Negligent but not Liable (or what happens when you forget to get insurance)
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One of the key ways in which risk is allocated on a construction project is through insurance, typically in the form of builder's risk, course of construction, or "all-risk" property policies. In most cases, the responsibility for obtaining insurance coverage is set out in a parties' construction contract. It is common for these contracts to require a policy holder to add others, such as the owner or a subcontractor, as named insureds, which then affords this party the benefit of coverage. By ensuring all parties can be indemnified by a common insurer, there should be, in theory, less disputes over who is responsible for a loss on a construction project when such a loss occurs, which should allow construction projects, even in the event of loss, to proceed in a timely manner.

In *Jacobs v. Leboeuf Properties Inc.*, an Ontario court had an opportunity to consider who should be responsible for a loss, on a construction project, when the owner fails to obtain the insurance coverage stipulated in the prime contract.

The basic facts of *Jacobs* were as follows:

1. The Owner executed a contract with a General Contractor to demolish and replace a residential property located in the City of Toronto.

2. The Prime Contract stipulated that:

   > **The Owner shall purchase and maintain property** . . . **insurance** in a form acceptable to the Construction Manager upon the entire Project for the full cost of replacement as of the time of any loss. **This insurance shall include, as named insureds**, the Owner, the Construction Manager, **Trade Contractors**, **and their Trade Subcontractors** and shall insure against loss from the perils of Fire, Extended Coverage, **and shall include builder's risk insurance for** physical loss or damage including, without duplication of coverage, at least theft, vandalism, malicious mischief, transit, collapse, and where applicable, flood, earthquake testing, and **damage resulting from defective design, workmanship or material. . .**

3. The Owner did not include the General Contractor as a named insured.

4. Although it appears the demolition work scope was completed without issue, the Owner alleged that there were numerous issues with the workmanship of the General Contractor, which caused the Owner to suffer property damage.

5. Ultimately the Owner sued the General Contractor, alleging that the General Contractor was responsible for paying the Owner the costs incurred to correct this property damage.

6. The General Contractor then brought a court application to dismiss the lawsuit on the basis that the costs the Owner was claiming should have been covered by the Owner's property insurance policy and, more particularly, on the basis that the General Contractor was supposed to be included as a named insured under that policy.

7. In response, the Owner argued that even if it had obtained a builder's risk policy, the type of property damage that occurred would have been excluded from coverage.

Ultimately the Court agreed with the General Contractor and dismissed the Owner's action. According to the judge, the Owner had clearly agreed to obtain a builder's risk policy indemnifying the parties, including the General Contractor, from "damage resulting from defective design, workmanship or material". The fact a "hypothetical" insurance policy may not have covered the loss was not important. Rather, by failing to obtain insurance, the Owner had voluntarily assumed the risk of loss. As such, even if the General Contractor was negligent, it could not be held liable.

Jacobs is a timely reminder for both owners, as well as general contractors, who in many cases are responsible for obtaining builder's risk policies, of the importance of ensuring that contract provisions, relating to who must obtain insurance as well as who must be added as an insured under an insurance policy, are followed.