneficial
- Overall intent: get downstream party to declare

§ A.2.3.1 Required Property Insurance

Owner shall purchase:

- Builder's risk
- "all-risks"
- Completed value
- Total value of entire Project (including modifications)
- Replacement cost basis
- Include interests of Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds.
- Include the interests of mortgagees as loss payees.

§ A.2.3.1 Required Property Insurance

Issues:

- “all risks” does not necessarily include theft, flood, earthquake, collapse, “green” exposures or terrorism (see § A.2.3.1.1)
 - Earthquake v. earth movement
- “include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds”
 - Additional insured? Named Insured? ATIMA? preclude subrogation?
- “include the interests of mortgagees as loss payees”
 - Loss payee vs lender’s loss payable
- Add requirement for Agreed Value or no-coinsurance form

§ A.2.3.1.2 Specific Required Coverages

“The insurance ... shall provide coverage for ... falsework and other temporary structures”

Recommended:

Covered Property should include permanent and temporary works including but not limited to:

- All structure(s) under construction, including retaining walls, paved surfaces and roadways, bridges, glass, foundation(s), footings, underground pipes and wiring, excavations, grading, backfilling or filling;
- All temporary structures (e.g., cofferdams, cribbing, falsework, construction forms, hoarding, fencing, scaffolding, signs, site lighting, temporary utilities and buildings or structures) located at the site and incidental to completion of the project;
- All property including equipment, machinery, materials and supplies on site for installation;
- All property including equipment, machinery, materials and supplies at other locations but intended for use at the site;
- All property including equipment, machinery, materials and supplies in transit to the site for installation by all means of transportation other than ocean transit; and
- Other property for which an insured is liable in connection with the project.

§ A.2.3.1.2 Specific Required Coverages

“The insurance ... shall provide coverage for ... building systems from testing and startup”

- Testing can be hot or cold:
 - Hot testing is introduction of feed stock, catalyst or similar media for processing and handling or commencement of supply to a system
 - Cold testing is hydrostatic, pneumatic, electrical, hydraulic or mechanical, commonly thought of as startup

§ A.2.3.1.2 Specific Required Coverages

“The insurance ... shall provide coverage for ... debris removal”

Issues:

- Debris removal is commonly limited to a percentage (e.g., 25%) of the reconstruction limit provided, and erodes that limit.
- Additional debris removal coverage may be provided, but a low limit is commonly provided.
- The cost of debris removal is generally estimated to be approximately 13% of hard construction costs and is in addition to the reconstruction cost.

Recommended:

- Debris removal shall be provided as an additional benefit with a limit of \$_____.

§ A.2.3.1.2 Specific Required Coverages

“The insurance ... shall provide coverage for ... demolition occasioned by enforcement of any applicable legal requirements”

Issues:

- Coverage is provided by an Ordinance or Law endorsement
- Why limit this requirement to demolition only?
 - Coverage for Loss to the Undamaged Portion of the Building
 - Demolition Cost
 - Increased Cost of Construction
- See § A.2.4.2, Optional Ordinance or Law Insurance
 - Not really so optional?

§ A.2.3.1.4 Deductibles and Self-Insured Retentions

“If the insurance required by this Section A.2.3 is subject to deductibles or self-insured retentions, the Owner shall be responsible for all loss not covered because of such deductibles or self-insured retentions.”

Deductible: The insurers obligations are triggered upon the first dollar of loss.

Self-Insured Retention: The insurers obligations are not triggered until the SIR is fully exhausted.

Issues:

- A self-insured retention = no insurance.
- None of the insurance requirements are applicable to a SIR.
- Carefully address any potential liability or property SIRs.

Deductibles and Self-Insured Retentions

If [Downstream Party] elects to self-insure or to maintain insurance required herein subject to deductible and/or retentions exceeding \$25,000, [Upstream Party] and [Downstream Party] shall maintain all rights and obligations between themselves as if [Downstream Party] fully maintained the insurance required herein with a commercial insurer including but not limited to Additional Insured status, Primary and Non-Contributory Liability, Waivers of Rights of Recovery, Other Insurance Clauses and any other extensions of coverage required herein. [Downstream Party] shall pay from its assets the costs, damages, claims, losses and liabilities, including attorney's fees and necessary litigation expenses at least to the extent that an insurance company would have been obligated to pay those amounts if [Downstream Party] had maintained the insurance pursuant to this Exhibit without said deductible or self-insured retention. All deductibles and retentions shall be paid by, assumed by, for the account of, and at the sole risk of the [Downstream Party]. The [Downstream Party] shall not be reimbursed for same by [Upstream Party] or other additional insureds.

