

Wrap Insurance for Construction Projects: Scope of Coverage, Resolving Coverage and Indemnification Disputes

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DECONSTRUCTING WRAP-UPS

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James P. Bobotek is a Partner residing in **Pillsbury Winthrop Shaw Pittman LLP's** Washington, DC and Northern Virginia offices, where he concentrates his practice on a variety of transactional insurance coverage, risk management and risk allocation issues, with an emphasis on those arising in the construction industry. A frequent speaker and author on construction-related insurance coverage issues, Mr. Bobotek counsels clients in formulating risk management strategies, obtaining insurance cover, and developing contractual insurance requirements. Mr. Bobotek regularly represents, owners, developers, and contractors in preparation, review and negotiation of development, design, construction, and related agreements. He also assists commercial policyholders in analysis, litigation and resolution of insurance coverage claims and disputes.

Arielle L. Murphy is an Associate in **Pillsbury Winthrop Shaw Pittman LLP's** Northern Virginia office. Her practice primarily involves drafting and negotiating construction, design, consulting, engineering, development, and other construction-related agreements for large office, residential, hotel, and mixed-use projects across the country. Ms. Murphy guides clients on risk mitigation strategies throughout the development lifecycle, including crafting and advising on contractual insurance requirements and indemnification obligations, and frequently is involved in issues involving wrap insurance in construction projects.

Tim Kraft is a 33-year commercial insurance industry veteran. He began his career in the brokerage world selling complex risk transfer programs to Fortune 1000 clients. For the past 23 years he has been an outsourced Risk Management consultant for several prominent real estate developers/owners/builders in the Washington, DC metro area. The scope of his practice covers more than 30 million+ square feet of operating Class A office space; 1.5 million square feet of retail space; 35,000+ apartment units and nearly 30 million square feet of projects in active development, including one project of 11 million square feet of office campus, tech center, multifamily and mixed-use occupancies within the Baltimore Inner Harbor. He is a graduate of the U.S. Naval Academy and a Marine Corps Infantry combat veteran. Tim earned the RIMS CRMP designation in 2020.

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What Is a Wrap-Up?

A “Controlled Insurance Program”

Typically includes the following coverages:

