



Penny Wise – Pound Foolish

Below is a costly lesson for subcontractors, GC's, and their brokers.
The following story has winners and losers.

Winners – Lawyers

Losers – GC, Sub, Agent, GC's insurance company, Agent's E&O carrier.

Typical construction contract situation where the GC has a contract with the subcontractor with reasonable indemnification and hold harmless provisions. There is also an insurance requirement attached to the contract "as part of the contract". While fairly exhaustive, the requirements in the insurance language are fair and very obtainable in the insurance marketplace. Here is the short story;

The contract contained language stating that the insurance provided by the subcontractor could not have any 3rd party action over exclusions among other provisions not relevant to this situation.

Subcontractor signed the contract (probably did not share it with his agent) and requested a certificate of insurance (COI) from his agent with the typical language, additional insured, waiver of subrogation, primary noncontributory.

ABC Coring Inc. created a hazard on the jobsite by cutting a hole in the floor. Employee from DEF Carpenter Inc. tripped and fell in the hole, causing significant bodily injury. GC is named in lawsuit for "unsafe work conditions". GC tenders claim to ABC Coring's insurance company under the additional insured endorsement for failure to protect the hole (which they are federally mandated to do under OSH Act). *Swiss Cheese Insurance Company* of the subcontractor states, "Claim denied and cites the exclusion in the policy" not even a reservation of rights letter (for those insurance folks it was the amendment to the Employer Liability Exclusion that removes the insured contract provision).

GC's carrier, *We Stand By You Insurance Company* advises that they still have a duty to protect the GC and will defend, however *We Stand By You* notes that they intend to go after ABC Coring and sue them directly for breach of contract in a separate cause of action. This cause of action is not insurable and ABC Coring will have to defend the lawsuit personally on the company's financials. In other words, they have to hire a lawyer and defend a claim that will include legal expenses of *We Stand By You*, the settlement cost of the claim, and possibly any expenses incurred

ABC Coring not liking that they have no insurance coverage to defend themselves for breach of contract is going to point the finger at the Agent who sold them *Swiss Cheese Insurance* and sue them for breach of duty as a broker. Broker is now obligated to advise their E&O carrier that they are being sued. This case above is a real case that is currently evolving but the basic lessons are there for EVERYONE involved in the transaction.

If the proper coverage were in place, 1 lawyer would have been called upon to defend all involved. Since the proper coverage is not in place, 3 lawyers will be billed. *We Stand By You*, will be defending GC,



Agent's E&O will be defending agent, and ABC Coring will be writing checks to Dewey Cheatum & Howe. (Lawyers always come out the winners).

What could have been resolved with an average claim cost of \$50,000 including legal expenses is now going to cost everyone and the expenses can easily be double for the same claim yet improper risk transfer provisions.

All three parties involved should consider how they can best protect themselves.

Brokers – Know what you're selling and advise your clients of potential uninsured exposures that your client may have. Don't be afraid to show them broader coverage for a higher premium and let them decide. If you don't offer an alternative, or if you don't disclose the gaps, decrease the deductible on your E&O policy and ensure that you have not misrepresented yourself on the application.

GC's – Get a better understanding of what insurance your subcontractors have. A certificate of insurance is NOT GOOD ENOUGH. While one would feel better that the carrier is going to after the sub personally, the loss still affects your results (and potentially your rates) until the case settles and your insurance company gets recovery.

Subs – While you have every right to complain about the costs of insurance, if you are going to buy it, buy the right coverage. You are signing contracts that require you to indemnify others as a part of your daily operations, understand where the deep pockets of insurance covering you and where you have to look at your balance sheet to cover an unfunded loss. The onerous insurance requirements in the contract are there FOR YOUR PROTECTION. The indemnification agreement is where you agree to protect the GC. The insurance section is where the GC is making sure that the funding for the indemnification agreement is in place from a company with deep pockets rather than your balance sheet.