2018 Forum on Construction Law Fall Meeting

Controlled Insurance Programs:
Opportunities and Problems

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**SPONSOR:** First Named Insured of the program.

**OCIP:** Owner Controlled Insurance Program. Covers the Owner Contractor, and Enrolled Subcontractors of any tier.

**CCIP:** Contractor Controlled Insurance Program. Covers The Contractor, and Enrolled Subcontractors of any tier. Can cover the Owner as an Additional Insured or as a Named Insured.

**WRAP:** Generic Term for a[n] OCIP, CCIP.

**PARTICIPANTS:** Parties covered under the Wrap
GL ONLY: Wrap that only covers General Liability. Does not include Workers Comp.

COMBINED PROGRAM: Covers General Liability and Workers Comp.


LOSS SENSITIVE: High Deductible or Retention. Combined Programs usually have a $250,000 or greater Deductible. Ultimate premium reflective of losses.

ENROLLMENT: The process that Subcontractors and participants go through to enroll in the Wrap.

ROLLING WRAP: a program establishing coverage for more than one project.
Features & Benefits

- Insurance Design for All Participants
- Higher Limits
- Coverage Consistency
- Extended Products and Completed Operations Endorsement (Statute of Repose)
- Single Attorney Representation Possibility
- Coordinated Claims Process
- Cost Control Possible Savings
- Minimization of Cross Suits
- May Provide Broader Coverage
Traditional Placement – Bodily Injury Claim

BI claim by Sub’s Employee

Owner

GC

Subcontractor

Lawsuit for Indemnity via Indemnity in Subcontract

Tenders defense of GC and Owner Via Indemnity Agreement in Subcontract.

GC Tenders Defense to GL Carrier via Contractual Liability

GC Tenders Defense to GL Carrier via AI Endorsement per Contract

Tendered Defense via Indemnity

Lawsuit for Indemnity per the General Contract

Tendered Defense via NI or AI Endorsement per Contract

Sub CGL Carrier

Tenders defense to Subs GL as per AI in Subcontract

Sub CGL Carrier
Con’t, Traditional Placement – Construction Defect Claim

- **Claim for construction defect and property damage**
  - **Cross-suit for Indemnity via contract**
  - **Tender for defense under CGL Policies**

- **Dec Action filed against carriers**
  - **Cross-suit for Indemnity via Subcontracts**

- **GC**
  - **Tender for defense via AI Endorsement**

- **Developer**
  - **GC’s CGL Carrier**
    - **Tender for defense via AI Endorsement**

- **Electrical Sub**
  - **Carrier 15-16**
  - **Carrier 16-17**

- **Stucco Sub**
  - **Carrier 15-16**
  - **Carrier 17-18**

- **Window Sub**
  - **Carrier 15-16**
  - **Carrier 17-18**

- **Roofing Sub**
  - **Carrier 15-16**
  - **Carrier 17-18**

- **Masonry Sub**
  - **Carrier 15-16**
  - **Carrier 17-18**

Subrogation claim as “Other Insurance”

OCIP Placement - Claim

BI Claim by Subs Employee

Owner

GC

Non-Employing Subcontractor

Tendered Defense to One Wrap Insurer who Defends the Suit
Attorney - Warnings & Precautions for Safe Usage

Do Not Operate Without a Qualified Construction Contract Lawyer

- “The Work Itself” Indemnity Provision and Article 3.18.1
- “The Work Itself Insurance Provision and Article 11.1
- Waiver of Subrogation – Liability
- Additional Insured Specificity
- Contractual
- Proper Parties “Developer”
- Exhibits Missing (Exhibit L)
Owner - Warnings & Precautions for Safe Usage

Do Not Operate Without Knowing What the Sponsor’s Characteristics Are.

- Are you in the Driver's Seat or Passenger Seat?

- Degree of Knowledge and Experience the sponsor possesses with this product.

- Attitudes of Sponsor Regarding Issues such as Coverage, Cost and Administration.
Broker - Warnings & Precautions for Safe Usage

Do Not Operate Without a Qualified, Experienced Insurance & Risk Management Construction Specialist.

- Contract Administration Expertise
- Coverage Expertise
- Stability of Broker
- Risk Management & Loss Control Experience
- Experience as a Wrapper
Warnings & Precautions for Safe Usage

Quality Control

- Do not Operate Without an Experienced, Qualified Quality Control/Inspection Program

Administration

- Do not Operate Without an Experienced, Qualified Wrap Administrator
Coverage Specifications

GL - Covers Bodily Injury and Property Damage arising from the Insured’s Operations and Completed Operations at the Project Site.

- Excess - Provides Additional Limits of Liability

- Follow Form vs. Excess

- Workers Comp - Covers Employees injured during the course of employment.
Coverage Specifications - Non Wrap

BUILDERS RISK - Covers Property Damage to the Project During the Course of Construction.