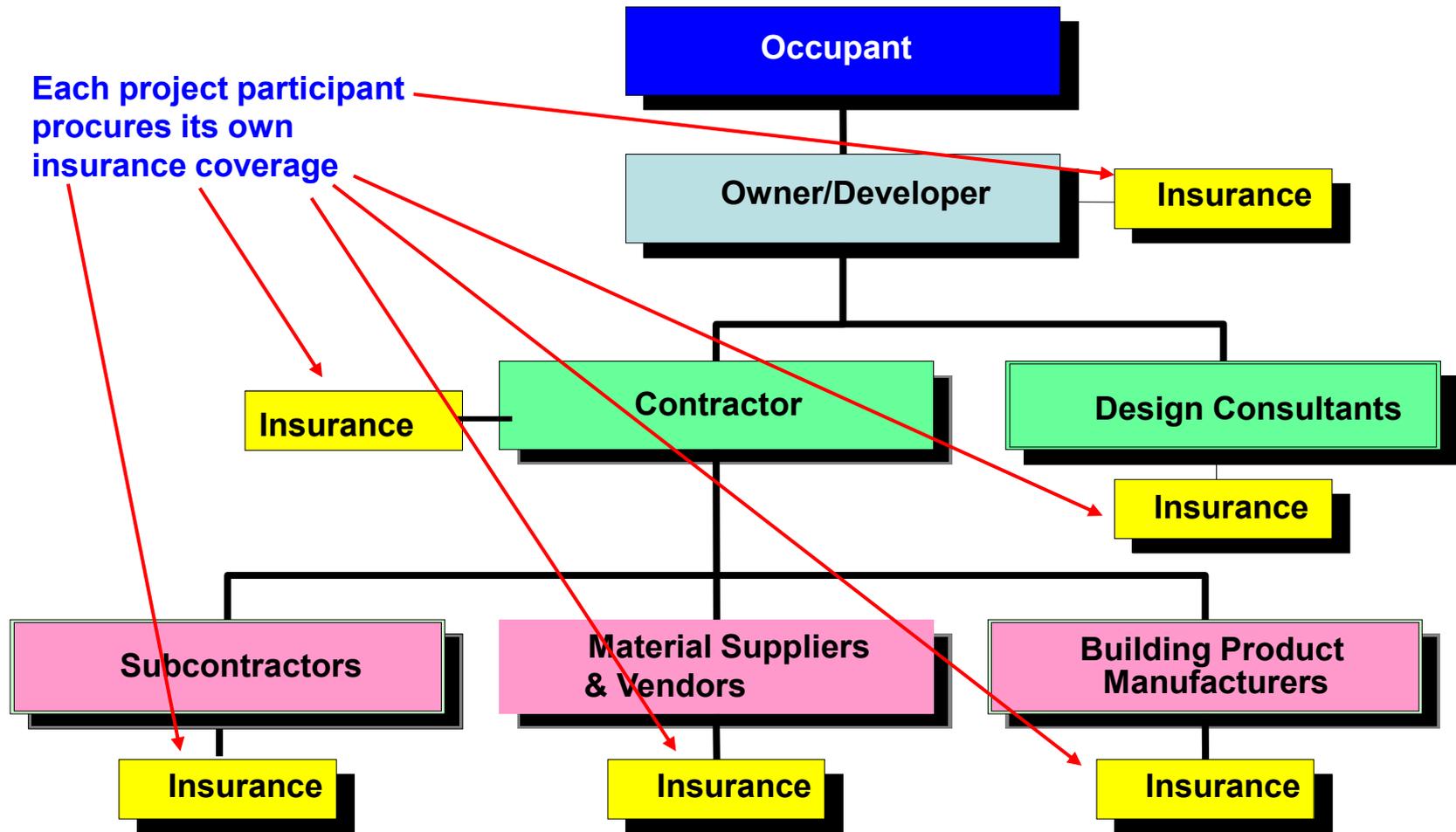
- Commercial General Liability
- Workers Compensation*
- Pollution Legal Liability*



