Workshop B

Controlled Insurance Programs:
Opportunities and Problems

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Table of Contents

I. Introduction/Manual Overview.........................................................3
II. Why Wrap (why try a new car, upgrade etc.)........................................6
III. Vehicle Specifications Glossary........................................................8
IV. Model Choices-Wrap Description.......................................................10
V. Key Product Features........................................................................11
VI. Attorney Warnings-Precautions for Safe Usage..................................12
VII. “Insurance Lingo”...........................................................................13
VIII. Owner Warnings-Precaution for Safe Usage......................................14
IX. Broker Warnings..............................................................................15
X. General Warnings-“Precautions for Safe Usage”.................................16
XI. The Power Train-Administration..........................................................20
XII. Additional Packages and Other Equipment Specs..............................20
XIII. “Gentleman and Ladies, Start Your Engines”-Vehicle Delivery..........24
XIV. Market.........................................................................................26
XV. Factory Rebate-Bid Credit Strategy....................................................27
XVI. MSRP/Sticker-Pricing........................................................................28
XVII. Monitoring/Check-Up and Troubleshooting.....................................29
XVIII. Roadside Emergencies.................................................................31
XIX. Conclusion.....................................................................................32
I. Introduction/Manual Overview

The Presenters recognize that changes in the coverage environment for construction risks have led to an increased interest in Owners and Contractors Insurance Programs, commonly referred to as wraps. Moreover, coverage enhancements afforded by wraps, such as extended products and completed-operations coverage in addition to flexible pricing options have made them a much more attractive alternative to the traditional insurance model. Additionally, traditional insurance products are often much more restrictive in effectively gaining additional insured protection. Lenders and construction partners have begun to scrutinize the quality of coverage afforded under same. As such, it has become increasingly important for construction practitioners, owners, developers, contractors, and subcontractors to have knowledge of these products. This paper’s purpose is to provide an advanced understanding of wraps, and further, the process by which to implement same, while identifying potential “bumps in the road.” This paper assumes some basic knowledge of insurance and insurance products.

Under the traditional model for insuring a construction project, all participants must procure their own commercial general liability, excess or umbrella liability, and workers’ compensation insurance. See Factory Mut. Ins. Co. v. Peri Formworks Systems, Inc., 223 F.Supp. 3d 1133, 1143 (D. Ore. 2016). Subcontractors at the lower tier provide the first layer of coverage by naming the general contractor, owner, and upper tier subcontractors on an additional insured endorsement. Pursuant to a subcontract agreement prior to engaging in the work, contractors will require a copy of the additional insured endorsement or certificate of insurance from their subcontractors to ensure protection. However, coverage assurance through certificates of insurance is ill advised by contractors and owners, as these documents convey no policy rights, and further,
provide scarce coverage summaries. Complete policy analysis is necessary in order to ascertain whether coverage adequately extends to those at the upper tiers of construction. Typically, complex endorsement terms and limitations within subcontractors’ policies are not contained within in the certificate of insurance that is provided to the general contractor. Some of these worrisome terms include exclusions for breach of contract, subcontracted work, earth movement, residential buildings, and prior work. Recent changes and limitations of additional insured endorsements are proving to be further inadequate to provide owners and contractors the coverage assurance they require. See infra.

Particularly, it has become increasingly more difficult for subcontractor trades to obtain appropriate coverage for residential building risks, such as condominiums, and in fact, in some cases not at all. In response to these apparent failures of the traditional model, insurance providers have developed and continue to develop alternate approaches to more adequately insure construction projects such as Controlled Insurance Programs (CIPs), generally referred to as wraps, to more adequately insure construction projects. CIPs are sponsored and controlled by the Owner (Owner Controlled Insurance Programs or OCIPs) or the Contractor (Contractor Controlled Insurance Programs or CCIPs), and typically include a combination of Workers’ Compensation, General Liability, and Excess coverage. These types of programs “seek[] to distribute, share, and manage risk at construction sites.” Kraft Co. v. J & H Marsh & McLennan of Florida, Inc., 2006 WL 1876995, at *1 (M.D. Fla. July 5, 2006). A recent trend among policies,

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1 A certificate of insurance is merely evidence of a contract for insurance, not conclusive proof that the contract exists, and not, in and of itself, a contract to insure. 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co., 634 F.3d 112, 122 (2d Cir. 2010).
2 An OCIP is not to be confused with an Owners Protective Liability Policy (“OCP”), which is distinguishable from wrap programs. See Vigilant Ins. Co. v. Travelers Property Cas. Co. of Am., 243 F. Supp. 3d 405 (S.D.N.Y. 2017).
however, excludes the workers compensation, unless in the case of exceptionally large projects, and only includes the general liability, and excess coverage. The underlying purpose of a wrap-up policy “is to make the insurance programs used primarily for construction projects more equitable, uniform and efficient. [Wraps] eliminate the costs of overlapping coverage and delays caused by coverage or other disputes between the parties involved in a project and, at the same time, protect all the contracting parties by bringing the risk of loss from the project within the insurance coverage of the [wrap].” *Virginia Sur. Co. v. Adjustable Forms Inc.*, 888 N.E.2d 733, 737 (Ill. App. 1st Dist. 2008).

Each of the CIPs provides coverage for all participants, as defined within the policies, and the owners as named insureds through one or a series of policies. *See Guarantee Ins. Co. v. Old Republic Gen. Ins. Corp.*, 2012 WL 4468352, at *1 (S.D. Fla. Sept. 26, 2012). CIPs are generally established for a single project. However, an owner or contractor can establish a Rolling CIP for a series of similar projects. These projects, however, do not always have separate limits for each project, and include a period between three to five years.

