ASSUME THE RISK OR PUSH IT DOWN: THE CHOICE IS YOURS

BY ROSS DRISCOLL, JR.

The environmental insurance landscape for restoration contractors is constantly evolving. Whether carriers are updating policy forms, increasing rates, becoming more restrictive, or increasing underwriting standards, the one thing that is always constant is change.

Over the past two years, I have seen more carriers underwrite a restoration contractor's risk transfer more than they had in the past. We all know that TPA's, franchisors, and property managers all push risk down to you. That is why they all have stringent insurance requirements and expect you to name them as an Additional Insured, and sign indemnity agreements, among other things. The restoration industry can do a better job of pushing risk down to your subcontractors, just like how risk is being pushed down to you.

In discussions with some of the top environmental carriers that support the restoration industry, I have found that 25% to 40% of claims caused by subcontractors end up impacting the general contractor/restorer. This is usually because there was not the proper risk transfer in place, or the restorer was not consistent enough to get what was needed from every one of their subcontractors. Know that there is not a lot of data on these estimates, so this percentage can be higher or lower for other carriers.

Subcontractor Agreements

Although I am not an attorney, I have seen countless subcontractor agreements and understand what makes one strong in the eyes of your insurance carrier. Too often, I see general contractors/restorers not push enough risk down to their subcontractors.

Think about it this way - those you are contracted to work for are transferring their risk onto you. It is your duty to push that risk down as much as possible. If for some reason you have a claim from either an uncovered subcontractor, or a subcontractor that did not have their risk management in order, you could end up paying the price for the next three to five years if your carrier must payout. You will need to demonstrate thorough risk transfer practices to find a carrier willing to support you if this happens.

I encourage you to get with local counsel to make sure you have at least the following in your subcontractor agreement:

1. Indemnify and hold harmless language.
2. Specific limits required from subcontractor (at least the following):
- General Liability - $1,000,000 per occurrence/$2,000,000 aggregate
- Commercial Auto - $1,000,000 Combined Single Limit (CSL)
- Workers Compensation - $1,000,000 per occurrence/$1,000,000 aggregate
- Contractor Pollution Liability (highly recommended) - $1,000,000 per occurrence/$2,000,000 aggregate
- Excess Liability (highly recommended and should follow each of the policies listed above) - $1,000,000 - Depending on your risk appetite and size of jobs, this may need to be much higher.

3. Subcontractor required to name you as an Additional Insured for Ongoing and Completed Operations. The most common forms are CG 2010 0704 (Ongoing) and CG 2037 0704 (Completed). Too often, I see general contractors/restorers only collect Ongoing Operations, which does not help when you have a claim caused by a subcontractor after the job is completed. Be sure that you are collecting both Additional Insureds.
4. Subcontractor required to provide you Waiver of Subrogation. For a claim caused by a sub, this will deny their carrier the ability to subrogate against you if/when you are also negligent.
5. Subcontractor required to provide you Primary and Non-Contributory wording. For a claim caused by a sub, this will require that their insurance will be primary, and your policy will not contribute.

Sub-Warranties (Independent Contractor Endorsements or Subcontractor Special Conditions)

Some environmental carriers have been seeing increasing property damage and construction defect claims for restoration contractors. A sub-warranty, or subcontractor special conditions, can negatively affect restorers that do not comply with the carrier's requirements. Every carrier is different, but the most common requirements for your subcontractors are:

- General Liability including $1 million/$2 million limits.
- Certificate naming GC as an Additional Insured (not just a cert holder).
- Waiver of Subrogation and Primary Non-Contributory language.
- Contract with hold harmless language signed by subcontractors.

> **"THE RESTORATION INDUSTRY CAN DO A BETTER JOB OF PUSHING RISK DOWN TO YOUR SUBCONTRACTORS, JUST LIKE HOW RISK IS BEING PUSHED DOWN TO YOU."**

For general contractors not involved in restoration and written with construction markets, sub-warranties are commonplace. This helps reduce the carrier's risk and forces the general contractor to hold their subcontractors accountable.

In the environmental market, where the majority of restorers have their General Liability/Pollution/Professional Liability packages, the carriers have not included sub-warranties until more recently. To simplify, I break sub-warranties into two categories – "hard" sub-warran-

ties and "soft" sub-warranties.

A "hard" sub-warranty would require that you meet every condition in my example above. If a subcontractor caused a claim and one of those conditions was not met, the carrier could deny the claim all together. An example of a "soft" sub-warranty would say you still have coverage if you do not meet all the conditions, but they may double your deductible or increase it to a specified amount.

If you have had claims caused by uncovered subcontractors or did not collect Additional Insureds, you are likely to have a "hard" sub-warranty on future renewals.

Any risk that you do not lay off onto your subcontractors, you will assume yourself.

Not All Additional Insureds Are Created Equal

I have heard countless restorers tell me that they collect Additional Insured's (AI's) from their subcontractors, but then a claim comes, and they realize that they should have been more vigilant in checking for the correct AI's. Just because you received a certificate of insurance from a subcontractor, it does not mean that you have been named as an AI. Too often, restorers think that is all that is needed, but you are putting your business's future in the hands of your subcontractors if that is all that you do. A certificate is used for informational purposes only and extends zero coverage – it even says this at the top of every certificate issued.