Types of Wrap-Ups

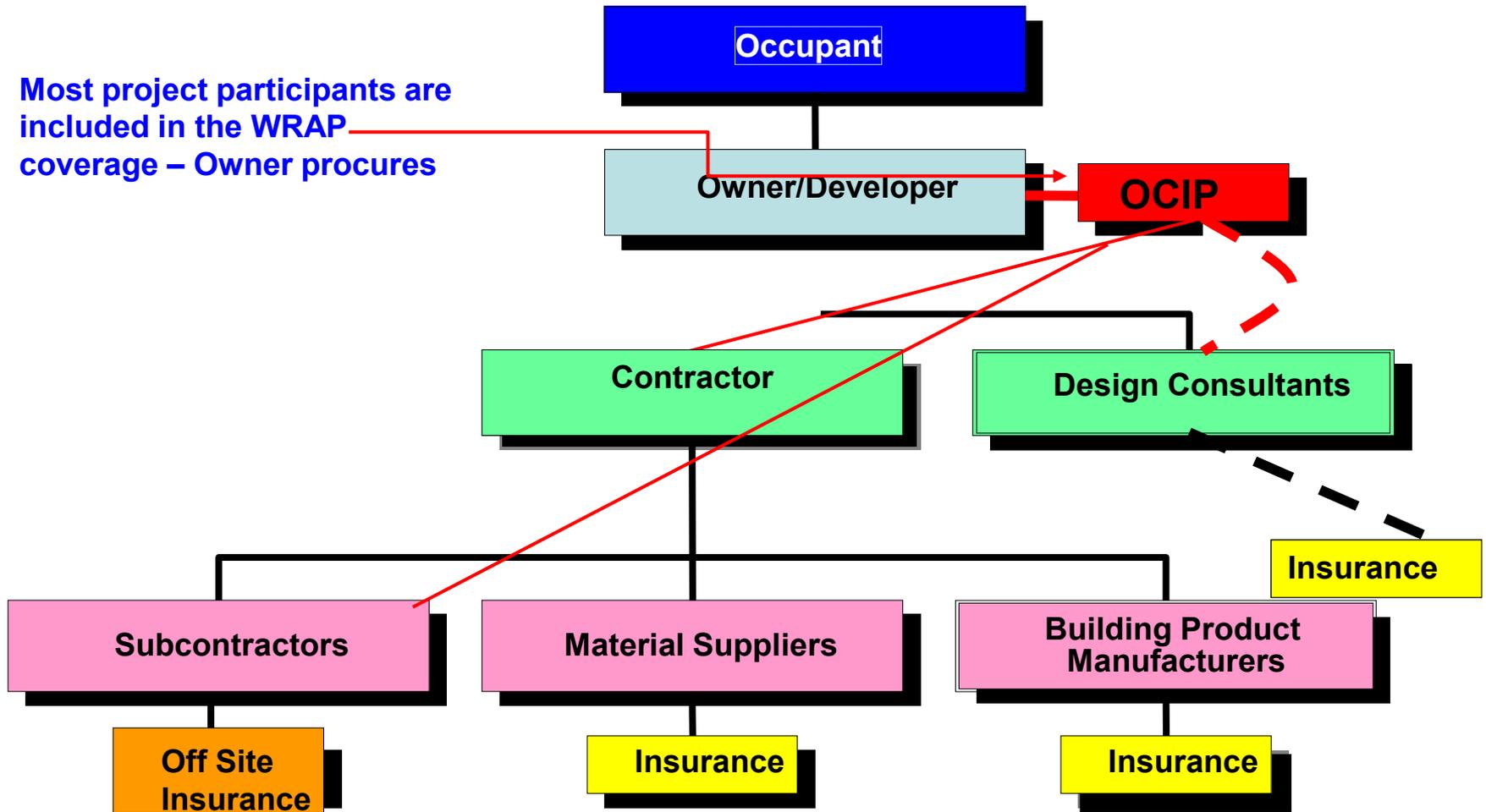
- Owner-Controlled Insurance Policies (“OCIPs”)
- Contractor-Controlled Insurance Policies (“CCIPs”)
- “Rolling WRAPS” (can be OCIPS or CCIPS)

