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Wrap and Roll: How to Make Sure Your Wrap Doesn't Get You Tied Up

I. An overview of CIP programs, with a primary focus on difficulties that can be encountered, from the underwriting of a project, through the management and handling of claims.

A. CCIP/OCIP General Overview

Generally, a wrap-up program is a controlled insurance program where one party obtains the insurance which will benefit all, or nearly all, of the parties who are performing work on a construction project. The coverages usually afforded under wrap-up programs typically include GL and worker's compensation coverage. In some instances, umbrella coverage may also be provided. Wrap-up programs come in multiple forms, Owner Controlled (OCIP), Contractor Controlled (CCIP), or Rolling Controlled (RCIP). RCIPs are typically utilized for operations which provide coverage on an ongoing basis, typically for multiple construction projects, or in contract maintenance for large plant/facilities.

Some of the benefits program sponsors realize from utilizing CIP programs include:

- Opportunity to reduce overall job cost as well as the cost of project risks;
- Comprehensive insurance coverage for all participants;
- Cost control, in form of lower premiums, economic scale of coverage and the elimination of redundancies;
- A recognized reduction in litigation and improvement of conflict resolution;
- Improved risk management and comprehensive loss control;
- Improved claim handling and loss control;

- Higher safety standards due to the utilization of a single, standardized safety program;
- Control of insurance coverage and limits of liability.

B. One size does not necessarily fit all: Factors to be considered by owners and underwriters to ensure the policy selected is adequately structured and tailored to meet the needs of the specific owner/project.

OCIP and/or CCIP policies are not right for every project, and every policy is not right for every project. Generally, for larger projects, those over at least $100 million, a wrap-program is advisable. From the underwriting perspective, larger projects allow insurers the opportunity to spread risk among the large numbers, whereas the same level of savings is not available on smaller projects. In addition to cost, the size and scope of the project is also a factor which must be considered and taken into account when structuring a wrap-up policy. A $10 million residential development project in a rural area will not require the same coverage parameters as a $300 million urban high-rise development or a $500 million public works project. Knowing and understanding size and scope will ensure that the wrap-policy purchased is appropriate and meets the project's insurance needs. However, equally important to procuring the "right" policy is developing a project culture which emphasizes safety and reporting, but also one which places a premium on vetting sub-contractors for performance history and qualification. Ultimately, to be effective all participants in the wrap-up program must "buy-in" to the program, literally and figuratively. The key here is to not only understand what the project entails in terms of scope/cost, but also ensuring that the project itself has the necessary organization, management and oversight to ensure that all benefits of the wrap-up program can be maximized to their fullest potential.

II. Pitfalls which may be encountered if the selected program is not right for the project/owner.

A. Coverage issues which may arise

1. Included/excluded coverages and limitations found in typical wrap policies.

Using a wrap-program for a project does not extinguish coverage concerns that exist under traditional CGL policies. The wrap coverage will still require that an occurrence take place in order to trigger coverage, and typical exclusion for issues such as pollution and terrorism will be present.

There are also a number of technical requirements that a subcontractor must satisfy in order to be considered an insured under a wrap. A subcontractor is not considered an insured for a project merely because they start work on a site. They must satisfy the enrollment requirements of the wrap-program, which can generally be satisfied by working with the broker or administrator for the wrap.

Wrap-programs also do not serve to cover all loses which may occur on a project. These programs are generally drafted to cover:

General Liability claims
Products and completed operations liability
Worker's compensation

Some wrap-programs may also cover EPL, professional liability (in design/build situations) or excess liability as well.

Normally, wrap-programs do not cover:

Builder's risk
Auto liability
Pollution
Coverage for property or materials on site that are not incorporated into the project

2. Terms and conditions typically included which may impact coverage.

Wraps contain many of the same exclusions that are found in CGL policies. For these reasons, professional services, such as engineering or design, may not be covered under a wrap. If it is the intention for designers, architects and engineers to be included in a wrap, brokers must make sure to address the exclusions appropriately.