§ A.2.3.2 Occupancy or Use Prior to Substantial Completion

“The Owner’s occupancy or use of any completed or partially completed portion of the Work prior to Substantial Completion shall not commence until the insurance company ... has consented in writing to the continuance of coverage.”

Issues:

- Many builder’s risk policies cease upon occupancy.
- Many Owner’s begin or permit occupancy prior to completion.

Recommended:

Prohibit any provision that causes coverage to cease upon occupancy.

§ A.2.3.3 Insurance for Existing Structures

“If the Work involves remodeling an existing structure or construction to an addition to an existing structure ... the Owner shall purchase ‘all risks’ property insurance on a replacement cost basis protecting the existing structure. ... The Owner shall be responsible for all coinsurance penalties”

Issues:

- Existing structures are not covered unless specifically endorsed onto the policy.
- “all-risks” does not necessarily include theft, flood, earthquake, or collapse.
- Prohibit coinsurance.

§ A.2.4 Optional Extended Property Insurance

§ A.2.4.1 “The Owner shall purchase ... Loss of Use, Business Interruption, and Delay in Completion Insurance”

Delayed Completion provides coverage for an actual loss of net income which results from delay beyond the projected completion date. The delay must be due to direct physical loss to Covered Property and be caused by or result from a Covered Cause of Loss. Coverage is readily available and cost-effective, and is usually purchased in conjunction with Soft Cost insurance.

Issues:

- If the Contractor procures this coverage for the Owner, confirm that it addresses the Owner’s exposures to loss (i.e., does not refer to “you” on the Contractor’s policy).
- See also “Soft Costs Insurance” in § A.2.4.7
- Limits must be stipulated

§ A.2.4 Optional Extended Property Insurance

§ A.2.4.2 “The Owner shall purchase ... Ordinance or Law Insurance ... regulating the demolition, construction, repair, replacement or use of the Project.”

Issues:

- This should not be optional.
- Coverage should be provided without sublimit.

§ A.2.4 Optional Extended Property Insurance

§ A.2.4.7 “The Owner shall purchase Soft Costs Insurance”.

Soft Costs are additional expenses which result from a delay in the completion of the project beyond the date it would have been completed had no loss occurred. The delay must be due to direct physical loss to Covered Property and be caused by or result from a Covered Cause of Loss.

Soft Costs

Examples of additional Soft Costs expenses include:

- Advertising and Promotion
- Insurance
- Interest
- Leasing/Commission
- Legal and Accounting
- License, Building Inspection and Permit Fees
- Real Estate Taxes/Ground Rents/Other Assessments
- Professional Fees
- Project Administration/General Overhead

§ A.3.1.1 Contractor's Certificates of Insurance

“The certificates will show the Owner as an additional insured on the Contractor's Commercial General Liability and excess or umbrella liability policy or policies.”

Issues:

- Owner only?
- “additional insured” is meaningless without further definition (see § A.3.1.3)
- GL and excess policies only? Add auto and pollution policies
- Attachment of required forms

§ A.3.1.3 [Contractor's] Additional Insured Obligations

“To fullest extent permitted by law, Contractor shall cause the CGL coverage to include (1) the Owner, the Architect, and the Architect’s consultants as additional insured for claims caused in whole or in part by the Contractor’s negligent acts or omissions during the Contractor’s operations; and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor’s negligent acts or omissions for which loss occurs during completed operations. The additional insured coverage shall be primary and non-contributory ... and shall apply to both ongoing and completed operations. To the extent commercially available, the additional insured coverage shall be no less than ... CG 20 10 07 04, CG 20 37 07 04 and CG 20 32 07 04.”