CONSTRUCTION DEFECT CASE – NO WRAP



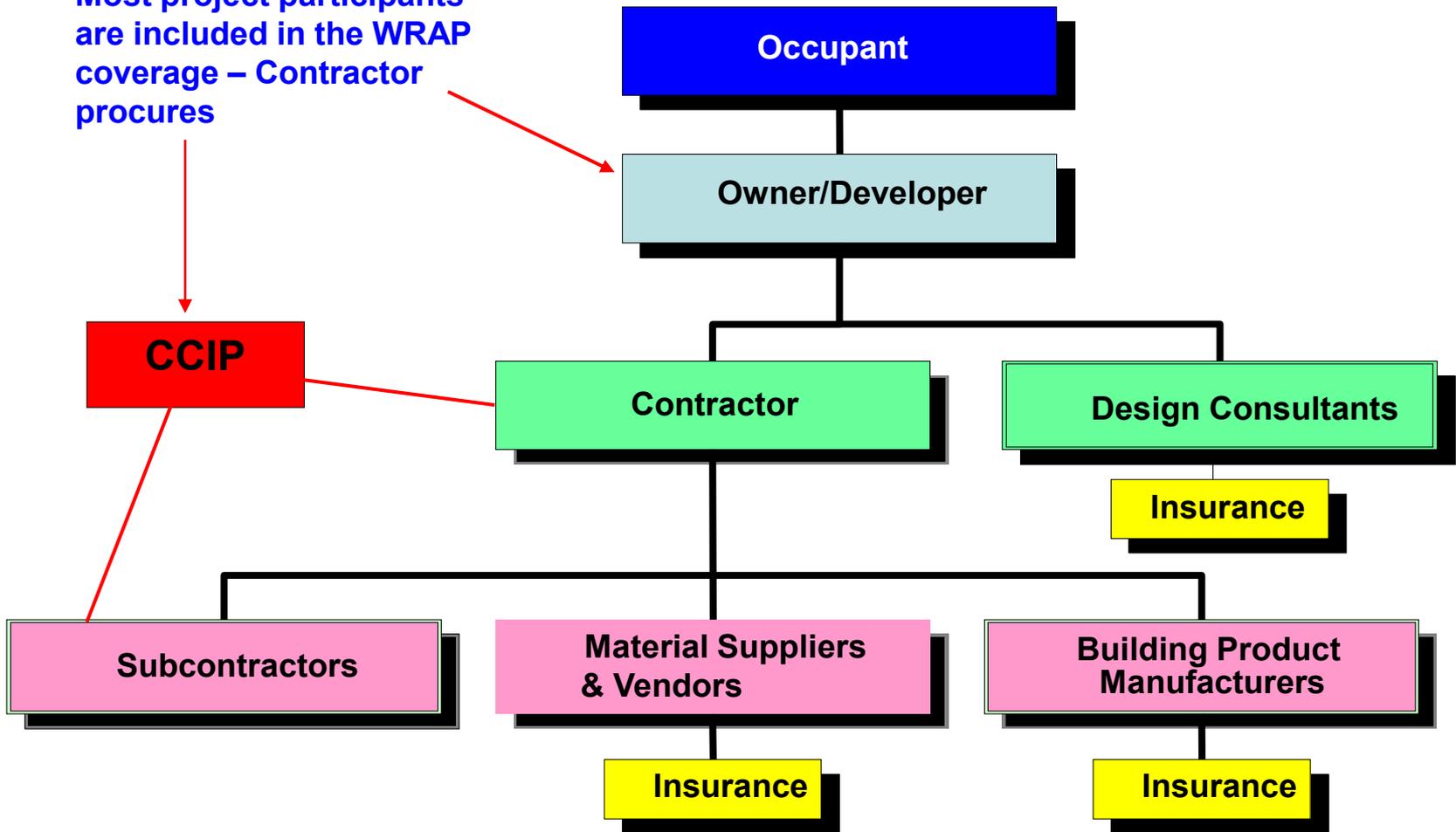
CONSTRUCTION DEFECT CASE - WITH AN OCIP

Most project participants are included in the WRAP coverage – Owner procures



CONSTRUCTION DEFECT CASE - WITH A CCIP

Most project participants are included in the WRAP coverage – Contractor procures



Advantages of a Wrap-Up

- Centralized cost control and administration
- Cost savings
- Uniformity of policy terms and provisions
- Reduce litigation between project participants and their insurers
- Higher limits dedicated to project
- Selection of carrier(s)
- Formal safety program

Disadvantages of a Wrap-Up

- Administrative costs
- Non-managing participants' partial loss of control over insurance program
- Potential coverage gaps
- Still need other insurance (off-site, professional liability, auto)
- Regulatory restrictions/size limitations *Alaska Dep't of Com. v. Aleyska Pipeline Serv. Co.*, 262 P.3d 593 (Alaska 2011) (non-construction OCIPs are permissible in the absence of a statute prohibiting them).

How Wrap-Up CGL Policies Differ from Other CGL Policies

- Project specific (usually)
- Site specific (on site vs. off site)
- Deductibles/SIRs - larger than most lower tier contractors and subs
- Who is an “insured”

More Differences

- Extended products/completed operations coverage period
- Notice provisions
- Endorsements:
 - Sole Agent
 - Knowledge/Notice of occurrence
 - Unintentional errors and omissions
 - Products/completed operations extension
 - Appropriate “project” or “site” definition
 - Joint defense
 - “Your work”
 - Other project-specific endorsements

