



Construction Claims: A Practical Reservation of Rights Checklist

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Disclaimer: Please understand that this checklist may not be considered legal advice applicable to any given claim. Each claim is unique and must be analyzed on its own facts and applicable law. This checklist is not exhaustive or all-encompassing, and merely describe topics which may, but not necessarily must, be considered for a given claim.

1 Choice of Law

- ◆ The analysis (test and factors) varies from state to state.
- ◆ Sometimes straightforward, but can be nuanced.
 - *E.g.*, conglomerate policyholders, interstate operations, state-specific endorsements, towers of insurance
- ◆ Is there a choice-of-law provision in your policy?
- ◆ *Immediate Concerns:*
 - Deadline to issue an ROR or denial letter
 - Whether an insurer can, or should, reserve rights in this jurisdiction

2 Who am I Writing to?

- ◆ Are they actually an insured?
- ◆ Does the tendering party = named defendant = an insured = the party which signed *or performed* the construction contract(s)?
- ◆ Are there endorsements which amend the schedule of named insureds?
- ◆ Consider checking with the underwriter.
- ◆ Be mindful of small differences in the names.
 - Different entities for the different states where they operate
 - Different entities for different operations
 - ◆ Residential vs. commercial construction vs. restoration
 - ◆ Property ownership vs. property management vs. holding company
 - Different entities for WBE or MBE certification
 - Example: Phil's Windows LLC vs. Phil's Windows MN LLC

2 Who am I Writing to (cont.)?

- ◆ It can be unclear who your recipient should be.

EXAMPLE LANGUAGE:

"It is our understanding that you are the contact person at [INSURED] to receive this communication on behalf of the Defendants [INDIVIDUALS/BUSINESS ENTITIES]. If our understanding is not correct, please immediately advise us in writing and forward this communication to the appropriate recipient(s). Additionally, if email is not the preferred method of communicating with respect to this matter, please advise."

- ◆ In some states, you may have to send (CC) your letter to the plaintiff(s), the named insured (even if they are not a defendant), the broker, and/or others. *E.g.*, New York Insurance Law § 3420(d)(2).

3 Subject Line

- ◆ Keep it simple (claim #, lawsuit caption, your named insured, etc.).
- ◆ Caution: listing a date of loss in the subject line can have unintended consequences.
 - For both bodily injury and property damage claims.
- ◆ This is a good time to consider what policy periods you are addressing.

4 The Intro: Requests for Information

- ◆ Put your RFIs upfront. It increases the likelihood you'll receive a response.
- ◆ Example considerations when drafting your RFIs:
 - Do you have the full contract? Are there master service agreements, proposals, letters, etc. you have not been provided?
 - Certificates of insurance and tenders to downstream subcontractors?
 - Is there an accident report?
 - Do you have all the pleadings (*e.g.*, cross-claims, third-party complaints, and counterclaims)?
 - Were there pre-litigation demands, negotiations, or correspondence?

5 The Intro: Who is Defense Counsel?

- ◆ Does your ROR require professionally "independent" ("*Cumis*" or "*Peppers*") or insured-selected counsel, *or at least that you notify the insured of its right to such counsel*?
 - Are the coverage defenses worth it?
- ◆ **Precision**: Avoid stating that you're "defending subject to a reservation of rights" if, in fact, you're reimbursing the reasonable and necessary fees/costs of insured-selected counsel.

5 The Intro: Who is Defense Counsel (cont.)?

- ◆ **Multi-defendant lawsuits:** Is separate counsel needed for each defendant due to an actual or potential conflict between them relative to either the liability claims and defenses in the underlying lawsuit or your reservation of rights?
- ◆ Captive programs: the insured may have a right to suggest or select counsel.
- ◆ The insured's preferred counsel might have valuable background knowledge about their business operations or the construction project.

6 The Intro: How Much are You Paying?

- ◆ Your duty to defend or pay/reimburse defense costs may be limited to post-tender or post-notice costs (*but not always*).
 - Important for additional insured tenders which may arrive late in the lifespan of a lawsuit.

7 The Intro: Mutual Consent

- ◆ Some jurisdictions require or encourage mutual consent to proceed with a defense under a reservation of rights (e.g., that the insured return a signed copy of the reservation of rights letter or, at least, not affirmatively object to your ROR).

8 Fact Section

- ◆ Less is more.
- ◆ Be careful about summarizing allegations of the complaint.
 - It can be safer to quote directly than to editorialize.
- ◆ Are you in a "four corners" or extrinsic evidence jurisdiction?
- ◆ Be careful about how you describe the documents you've received.
 - Is the "contract" or "subcontract" you received (1) complete; (2) the final version; and (3) accurate/authentic?

9 The Policy Language

- ◆ Example considerations:
 - Endorsements issued after the policy incepted
 - More than one AI endorsement is implicated
 - More than one endorsement re: limits of liability
 - State-specific endorsements

10 Additional Insureds: The "Written Contract"

- ◆ Many additional insured endorsements require a "written contract".
- ◆ What is a "written contract"?
 - The body of caselaw is mixed (even within a given state).
 - Be prepared for the tendering defendant to argue that "written contract" should be interpreted broadly to include many different types of documents.
- ◆ What might a tendering defendant *argue* comprises the "written contract"?
 - Master Service Agreement?
 - Certificates of insurance ("evidence" but not a "contract")?
 - Prior course of dealings?
 - Emails, letters, proposals?
 - Other agreements incorporated by reference?
- ◆ Additional "Written Contract" Considerations:
 - Must the named insured be a signatory to the "written contract"?
 - Is it even signed? When was it signed (before the loss)?
 - Do you have a complete and final/operative copy?
 - Were there amendments to the contract's standard/AIA language?
 - Were there multiple contracts for one job site (if >1 building)?
 - Do you have any authentic copy?