§ A.3.1.3 [Contractor's] Additional Insured Obligations

Upstream Issues:

- Limited parties covered by AI endorsement
- The 07 04 or later editions do not provide coverage for the Additional Insured's sole negligence.
- The 07 04 or later editions do not provide coverage for a third party action over.
- Upstream will prefer additional insured status on combination of CG 20 10 10 01 and CG 20 37 10 01 (which remains available from many insurance companies)

Downstream Issues:

- Downstream party is sharing its limits with each additional insured party.
- AI status would likely be provided on 04 13 edition instead of 07 04.

§ A.3.1.3 [Contractor's] Additional Insured Obligations

Issues with the 04 13 editions:

1. Only applies to the extent permitted by law;
2. Will not be broader than that which [the Named Insureds] are required by the contract or agreement to provide for such additional insured; and
3. The most [the insurance company] will pay on behalf of the additional insured is the amount required by the contract or agreement or available under the applicable Limits of Insurance.

§ A.3.2 Contractor's Required Insurance Coverage

§ A.3.2.1 “The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, unless a different duration is stated below.”

Recommended:

[Downstream Party] agrees to maintain Products-Completed Operations coverage with respect to the Work performed under the Agreement in identical coverage, form and amount, including required endorsements, for the full term of the Statute of Repose following Date of Substantial Completion of the Work by Subcontractor.

§ A.3.2.2.1 [Contractor's] Commercial General Liability

CGL “policy limits of not less than \$_____ each occurrence, \$_____ general aggregate, and \$_____ aggregate for products-completed operations hazard”

Issues:

- How do you know if the general aggregate has been eroded or exhausted by claims elsewhere?
- Add requirement for Designated Construction Project General Aggregate Limit ISO CG 25 03 05 09 or much higher excess limits
- Consider use of Project Specific Program

§ A.3.2.2.1 [Contractor's] Commercial General Liability

§ A.3.2.2.1.3 “damages because of physical damage to or destruction of tangible property, including the loss of use of such property”

See also §10.3 of the General Conditions

Issues:

- Environmental/pollution damage is physical damage to tangible property and is largely if not totally excluded from most contractor's GL coverage.
- Coverage is excluded for damage to or loss of intangible property

§ A.3.2.2.1.5 [Contractor's] Required Insurance Coverage

CGL “providing coverage for claims including ... the Contractor’s indemnity obligations under Section 3.18 of the General Conditions”

Upstream: The unmodified § 3.18 is extremely limited and fails to meet the scope permitted by some anti-indemnity laws.

Downstream: The unmodified § 3.18 is terrific as it strictly follows the limited scope of coverage provided by general liability insurance.

Issues:

- Assuming that 3.18 will be modified by most attorneys, insurance is generally responsive to allegations of Bodily Injury and Physical Injury to Tangible Property, subject to the limits of liability, and **nothing else**.
- Insurance applies to but does not “cover” a broader indemnification requirement.

§ A.3.2.2.1 Additional Recommended Requirements

Recommended: Add requirements for:

- Additional Insured Primary & Non-Contributory status
 - This insurance shall be endorsed to provide primary and noncontributing liability coverage by ISO CG 20 01 04 13. It is the specific intent of the parties to the Agreement that all insurance required herein shall be primary to and shall seek no contribution from any other insurance (primary, umbrella, contingent or excess) maintained by [Upstream] Parties, with [Upstream] Parties' insurance being excess, secondary and noncontributing.

- Electronic Data Liability endorsement ISO CG 04 37 with coverage to the full limits of the policy(ies) (i.e., without sublimit).
 - Without this endorsement, General Liability insurance excludes coverage for loss to intangible property, including electronic data.

§ A.3.2.2.1 Additional Recommended Requirements

- Personal injury contractual liability exclusion shall be deleted.
 - General liability insurance excludes coverage for the assumption of personal injury liability in a contract or agreement. Depending on the type of contractor (e.g., security) being engaged, it may be advisable to require the deletion of the Personal Injury Contractual Liability Exclusion.

- To the extent permitted by law, [Downstream Party] agrees to waive its right of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation in favor of [Upstream Parties] on ISO form CG 24 04 05 09.
 - Also see § 11.3.1 of the General Conditions providing limited waiver of subrogation requirements

§ A.3.2.2.2 Prohibitions

“The Contractor’s Commercial General Liability ... shall not contain an exclusion ... of coverage for the following:”

§ A.3.2.2.2.1 “Claims by one insured against another insured, if the exclusion or restriction is based solely on the fact that the claimant is an insured, and there would otherwise be coverage for the claim.”