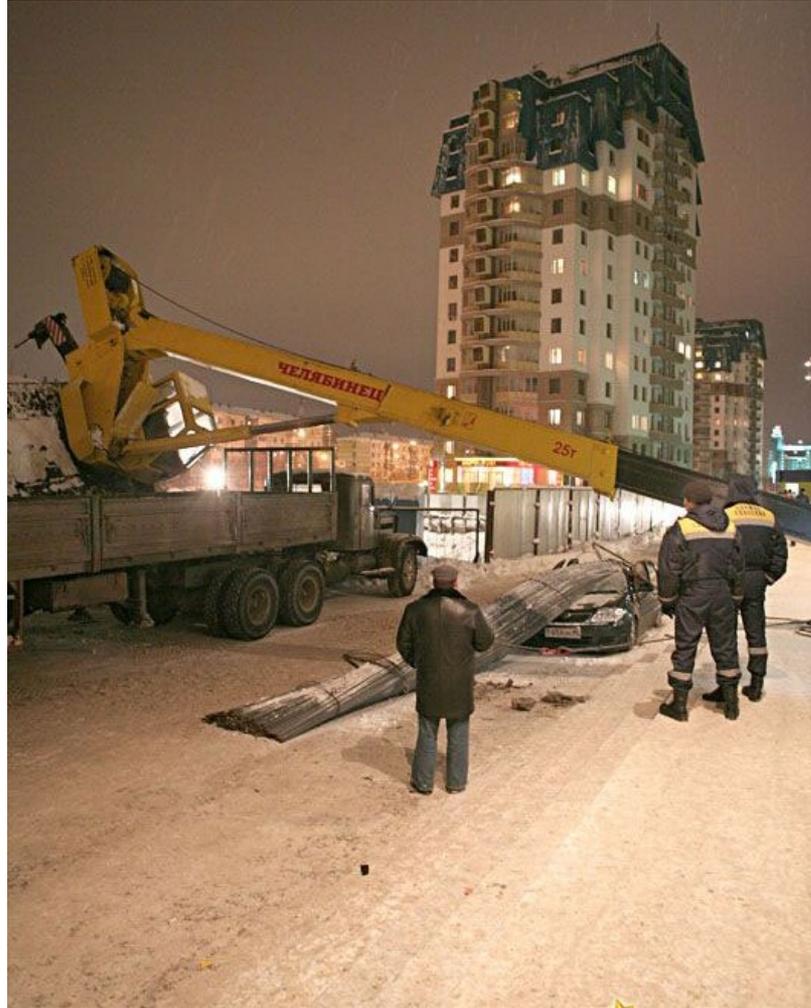
And Even More Differences!

- Insurance bid instructions
- Project manuals
- May have specific claims handling instructions, reporting for workers compensation, and the like

