

RISKY BUSINESS

May 2016

Inside this issue:

FYI	1
The Claims File	2
Loss Control Lowdown	3
Counselors' Comments	4
Brokers' Beat	5
Calendar of Events	6
From The Board Room	6

A PUBLICATION OF THE MIAMI VALLEY RISK MANAGEMENT ASSOCIATION

MVRMA OFFICERS

PRESIDENTJOHN GREEN, TIPP CITY

VICE PRESIDENT.....DINA MINNECI, INDIAN HILL

TREASURER.....JANINE COOPER, ENGLEWOOD

SECRETARYJULIE TRICK, VANDALIA

FYI...Builder's Risk Coverage

By Tom Judy



A construction site has many characteristics that cause unique exposures to loss or damage to the project. A construction project in progress is more exposed than a completed building to the risk of property damage from fire, wind, flood, theft, vandalism and other unexpected perils. Further complications arise because the project's property values will change as construction progresses; the property used in construction may be owned by different parties during the course of construction (e.g., general contractor, subcontractors and the owner); and the property may be in transit, on the job site or at an off-site storage location awaiting installation. Given these unique coverage issues, the typical contract between an Owner and Contractor will require that one of the parties procure builder's risk coverage for the project.

What is Builder's Risk Coverage? Builder's Risk (sometimes called Course of Construction) Insurance is a specialized form of property insurance designed to cover the property loss exposures associated with construction projects. This coverage protects the interests of the owner, the contractor and subcontractors by covering the property under construction and the equipment and materials to be installed.

Ownership of a construction project is generally more complicated than ownership of a completed structure. While the City may own the land, the contractor or sub-contractor may own building materials, equipment and supplies. At any point in time, the ownership interest of any particular party to the construction project may vary. As owners or part-owners of the insured property, both the city and the contractors or sub-contractors may rightly have a claim to Builder's Risk insurance proceeds. Accordingly, most Builders' Risk policies should be written to cover all parties with an insurable interest in the property such as the owner (i.e., the city), the contractor and all sub-contractors.

Who buys the policy? Builder's Risk coverage can be purchased by either the owner or the contractor. The bidding documents should specify which party is responsible to purchase the coverage as contractors will need to know whether to build the cost into their bid.

Should the City be a Loss Payee? Yes, the contract documents should specify that the City will be named in the Builder's Risk policy as a Loss Payee. Being a Loss Payee means that any payment by the insurer will include the City as a payee.



FYI...Cont.

Who is responsible for any deductible? This should be governed by the construction contract documents. Since deductibles will vary considerably from policy to policy, it is important to determine prior to the contract the amount of the deductible and who will absorb it. You should be aware that the standard AIA contract states the owner will be responsible to pay costs covered by deductibles. If you are concerned about deductible exposure, this contract provision should be modified to shift the risk to the contractor.

Does MVRMA provide builder's risk coverage? MVRMA's property program provides automatic coverage for property in course of construction up to \$25 million subject to policy conditions. There is no added cost for this coverage. However, there is a \$250,000 self-insured retention (or deductible) that MVRMA must pay for each claim. Also, a member's builder's risk claims will be included in their loss history and will be included in the calculations of the member's future MVRMA contributions.

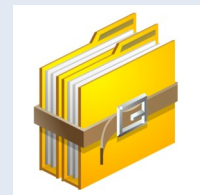
As such, MVRMA members may want to consider transferring this risk to the contractor and his insurer. This can be done by requiring the contractor to obtain the Builder's Risk coverage. Using this option will protect MVRMA's loss fund and keep course of construction related property claims out of the member's loss experience when calculating their future premium contributions.

Conclusion. When preparing construction contracts there are several important issues that need to be resolved regarding builder's risk coverage. It is important that legal counsel and MVRMA be involved in those discussions. Most importantly, make sure that builder's risk coverage is appropriately addressed in bid documents and the construction contract. Since this coverage is typically during the construction period only, make sure to add the newly completed building to the MVRMA property schedule.

The Claims File

By Craig Blair

Spring and Summer Issues



Our members are well into the busy time of the year with park programs, hiring of seasonal employees, festivals, roadwork and infrastructure projects. These activities all bring unique risk exposures to the city. The claims office has already started fielding questions regarding how to handle claims that have or can be expected to result from these projects.

When hiring of seasonal help, the first step is proper documented training for any equipment employees may be expected to use such as mowers, trimmers, chainsaws, etc. Also, proper background checks should be completed for employees that will be working with minors and BMV driver's license checks for those who will be driving city vehicles. MVRMA covers liability incurred by employees while "working within the scope of their employment" on behalf of the city.