Recommended:

- Prohibit Insured vs Insured exclusion
- Named Insured vs. Named Insured exclusion is acceptable

Prohibitions

§ A.3.2.2.2.2 “Claims for property damage to the Contractor’s Work arising out of the products-completed operations hazard where the damaged Work or the Work out of which the damage arises was performed by a Subcontractor.

CGL Wording:

“This insurance does not apply to:

Exclusion I. Damage To Your Work

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

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.”

§ A.3.2.2.2 Prohibitions

§ **A.3.2.2.2.4** “Claims for indemnity under Section § 3.18 of the General Conditions arising out of injury to employees of the insured.”

Issues:

- Such allegations are commonly a claim of sole negligence.
- § 3.18 does not require indemnification for sole negligence.
- Coverage for sole negligence is necessary with regard to 3rd party over actions.

§ A.3.2.2.2 Prohibitions

A.3.2.2.2.5 “Claims or loss excluded under a prior work endorsement or other similar exclusionary language.”

A.3.2.2.2.6 “Claims or loss due to physical damage under a prior injury endorsement or similar exclusionary language.”

Upstream: Critically important

Downstream: Difficult to avoid if a small contractor.

Issue:

- These endorsements essentially revert a GL policy to a Claims-Made form with no prior acts coverage and no “tail” (extended reporting period).

Continuous or Progressive Injury and Damage Exclusion

Example:

This insurance does not apply to:

1. Any damages arising out of or related to “bodily injury” or “property damage” **whether** such “bodily injury” or “property damage” is **known or unknown**;
 - (a) Which first occurred in whole or in part prior to the inception date of this policy); or
 - (b) Which are, or are **alleged to be**, in the process of occurring as of the inception date of the policy; or
 - (c) Which were caused, or are alleged to have been caused, by the same **condition(s) or defective construction which first existed prior** to the inception of this policy.

§ A.3.2.2.2 Prohibitions

§ A.3.2.2.2.7 “Claims related to residential, multi-family, or other habitational projects”

Issues:

- The term “habitational” varies widely from carrier to carrier.
- Condominiums? Apartments? Barracks? Dorms? Jails? Retirement centers? Tract homes? Custom homes? Other?

§ A.3.2.2.2 Prohibitions

§ A.3.2.2.2.8 “Claims related to roofing, if the Work involves roofing.”

Issues:

- Why limit to roofing?
- Insurance companies utilize numerous other forms of exclusions regarding the Work.

Recommended:

- Prohibit any endorsement limiting coverage to business or classification description, or designated premises, project or operation.

§ A.3.2.2.2 Prohibitions

§ **A.3.2.2.2.9** “Claims related to exterior insulation finish systems (EIFS), synthetic stucco or similar exterior coatings or surfaces, if the Work involves such coating or surfaces.”

Issues:

- This coverage is not readily available to most contractors.
- When available, certified applicators are required and the cost is not economical.

§ A.3.2.2.2

Recommended: Prohibit any endorsement exclusion or limitation of coverage for “Claims related to the assumption of tort liability of another.”

Issues: Prohibit:

- Contractual Liability Limitation endorsement ISO CG 20 39 10 93
- Amendment of Insured Contract Definition ISO CG 24 26 04 13
- any endorsement modifying the Employer’s Liability exclusion.

§ A.3.2.3, Auto

“Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Contractor”

Issue:

This fails to include hired vehicles.

Recommended:

- Additional Insured status shall be provided in favor of [Upstream Parties] on ISO form CA 20 48 10 13.
- This insurance shall be endorsed to provide primary and noncontributing liability coverage on ISO form CA 04 49.
- To the extent permitted by law, [Downstream Party] agrees to waive its right of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation in favor of [Upstream Parties] on ISO form CA 04 44 10 13.

§ A.3.2.4, Excess Liability

“Contractor may [use] ... a combination of primary and excess ... insurance, provided such primary and excess or umbrella insurance policies result in the same or greater coverage as the coverages required under Section A.3.2.2 and A.3.2.3.

