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## **“How to Best Wrap Up Construction Claims in the 21<sup>st</sup> Century”**

### **I. Introduction**

#### **What is an Owner Controlled Insurance Program (OCIP)?**

An OCIP, is a centrally procured / managed insurance and risk control program implemented for a single construction project or a series of construction projects. Rather than each contractor providing its own insurance coverage's and passing this cost to the Owner through the construction contract, the owner of the project purchases insurance typically recommended by their Insurance Broker to cover the following areas of risk: Commercial General Liability, Workers' Compensation, Excess Liability and Builders Risk.

#### **What is a Wrap Policy?**

A Wrap or Wrap-up Policy is, as its name suggest, an insurance policy that wraps up, or bundles specified insurance risk into a single insurance program. Instead of relying upon the general contractor or construction management firm and each subcontractor to provide insurance coverage for the project(s), a single policy is purchased which insures all parties on the project(s); including the owner and all enrolled general / sub-contractors of all levels. However, contractors still maintain coverage for other exposures such as Off-site operations, auto liability and contractors equipment. An OCIP is often referred to as a Wrap. However, a Wrap may include various types of insurance policies including a Contractor Controlled Insurance Program (CCIP).

#### **When are OCIP's and Wrap-Ups Used?**

The project size is important from two perspectives, primarily the owner needs adequate volume to cover the fixed costs of the program and generate savings. Secondly, many states have minimum project sizes required in order for a project to qualify to be insured under a Wrap-up program. The following is a guideline of when projects should be considered for a wrap-up program:

- Single project - \$100 million Construction value;
- Rolling Wrap-Up - \$300 million over a three – year term;
- Maintenance Wrap-Up - \$25 million Annual Maintenance Labor.

The state regulations can vary between private and public projects and may impose certain obligations upon the sponsor(s).

### **What do OCIPs Cover As Far As Construction Products, On Site Injury, and Construction Defect Claims?**

Each OCIP is generally written by an insurance company to address the various risks associated with a construction project. The type of coverage in an OCIP will depend on the project, but generally will include Commercial General Liability, Workers' Compensation, Excess Liability and Builders Risk coverage. In regard to construction product claims, coverage is generally provided under the Commercial General Liability (CGL) and Builders Risk, course of construction (COC) portion of the OCIP. Job site contractor employee industrial related injuries will be covered by state statute workers' compensation and Third Party filings may also trigger coverage under the CGL based on claims level investigation; Construction defect claims also are usually covered under the CGL portion of the OCIP.

## **II. Coverage Issues for OCIP's**

### **What is covered by an OCIP**

As noted above, an OCIP's coverage will depend on the specific language of each of the insurance policies procured under the program. That being said, for construction claims under an OCIP, there are several key coverage issues that will need to be evaluated at various stages of a claim.

First, one of the key aspects of an OCIP is that only parties who are actually enrolled in the OCIP are provided coverage. To become an enrolled party, each trade contractor, general contractor, design professional (if E&O coverage is included in the OCIP), and supplier/manufacturer (mostly excluded) must meet the specific requirements of the program. Generally these requirements include:

- Executed Construction contract
- Completing an OCIP enrollment form and submitting it to the OCIP administrator in a timely fashion
- Procuring separate off job site insurance and providing the OCIP administrator certificates of insurance (COI) with any required additional insured endorsements and waivers of subrogation
- Pre-qualification standards - Safety

## **What are the Standard Exclusions?**

It should be noted that OCIPs generally preclude enrollees to make claims against one another. The “insured versus insured” exclusion eviscerates coverage if a formal claim is made against another enrollee. OCIPs may also have an exclusion for coverage based on dates of construction being completed, phases, locations, or the like. Many OCIPs also contain exclusions where other insurance is available and make the OCIP “excess” in nature; however, more frequently, standard CGL policies contain OCIP exclusions which preclude any coverage for the insured if an OCIP is in existence (even in some instances where the insured was not even enrolled). It is therefore critical to carefully examine the policies under the OCIP before any tenders are issued to parties or other insurers.

