THE MOVE TOWARD OCIP/CCIP POLICIES ON CONSTRUCTION PROJECTS

JOE RAMIREZ, HOLLAND & HART LLP
CHRIS MOSLEY, SHERMAN & HOWARD LLC
CRAIG CARPENTER, ALL RISKS LTD
Objectives

- Learn how an OCIP/CCIP GL program works
- Why it is preferred to the old system where every construction professional had its own coverage
OCIP/CCIP = OWNER OR CONTRACTOR CONTROLLED INSURANCE PROGRAM AKA “WRAP-UP” PROGRAM

- Purchased by owner/developer or general contractor (i.e., wrap sponsor)
- All entities enrolled in program are covered as named insureds
- On-site risks covered plus incidental areas
- Bid-deduct process offsets program cost for wrap sponsor
- Covers project through date of completion
OCIP/CCIP = OWNER OR CONTRACTOR CONTROLLED INSURANCE PROGRAM AKA “WRAP-UP” PROGRAM (Cont’d)

- Provides completed operations coverage through statute of repose
- Wrapping all entities into one insurance program provides leverage to negotiate better coverage terms
- Mid-sized & smaller GCs can bid for project
- Administered by a third-party insurance professional managing Loss control and claims management
- Less finger-pointing and litigation between construction entities
OLD SYSTEM CONSTRUCTION PROJECT

Each Entity Purchases its Own Insurance

- general contractor purchases its own insurance
- owner (+ lender) named “additional insureds”
- each lower tier contractor and subcontractor purchases its own insurance
- upstream contractors (+ GC) named “additional insureds”
- duplicative insurance costs are passed through to owner
- accident – owner, GC and 1 or more subs sued

- owner claims as AI on GC’s policy
- GC claims as AI on sub’s policy
- sub claims as AI on sub-sub’s policy, etc.
- finger-pointing

- Multiple carriers & law firms
- Uncertainties re scope, amounts, and duration of coverage
- Time-consuming
- inefficient
- contentious
WHAT CAN OCIP/CCIP GL POLICIES COVER INCLUDING PROTECTION FOR CONSTRUCTION DEFECT CLAIMS

- Wrap-ups can include
  - General & excess liability coverage
  - Workers’ Compensation, Employers’ Liability
  - Builders’ Risk
  - Environmental and Professional Liability (large projects)
  - “Rolling” wrap for similar projects not individually large enough for a stand-alone wrap
WHY DIDN’T ANYBODY TELL ME THIS WAS AVAILABLE?!

better and broader coverage obtained due to “volume” purchasing power, e.g.

- dedicated limits
- higher limits
- additional layers
- reinstating limits
- warranty work coverage
- removal/modification of “business risk” exclusions:
  - “your work” exclusion 1.
  - “your product” exclusion k. or modified to remove “your work”
  - “property damage” exclusion j.
  - “impaired property” exclusion m. or modified to remove “your work”
- wrap sponsor protected from third-party-over actions by WC immunity in some states
What are the pitfalls or dangers in going with an OCIP/CCIP Program?

It can’t all be wine and rose?
TRAPS FOR THE UNWARY

- Poorly-designed wrap can provide less cover than a well-designed traditional insurance program
- Administrative burden
- Cost of compliance with “subjectivities”
- Catastrophic occurrence impact on project limits
- Costs savings for contractors not clear
- May discourage bids from contractors without wrap experience
- False assumption that all brokers and program sponsors have knowledge to negotiate enhanced coverage with carriers
- Excess layers have to truly follow form or gaps will arise
PREMIUMS

► Commercial Projects
  ► Combination of contract value + loss experience
  ► 1 – 1.5% of contract value
  ► Additional premium based on losses incurred during the program

► Residential Projects
  ► Straight-line pricing
  ► $5 per $1,000 to $18 per $1,000
  ► Price varies by project
NEGOTIATING WRAPS

- Negotiated document – Not an off-the-shelf product
- Negotiated team
  - Risk manager – GC/developer
  - Broker
  - Coverage attorney
NEGOTIATING WRAPS (Cont’d)

Key issues to consider – Types of coverages

- General Liability
- Workers’ Liability
- Professional Liability
- Pollution Liability
- Builders’ Risk
- Auto Liability
NEGOTIATING WRAPS (Cont’d)

Key issues to consider – Parties insured

- Developer
- General Contractor
- Subcontractors
- Suppliers
- Design Professionals
Key issues to consider – completed operations
- Ongoing operations vs. completed operations
- Must have “completed operations” coverage through statutory period
NEGOTIATING WRAPS (Cont’d)

Key issues to consider – coverage exclusions

- Your work exclusion
- Business risk exclusions
- Other exclusions

Goal: Confirm coverage for construction defect claims
Key issues to consider – deductibles/self-insured retentions