Wraps can be established in a multitude of ways. For example, the owner can purchase coverage and subsequently self-insure a portion of the exposure, or the owner may choose a hybrid approach. Additionally, by increasing the retention or deductibles, the insurance sponsor can obtain lower premiums. However, this route may require some form of collateral to provide assurance of funding for loss payments. As with many insurance products and risk management strategies, the devil is in the details. In an effort to assist legal practitioners in their understanding of these details, and when they are engaged in these insurance products, the following “Operator’s Manual” can be used to help explain some of the issues that can arise and give some insight on avoiding pitfalls associated with these products.
II. **Why Wrap (why try a new car, upgrade etc.)**


As insurance carriers accept the coverage intentions of “broad form property damage,” and particularly, the subcontractor exception to the “Your Work” Exclusion, which provides coverage to a contractor for property damage arising out of the work of subcontractors, it is critical for participants to understand the nature of the process to assure this coverage exists. See generally *Limbach Co. LLC v. Zurich Am. Ins. Co.*, 396 F.3d 358 (4th Cir. 2005). Insureds seeking coverage
must also understand when this coverage may not exist due to the endorsements that delete coverage, or policy forms, which do not include the subcontractor exception to the “Your Work” Exclusion. See Owners Ins. Co. v. Jim Carr Homebuilder, LLC, 157 So. 3d 148, 150 (Ala. 2014); J.B.D. Const., Inc. v. Mid-Continent Cas. Co., 571 Fed. Appx. 918, 924 (11th Cir. 2014)(unpublished).

Seeking coverage under the standard commercial general liability coverage form will generally require a showing that the subcontractor’s work damaged the work of others, which can be a difficult task with these exclusions in place. This principle was demonstrated in Essex Ins. Co. v. Kart Const. Inc., 8:14-CV-356-T-23, 2015 WL 4730540 (M.D. Fla. Aug. 10, 2015), where the court dealt extensively with the interpretation of the j(5) and j(6) exclusions, specifically interpreting the meaning of “that particular part.” In Kart, the insurer argued that the welder subcontractor was working on the entire tower at issue, excluding all coverage, while the subcontractor contended that it was only excluded from coverage for the actual ten-foot area upon which he was welding, and not the exterior equipment that was damaged while he was working on this section of the tower. The court agreed, finding that “that particular part” of real property on which the insured is operating only applied to the part of the tower on which he performed work at the moment of the accident, which was the ten-foot portion.

The court in Kart did not find the entirety of the project to be the “work” of the subcontractor, as contemplated by the policy; however, contractors may still find difficulty in seeking coverage under their own policies of insurance, as some courts have found the entirety of the project to be “your work.” J.B.D. Const., Inc. v. Mid-Continent Cas. Co., 571 Fed. Appx. 918 (11th Cir. 2014).
When operating under the traditional model of insurance procurement, difficulty arises for owners and contractors in verifying that the subcontractors’ commercial general liability policies, in fact, afford additional insured coverage. These issues are particularly prominent in the context of a blanket additional insured endorsement under which the party seeking additional insured coverage is not specifically named. Some courts can be especially rigid in the wording of the written contract or agreement required for additional insured status. For example, in United Stationers Supply Co. v. Zurich Am. Ins. Co., 896 N.E.2d 425, 426 (Ill. App. 1st Dist. 2008), the court determined that the construction contract between the owner and contractor—while requiring that the contractor maintain insurance under which the owner would be an additional insured—did not specify the type of insurance that the subcontractor was required to maintain. Thus, the court concluded that “the only provision in the construction contract requiring that [the owner] be named as an additional insured . . . is silent as to which policy or policies [the owner] was to be added as an additional insured. Id. at 435.

While these issues are cause for concern, wraps, when properly implemented, can address many of these issues when attempting to procure the broadest coverage for a construction defect exposure. A successfully implemented wrap can provide participants with coverage without relying on the subcontractors’ coverage as primary liability protection.

III. Vehicle Specifications Glossary

Getting your drivers license.

Commercial General Liability (CGL): covers bodily injury and property damage arising from the insureds operations and completed operations at the project site.

Excess Coverage: provides additional limits of liability which may be in the form of an umbrella and may “follow form,” providing coverage for work at the project site.
Workers Compensation Wrap Coverage: covers employees injured during the course of employment on the project site.

Sponsor: The first named insured and the entity who is controlling the wrap, further responsible for premium payment, reporting losses, and compliance with policy and underwriting provisions.

Owner Controlled Insurance Program (OCIP): covers owner, general contractor, and all enrolled subcontractors, including subcontractors of any tier which qualify for coverage under the wrap.

Contractor Controlled Insurance Program (CCIP): controlled by contractor, covering themselves and all enrolled subcontractors. Can also include owner as additional insured or named insured.

Wrap: generic term used to describe the OCIP or CCIP. ³

Participant: parties enrolled and covered under the wrap.

Project Definition: specific site description of the project location, as wraps are designed to be project specific.

General Liability Only: wraps only providing coverage for general liability and excess liability.

Guaranteed Cost: a wrap with fixed cost premium determination, not a loss sensitive program in which the premium is ultimately reflective of the losses on the project.

Loss Sensitive: usually contains high deductible on combined programs of between $100k and $500k. The ultimate premium is reflective of losses.

Enrollment: the process subcontractors and participants are asked to complete in order to gain coverage.

Rolling Wrap: a program established to cover multiple similar projects under one policy term.