In addition, completed operations coverage may be something that has to be addressed specifically. Without completed operations coverage, then the coverage period for a project may end upon completion. Damages or claims may manifest after completion, which could create a coverage gap without completed operations coverage. If the insured or owner intends to carry completed operations coverage for the project, then the owner or contractor in charge of the wrap may have to continue to pay premium for that coverage until

the expiration of the statute of limitations or statute of repose expires for the project.

One issue that should be considered is the, as wrap-policies have become more prevalent, that some subcontractors may elect not to participate in the program. The reasoning for this can cover a number of areas, but one of the stated reasons often includes the fact that a subcontractor may be responsible for paying additional premium obligations or to reimburse the general for the same in order to participate. If the contractor already has coverage for the project through a CGL policy that covers all of his work, he or she may wonder why they would pay more premium for coverage that they already have.

Subcontractors must be aware, however, that many CGL policies now include a wrap exclusion endorsement. This means that their CGL coverage will not respond to claims for projects that include wraps. Some exclusions are so broad as to state that there will be no coverage under the CGL policy for any project where a wrap exists, regardless of whether the insured is enrolled in the wrap program. The impetus for this exclusion is to force insureds to elect for wrap coverage where it is available, however, this provision could serve to leave a subcontractor without any coverage if the elect not to participate in the wrap.

3. Key policy language which may alter coverage and policy limits adversely.

There are a number of issues which could affect coverage and policy limits in a wrap situation. As mentioned above, exclusions for other existing insurance for a general or subcontractor will ensure that their existing primary CGL coverage would not act as additional umbrella coverage or even dual primary coverage for the project.

Additionally, some wrap policies are written so that the coverage erodes as defense costs and expenses are paid. This is an additional reason to make sure that there is sufficient coverage available under the wrap.

Some states allow for a subcontractor injured on a jobsite to bring a claim against their employer for worker's compensation as well a traditional third-party action against a third party if the injury was caused by another party. Claims by a subcontractor's employee against a general contractor are typically referred to as an Action Over. Exclusions in wrap policies may preclude coverage for an Action Over claim based on the fact that the claim relates to an on-site employee. Some states, including Texas, have approached this issue by

determining that all contractors included under a Wrap policy are entitled to the benefit of the exclusive remedy provided by worker's compensation coverage. See., e.g., Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433 (Tex. 2009).

4. Typical coverage gaps which may impact.

One of the greatest concerns with wrap policies is the sufficiency of their limits. In most situations, the wrap coverage available is going to be greater than the collective coverages that could be cobbled together from the various tiers of subcontractors on a project. However, it must be remembered that wrap policies are often used only for large capital projects or developments, often in terms of $100 million or more.

As such, given the sheer size of projects, it is not hard to imagine a catastrophic event that would create an exposure in excess of what would normally be very high policy limits. For example, consider the recent collapse of the Hard Rock Hotel that was under construction in New Orleans. Not only does the event involve multiple fatalities, it also involves significant structural claims which could cause the project to have to be completely removed and restarted. Considering the nature of increasing jury verdict awards, it could be possible for an event like this in some states to create the risk of verdicts in excess of the coverage limits.

In the context that the wrap is administered and held by an Owner (OCIP), a gap in coverage could arise for owners in relation to completed operations. Most completed operations coverage provides coverage for claims "away from premises that the Named Insured owns or rents". If the owner continues to operate the property, this may preclude coverage for the owner for any claims resulting from negligent construction of the project.

One common theme that arises in construction defect cases is whether an issue is attributable to negligent work or to negligent design or engineering. As with CGL coverages, wraps will generally exclude coverage for professional services, including design and engineering. Wraps can be written to include this coverage, however, there still may be inconsistent triggers for coverage. As one example, CGL coverage requires that an accident or occurrence take place with resulting damage to some physical part of the project while professional liability coverage has no such requirement.

B. The interaction of risk transfer requirements and wrap policies and practical considerations and strategies to employ when evaluating and defending claims falling within a wrap program.