Deductibles & SIRs generally

Key issues

Per occurrence vs. aggregate

What expenses count toward satisfaction
The Effective Use of Brokers

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Insurance Brokers

- Can Be A Tremendous Asset
- Can Be Frustrating
- Goal: Tips For Making Brokers A Tremendous Assets
Types Of Brokers

- Retail Brokers (this is who you work with)
- Wholesale Brokers (this is who retail brokers work with)
- Other Wholesale Brokers (this is who wholesale brokers work with)
Types Of Brokers

- Broker Industry Structure

  Multi-Nationals
  Nationals
  Regional
  Local
  Mom & Pop
Types Of Brokers

- General Practitioners

- Specialists
  - Industry (Construction/Banking/Non-Profits)
  - Subject Matter (Workers’ Comp/Executive Liability/Etc.)
  - Fewer, Deeper partnerships
Your Assets & Liabilities In Selecting A Broker

- **Assets**
  - You Are The Client
  - The Brokerage Market Is Very Competitive
  - The Long Standing Soft Market

- **Liabilities**
  - No One Likes Insurance
  - No One Know What Services An Insurance Broker Provides
  - Path Of Least Resistance
Broker Services

- **Proactive Services**
  - Provide Advice Regarding Insurance Needs (including types/limits)
  - Negotiate & Purchase Insurance
  - Analyze Overall Risk Management

- **Claim Services**
  - File Claim
  - Pursue Claim
  - Access Key Insurance Executives
  - Work With Coverage Counsel
Things to consider

- Relationship – carrier relationships.
- Qualifications – history, ownership structure, annual growth rate, premium volume, office locations.
- Senior management access & annual planning.
- Licensing & regulatory issues.
- Service teams.
- Financial & accounting.
- Training/education.
Making The Most Of Your Broker

- Demand More

- Expect The Same Service As You Expect From Your Attorneys (and other service professionals)
  - Expertise
  - Client Focused Solutions
  - Outstanding Client Services

- Remember: There Are A Lot Of (Good) Brokers Willing To Serve Your Business!!!
NEW CHALLENGES IN BUILDER’S RISK COVERAGE

KEVIN BRIDSTON, HOLLAND & HART LLP
CHARLOTTE WIESSNER, SHERMAN & HOWARD LLC
A form of property insurance that covers the risk of casualty to a construction project before its completion.

Covers physical loss or damage to covered property from a covered cause or peril.

Usually “all risks,” i.e., coverage for all causes of physical loss, unless excluded.
Builder’s risk policies provide first-party coverage for casualties—fortuitous losses to the covered property—similar to a typical homeowner’s property insurance policy.

Covers the interests of various parties in an ongoing construction project, including the owner, general contractor and subcontractors of all tiers.
The Basics (cont’d)

- Can apply to new construction as well as to the renovation of existing property.

- Coverage ends when the construction is complete and is replaced with the owner’s regular property policy.
Builder’s risk policies are a “nonstandard” line of coverage – read the policy!

Covers labor, construction materials, and equipment that are incorporated into the completed project. Be aware of the difference between the actual cash value (ACV) policy and a replacement cost value (RCV) policy.

Should also cover the work in place and materials delivered to and stored at the site but not yet incorporated into the work.
Consider Difference in Conditions (DIC) policy to cover gaps.

Interplay between covered losses and uncovered losses.

- Design or construction defect leads to potential loss – for example, a missing concrete lip leads to major water flows following a rainfall event.
- Correction of the defect will not be covered.
- Ensuing loss caused by the water damage should be covered.
Coverage (cont’d)

What is a fortuity?
- Damage caused by subcontractor.
- Where is the line between defective performance and a covered fortuity?
- What is a fortuity?

Are extended general conditions costs covered?
The construction contract should define the specific perils or risks that must be covered.

Builder’s risk provisions in industry contract forms (AIA, Consensus DOCs, EJCDC, DBIA) vary.

The nature and location of the project determine the perils that need to be covered.

Perils may include fire, earthquake, vandalism, theft, collapse windstorm, lightning, water damage (other than flood), explosion, earth movement, terrorism, hail and civil riot.
Some natural disasters like flood or earthquake are not covered absent a special endorsement.

Typical exclusions include faulty workmanship, defective design and vice. Check the exclusions!

The policy should insure the total value of the project, i.e., the contract amount, as may be increased by change order, i.e., replacement value.
Failure to obtain the required coverage can have serious consequences.

Absent a contract provision requiring builder’s risk, the contractor bears the risk of loss until the project is turned over to the owner.
Who Should Obtain the Policy

- Either the owner or the contractor can obtain the policy.
- Most industry form construction contracts provide that the owner will obtain it.
  - Can be by an endorsement to the owner’s existing property policy. Need to verify the coverage.
  - May reduce limits if a claim is made.
  - Must coordinate coverage for existing structures.
Who Should Obtain the Policy (cont’d)

- Benefits of having the contractor obtain the coverage:
  - Familiar with the scope of coverage.
  - May have a master policy in place.
  - Often more comprehensive coverage.
  - Can get a premium quote quickly.
  - Will administer any claims filed under the policy.