- **LEG 3**: Broadened Faulty Workmanship,

- **Pollution Liability**: Covers Third-Party Bodily Injury, Property Damage, Defense and Cleanup as a result of pollution conditions (sudden/accidental and gradual) arising from contracting operations performed by or on behalf of the Contractor.

- **Owners or Contractors Protective Professional Indemnity**: Provides project owners with coverage needed when an A/E's own insurance is not adequate or becomes unavailable. Indemnifies the owner for damages or losses in excess of the A/E's available insurance.

- **Subcontractor Default Insurance Coverage (SDIC) Guard**: Alternative to surety bonds. Protects a GC from losses arising from defaults by unbonded subcontractors.
Subguard Policy

History

- Developed by Zurich in 1995

Basics

- Two party agreement that shifts the burden of defaulting subcontractors to the insurance company
- Policy specifies that the insurance company will compensate the GC for losses resulting from a subcontractor’s default
- Covers all subcontractors on a given project or on an annualized basis for all projects combined
- Generally covers both first and second tier subcontractors
- Also provides coverage for indirect losses due to subcontractor default, including liquidated damages and contingencies
- Pricing is negotiable - usually from 0.4% to 1.00% of the total subcontract values

Subguard vs. Surety Bonds

**Prequalification** –
- Subguard - GC maintains responsibility for gathering pertinent underwriting information on applicable sub
- Surety - surety provides underwriting and pre-qualification

**Coverage Cancellation/Voided Coverage**
- Subguard - coverage may be voided or cancelled if certain underwriting procedures are not followed or if incorrect information is provided
- Surety - once the bond is executed, remains in force and may not be cancelled

**Claim Resolution**
- Subguard - default insurance makes GC responsible for resolving subcontractor default issues, although costs of completing work are covered
- Surety - if subcontractor has bonded its work to the GC defaults, will help resolve claim, deal with unpaid creditors and assure work under contract is completed
“Other Insurance” Issues


- **Pavarini Construction Co. (Se) Inc. v. Ace American Insurance Co.,** 161 F.Supp. 3d 1227 (S.D. Fla. 2015) (holding a non-OCIP policy was not primary as to a CGL policy that was part of an OCIP)

- **Muss Development, LLC v. Nationwide Insurance Co.,** No. 13 CV 4848(RJD) (MDG), 2015 WL 6160240 (E.D.N.Y. Oct. 20, 2015) (holding coverage under a non-OCIP policy was primary as to coverage provided by an OCIP policy)

- **Certain Underwriters v. Illinois National Insurance Co.,** 99 F. Supp. 3d 400 (S.D.N.Y. 2015) (holding a truckers’ liability policy was primary, and the remaining policies - an umbrella policy excess to the primary & policies that were incorporated into an OCIP - provided the same level of coverage and were required to ratably divide any costs remaining after exhaustion of the primary)

- **Axis Surplus Insurance Co. v. Glencoie Insurance Ltd.,** 139 Cal. Rptr. 3d 578 (Cal. Ct. App. 2012) (affirming lower court’s judgment, rejecting OCIP carrier’s argument that lower court abused its discretion in allocating liability as to the OCIP policy and non-OCIP policies because it did not apportion liability using the equal shares method found in the policies’ "other insurance" clauses)
Determine the experience and stability of administrator

- Processor or Technical Assistance
- What Services will Administrator Perform
- Certificate Review
- Enrollment Verification
- Coverage Review
- Bid Credit Strategy, Implementation, Negotiation
- Contract Provisions
- Wrap Manual
Pricing

Detail the product models available and list specific prices for each model and additional options

- OCIP, CCIP, PROJECT SPECIFIC, OWNERS INTEREST

- Establish Cost Comparisons with Traditional GC Placement or CCIP

- Rate Range is a function of project size and type,
  - Commercial $3-$5 per 1,000 of Construction Cost
  - Residential $5 to $8 per 1,000 of Construction Cost

- Analyze Estimated Sub Credits

- Analyze Broker Costs
Availability

- Market Instability

- AVAILABLE STATES FLORIDA VS SOUTH CAROLINA VS New York

- CONDOS VS APARTMENTS VS COMMERCIAL

- Size of Project, Minimum Premiums

- Admitted vs. Non Admitted

- Loss Experience

- Quality Participants

- COST EFFICIENCY

- Describe Where, How product can be purchased, or Where to direct orders, BOR 'S
Maintenance

- Performance Measures
- Bid Credits
- Deductible Allocation
- Broker Experience
- Term - Too Short
- Limited Work Agreements - Foundations covered under two policies
Site Description