Typical participants in wrap-up programs include the owner, general contractor, and subcontractors. Through these programs, various types of coverages are provided to enrolled parties, including general and excess liability, workers' compensation, employer's liability, and occasionally builders risk. Given this arrangement, the need for traditional risk transfer mechanisms is obviated, since all parties enrolled in the wrap-up program benefit from the single program that usually also includes a cost-savings for subcontractors.

However, situations may arise where an arisen claim is not covered under the wrap-up. For example, not all parties may enroll in the program, the wrap-up scope is limited based on exclusions, the exposure is related to an offsite activity not covered. For unenrolled contractors and offsite exposures, or policy limits are insufficient to meet the needs of an unanticipated loss. Indeed, as wrap-up programs have become more widespread, so has the use of "wrap" exclusions. Wrap exclusion endorsement in commercial general liability policies and may have the effect of excluding or modifying coverage for damages related to project work insured by a wrap. In these scenarios, the general contractor and owner may still be able to rely on traditional risk transfer strategies should a claim arise which falls outside of the program.

Again, organization, management and oversight are critical components to ensuring that program benefits are capitalized. As such, the basic tenets of sub-contractor vetting, and retention should not be tossed aside simply because a wrap-up program is implemented. Sub-contractor agreements should still contain enforceable indemnity and additional insured provisions aimed at affording supplemental protection in the event a loss occurs which may fall outside the program, either due to the sub-contractor's non-enrollment or some other exclusion. From the claims professional's perspective, understanding that applicable exclusions exist on the one hand, or risk transfer opportunities may still exist on the other hand, may ultimately help to mitigate legal and indemnity cost exposure.

III. Overview of key court decisions and impact on wrap programs.

Lee Kennedy Co., Inc. v. Arch Ins. Co., 357 F. Supp. 3d 81 - Dist. Court, D. Massachusetts 2019. Federal Court found that Arch had not breached its insurance contract with Lee Kennedy by refusing to pay some $700 thousand plus in costs and losses Lee Kennedy had sought from Arch under its contractor-controlled insurance program policy based upon an exclusion which did not afford coverage for losses in r which the insured was obligated to pay damages by reason of the assumption of liability in a contract or agreement. The Court ruled that to the extent that Lee Kennedy based its claim on the contract with the Winsor School where it assumed liability for the defective work of Kenvo, Lee Kennedy's coverage claim, "falls directly within this contract liability exclusion."

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), upheld the denial of coverage on the basis that the subject plant was insured under a contractor-controlled insurance program (CCIP) and its policy contained an exclusion for "any liability arising out of any project insured under a 'wrap up' or similar rating plan." The court stated: "If the defendant wanted to exclude coverage for any project that 'involves' a wrap-up or is 'in any way' affiliated with a consolidated insurance program, it should have explicitly included such limitations and defined the term 'wrap-up".

TIC Energy & Chemical Inc. v. Martin, 498 S.W.3d 68 (Tex. 2016), relied on holdings in Factory Mutual Ins. Co. v. Feri Formworks Systems, 223 F.Supp. 3d at 1143 and Kraft Co., Inc. v. J&H Marsh & McLennan of Fla., Inc., No. 2:06-CV-6FtM-29DNF, 2006 WL 1876995 (M.D. Fla. July 2006), (a CCIP is a type of wrap-up insurance program that seeks to distribute, share and manage risks at construction sites through a single carrier) to establish the constructive benefits of controlled insurance programs in connection with upholding statutory immunity among the participants of an OCIP under the Texas Workers Compensation Act.

Structure Tone, Inc. v. National Cas. Co., 2015 N.Y. App. Div. LEXIS 5613, 2015 NY Slip Op 05760 (N.Y. App. Div. 1st Dep't July 2, 2015) that a wrap-up exclusion contained in a subcontractor's CGL policy barred additional insured coverage for a wrap-up project's general contractor, even though the subcontractor was not enrolled in the wrap-up. The Appellate Division's decision circumvents the common risk transfer practices within the construction industry, and therefore, is a cause of concern for contractors seeking to obtain additional insured coverage under an unenrolled subcontractor's CGL policy.