At some point in your career, someone has asked you to name them as an AI, where they request you to have CG 2010 1185, or equivalent. Know that the last four numbers of every policy form is the date it was created. For CG 2010 1185, this is the November 1985 version, which gives "your work" wording. I like to refer to this form as the O.G. (original gangsta) of AI's because it provides coverage for both Ongoing and Completed Operations. Know that hardly any carrier provides these anymore, and now carriers separate AI forms into two main categories – Ongoing and Completed Operations.

The most common AI's that I see are the July 2004 versions – CG 2010 0704 (Ongoing) and CG 2037 0704 (Completed Operations). Any time you see "CG" in front of a policy form, know that these are common forms created by International Organization of Standardization, commonly referred to as ISO. Standard/admitted carriers, as well as many surplus lines carriers use ISO forms. Still, if you are with an environmental carrier that writes your GL/Pollution/Professional Liability package, they may use ISO forms and/or their own proprietary policy forms.

I am a proponent of the 2004 versions because they are broader than the more recent 2013 and 2019 ISO forms. Also, they do not provide the AI coverage for sole negligence. In older forms, like the 1001 (October 2001) versions, they provide sole negligence. This means that even if the entity that you named as an AI was 100% negligent, they could still make a claim on your policy instead of their own.

For each AI, Ongoing and Completed Operations, you will find that there are boxes with fill-in language. If you have blanket AI's, the boxes will likely say something like, "Any person organization to who the named insured has agreed by a fully executed written contract that such person or organization be added as an Additional Insured…". The key is that there is a contract that requires the AI. If someone says, "Add me as an AI," but there is no

agreement in place, then the AI form will not trigger.

Outside of blanket language, some will take it a step further and ask to be scheduled. Most of the TPAs and franchisors will not accept blanket language, as they want to be named in the policy. Often, the same AI forms are used, but you will find that organization and their address will be listed rather than the blanket wording. If you are heavy in re-construction and have subcontractors who perform a lot of work for you, especially trades like roofing, electrical, plumbing, and waterproofing, it may not be a bad idea to schedule you as an AI for Ongoing and Completed Operations in their policy. If done this way, then you know for a fact that you are an AI and don't have to rely on the blanket wording. Most carriers charge a nominal fee to process a scheduled AI – usually $250.

The latest ISO forms, 0413 (April 2013) and 1219 (December 2019), have been updated to reduce the policy limits available to those you list as an AI. When you read the CG 2010 0413, CG 2037 0413, CG 2010 1219, and CG 2037 1219, each of them state, "If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader that that which you are required by the contract or agreement to provide for such additional insured."

Say you are more risk-averse and carry higher limits than most require. Rather than the $1,000,000 Excess Liability (what many mistakenly call an Umbrella), you carry $5,000,000 or $10,000,000 to be safe. Most often, you have signed a contract that requires you to have General Liability of $1,000,000 per occurrence/$2,000,000 aggregate, with a $1,000,000 Excess Liability, equating to a total of $2,000,000 per occurrence/$3,000,000 aggregate when combined. If you have those $5,000,000 or $10,000,000 Excess limits, as an example, and you have the 0413 or 1219 versions of AI's, those higher limits would not be available to you or your AI if there was a claim above $2,000,000 per occurrence. You may be asking yourself, "Why am I paying for those increased limits then?" I would not argue that with you, so you should do what you can to have the 0704 (July 2004) versions instead.

Be Vigilant

It is critical that you push risk down. Any risk that you do not lay off onto your subcontractors, you will assume yourself. First, go back and review your subcontractor agreement with local counsel. I would encourage you to include at least those five points, where your attorney may add others to the Indemnity section. Be sure that you have a signed copy from every one of your subcontractors.

It would be wise to ensure that your subcontractors have the 0704 (July 2004) AI versions or earlier. You can make this a requirement in your subcontractor agreement. Every time ISO creates new forms, you can bet that they create more mouse traps to get out of claims and are not making their forms broader for the insureds.

Next, be sure that you do not have a "hard" sub-warranty in your current GL and Pollution policies. Be sure that this is a topic of conversation with your agent before your next renewal, as something like this could put a company out of business.

Lastly, make sure that you have excellent documentation. This may be the most challenging part, but you really need someone on the team who keeps good records of your subcontractor agreements and the certificates that list your company as an AI for ongoing and completed operations. ABV – "Always Be Vigilant!" If you are not careful, an inadequate subcontractor could cost you. C&R

Ross Driscoll Jr., MBA, CIC, is a Partner and the Vice President of National E&S Insurance Brokers and Driscoll & Driscoll Insurance Agency. Prior to joining the family business, he was a Contract Surety Underwriter at Zurich North America. He specializes in the risk management for contractors, especially those in fire/ water restoration industry. As a Certified Insurance Counselor (CIC), he has expertise in all lines of Property & Casualty Insurance. Ross has been recognized by various insurance carriers as one of the top up and coming producers in the country. He is one of the few producers who truly understands his customer's risks as well as how to manage them.