³ The use of wraps can be subject to certain regulatory requirements or restrictions which could include the deductible size, project size, loss sensitive plan restrictions or use with particular municipal projects. These restrictions should be considered when utilizing these products.
Wrap Addendum: a contract document specifying program specifics. It is usually incorporated in a contract between the owner and contractor, flowing down to the subcontractor agreement, and necessary to supersede or amend other existing insurance contract and indemnity provisions.

Wrap Manual: a user guide supplying information on how the wrap is structured and administered. Commonly utilized to answer frequently asked questions from participants. Usually a contract document.

Wrap Administrator: party which performs enrollment process and other administrative services, and further assists in realizing bid credit calculations.

Broker: insurance producers and or coverage advisor.

IV. Model Choices-Wrap Descriptions

That first new car

A wrap-up insurance program covers all eligible construction participants on a construction project under a single policy, while CIPs or wraps are types of project specific programs that generally include general liability, excess, and workers compensation. Insurance programs can be sponsored by an owner, creating an OCIP, or a CCIP. Wraps may also be written to combine similar projects on a “rolling” basis over a period of time, as opposed to a single project. Combined wraps, which include workers compensation coverage, are generally written on very large projects. But GL and excess-only products can be written on a much smaller scale. In the evaluation of wraps, it is important to understand the “wrap vehicle” chosen by the sponsor. Builders risk generally will not be included. It has become very common to split wraps to have a different insurance carrier for both GL and excess and/or workers compensation policies.

Wraps can be written on a guaranteed cost basis, whereby the premium does not fluctuate based on losses. Additionally, one may procure a wrap on a loss sensitive basis, in which the
premium will be ultimately determined by the losses that are reported against the policy. These programs usually have factors that will determine the minimum and maximum premiums.

V. **Key Product Features**

*A quick look under the hood*

In order to identify the key benefits of the wrap, customization of the desired insurance product for the project scenario or project type contemplated is necessary. Structure of limits and coverage consistency should be designed to match the strategy of the project, whether phased or not phased construction. A key focus should be to extend the coverage up to the statute of repose that exists, in the particular state the project is located. *See infra.*

One of the main benefits of a wrap is the avoidance of the necessity to secure additional insured protection for various sponsors from other participants in the form of broad additional insured endorsements that contain specific contract requirements. Many parties can be named as insureds or included as additional insureds on the policy, diminishing administration for all parties. Another popular feature includes negotiation of attorney representation structure as to potential claims. Coordinating the claims process—whether via a third-party claims advocate working for the client handling the self-insured retention, or the wrap day-to-day administration—is a helpful strategy for the insurance sponsor. Partnering with a professional construction lawyer, who has a solid knowledge of the product, should also be considered to avoid future potential litigation.

The sponsor has the ability to structure the bid credit philosophy to accomplish potential cost savings, and further, negotiate certain terms and conditions to minimize cross suits. Coverage broader than that offered by the traditional insurance market may also be negotiated. A wrap can offer the opportunity for Minority Business Enterprises (MBE) or Disadvantaged Business Enterprises (DBE) designations to qualify for larger construction projects from an insurance
standpoint, as enrollees under the wrap do not have to use their current coverage for on-site exposures. However, the main benefit is to develop risk management strategies that provide for more coordinated, site-specific safety and loss control programs by the participants to reduce loss cost of the project. Improved quality control protocols can also be implemented due to underwriting requirements. These are perhaps the most overlooked benefits when considering a wrap.

Deductible strategy and allocation should be clearly considered and communicated. It is strongly suggested these be incorporated in the contract documents as well. The sponsor receives the benefit of the premium reduction, but may not want to assume the deductible for risks such as contractors violating standard safety and security standards.

It is important to recognize that not all wraps are the same. These products vary in coverage, premium determination methods, deductible, retentions, terms and conditions, etc. Therefore, it is important to analyze the distinctions between the various wrap product offers, even on the same project (OCIP vs. CCIP). This is highly encouraged to ensure the client’s interests are protected.

VI. **Attorney Warnings-Precaution for Safe Usage**

*You’ve passed the driver’s test; don’t forget what you learned (there are crazy drivers out there).*

The proper construction and coordination of the various insurance provisions of the contract documents for a construction project is critical. Organizing the proper contract provisions in the implementation of a wrap insurance program, and proper protections for various parties involved, can significantly alter the outcome. It is essential for the practitioner to understand the nature and applicability of the insurance contract provisions, and their applicability to a construction project when utilizing a wrap. An experienced contract construction lawyer is invaluable to this process. A well-planned, coordinated collaboration with an experienced
construction insurance broker can make this process easier, more effective, and reduce the possibility of critical contract deficiencies. Understanding the applicability of certain contract provisions and structures, such as AIA insurance provisions, modified AIA provisions, AIA insurance provision exhibits, or customized agreements while realizing the strengths and weaknesses of these platforms as applied to a wrap, is vital.

For example, the lack of additional insurance specificity, specific form and edition date, in conjunction with contract documents can drastically affect desired outcomes. If the contract does not specify which form should be used, and a loosely defined additional insured endorsement is used, the defense in claims can be unraveled. Another example may be applying a waiver of subrogation to the property coverage, but not to liability coverage. These are just a few examples that should be a focal point and addressed by the construction lawyer and broker collaboration effort.

**VII. Insurance Lingo**

*Is it English or French?*

When drafting contract documents, one should be well-versed in the different terms and their direct insurance definition and application. For example knowing the difference, from an insurance technology standpoint, between project specific placements, and wrap coverage placements for a specific project is important. Project specific placements are generally purchased by owners or contractors of projects for their own protection, while not generally including coverage for subcontractors, and may/may not include coverage for contractors if procured for the benefit of the owner. CIP coverages or wraps include coverage for subcontractors of all tiers who qualify for enrollment. The term project specific” has also been used to describe what is known as
a traditional liability policy as well. This can get confusing, and should be clarified when necessary.