General Liability Coverage Similar to Other CGL Policies

- Insuring agreement
- Exclusions
- Terms and Conditions
- Definitions

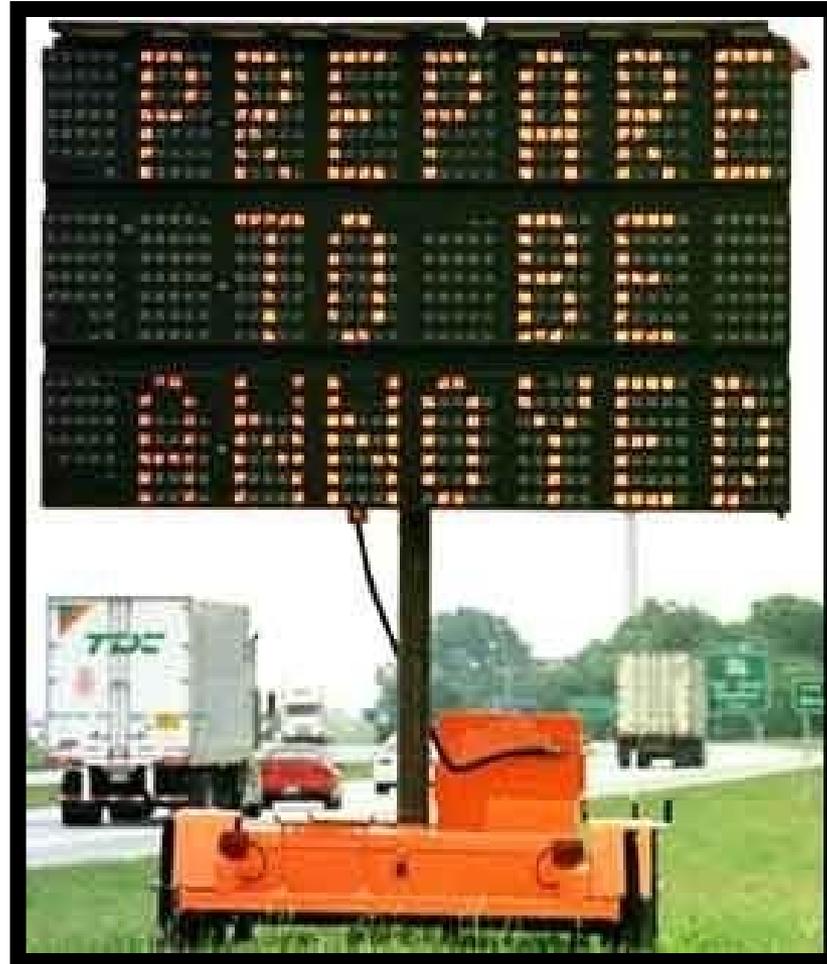
Wrap Up Coverage Issues



Choice of Law

- Law of the site
- Place of contracting/delivery
- Insured's principal place of business
- Which insured?

Notice



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Providing Notice

- Who must give notice?
- Notice for one insured, notice for all insureds?
- Notice for one policy, notice for all policies?
Sample language - “Knowledge of an "occurrence," claim or "suit" by one or more Named Insured or Insured shall not constitute knowledge of such "occurrence," claim or "suit," by any other Named Insured, and notice of any "occurrence," claim or "suit" given to the Company or any of its authorized agents by one Named Insured or Insured shall constitute such notice by all Named Insured and Insured.”
- Not typically included in “sole agent” endorsements.

Who Is Covered?

Subcontractor delivers unassembled scaffolding.

Insured?



Waco Scaffolding Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, No. 74656, 1999 WL 980629 (Ohio Ct. App. Oct. 28, 1999).

Who Is Covered?

OCIP “covers the Owner, Contractor and Subcontractor of all tiers, *but not excluded entities as defined herein.*”

“Excluded entities” means “vendors, **suppliers**, **fabricators**, material dealers, drivers and others *who merely **transport**, pick up, deliver or carry materials, personnel, parts or equipment or any other items or persons to or from the Project site*”

Who Is Covered?

- Some wrap-up programs use named insured endorsements that rely on the enrollment process to effect coverage for the contractors and subcontractors.
- Under this approach, a blanket endorsement may provide that “enrolled contractors” are included, and the wrap-up administrator is expected to enroll only those that are eligible.
- **Red flag** - A mistake in the enrollment process (such as an accidental failure to enroll a contractor or sub) may lead to a finding of no coverage.
 - *Hartford Underwriters Ins. Co. v. Am. Int’l Grp.*, 751 N.Y.S.2d 175 (N.Y. App. Div. 2002); *Workers’ Comp. Fund v. Wadman Corp.*, 210 P.3d 277 (Utah 2009).

Who Is Covered

Subcontractor fabricates structural steel and installs some metal fabrications. Employee injured delivering steel beams to another subcontractor.

Is the subcontractor who delivered the steel an Insured under the OCIP?



Am. Prot. Ins. Co. v. Acadia Ins. Co., 814 A.2d 989 (Me. 2003);
Higgins Erectors & Haulers Inc. v. Niagara Frontier Trans. Auth.,
529 N.Y.S.2d 654, 655 (N.Y. App. Div. 1988).

Project Descriptions - “On-Site” vs. “Off-Site”

- Wrap-up coverage is typically limited to on-site risks, losses and casualties.
- Project site descriptions need to be very clear, and consistent in the contract documents, the Wrap Manual, and the Wrap-up policies.
 - *Chase v. Terra Nova Industries*, 728 N.W.2d 895, 900 (Mich. Ct. App. 2006) (contractor on unrelated project sought coverage under an OCIP because the unrelated project fell within the literal description set forth in the OCIP documents).

Workers' Compensation

- If workers' compensation coverage is provided under a wrap up, is such coverage the exclusive remedy of a subcontractor's injured employee?
- States are split as to whether the sponsor of a wrap-up is entitled to the protection of the workers' compensation statutory bar.