11 Additional Insured: The Causal Connection

- Arising out of vs. caused by vs. vicarious liability.
- The scope or existence of AI coverage might be different for ongoing operations vs. completed operations.
- Double check for AI endorsements added after the policy was issued.

12 When Does Your Policy's Coverage Attach?

- ◆ Other insurance provisions. *Amended by endorsement?*
 - Are you excess or must you split defense costs?
- ◆ For AI tenders, you may be excess if the "written contract" does not require that coverage must be primary and/or non-contributory basis.
- ◆ Is there a deductible or SIR? *Amended by endorsement?*

13 Insuring Agreement Issues: Construction Defects

- ◆ Is faulty work an "occurrence" in this jurisdiction?
- ◆ Is faulty work "property damage"?
- ◆ What was the insured's scope of work for the project?
 - Did the insured allegedly cause damage to something outside the scope of the insured's own work?
 - How far removed from the insured's own scope of work must the damage be for it to be covered in this jurisdiction?
- ◆ Is there coverage for loss of use in this jurisdiction?
- ◆ Are rip and tear costs covered?
- ◆ Is incorporating defective work/materials ≠ "property damage"?
- ◆ Economic losses ≠ "tangible property"?
- ◆ Breach of contract ≠ "occurrence"?
- ◆ Is your policy period even triggered by the P/D or B/I?
- ◆ Other temporal defenses relating to the scope of coverage:
 - Prior knowledge by an insured
 - "Known loss" prior to policy period (*i.e.*, fortuity)
 - Endorsements modifying prior knowledge limitations
 - Deemer or non-cumulation clauses
- ◆ Allocation of covered vs. uncovered damages.
- ◆ Does your insured's obligation to provide contractual indemnity qualify as "damages because of 'bodily injury' or 'property damage'"?

14 Common Exclusions: Construction Defects

- ◆ Exclusion b. Contractual Liability
 - Sometimes applied to breach of contract claims by Courts
 - An anti-indemnity statute might impact whether or not an indemnity provision qualifies as an "insured contract"
- ◆ Breach of Contract Exclusion Endorsement
- ◆ Professional Services Exclusion Endorsement
 - Check whether you issued a professional liability policy
- ◆ Exclusion j. Damage To Property
- ◆ Exclusion k. Damage To "Your Product"

14 Common Exclusions: Construction Defects (cont.)

- ◆ Exclusion l. Damage To "Your Work"
 - The subcontractor exception
- ◆ Exclusion m. Impaired Property
- ◆ Pollution Exclusions and Endorsements (traditional pollution vs. other types)
- ◆ Designated Premises Endorsement

15 Common Exclusions: Personal Injuries

- ◆ Classification Limitation Endorsement
- ◆ Professional Services Exclusion Endorsement
- ◆ Designated Premises Endorsements
- ◆ Exclusion d. Workers' Compensation And Similar Laws
- ◆ Exclusion e. Employer's Liability
- ◆ Independent Contractor Exclusion Endorsement
- ◆ Exclusion g. Aircraft, Auto Or Watercraft
- ◆ Exclusion h. Mobile Equipment

16 Policy Conditions

- ◆ Late Notice
 - Pre-suit demand letters or pre-suit negotiations with the plaintiff?
 - Endorsements limiting its scope or effect (e.g., prejudice)?
- ◆ Cooperation
 - Can be particularly important for policies with high SIRs or retentions
- ◆ Voluntary Payments

17 Tenders to Other Insurers?

- ◆ Who is going to make the tender?
- ◆ Don't forget downstream parties (e.g., sub-subcontractors).
- ◆ Request copies of any tenders or notices to other insurers and related correspondence.
- ◆ Request copies of any certificates of insurance issued to the insured seeking coverage under your policy.

18 State-Specific Boilerplate Language

- ◆ Examples:
 - **Illinois:** Part 919 of the Rules of the Illinois Department of Insurance requires that our company advise you that, if you wish to take this matter up with the Illinois Department of Insurance, it maintains a Consumer Division in Chicago at 122 S. Michigan Ave., 19th Floor, Chicago, Illinois 60603 and in Springfield at 320 West Washington Street, Springfield, Illinois 62767.
 - **California:** If you believe that all or part of this claim has been wrongfully denied or rejected, you may have this matter reviewed by the California Department of Insurance, 300 Spring Street, 11th Floor, Los Angeles, CA 90013, 1-800-927-4357.

19 Examples of Other State-Specific Considerations and Reservations

- ◆ Florida: You may want to state that you not consenting to the insured participating in the F. S. Ch. 558 (the Florida Construction Defect Statute) process for construction defect claims or any alternative dispute resolution proceeding.
- ◆ Colorado and other states have statutes specific to coverage for construction defect claims. Co. Rev. Stat. 13-20-808.

Questions?

Please contact our team of Hinshaw attorneys:



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Paris Glazer represents insurers in coverage and extra-contractual matters involving commercial general liability, professional liability, excess/umbrella liability, and directors and officers liability policies, as well as manuscript, captive, and reinsurance programs. He also assists clients with business litigation.

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Daniel Shatz represents clients in business and insurance coverage disputes. With experience at all stages of litigation—from regulatory investigations to mediation and settlement conferences to evidentiary hearings and trials—he ensures clients are informed throughout the process and provides solutions tailored to their unique legal issues.

[Full Biography](#)

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