An owner may believe an agreement requires the contractors to procure and maintain coverages, when in fact, the contractor is instead covered as an additional insured in project specific policies, leading to serious coverage questions. Furthermore, such insurance structuring raises the issue of credits, particularly as to coverage purchased by the owner on behalf of the contractor, which can create large financial implications to the sponsor. Drafting unachievable insurance requirements or incomprehensible requirements also does not serve the client’s or the sponsor’s best interests. Confusion regarding the insurance products can manifest itself in the contract documents, sometimes the origin of which is the uninformed insurance broker, who lacks a general understanding of these products and experience.

**VIII. Owner Warnings-Precautions for Safe Usage**

When involved in a wrap, it is important to understand the complete scope of engagement and whether your client is familiar with wraps. It would be wise to comprehend the broker’s experience to ensure you are in the driver seat, not staring out the passenger window. In other words, your client is relying on your advice as to the viability of a wrap. This could be fraught with peril because of the many elements involving a successful wrap implementation, as noted above. Questions to ask include: what experience and knowledge does your client or the sponsor have with the wrap products and implementation? What is the attitude of the client regarding coverage, cost and administration of the wrap and objectives regarding these issues? A disinterested, uninformed client could have unrealistic expectations regarding the performance and cost associated with a wrap. This commonly causes serious problems in the case of a complex construction defect claim. Clients lacking appreciation for the protection from a wrap, focused
solely on bid credits or price, can create challenges as well. When insurance is viewed as an item to check off the list, poor decisions are made that later on can derail a project, or even severely damage the viability of the companies involved in the project.

IX. **Broker Warnings - Precautions for Safe Usage**

*The Officer was nice and just wrote a warning*

If the broker does not have wrap experience, in all likelihood they will not be knowledgeable regarding the contract provision amendments necessary for the construction agreements. Moreover, they most likely will not be able to properly connect these amendments with important issues of the wrap coverages. The broker’s coverage and administration experience is essential for a successful wrap implementation strategy, and their ability to effectively collaborate with other wrap team members. The broker should be the experienced leader to create synergy between parties. However, in many cases the broker can quickly lead to a challenging position.

For example, the wrap coverage could be triggered prematurely or incorrectly, which establishes the term of coverage. This can cause the wrap to terminate before the project is complete, creating the need for extensions. The broker may not define the project site accurately, or fail to include all required parties. An inexperienced broker might mismanage quality control communication or miscommunicate about roles in safety to the general contractor. The broker and their firm must have a working knowledge regarding the implementation of wrap risk management and loss control strategies: two key elements to a successful-performing wrap. The stability of the broker and their wrap service team is imperative especially for a long-term construction project.

X. **General Warnings – Precautions for Safe Usage**
Back on the road, check your mirrors and use your signals.

Quality Control

Individual projects and underwriting companies may have different requirements and levels of third-party quality control review requirements. In some cases with respect to quality control requirements, these can be viewed as a warrant. If breached, they most often jeopardize coverage. A number of wrap insurers have third-party quality control review requirements. It should be noted that independent or municipality employed third-party threshold inspectors, generally incorporated in the project, will generally not meet the carrier’s quality control requirements. It is advisable to perform a short feasibility analysis between the various quality control companies, to determine the services, cost, technical capabilities, and the experience of each quality control firm necessary to protect the client’s interests.

The practitioner should rely on and vet the experienced insurance broker, to ensure their understanding of the carrier’s underwriting requirements, as to its requirements of the third-party inspection company. Generally, proposals from quality control firms need to be reviewed by the underwriters and approved to confirm they are meeting the protocols, including the type of inspection and number of inspections, which are set by the preferred carrier. This is generally required by most carriers regarding residential or condominium type projects. Some companies however, have incorporated these requirements for apartments as well.

The overall objective is not only to comply, but to improve the overall quality of the project, reduce the possibility of a construction defect, and ensure safety. It must be emphasized how important the evaluation of service and experience can be, and how cutting corners can greatly affect the desired results. It is uncommon, but the contractors’ own quality control, once vetted by
the carrier, could actually meet the carrier requirements, instead of requiring an outside firm. However, this is generally not the case.

Due to the nature of the warrant process, problems may arise when a third-party independent engineer reviews a product installation, and the suggestions are not followed by the contractor. As an example, at a project, a window’s water-proofing standard may be reviewed by the engineer who later suggests changes to the contractor. However, the contractor may not approve of the standard and deviate from the engineer’s specifications. This deviation, if discovered, can jeopardize coverage and require the contractor to remediate the work in order to comply with the engineer’s directive, creating extra costs. This would also jeopardize the extended completed operations coverage provided by the carrier. Further complicating matters, these issues are often discovered long after the project is complete.

The technology capabilities of the third-party quality control is also important regarding the nature of how services will be provided and interact with these protocols already being provided by the contractor. Technology can reduce costs associated with control, time and labor. If decisions can be made quicker, that should be considered when analyzing the different options.