- Owner pays for the coverage as a pass-through cost regardless of who obtains it.
Deductibles

- Usually the owner pays the deductible regardless of who obtains the policy.

- Options on payment of the deductible can include splitting it or pro-rating it based on the policy payout in the event of a claim.

- Expect high deductibles for certain risks, such as earthquake.
PROFESSIONAL LIABILITY POLICIES – COVERAGE AND PITFALLS

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The Basics

- CGL policies, including OCIPs and CCIPs, generally do not include (and affirmatively exclude) coverage for design defects and deficiencies
  - Project specific policies may be available to cover all design professionals working on a given project

- Design defects and deficiencies are defined by the common law standard of care
  - Negligence
  - Meaning conduct that falls below the level of care that would be exercised by a reasonably careful design professional under the same or similar circumstances
Contract Clauses

- Contractual clauses that may void or impair coverage
  - Guaranteed outcomes (i.e., LEED certification, energy efficiency, etc.)
  - Agreements to perform services at the highest level of care
Contract Clauses (cont’d)

- Waiver of subrogation without carrier consent
- Limitation of Liability
- Agreements to indemnify, defend and hold harmless
Defense Costs

- Professional liability coverage is often self-depleting (Pac-Man policies)

- Limits are eaten up by defense costs (Defense Within Limits Coverage)
  - Early settlement vs. scorched earth approach
  - Coverage counsel for the insured?
  - Balancing act for insurance defense counsel
  - Claimants also need to be aware of the issue
  - Other insurance clause / CGL policies
Deductibles and SIRs

- Is there an aggregate deductible or SIR?
- Must insured satisfy SIR personally?
Claims-Made Nature of Professional Liability Policies

- Not typically occurrence based

- Based on claims made during the coverage period
  - Timely notice to carrier is critical
  - Identify what triggers notice requirement

- Prior Acts Coverage (statute of repose period is ideal)

- Tail Coverage (statute of repose period is ideal)
Construction Defect Action Reform Act (CDARA)

- C.R.S. § 1 3-20-801, et seq.

- Covers actions for loss caused by a defect in the design or construction of an improvement to real property (13-20-802.5(1))
Construction Defect Action Reform Act (cont’d)

- Allows recovery of actual damages, which can include cost of repair, relocation costs, loss of use if residential. (13-20-802.5(2))

- Applies to construction professionals – architects, contractors, subcontractors, developers, builder vendors, engineers and inspectors (13-20-802.5(4))

- Requires a “notice of claim” before filing a lawsuit (13-20-802.5(5))
Construction Defect Action Reform Act (cont’d)

- Is the alleged defect covered by insurance?
  - Occurrence?
  - Property damage?
  - “Your work” exclusion
  - Defense available
Contractors Insurance Statute

- C.R.S. § 13-20-808

- In Colorado, insurance policies are to be broadly interpreted in favor of the insured and the insured's reasonable expectations – extends to the duty to defend
Contractors Insurance Statute (cont’d)

- Duty to defend can be triggered by a potentially covered liability in a CDARA notice of claim, complaint, counter-claim or third-party complaint

- Insurer must investigate the claim and cooperate with the insured
Contractors Insurance Statute (cont’d)

In interpreting a liability policy issued to a construction professional, a court “shall presume the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident” unless the property damage is intended or expected by the insured (13-20-808(1)(b)(iv)(3))
Contractors Insurance Statute (cont’d)

- Operates to take away the insurance company’s threshold argument that defective construction does not constitute an accident or “occurrence”

- Is there property damage alleged?

- Exclusions
  - Liability assumed under Contract
  - “Your Work”
Residential vs. Commercial Construction Under CDARA

- Residential (13-20-806(7))
  - Cannot waive or limit damages in contract – void
  - Cannot waive implied warranties – void
  - Cannot alter applicable statute of limitations or repose
  - Consequential damages waivers are suspect
Residential vs. Commercial (cont’d)

- Commercial
  - Residential restrictions in Subsection 7 do not apply
  - Can limit damages
  - Option is to limit damages to amount of insurance coverage
Statutory Bad Faith

- Colorado Unfair Claims-Deceptive Practices Act (UCDPA) (10-3-1101 - 10-3-1116) prohibits unfair or deceptive trade practices in the insurance industry, establishing standards for unfair claim handling and settlement practices, misrepresenting the benefits or terms of insurance policies, and other improper practices.
UCDPA amended in 2008 to add §§ 1115 and 1116, creating a private right of action under which insureds can initiate a lawsuit for statutory bad faith against insurers for unreasonably delaying or denying payment of a first-party claim. Insureds may bring both common law and statutory bad faith claims in one lawsuit.
Statutory Bad Faith

Other Issues


- What does double damages mean?