One question we are often asked this time every year is whether employees driving their own vehicles to pick up supplies or make deliveries on behalf of the city are covered. Under Ohio law the "insurance follows the car", which means that when a party pays a premium to an insurance company for liability and collision coverage, the insurer has a contractual duty to provide coverage for damages to a 3rd party, and the damages to the employee's vehicle as well. The city would still have exposure when the employee is liable for other parties' damages, as the employee would be in the "course of their employment". However, this would be secondary coverage and would be applicable only after all other insurance coverages have been exhausted.

In cases where roadwork and infrastructure projects are contracted to a third party for completion, it is very important that MVRMA review the bid specifications and/or contract to ensure appropriate transfer of risk to the contractor for any claims arising out of their work. Whenever reporting a claim to MVRMA that derives from a city project, please include the name of the contractor along with the contact person so we can promptly forward the claim to the correct party.



Work Zone Safety

Last year was the deadliest year in over a decade in Ohio's roadway work zones.

Thirty people, all but one of them motorists, died last year in work-zone crashes in Ohio. This number was nearly double the 2014 number and was the most in a decade, according to Jerry Wray, director of the Ohio Department of Transportation. The nationwide toll was 669 in 2014, the most recent year for which nationwide data is available.

Because of those 30 fatalities the Ohio Department of Transportation (ODOT) is warning motorists of work zone dangers, and asking for their help in reversing the trend.

With roadways aging, there will be more and more construction occurring to rebuild and expand them to match the needs of the 21st century. When these are finished, there will be more that are in need of repair. This is the never ending cycle of roadway construction. This coupled with the growth of US travel is continuing to cause problems on the roadways. The cumulative travel has grown by 0.6% from 2009, which amounts to 16 billion vehicle miles of travel. Night work is also becoming more common among roadway construction. According to the US Department of Transportation, 53 percent of work zones are designated as day work, 22 percent as night work, and 18 percent as all day construction 18 or more hours per day.

Worker safety is a challenge with motorists being more distracted than ever. Flagger safety is a concern in work zones. Workers performing flagging duties must be aware of the potential risks and be knowledgeable of proper flagging procedure in order to minimize these risks.

Flaggers and workers on foot face the greatest risk of being struck by vehicles or construction equipment since they are often invisible to motorists or equipment operators. Those workers who operate construction equipment are most likely injured by collision, overturning equipment or being caught in running equipment. Most highway work zone workers frequently operate in conditions involving low light, reduced visibility, poor weather, or vehicle congested areas.

The Manual for Uniform Traffic Control Devices (MUTCD) defines the standards used by road managers nationwide to install and maintain traffic control devices on all public streets, highways, bikeways, and private roads open to public travel. The MUTCD, which has been administered by the FHWA since 1971, is a compilation of national standards for all traffic control devices, including road markings, highway signs, and traffic signals. It is updated periodically to accommodate the nation's changing transportation needs and address new safety technologies, traffic control tools and traffic management techniques.

For more in depth analysis of Worker Safety in Work Zones, refer to ODOT's Guidelines for Traffic Control.

MVRMA will be sponsoring three days of Work Zone and Traffic Control Training in May and June. Check the MVRMA website for more information. www.mvrma.com



U.S. Supreme Court Expands Qualified Immunity Defense

In *Mullenix v. Luna*, 136 S.Ct. 395 (November 9, 2015), the United States Supreme Court issued a decision that appears to expand the qualified immunity available to law enforcement officers. By an 8-1 vote, the court reversed the lower court rulings that denied immunity to a Texas trooper who shot and killed a fleeing suspect during a high speed pursuit.

On March 30, 2010, police attempted to arrest Israel Leija on an outstanding warrant. Leija sped off in his vehicle and a high speed pursuit ensued with several police agencies. Leija entered the interstate and traveled at speeds between 85 and 100 mph. During the pursuit, Leija twice called police dispatch claiming to have a gun and threatening to shoot at police if they did not abandon the pursuit. Other officers responded, including State Trooper Chadrin Mullenix who positioned himself on an overpass while other police officers set up tire spikes underneath the overpass. While waiting, Trooper Mullenix devised a plan to shoot at the fleeing vehicle with his service rifle with the intent to disable the vehicle. He contacted dispatch to inform his supervisor of his plan and to solicit the supervisor's input on whether it was "worth doing." Prior to receiving a response, Mullenix exited his vehicle with his service rifle in order to position himself. While out of the vehicle, his supervisor responded to "stand by" and "see if the spikes work first." It is unclear as to whether or not Trooper Mullenix heard this response; however, counsel for the Estate maintained that he should have been able to hear it from his position.