**Deductibles, Self-Insured Retentions and Collateral**

When strategizing the wrap parameters, careful consideration should be paid to the contract provisions regarding the deductible or self-insured allocation. The sponsor obtains the benefit of premium reduction due to increased deductible or Self Insured Retention (SIR), but may not want to accept the exposure of repeated violations of safety requirements, which cause claims. Admitted carriers for combined programs usually have deductible or SIRs in the range of $100,000-$500,000, and general liability-only programs from non-admitted carriers can run as low as $10,000. Usually collateral is required of the sponsor for combined deductibles in the form of
letters of credit to fund deductible payments. This also protects the contractor who may have contractual obligations that would be dependent on fully restored damage satisfied by self-insured retention payments.

**Terms and Conditions**

As previously mentioned, not all wraps are the same. There are distinct differences between coverage terms of each wrap program, especially when purchasing a policy written by a non-admitted carrier, or surplus insurer, utilizing manuscript forms. These coverage terms need to be reviewed carefully and the same care mentioned earlier should be given to the contract provisions regarding the insurance requirements so that conflicts do not occur.

For example, many wrap policies written by surplus lines carriers may include a cross suit exclusion, excluding coverage for those suits brought against one insured under the policy by another insured with coverage under the same policy. Such exclusions can even become relevant in the context of the additional insured. In *Certain Underwriters at Lloyd's of London v. Sterling Custom Homes, Inc.*, 705 Fed. Appx. 259 (5th Cir. 2017), the court found that a policy’s cross suit exclusion unambiguously applied to both named insureds, as well as additional insureds. The provision excluded coverage for:

> “Bodily injury”, “property damage”, “personal and advertising injury” or any injury, loss or damage arising out of any claim, “suit”, action or other proceeding or any allegation or expense initiated or caused to be brought about by any insured covered by this policy against any other insured covered by this policy.

*Id.* at 264.

The court reasoned that “the cross suits exclusion in accordance with its plain text—‘any insured’ means any insured entity, without regard to how the entity obtained insurance—does not nullify the policy's additional insured provision.” *Id.*
Such provisions using the broad term “any insured” can be particularly worrisome, as suits among various subcontractors, owners, and prime contractors are common in the context of construction defect claims, placing a severe limitation on coverage.

Additionally, statute of repose coverage endorsements may limit coverage to ten years despite the fact that certain states may have longer exposure. Many states allow for causes of action to be brought within a period of years after substantial completion of the improvement to real property. See e.g., Ga. Code Ann. § 9-3-51; Tex. Civ. Prac. & Rem. Code § 16.009; N.C. Gen. Stat. § 1-50(a)(5). In Florida, the clock begins after latest of a series of dates enumerated within the statute, such as the date of the certificate of occupancy or abandonment. Fla. Stat. § 95.11(3)(c). In each of the aforementioned cases, liability could potentially extend beyond the coverage of the policy, creating substantial exposure.

In particular, however, the law in South Carolina underscores the importance of comparing a policy’s time limitations to the applicable statute of repose, as S.C Code §15-3-670(A) excludes claims for fraud, gross negligence, or recklessness from the protections afforded by the statute of repose. Moreover, in Hampton Hall, LLC v. Chapman Coyle Chapman & Associates Architects AIA, Inc., CV 9:17-1575-RMG, 2018 WL 2305658, at *2 (D.S.C. May 21, 2018), the court concluded that code violations, while not gross negligence per se, can be evidence of gross negligence, sufficient to abolish the protections afforded under the statute. Policyholders should be leery of time restrictions, particularly as the former demonstrates perpetual liability, as code violations are frequently alleged in construction defect matters.

Limits should be reviewed specifically with regard to the exposures, wrap strategy, and objectives of the sponsor. Failure to procure adequate limits can create serious consequences and
create problems possibly with the bid-credit process, as subcontractors may refuse to offer appropriate credits due to inadequate limits provided.

XI. **The Power Train-Administration**

*Where the Rubber meets the Road*

One should not embark on a wrap without understanding the administration services required and whether those administrative services are being provided by an experienced, qualified wrap administration team. Sometimes these services are provided directly by the broker and others by a third party administrator.

These services may—but often do not—include contract review and recommendations, wrap addendum and wrap manual recommendations, and enrollment and bid credit strategy development and negotiations. Certificate review services are commonly offered to supplement risk management services being provided by other participants. This can be important to prevent inadequate non-wrap coverages being utilized on the project, such as workers compensation, or automobile coverages. Administration services should include quality, prompt, responsive reporting with current technology capabilities regarding interactions with contractors. These services are extremely vital when a combined workers compensation wrap is implemented.

XI. **Additional Packages and Other Equipment Specs**

*Comparing the Features*

The following are known as “additional packages or miscellaneous equipment.” Insurance products that coexist with a wrap, are traditionally not included in the wrap. The most important of which is the builders risk coverage, and is the most crucial construction document for the project. It is important to realize these policies are not identical. They can contain limits for water intrusion, higher deductibles, and onerous faulty work exclusions. It is strongly suggested the
sponsor should control the builders risk placement. If not, they should be given the opportunity to review and make sure there are no weaknesses. However, the Lloyds form, referred to as “leg 3” is a broadened faulty workmanship coverage that enables the builders risk to respond more broadly for a damage to the building resulting from faulty work. These endorsements vary and their specifics should be reviewed.

The pollution liability is another product that often needs to be placed alongside a wrap to cover any exposures, especially when demolition is involved. Again, these forms should be reviewed and should coordinate with the contract documents.

Additionally, an Owners and Contractors Protective Professional Indemnity policy (OPPI) is used to protect owners from inadequate architect/engineers professional coverage, or uncollectable coverage placements. This product is trending toward greater popularity as “design flaws” continue to grow in frequency for claims. Architects attempt to contractually limit their liability to the fees involved in the project, as opposed to limits available. The OPPI pricing will reflect this contractual provision. As with any policy, insureds under OPPI policies should be aware of the contract’s prerequisites for coverage, as failing to maintain a particular limit of liability through a primary Design Professional’s Insurance policy. See Lehigh Cement Co. v. Steadfast Ins. Co., No. Civ. A. 04-4906, 2006 WL 7381 (E.D. Pa. 2006).

