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Construction law:

A specialty practice in today's complex legal environment

Many lawyers a generation ago practiced “threshold law.” They took any case that crossed the threshold of their office’s door. Most lawyers in today’s competitive legal market focus on a specialty practice area. Although construction law has evolved over the years into a specialty practice, there is still no universally accepted definition of the practice. In 2007, for example, construction law practitioners began the process to petition the North Carolina State Bar to approve construction law as an area of law for which a lawyer could become certified as a “specialist.” Currently, the State Bar recognizes only 16 areas of law with such classifications. Without such a certification, a lawyer cannot call himself or herself a “specialist” in a particular area of the law. Attempts to add construction law as a specialty in North Carolina stalled partly because practitioners were unable to reach consensus on its definition.

The 16 recognized specialty practice areas run the gamut, from appellate practice to workers’ compensation law, and include bankruptcy law, criminal law, family law, immigration law and trademark law. Interestingly, there are parts of each of these practice areas that often must be addressed by the construction-law practitioner. Today’s construction lawyer must be well-versed in more than just contract drafting and interpretation, licensing and regulatory requirements,

mechanic’s liens and bonds, and the various forms of dispute resolution — mediation, arbitration and litigation.

As construction lawyers, we cater to the needs of the construction industry. Over the last several years, our clients’ needs have broadened to include areas of the law that one might not necessarily associate with construction law, including aviation, employment and immigration, e-discovery (storage, production and forensic investigation of digital data) and insurance.

By way of example of a critical, but often overlooked, aspect of construction law, we will discuss the importance of understanding and properly addressing the last category: insurance. A large part of our practice is assisting clients in recognizing, evaluating and addressing the risks they may be assuming when they are contemplating signing a contract to participate on a construction project.

A key component of a comprehensive analysis is having the right insurance for the parties and for the project. The use of a contractor-controlled insurance program or an owner-controlled insurance program, for example, may be a better option than relying on multiple separate policies to adequately and efficiently cover the risks for a particular project. The variables from one project to the next warrant a thorough review of the project’s proposed insurance coverages and allocations of risk.

A major component of a project’s insurance review is complying with contractual requirements to name certain parties as additional insureds. The project contracts, for example, may require the contractor to be named as an additional insured on a subcontractor’s commercial general liability insurance policy. An additional insured is a party — the contractor in this example — other than the named insured — subcontractor — who is covered on the named insured’s insurance policy as if the additional insured was a named insured on the policy. The additional insured status in this scenario gives the contractor direct rights under the subcontractor’s liability insurance policy. It may also avoid certain exclusions in the contractor’s own liability insurance policy.

Unfortunately, we see many instances, usually after it’s too late, where contractors think they have been included as an additional insured on a subcontractor’s liability insurance policy only to find out when the insurance coverage is needed that they were never properly added. The only way to become an additional insured is by an endorsement issued by the named insured’s insurance company.

Contrary to popular belief and practice, one may not become an additional insured only based on a certificate of liability insurance stating that the purported AI is an AI on the policy referenced in the certificate. The certificate also is known

as an ACORD 25 form. Certificates of insurance often are presented as proof that the purported AI has been named as an additional insured, but that alone will not make it so. The AI should demand a copy of the actual additional insured endorsement issued by the insured's insurance company. The AI also should demand a copy of the Declarations Page of the insured's liability policy, which includes basic information such as the named insured, the insurer, the policy number, the monetary limits of insurance coverage, the policy period and an identification of the forms and endorsements to the policy.

The next issue is determining which AI endorsements should be used. There is no single standard AI endorsement form. The Insurance Services Office is an industry organization that develops many standard insurance policy forms, including additional insured endorsements. Selecting the appropriate AI endorsement largely depends on the needs of the project and the identity of the parties to the construction contract. Many projects specify the particular policy endorsement forms to be used to add additional insureds. Each endorsement form provides different insurance coverage for the AI.

Commonly used AI endorsements include ISO forms: CG 20 10 11 85 Additional Insured — Owners, Lessees or Contractors — (Form B); CG 20 10 07 04 Additional Insured — Owners, Lessees or Contractors — Scheduled Person or Organization; CG 20 10 04 13 Additional Insured — Owners, Lessees or Contractors — Scheduled Person or Organization; CG 20 33 10 01 Additional Insured — Owners, Lessees or Contractors — Automatic Status When Required in Construction Agreement With You; CG 20 33 04 13 Additional Insured — Owners, Lessees or Contractors — Automatic Status When Required in Construction Agreement With You; CG 20 37 07 04 Additional Insureds—Owners, Lessees or Contractors — Completed Operations; CG 20 37 04 13 Additional Insureds — Owners, Lessees or Contractors

— Completed Operations; and CG 20 38 04 13 Additional Insured — Owners, Lessees or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement.

The numbering of the forms is: CG = Commercial General Liability Insurance. The first two digits designate the specific insurance category. The next two digits are the endorsement number within the specific insurance category. The last four digits are the date of the endorsement expressed in month and year format.

In this article, we have touched on a sliver of insurance coverage issues common to most construction projects. We often deal with many other insurance coverage issues, including the interpretation of the insurance policy's insuring agreement, which defines the coverage provided by the policy, the policy's numerous complex coverage exclusions and the often overlooked exceptions to the coverage exclusions. The old saying, "what one hand giveth, another hand taketh away," is often used to describe insurance policies. However, an experienced construction practitioner does not stop the analysis there because an "exception to an

exclusion" may then "giveth back." Perhaps, another old saying might be more applicable: "You have to be a lawyer to understand what that thing means."

Few people look forward to discussing insurance programs, coverage and policies. Most never fully understand the extent of their insurance coverage — or, equally important, the lack of coverage — until a claim needs to be made, at which point it's usually too late. Like a front -end alignment keeps a car traveling straight and true, a comprehensive review of a party's insurance needs before the construction project begins may help keep that project on course if a claim arises in the middle of construction.

Although construction law has evolved into a specialty practice, today's construction law practitioner must be able to analyze and address a broad range of legal matters affecting the construction industry. Whether it is working with a client in addressing their insurance needs, filing suit to collect unpaid contract funds or helping them draft their internal procedures for operating drones on a construction site, today's construction lawyer has to be skilled in many areas of the law.

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Chapin and Davis represent public and private owners, developers, contractors, construction managers, subcontractors and sureties on legal matters affecting their industry. They, along with the other lawyers at Conner Gwyn Schenck, are co-authors of NORTH CAROLINA CONSTRUCTION LAW, a treatise published by Thomson Reuters. It contains in-depth analyses of numerous aspects of construction law, including public procurement regulation, project delivery and financing systems, insurance, liens, suretyship, building codes, occupational licensing and regulatory compliance. Drew's and Paul's full biographies can be viewed at www.cgspllc.com.