Workers' Compensation IS the Exclusive Remedy

- *HC Beck, Ltd. v. Rice*, 284 S.W.3d 349, at *350 (Tex. 2009) (“A general workplace insurance plan that binds a general contractor to provide workers' compensation insurance for its subcontractors and its subcontractors' employees achieves the Legislature's objective to ensure that the subcontractors' employees receive the benefit of workers' compensation insurance.”).
 - *But see Halferty v. Flextronics America, LLC*, 545 S.W.3d 708 (Tex. App. 2018) (holding that Flextronics was not a statutory employer because no OCIP was in place and “the contracts at issue in this case do not incorporate workers' compensation coverage upstream and downstream like in *HC Beck*.”).
- *Stevenson v. HH & N/Turner*, 2002 US Dist. LEXIS 26831 (E.D. Mich. 2002)
- Me. Rev. Stat. §105-A (2011) (“a person performing construction work on a construction site for a hiring agent is presumed to be the employee of the hiring agent for purposes of this Act” (subject to certain exceptions)).

Workers' Compensation *IS NOT* the Exclusive Remedy

- *Pogue v. Oglethorpe Power Corp.*, 477 S.E.2d 107, at *109 (Ga. 1996) (“While it is true that the contract benefitted the employer by providing for the payment of premiums, the bottom line is that the contract did not benefit Pogue as a workers' compensation insurance contract would. We conclude that Oglethorpe did not provide workers' compensation benefits to Pogue by purchasing a “wrap-up” workers' compensation insurance policy.”)
- *Culp v. Archer-Daniels Midland Co.*, No. 4:08 CV3197 (D. Neb. Apr. 17, 2009)
- *Pride v. Liberty Mutual Ins. Co.*, 2007 US Dist. LEXIS 40833 (E.D. Wis. 2007)
- *Thomas v. Chevron U.S.A., Inc.*, No. 2016–CA–00101–SCT (Miss. 2017).

SIRs and Deductibles

- Who pays SIRs or deductibles?
 - Should be addressed in the contract documents.
 - Be cognizant of state law limitations.
 - Review the SIR wording in the insurance policies to ensure that wrap-up participants will not be held hostage to another party's inability or unwillingness to satisfy the SIR (or its portion of the SIR). Some courts have held, based on a literal reading of the policy language, that payments by anyone other than the named insured do not satisfy the SIR. See *Forecast Homes, Inc. v. Steadfast Ins. Co.*, 181 Cal. App. 4th 1466, 105 Cal. Rptr. 3d 200 (2010).
- How many SIRs or deductibles apply?

Priority of Coverage

- Wrap-up participants' intent and expectation is that wrap-up insurance will be primary.
- Pay close attention to the “other insurance” clauses in the primary wrap-up policies, and to the definition of “underlying insurance,” “other insurance,” “exhaustion,” and related clauses in the excess policies.
- Some excess/umbrella wrap-up insurers contend that horizontal, not vertical, exhaustion applies - all underlying, potentially available insurance must first be exhausted before they must pay.
 - *Zurich Am. Ins. Co. v. Pennsylvania Mfr. Ass'n Ins. Co.*, No. A-4260-01T1, 2003 WL 23095605, at *5 (N.J. Sup. Ct. App. Div. May 7, 2003) (excess OCIP carrier argued that it was excess to an enrolled contractor's own program policy. The court looked beyond the policies to the contract documents and rejected the argument).

Priority of Coverage

Typical CGL other insurance clause

b. Excess Insurance

- (1) This insurance is excess over:
 - (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

Priority of Coverage

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

Priority of Coverage

- *Royal Ins. Co. v. Wausau Ins. Co.*, No. CA916366E, 1994 Mass. Super. LEXIS 184 (Mass. Super. Ct. July 1, 1994)
- *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Am. & For. Ins. Co.*, No. CV 04-7257 PA (PLAX), 2006 U.S. Dist. LEXIS 96778 (C.D. Cal. Feb. 9, 2006) (finding the contractor's practice policy to be primary).

Wrap Up Exclusions

Many wrap-up participants' own CGL policies include a "wrap-up exclusion."