Approximately three minutes later, Leija's vehicle approached the overpass and Trooper Mullenix fired six shots, four of which struck Leija's upper body. None of the shots hit the radiator, hood or engine block. The Estate filed suit under 42 U.S.C. § 1983 alleging Mullenix violated Leija's Fourth Amendment by using excessive force. The district court denied the trooper's motion for summary judgment on the ground of qualified immunity, finding that there were issues of fact as to whether the trooper acted as a reasonably trained officer in the same or similar circumstances. The Fifth Circuit Court of Appeals affirmed the district court decision.

The Supreme Court reversed. In doing so, the court summarized some of its prior holdings on the issue of qualified immunity. The court stated that qualified immunity shields officials from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (Citations omitted.) A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." (Citations omitted.) "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." (Citations omitted.) Put simply, qualified immunity protects "all but the highly incompetent or those who knowingly violate the law." The Supreme Court then went on to somewhat admonish the lower courts by stating:

We have repeatedly told courts . . . not to define clearly established law at a high level of generality. (Citations omitted.) The dispositive question is "Whether the violative nature of a particular conduct is clearly established." This inquiry "must be undertaken in light of the specific context of the case, not as a general proposition." (Citations omitted.) Such specificity is especially important in the Fourth Amendment context, where the court has recognized that "It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. (Citations omitted.)

The court then went on to discuss the various previous pursuit cases to distinguish them from the facts and circumstances confronting *Mullenix*. The court likewise distinguished certain cases relied upon the Fifth Circuit in support of their decision in denying qualified immunity. The court then went on to conclude that "Given Leija's conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violates the law' would have perceived a sufficient threat and acted as Mullenix did." The court further went on to state: "Ultimately, whatever can be said of the wisdom of Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in the circumstances 'beyond debate.'"

Counselors' Comments...Cont.

The Supreme Court's recent decision essentially reemphasizes its prior pronouncements with respect to the applicability of qualified immunity. It is a reminder to all lower courts that qualified immunity evaluation must be considered in the "specific context" of a case rather than from some general proposition of law. Provided the actions of the officer are not "plainly incompetent" or the reasonableness of the action of not "beyond debate," then qualified immunity should shield the officer from liability.

While this recent decision is beneficial to the defense of claims involving issues of qualified immunity, it does not constitute a bright line case that specifically defines what an officer can and cannot do in any given circumstance. It therefore is important that the officers follow their training, keep abreast of recent case law, and clearly articulate the justification for their actions taken in the field.



Volunteer Accident Insurance

Consider this, a City Community Center has set up a committee of Volunteers to aid with evacuations related to natural disasters. When several areas in the City were flooded and forced to evacuate, the Volunteers responded by helping with the evacuation process. While assisting an elderly couple leaving their home, one Volunteer drops a heavy box on his foot, shattering his ankle. He is immediately transported to the local hospital, receives the needed treatment and is released. The City purchased Volunteer Accident Insurance which covered the medical cost and avoided a potentially sticky situation. What if this happened at your entity, how would those costs be handled?

Volunteer Accident Insurance provides accident and health coverage for volunteers that get injured while participating in an organization's sponsored activities, including direct travel to and from said activities. Benefits include:

- ◆ Accident Medical Expense
- ◆ Accidental Death and Dismemberment
- ◆ Coma Benefit
- ◆ Weekly Accident Indemnity

These policies are purchased on an annual basis and because claims are paid under an accident insurance program, these claims may not affect your City's General Liability, Workers' Compensation or other general insurance programs which could result in higher premiums in the future.

If your organization utilizes a large number of volunteers you should consider volunteer accident insurance, but just as important is knowing what to do if a volunteer is injured at a community sponsored event. Before an event, make sure everyone knows what to do when a volunteer is injured, who to contact, where the injured volunteer should be taken for medical care, and a plan on how to contact the volunteer post medical care.

For more information, contact Alliant Insurance Services.

Calendar of Events



Upcoming Training Events

Please continue to check our website, mvrma.com for upcoming training dates:

Two Day—Driver New Student Course

May 4 & 5, 2016

May 12 & 13, 2016

One Day —Driver Recertification Course

May 19, 2016

May 26, 2016

Work Zone Safety

May 31, 2016

June 2, 2016

June 8, 2016

Upcoming Board Events

Board Meetings

June 20, 2016, 9:30 AM

September 19, 2016, 9:30 AM

December 19, 2016, 9:30 AM

MVRMA Office

From The Board Room

Actions taken at the March 21, 2016 Board meeting included approval of:

- Revisions to MVRMA Public Records Policy
- Revisions to Committee Mission Statements portion of the MVRMA handbook