Sub-contractor default (SDI) is a liability policy that acts like a performance bond for the default of subcontractors that are not incorporated in a specific bond program. This is not to be treated like a bond, but an insurance policy, which can be canceled unlike a bond.

Each of these products insure different risks, which may prove relevant in the context of policies’ “other insurance” clauses. Such clauses only apply when two or more insurance policies insure the same subject matter, risk, and interest. See Citizens Prop. Ins. Corp. v. Ashe, 50 So.3d
In Pavarini Constr. Co. (Se) Inc. v. Ace Am. Ins. Co., 161 F. Supp. 3d 1227 (S.D. Fla. 2015), the court held that while the OCIP policies insured the project’s owner, contractor, and subcontractors against claims of property damage and bodily injury claims, the other applicable SDI policy insured against subcontractor contractual default. As these policies insured different risks, the other insurance clauses did not apply. Without the other insurance clause, the SDI policy became excess to the OCIP policies. Id. at 1235.

In a context under which the insured may have coverage under both a standard CGL and a wrap policy, one should be particularly aware of the other insurance language within the policies. In Zurich Am. Ins. Co. v. Acadia Ins. Co., 243 F. Supp. 3d 1201 (D. Colo. 2017), the court found the relevant CGL policies to be excess to the wrap policy, stating in relevant part:

Owner–Controlled Insurance Programs (OCIPs) were developed to make the insurance programs used primarily for construction projects more equitable, uniform and efficient. OCIPs eliminate the costs of overlapping coverage and delays caused by coverage or other disputes between the parties involved in a project and, at the same time, protect all the contracting parties by bringing the risk of loss from the project within the insurance coverage of the OCIP. Id. at 1208.

Conversely, in Muss Dev., LLC v. Nationwide Ins. Co., 13 CV 4848 RJD MDG, 2015 WL 6160240 (E.D.N.Y. Oct. 20, 2015), the court found the CGL policy to be primary to the OCIP. In that matter, the OCIP manual, which was incorporated into the subcontract agreement, required that the contractor name the owner as an insured on a primary and non-contributory basis. Therefore, the court concluded that the OCIP was excess to the CGL. Cf., Certain Underwriters v. Illinois Nat. Ins. Co., 99 F. Supp. 3d 400 (S.D.N.Y. 2015) (holding that the liability policy was primary, while the remaining available policies incorporated into an OCIP provided the same level of coverage, requiring a pro rata division of all costs in excess of the primary policy); Axis Surplus Ins. Co. v. Gencoe Ins. Ltd., 139 Cal. Rptr. 3d 578 (Cal. Ct. App. 2012).
In each of the aforementioned scenarios in which the insured sought primary coverage under the CGL, while relying upon the wrap as excess, presumably none of the CGL policies contained an endorsement excluding coverage for projects insured under a wrap. Such is a common practice in the insurance industry. Further, wrap exclusions are almost universally upheld by the courts, broadly excluding coverage even should the OCIP fail to cover the entirety of the claims at issue. See TNT Equipment Inc. v. Amerisure Mut. Ins. Co., No. 6:15-cv-1461-Orl-37DAB, 2016 WL 5146198 (M.D. Fla. Sept. 16, 2016) (finding that the wrap exclusion in the CGL precluded coverage, as an OCIP had been issued for the project); First Mercury Ins. Co. v. Waterside Condominium Assoc., No. 3:12-cv-02348-ST, 2013 WL 6383883 (D. Or. Dec. 15, 2013) (finding that the CGL’s wrap exclusion precluded coverage, despite the fact that CGL policy was issued for the purpose of covering potential completed operations claims stemming from the project); Certain Underwriters at Lloyds of London v. Illinois Nat. Ins. Co., No. 09 Civ. 4418(RJH), 2011 WL 723544 (S.D.N.Y. Feb. 25, 2011) (holding that CGL’s OCIP exclusion precluded coverage, as an OCIP had been issued for the project).

Comparatively, in Continental Cas. Co. v. Amerisure Ins. Co., 886 F.3d 366 (4th Cir. 2018, the court found a CGL’s wrap exclusion to not apply because the language required that it did not apply to bodily injury arising out of the insured subcontractor’s work, if the operations were included within a wrap. The court ultimately found that while the wrap was applicable, there were sufficient allegations in the complaint regarding work performed by the underlying plaintiff for parties other than the insured subcontractor. Thus, the insurer had a duty to defend under the CGL. Id. at 372. Ultimately, should an insured wish to procure coverage under other insurance products, in addition to its wrap program, the insured should look for any such endorsements disclaiming coverage also covered under a wrap.
However, should one find oneself in a situation in which the exclusion has already made its way into the policy, and a claim is made, the Fourth Circuit decision underscores the importance of closely reading the policy’s language as compared to the specific allegations of the complaint. What may at first glance appear entirely prohibitive may in fact allow for a defense under the broad duty to defend. In bargaining for coverage under the standard CGL, insureds should request an excess clause relevant to wraps, as opposed to an exclusion to avoid coverage issues.

XII. “Gentleman and Ladies, Start Your Engines” – Vehicle Delivery

Your first NEW car.