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 has been provided by the prime 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 insurance does not apply . . . [to your operations] at the location described . . . as a consolidated (wrap up) insurance program has been provided . . .

Wrap Up Exclusions

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 has been provided by the prime 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 exclusion applies whether or not [the wrap up]:

- (1) Provides [identical] coverage;**
- (2) Has limits adequate to cover all claims; or**
- (3) Remains in effect.**

Wrap Up Exclusions

- Courts typically uphold them:
 - *Certain Underwriters at Lloyds of London v. Illinois Nat. Ins. Co.*, No. 09 CIV. 4418 RJH, 2011 WL 723544, at *7 (S.D.N.Y. Feb. 25, 2011); *aff'd sub nom, Certain Underwriters at Lloyds of London v. Illinois Nat. Ins. Co.*, 553 F. App'x 110 (2d Cir. 2014) (applying wrap-exclusion to deny coverage); *Assurance Co. of Am. v. National Fire & Marine Ins. Co.*, No. 2:09-CV-1182 JCM PAL, 2011 WL 3273892, at *2 (D. Nev. July 28, 2011) (enforcing wrap exclusion, rejecting argument that it functions as an “escape clause” and finding it is “a bargained-for exclusion where secondary insurance is already in place”); *TNT Equip. Inc. v. Amerisure Mut. Ins. Co.*, 2016 U.S. Dist. LEXIS 128734 (M.D. Fla. Sep. 21, 2016) (denying coverage to a lower-tier subcontractor, holding that the plain language of the wrap exclusion in the upstream subcontractor’s CGL policy clearly intended for the wrap exclusion to apply to parties other than itself).
- Sometimes even when an entity is not enrolled in the OCIP!
 - *Structure Tone, Inc. v. Nat. Cas. Co.*, 130 A.D.3d 405 (N.Y. App. Div. 1st Dept. 2015) (wrap-up exclusion was triggered, even though the subcontractor was not enrolled in the project’s wrap-up program).

Wrap Up Exclusions

- *Thompson v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 3:14-CV-00259-WWE, 2017 WL 1330182, at *1 (D. Conn. Apr. 6, 2017) (finding that, because the National Union policy did not define “wrap-up,” the policy language was ambiguous and construed against the insurer to find coverage).
 - “. . . [t]he Court cannot find that a reasonable layperson in the insured’s position would have understood and expected—based on the language of the contract—that liability was excluded under the instant circumstances.”
- This can lead to a coverage gap -- the wrap-up coverage may not be as broad as the enrolled contractor’s or sub’s own program
- To avoid potential coverage gaps, it is far better for a contractor or subcontractor to carry its own CGL coverage to apply on an “excess/difference-in-conditions” basis.

Additional Insureds

- Biggest additional insured issue in wrap-ups is that additional insured endorsements are left out of the policy.
- **Query** - if a wrap up is in place, why would an entity need to be named as an additional insured?
 - Wrap-ups typically cover only on-site exposures;
 - Wrap-up participants need to ensure not only that they are included as insureds under the wrap-up policies, but also that those they have contractually agreed to protect are included as additional insureds.

Indemnity Provisions

- If a wrap up is in place, why would an entity need to be indemnified?
- Does a wrap up provide any coverage for indemnity obligations?

Indemnity Provisions

- Contract documents may require contractors and subs to defend and indemnify owner, contractors and/or subs in the tiers above them.
- Since all participating contractors are insureds under the wrap up CGL policy, the wrap up CGL policy's contractual liability coverage may respond to indemnity transfers, subject to all other terms and conditions.
- An ISO CGL policy may provide contractual liability coverage under the “insured contract” exception to the contractual liability exclusion.

Separation of Insureds

- Most wrap-up CGL policies contain a "separation of insureds" provision, which clarifies that, except as respects the limits of liability, the policy applies to each named insured as if it were the only named insured, and separately to each insured against whom a claim is brought.
- Very important – without it, one participant's actions or failure to act could result in a loss of coverage for other participants.
- Stay aware of the impact of “cross-liability” exclusions and their effect on the “separation of insureds” clause.
 - Should be limited to contribution or indemnification claims brought by one wrap-up participant against another.

Thank You!