Issue:

- This is excess over General Liability and Auto Liability only.
- This fails to require coverage excess of A.3.2.6, Employer’s Liability

§ A.3.2.4, Excess Liability

“and in no event shall any excess ... insurance provide narrower coverage than the primary policy.”

Recommended:

This insurance shall follow form of the underlying coverages. It shall be excess over and be no less broad than all coverages and conditions described above, including but not limited to the required additional insured status, designated construction project(s) and/or location(s) general aggregate, waiver of subrogation, and prohibited exclusions or limitations, and will be primary to and not seek contribution from any other insurance (primary, umbrella, contingent or excess) maintained by [Upstream] Parties.

§ A.3.2.4, Excess Liability

“The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.”

Issue:

This requirement will not be met by most insurance companies.

Recommended Policy Wording:

If we are liable under this insurance, we will pay for injury, damage or loss after:

The amount of the “applicable underlying limit” or “self-insured retention” is paid by or on behalf of the insured.

§ A.3.2.5-7, Workers' Compensation, Employer's Liability, USL&H and Jones Act

Recommended Additions:

- Employees leased through a Professional Employment Organization (“PEO”) are not permitted.
- Stop Gap coverage must be provide if Work is to be performed in a monopolistic state, listing the state(s) in which Work is to be performed.
- USL&H coverage must be provided where such exposure exists listing the state(s) in which Work is to be performed.
- To the extent permitted by law, [Downstream Party] agrees to waive its right of recovery and shall cause this insurance to be endorsed to waive all rights of subrogation in favor of [Upstream Parties] on form WC 42 03 04.

§ A.3.2.8-10, Professional and Pollution Liability

The descriptions of when coverage is to be required are quite brief.

Possible Additions:

- Broader description of scope of coverage
- Inclusion of prohibitions regarding exclusions or limitations
- Additional Insured status on the pollution liability coverage
- Term for which coverage must be maintained beyond course of construction
- Waiver of right of recovery and subrogation

§ A.3.2.8-10, Professional and Pollution Liability

See also § 3.12 of the General Conditions that addresses “Shop Drawings, Product Data and Samples”.

Issue:

It should be recognized that professional liability exposures arise from shop drawings, samples, “value engineering”, construction management, “green” construction, and design build.

§ A.3.2.12, Unmanned Aircraft (Drones)

General Liability insurance excludes coverage for operations of drones.

Issues:

- Coverage can usually be added to a general liability policy by endorsement for a nominal premium.
- This coverage should extend to bodily injury, property damage, and personal injuries (e.g., invasion of a right of privacy).
- Require that coverage also be included by the excess liability insurance.

§ A.3.3.1

“The Contractor shall maintain the required insurance until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, unless a different duration is stated below:”

Recommended:

[Downstream Party] agrees to maintain Products-Completed Operations coverage with respect to the Work performed under the Agreement in identical coverage, form and amount, including required endorsements, for the full term of the Statute of Repose following Date of Substantial Completion of the Work by [Downstream Party].

§ A.3.3.2.4

“Insurance for physical damage to property while it is in storage and in transit to the construction site on an ‘all-risk’ completed value form”

Issues:

- “physical damage” does not include theft
- “property” should include “equipment, machinery, materials and supplies at other locations or in transit and which is intended to become part of the project”
- “all-risk” does not necessarily include theft, flood or quake
- “completed value form” has no application to these particular exposures

§ A.3.3.2.5

“Property insurance on an ‘all-risks’ completed value form, covering property owned by the Contractor and used on the Project, including scaffolding and other equipment.”

Issues:

- “property” should be “property that is not intended to become part of the project except as specifically covered by the policy”
- “all-risks” does not necessarily include theft, flood or earthquake
- “completed value form” has no application to this exposure

Certificates of Insurance

Require (at a minimum):

- Certificate of Liability Insurance ACORD 25 (2016/03)
- Evidence of Commercial Property Insurance ACORD 28 (2016/03)
- Copy of GL Additional Insured endorsement(s)
- Copy of Schedule of Forms and Endorsements page(s)

Questions?

Charles E. Comiskey

CPCU, CIC, CPIA, CRM, CRIS, CCM, CMIP

President, RiskTech, Inc.

Sr. V.P., Brady Chapman Holland & Assoc.

713 254 1818

charles.comiskey@risktechinc.com