Now that you have strategized, collaborated for the scenario-based exposures, collaborated, developed the appropriate contracts, procured the proper underwriting data and submitted to the marketplace for a quote, evaluated the costs, and established the strategy of bid credits and deductible allocation, you are ready to move forward with the implementation of the wrap. If this “vehicle” sounds more like the DeLorean, one would be correct. It is very easy to get off course; drive carefully. Hopefully, due diligence has occurred, and there is an experienced driver team ready to embark on this process. The driver team should include knowledgeable, experienced professionals like the lawyer, broker, claims team, administrator and quality control. Just like buying a vehicle, at the outset, the best decision is to buy from the best manufacturer and select the most precise car (insurance architect and carrier) for the driving experience.

As a sponsor, one should meet the underwriter and familiarize oneself with who will be insuring the risk, working towards building a long-term relationship. Further, as a sponsor, one should resist the temptation to select a carrier only on price without understanding the marketplace. Imagine the risk while working on a high-rise condominium with a carrier who has little or no experience with high-risk residential projects. Akin to buying any vehicle, starting with a respected
and experienced manufacturer is critical. Similarly, one should view the contract documents in a wrap policy in this matter. No prudent sponsor wishes to be involved with a complex construction defect claim and realize the contracts are inaccurate and have problematic additional insured and indemnity provisions. As the AIA or other contract documents are modified, it is important to coordinate those insurance provisions with the insurance provisions of the wrap addendum and coverages, some uniformity needs to be coordinated with the wrap addendum and the wrap manual.

The wrap manual is a guide like an operator’s manual for the participants to understand how the wrap coverage is going to be provided, but generally a description of the overall coverages, terms and conditions. Many experts advise that the manual be included as a contract document. However, the manual should never be a substitute for a full review of a policy’s terms. In Layton Constr. Co., Inc. v. Wrapid Specialty, Inc., 2:14-CV-00402, 2015 WL 7312896, at *1 (D. Utah Nov. 19, 2015), a court found that a manual’s failure to include certain notable exclusions, such as the cross suit exclusion, did not give rise to an action for misrepresentation by the insurer:

The Manual's statement that “the Program provided comprehensive commercial general liability” coverage is a general statement that could not reasonably be expected to indicate that the Program was truly comprehensive, making it the first of its kind in the insurance industry. Therefore, any omission that resulted in Wrapid's failure to notify Layton that the Program did not cover everything was not false or misleading because it was incomplete. Id. at *15.

However, all wraps specially require proper communication and orientation of the delivery of the wrap to the project participants. Understanding the bid credits and how they will be handled, like a factory rebate, can dramatically alter the performance.

**XIII. Market**

*What are NADA and KBB saying?*
The market is currently exhibiting a degree of instability, especially in states like Florida. Florida shows signs of markets moving out of the wrap market for certain types of risk or raising their minimum premiums. It is important to understand the environment within a state, regarding its approach to construction defects coverage that might be available or not available under a commercial liability policy. Understanding how those particular positions affect condominiums, apartments or commercial properties will also play a role.

The market instability is created by losses related to primarily residential and commercial apartments. This could be because of underpriced risk while the real estate economy was recovering from the financial crisis or participating in first layer excess over their own primary placements. Reputable general contractors, however, are still receiving reasonable rates.

The claims experience of a particular contractor will affect the appetite of certain carriers within certain geographical areas. The size of project will be affected by minimum premiums in terms of what carriers are willing to commit their limits for. This also depends on whether the products are being offered in admitted or non-admitted markets. Admitted carriers have a higher degree of regulatory scrutiny and are required to file rates and forms with insurance departments. The non-admitted (or surplus lines and excess markets) do not have this challenge, and have much more flexibility with their forms and are very prevalent in the wrap marketplace. In many cases it is possible to customize wrap coverages for sponsors in this market. However, in some cases their terms may be more restrictive. The admitted market is beginning to take positions in providing general liability-only placements which for years have been primarily provided by the non-admitted marketplace.
The loss experience is always evaluated, in terms of the contractor and his experience and the size of the project. The underwriters will also of course look at the quality of the participants, meaning the contractor and his approach to loss control safety and security.

**XIV. Factory Rebate-Bid Credit Strategy**

*How can you afford that?*

The bid credit strategy can be implemented in several ways. The sponsor should clearly understand the objective of the bid credit strategy. It is common for new wrap sponsors to ask for verification if the bid credits are rebated back to the sponsor, and ensure that they are accurate. An alternative to this strategy is to ask the participants to bid “net,” removing insurance costs from their bids. Often this does not give the sponsor a clear comfort that he or she is receiving the proper credits, towards purchasing the insurance.

One approach is to simply charge participants the amount they currently pay for insurance and the deductibles they have on traditional policies. Sponsors can also require the subcontractors contribute a value-added credit to recognize the benefit they are receiving from a wrap with coverage extended through the statute of repose, particularly when their current insurance does not meet the contract requirements. Thus, the wrap enables the contractor to be able to qualify under the insurance provisions from the sponsor.

Bid credit analysis needs to be more in depth when dealing with loss sensitive workers compensation programs that will have a premium differential based upon the losses and the various rate factors associated with a loss sensitive workers compensation program.

**XV. MSRP/Sticker - Pricing:**

*Qualifying for a Loan.*
With respect to evaluating the pricing of various wrap products, it is important to understand the initial pricing and overall cost and relative efficiencies of how the products will perform. This evaluation needs to consider the limits, the rates, the way defense is handled (inside or outside of limits), the cost of third-party quality control, and of course the cost of the broker and the administration as well. An analysis of the bid credit strategy will affect the overall cost associated with the wrap as well.

