

Construction OCIP/CCIP Insurance Programs: Potential Coverage Gaps and Other Coverage Pitfalls

Coordinating With Other Policies; Issues With Unenrolled Subs and Additional Insureds

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Introduction

- Insurance Goals as a Component of a Comprehensive Risk Management Strategy
- Avoid, Minimize, Shift & Insure Risks

Introduction

- The Rise of Owner/Contractor Controlled Insurance Programs
 - Litigation exposures
 - Changing insurance market
 - Direct and indirect costs

Controlled Insurance Programs “101”

- Commercial General Liability Insurance (CGL) Programs
 - Conventional CGL policies
 - “Wrap-Up” or Controlled Insurance Policy (OCIP or CCIP)
 - CIPs bundled with other coverages
- Key Differences Between CIPs and Conventional CGL Programs
- Advantages and Suitability of CIPs Depending on Project Factors

Types of Controlled Insurance Programs

- OCIPs
- CCIPs
- “Project Specific”
- “Rolling Wraps”

OCIP v. CCIP

- OCIP v. CCIP Comparisons
 - The Metrics
 - OCIPs – Pros and Cons
 - CCIPs – Pros and Cons

Procuring CIP Coverage

- Risk Management Team
- Analysis and Negotiation of Components Key to Specific Project
- Contractual Implementation of the OCIP (The OCIP Exhibit)
- Integration of the OCIP With Other Risk Transfer Provisions in the Construction Contracts

Negotiating the CIP

- Goals May Vary by Type of Project
- New Construction v. Rehab/Conversion
- For-Sale v. Other (e.g., Apartments)
- Interplay With Other Coverage Types
- Interplay With Other CGL Policies

Integration of the CIP into Project Documents

- Statutes Requiring Disclosures to Wrap-Up Participants
- Anti-Indemnification Statutes – Effect of CIP on Scope of Indemnity

Integration of the CIP into Project Documents

- Construction Documents – OCIP Exhibit, OCIP Manual
- Key Drafting Points
 - Statutory disclosures
 - Eligibility and enrollment procedures for those parties which are eligible
 - Summaries of coverages and limits, and coverages not provided
 - Responsibility for SIRs/Deductibles
 - Sponsor disclaimers
 - Joint defense
 - Duties of participating parties
- Integrating CIP with Other Risk Management Provisions

Claims Issues Arising From OCIP/CCIP Policies

- Wrap Policies Meant to Address All Claims Arising From the Project
 - Scope of coverages included in the wrap-up policy
 - Participation in the wrap-up policy by all possible players
 - Shared limits
 - Specific to the project
- Relationship Between the Wrap-Up Policy and Other Policies
 - Project participants have their own insurance covering them for their operations
 - CGL policies issued to participants not solely specific to the project

Claims Issues Arising From OCIP/CCIP Policies

➤ When Claims Arise

- Efforts to maximize availability of limits
- Large losses often result in non-wrap-up carriers being noticed for claims
 - Requests to defend
 - Requests to indemnify
 - Allocation/Coordination
- Question is whether non-wrap policies have any obligation to respond to claims that should be addressed by an OCIP/CCIP

Claims Issues Arising From OCIP/CCIP Policies

- Duty to Defend and Wrap-Up Policies
 - Duty to defend broader than duty to indemnify
 - Limits on defense costs
 - Triggering of standard policies when defense limit on wrap-up policy exhausts

- Question of What Policy Must Respond to a Loss at the Project
 - *Structure Tone, Inc. v. National Cas. Co.*, 130 A.D.3d 405 (N.Y. App. Div. 2015) – wrap exclusion in subcontractor’s CGL policy was triggered, precluding coverage for the loss
 - *Thompson v. Natl. Union Fire Ins. Co. of Pittsburgh, PA.*, 249 F. Supp. 3d 606, 608 (D. Conn 2017) – wrap exclusion found ambiguous: “This insurance does not apply to ... any liability arising out of any project insured under a ‘wrap-up’ or similar rating plan[.]”
 - Policy failed to define “wrap-up” or “similar rating plan[.]”

Claim Issues – Case Study

The Incident

- Major explosion at power plant under construction
- Multiple fatalities and numerous other injuries
- Hundreds of millions in property damage

Claim Issues – Case Study

The Coverage

- CCIP for project with CGL and Workers Compensation coverage
- Some, but not all, subcontractors enrolled
- GL, Umbrella and Excess limits of \$50 million
- Defense coverage limited to \$1 million primary policy

Claim Issues – Case Study

Dispute – How Should Settlement Costs Be Allocated?

- CCIP vs. coverage of non-enrolled subcontractors
 - Goal was to settle claims as to all defendants to extinguish cross-claims
 - A percentage sharing was agreed
- If CCIP exhausted, allocation among
 - Program policies of contractor and subcontractors
 - Considerations
 - Liability exposure
 - “Other insurance” clauses
 - “Additional insured” provisions
 - Never resolved

Claim Issues – Case Study

Dispute – Should CCIP Be Used to Pay Claims or Settlements For Individual Enrollees?

- One subcontractor settled a group of personal injury claims on its own
- The GC incurred liquidated delay damages
- CCIP considered interpleader action
- Result – CCIP funds used only to extinguish claims against all defendants

Claim Issues – Case Study

Dispute – What to Do about Limited Defense Coverage?

- The CCIP was to have \$50 million in defense coverage outside of limits
 - But actually only the primary had defense coverage
- The owner looked to the contractor
- The contractor's primary program coverage was endorsed as excess to the CCIP
 - So its primary refused to defend
- Contractor was defended as an additional insured under a non-CCIP subcontractor's policy
- Owner's defense costs were claimed against the broker in a malpractice action

Claim Issues – Case Study

Dispute – The Contractor’s Practice Program Excess Policies Were Not Endorsed as Excess of Wrap?

- The contractor’s own tower of GL coverage should have been endorsed as excess of wrap over the CCIP
- Only the primary was endorsed
- Contractor had to purchase retroactive excess coverage to meet contractually required limits
- Contractor had to sue brokers

Claim Issues – Case Study

Dispute – With a CCIP, is the Contractor the “Employer” of the Subcontractors’ Employees for Purposes of the Workers Compensation Claim Bar?

- The general contractor claimed to be the “principal employer” because it paid the premiums for the workers comp coverage
- Supreme Court of CT agreed. *Gonzalez v O and G Indus., Inc.*, 322 Conn 291, 140 A.3d 950 (2016)
 - So injured subcontractor employees’ claims against the GC were dismissed

PROTECTING YOUR INTERESTS IN A WRAP-UP PROGRAM

- Have your broker read and understand the contractual insurance requirements for the project, the OCIP/CCIP Manual, and the Insurance Policies

- Does the wrap-up program have sufficient policy limits?
 - Obtain excess of wrap-up endorsements as needed

- Consider implications of starting a wrap-up midstream
 - Coverage for period prior to commencement of CCIP
 - Coverage for completed operations claims

- Do the policyholder's "practice" policies provide coverage for project-related off-site activities and other potential gaps?

THANK YOU!



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