

BUILDERS RISK CASE

Property insurance policies, including builders risk, contain an exclusion for land. This case illustrates the need to amend the standard land exclusion in certain circumstances, as well as the application of Temporary Storage coverage and the use of a loss limit instead of insurance to value.

A California water district was building a large reservoir system, with an earthen fill dam, at a cost of \$1.9 billion. The insurance broker arranged builders risk coverage, with a \$100 million limit, for the interests of the district and all of its contractors. The policy contained an amendment to the land exclusion to cover the borrow soil material that would be used to build the dam. The borrow soil, located on the construction site, had to meet engineering specifications. Prior to construction, an El Nino storm flooded the site saturating the borrow soil and preventing its use in the dam. This required the contractor to truck borrow soil from a new location some distance from the former site, at an added cost of approximately \$20 million. The insured presented a flood claim for this additional expense but the property insurer denied it.

The insurer initially based their denial on the land exclusion. Although it is rare for an underwriter to alter the land exclusion, in this case the exclusion was specifically amended to meet the engineering specifications of this earthen fill dam. I testified that the insurer's policy covered materials "which will become a part of the structure," including the borrow soil. I also pointed out that in construction insurance custom and practice, the builders risk policy incorporates the points of the construction contract that bear upon insurance, such as the definition of construction materials, construction means and methods, and operational testing. The underwriter, therefore, had to accept the requirement to amend the land exclusion in order to cover the borrow soil material.

The insurer's coverage counsel mistakenly opined that the insured had not intended to insure everything. He based this on the fact that the insured had purchased a \$100 million loss limit, rather than a \$1.9 billion insurance to value limit. I testified that a loss limit is used to cover the maximum probable loss the insured expects to sustain, which is typically far less than the total cost of the project. Further, a loss limit does not restrict coverage to certain aspects of the project but rather caps the amount payable for any occurrence.

The insurer's claims adjuster testified that the policy contained a sublimit for Temporary Storage, also known as Off-Site Storage, and that this sublimit should apply. I explained that Temporary Storage coverage applies to material that is off-site awaiting delivery and had no application to this case.

The insurer's underwriting department obviously understood and accepted the unique risks of this project, but the claims department and the company's

coverage counsel did not. The defendant insurer ultimately agreed to settle for nearly the full amount of plaintiff's damages.

The map associated with this case is an outline depicting certain aspects of the case and is not intended as a complete description of the facts or of my testimony.



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