Analyses of the product models available, listing the specific pricing for each model and options, is a critical component. Alternatively, attempting to evaluate a product without understanding how it will perform against other products available in the marketplace, can prove to be a mistake. First, one should understand the product options available on a particular project, whether it be an OCIP, CCIP, or a project specific program that provides coverage for the general contractor and owner, offering the extended products and completed operations endorsement. However, one can also consider an owners’ interest policy, only providing coverage for the owner. Not one product may be better for all projects. Establishing cost comparisons also with a traditional general contractor placement, and a comparison of the various coverages offered, should be considered.

The rate range from carriers, is a function generally of the project size and type. Commercial projects usually will have a lower rate range than residential due to the exposure of multi-plaintiff claims. There is also an analysis necessary of workers compensation that can be on a guaranteed costs or loss sensitive models, including minimum or maximum premium development.

As mentioned above, an estimate of the sub-credits available and how this estimate is formulated by the broker, as well as the estimate of the broker costs, can greatly influence pricing.
These elements will serve as the basis of a feasibility study, if that is the formal analysis taken either by the sponsor or the broker. It is helpful to understand where these products are purchased, whether to a direct carrier or through a wholesale broker, and what the effect of those strategies are on the cost of the program. Of course, another consideration needs to be given to apartments that may be intended to be converted at some future time to a condominium. This is a very restricted marketplace, but can be achieved under certain circumstances, either before the conversion or at the time of conversion.

XVI. **Monitoring/Check-Up and Troubleshooting**

*Always take care of something new.*

Now that a wrap has begun, proper “vehicle” maintenance and monitoring is vital. Troubleshooting problems may occur, when wrapping. Monitor fluids, and continue to drive safely.

There are several parts of the wrap that need to be monitored. The performance measures are dependent on the objectives by the sponsor. If the coverage is the main element, as opposed to the cost, this should be the focus regarding performance. Monitoring the enrollment and certificate of insurance compliance would be the emphasis, if a net bid strategy was selected.

One element to manage is how claims are being handled and monitored. The reserves established, and the deductible or self-insured retentions allocation should be another. Other areas to be concerned with are crane coverage and how the crane contracts are written, whether there is shifted liability that may not be warranted. Will they be enrolled in the wrap, or maintain their coverage outside the wrap?

Normally wraps do not provide coverage for off-site work, which includes fabrication for project products such as windows. It may be more practical to include the contractor who is
fabricating off-site. This may be more difficult for workers compensation exposure, but surely should be considered for the general liability exposure. See Kershner v. Samsung Austin Semiconductor, LLC, 2016 WL 397483 (Tx. Ct. App. July 22, 2016).

The amount of direct purchase materials from the sponsor outside a general construction agreement should be reviewed as well. Perhaps they are purchasing for tax purposes, which could change the performance of the bid credits because the full contract is not being provided by the subcontractor.

One should continue to evaluate the broker’s experience: how well are they performing and following up on services promised, managing relationship with the carrier and providing adequate support? It is common the product is sold and there is no longer a broker to depend on. Has the timeline been mismanaged for the term of the wrap? Did the wrap start too early? Can the wrap be extended if the project is not complete?

Other areas to troubleshoot are warranty, service, and repair work after expiration. Some companies will give various time periods for contractors to return for this type of work. It should be clearly defined what is considered “warranty,” “service” or “repair” work, opposed to a checklist or punch list. For example, the warranty period may expire, requiring a subcontractor to procure its own insurance.

Limited work agreements also should be contemplated when sponsors want to engage contractors to complete soil mixing, demo work, or similar such scopes. How is the wrap strategized to providing coverage? Should it be? Alternatively should it be a traditional placement to pick up that scope of work instead? Other troubleshooting aspects, include ensuring the coverage description for project site and actual project scope of work are consistent with one another. For example, the description may not extend outside the boundaries of the project, and there is work
being performed on the side of the road that could be considered not covered. There may be temporary storage facilities which supports the part of the wrap that were not clearly defined.

**XVII. Roadside Emergencies**

*Check engine light is on, the car is overheating*

The “vehicle” has a problem. It is time to pull over, get the insurance information ready. An example of a roadside emergency that may occur on a wrap, includes exclusions such as course of construction exclusion, damage to property that do not provide general liability coverage during the project, but only after the certificate of occupancy has been provided for damage to the building. These endorsements should be avoided at all cost.

To be further considered, is the coordination of the builders risk expiration. As an example, perhaps the client is a general contractor operating in an OCIP, and the owner purchased the builders risk. The wrap and builders risk are soon expiring, and the owner does not want to renew. There could be uncovered exposures, coupled with risk of course of construction exclusion. Project abandonment would certainly qualify as a “roadside emergency.” The sponsor can run out of money to finish the project, creating a situation where the policy is cancelled, leading to contractors losing their completed operations coverage.

Another issue may be the termination of the general contractor or a cancellation of an OCIP for reasons such as not paying premium or not following underwriter advisements, financial malfunction like increased losses, credits are not being accomplished because of bad relationships with contractors are just a few of the items that could create major problems.

**XVIII. Conclusion**

It should be apparent to the Practitioner, wraps have a lot of moving parts, but if a comprehensive analysis is undertaken, a proper wrap program design can address many of the
deficiencies of the traditional placement and possibly more cost effectively. Wraps can be an effective remedy against the unreasonable positions taken by carriers in property damage claims arising out of defective construction, as well as restrictive coverage terms within subcontractors’ policies. Although not a perfect solution to the exposure of defective construction, wraps are a major improvement to the traditional model for insuring construction projects via additional insured endorsements.