- Wrap Exclusion - See appendix and slide 20

- Roadside Emergencies/Coverage Issues

- Course of Construction Exclusions (COC) - See Appendix

- Builders Risk Expiration

- Cross Suits - See Appendix

- Exclusions J, K, L - See Appendix

- PROPER PARTICIPANTS

- AIR RIGHTS
Wrap Exclusions

- Continental Casualty Co. v. Amerisure Insurance Co., No. 3:14CV529, 2017 WL 34822 (W.D.N.C. Jan. 3, 2017) (rejecting CGL and umbrella carrier’s argument that its “controlled insurance program” exclusion precluded coverage since a rolling owner controlled insurance program (“ROCIP”) had been issued for the project)

- TNT Equipment Inc. v. Amerisure Mutual Insurance Co., et al., No. 6:15-cv-1461-Orl-37DAB, 2016 WL 5146198 (M.D. Fla. Sept. 21, 2016) (holding CGL carrier’s OCIP exclusion precluded coverage since an OCIP had been issued for the project)

- First Mercury Insurance Co. v. Waterside Condominium Association, No. 3:12-cv-02348-ST, 2013 WL 6383883 (D. Or. Dec. 5, 2013) (holding OCIP exclusion in CGL policies precluded coverage for underlying construction defect action, where a CGL policy covering ongoing operations was issued and a $1,000,000 “set aside” was issued to pay potential completed operations coverage claims arising out of the project)

- Certain Underwriters at Lloyds of London v. Illinois National Insurance Co., No. 09 Civ. 4418(RJH), 2011 WL 723544 (S.D.N.Y. Feb. 25, 2011) (holding CGL and umbrella carrier’s OCIP exclusions precluded coverage since an OCIP had been issued for the project)
Warranty/Service work after expiration - See Appendix

- Offsite Fabrication
- Cranes
- Direct Purchased Materials,
- Builders Risk – Primary
- Project Abandonment
- Running out of Money
- Subs Lose Completed Operations
The following exclusion is added to SECTION I - COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY:

This insurance does not apply to "property damage" to the project shown above or any part of the project shown above that occurs during the course of construction. The project shown above or part of the project shown above will be deemed to be within the course of construction until it satisfies the definition of “products-completed operations hazard” as defined in this endorsement.
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY. CROSS SUITS EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERALLIABILITY COVERAGE PART

In consideration of the premium charged, it is agreed that SECTION IV. EXCLUSIONS, is amended to include the following exclusion:

This insurance does not apply to any claim or "suit" based upon, arising out of, directly or indirectly, in whole or in part, or in any way involving the following:

Cross Suits

Any claim made or "suit" brought by any "Named Insured" under this Policy against another "Named Insured" under this Policy.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN UNCHANGED.
Designated Project Endorsement

This endorsement modifies insurance provided under the following

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

In consideration of the premium charged it is agreed that

PROJECT SCHEDULE

Project Location:

Project Description:

(If no entry appears above information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

I. This insurance shall apply to “bodily injury”, “property damage”, “personal and advertising injury” and medical Expenses arising out of construction operations, provided that

1. Any construction operations only pertain to the project location and project description set forth in the PROJECT SCHEDULE above;

2. Any incidental construction operations only pertain to the project location and project description set forth in the PROJECT SCHEDULE above on adjacent properties with a maximum distance of one thousand (1,000) feet from such project address; or

3. Any off-site construction operations only that pertain to the Off-Site locations as set forth in the OFF-SITE SCHEDULE below, and (ii) relate to the project location and project description set forth in the PROJECT SCHEDULE above.

OFF SITE SCHEDULE

Off-Site Location(s):
ISO Wrap Exclusion

This endorsement modifies insurance provided under the following COMMERCIAL GENERAL LIABILITY COVERAGE PART

ISO Wrap Exclusion

SCHEDULE
Description and Location of Operation(s):
(If no entry appears above, information required to complete this endorsement maybe shown in the Declarations as applicable to this endorsement)

The following exclusion is added to paragraph 2.
Exclusions of COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I Coverages)

This insurance does not apply to "bodily injury" or "property damage" arising out of either your ongoing operations or operations included within the "products-completed operations hazard" at the location described in the schedule of this endorsement, as a consolidated (wrap-up) insurance program liaison provided by the primary contractor/project manager or owner of the construction project in which you are involved.

This exclusion applies whether or not the consolidated (wrap-up) insurance program:

(1) Provides coverage identical to that provided by this Coverage part;
(2) Has limits adequate to cover all claims, or
(3) Remains in effect.
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WRAP-UP EXCLUSION

This endorsement modifies the Conditions provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to any work performed at or for a project which is insured under a Consolidated (Wrap-Up) Insurance Program. This insurance shall have no obligation to defend or indemnify for any claim or any project where such Wrap-Up insurance exists or has ever existed.

This exclusion applies whether or not a claim is covered under such wrap-up insurance, the limits of such Wrap-Up insurance are exhausted, the carrier is unable to pay or for any other reason.