## **When and How Should a Tender be Issued for an OCIP?**

Once the evaluation of the potential coverages is completed, a tender to the OCIP should be made by the insured/enrollee. Most OCIPs have an instruction manual or binder associated with and provided to each enrollee upon enrollment. This manual should be reviewed and closely followed to ensure proper tendering of the claim. Some claims under OCIPs need to be tendered to the Owner and the insurer; some are to be directed to a specified Third Party Administrator (TPA), and others are to be directed only to the OCIP administrator or broker. Sloppy tendering can delay the determination of a defense being provided and/or preclude coverage.

## **What Are The Concerns From The Claims Perspective On a Construction Project OCIP Tender?**

A claims examiner on a construction OCIP claim has to take into consideration all of the same issues as in a construction or construction products matter, but must also overlay the analysis with a clear understanding the role of the parties in regard to the OCIP, the scope of coverage provided (and exclusions under) the OCIP, and set up clear goals and a plan at the outset of the mechanisms and strategy for resolving the claim. Much of the analysis must focus on setting indemnity and defense reserves and early analysis of liability exposure for all of the enrolled parties and those implicated in the claim. For example, in a construction product/construction defect case where component part manufacturers and suppliers as well as trade contractor installers and design professionals are all implicated, if all are enrolled in the OCIP, the joint defense strategies and efficiencies can often be maximized. However, if the various parties are not all enrolled, complications in evaluating the anticipated defense fees and costs arise. Moreover, liability and defense issues may create unanticipated potential conflicts of interest requiring the appointment of separate defense counsel for different OCIP enrollees, further impacting the ability to set reserves on a case early on in the life of the matter. However, a reasonable and calm approach to evaluating the indemnity and expenses will assist the claims professional in setting reserves. One of the key aspects to ensuring proper management of an OCIP construction claim is to make sure all lines and levels of communications between and among defense counsel, experts and the client are open honest and robust.

## **What is the role of the TPA in an OCIP construction claim?**

The industry practice of an OCIP TPA is to partner with the Broker of record and owner / sponsor team towards a working process for timely resolution of claim exposures with all vested partners. In the best drafted case scenario, 1) an enrolled contractor calls the TPA's claims intake call center, 2) an initial claims report is communicated to the owners claims handling department or claims handling administrator (owner / sponsor level investigation), 3) the intake call center transfers the claims records to the appropriate OCIP insurance carriers handling office – an adjuster is assigned, claims process / investigation begins (carrier level).

### **III. Litigation and Claims Management Through Use of OCIPs**

#### **Setting Up an OCIP – Timing & Process**

It is generally critical to have the OCIP prepared and in place well in advance of the pre-construction processes of bidding and awarding of contracts to the enrollees. However, an OCIP can be set up even after contracts are awarded so long as the amended language in the contracts is crafted properly.

#### **Benefits and Challenges of an OCIP**

From a claims perspective, OCIPs can have additional challenges due to the additional layers of issues to be evaluated in the coverages and parties involved. The potential to need to appoint separate counsel and the various moving parts further make setting reserves for indemnity and expenses more complicated in OCIP claims as well.

From a legal and defense perspective, OCIPs provide for a more streamlined approach to handling the claims and liability issues in the construction OCIP case. One adjuster and one defense counsel can often work together on the entirety of the claim and prevent the infighting among the defense that can otherwise distract from a joint defense of a construction claim.

#### **Risk Transfer Issues and Options in Construction OCIP Claims**

As noted above, OCIPs for construction claims carry some implications on risk transfer that otherwise might be available. Under most OCIPs, enrolled parties cannot make claims against one another, at least while the OCIP remains in place, or they bear the risk of losing any coverage under the OCIP.

### **IV. Practical Tips and Tactics for Construction OCIP Claims**

#### **Administration of the OCIP**

It is important to note who the administrator is for an OCIP at the outset of a claim. The Administrator is the key person who holds the enrollment paperwork, and can provide this critical information of who is enrolled in the OCIP and who is not. This obviously impacts the potential for risk transfer. When handling an OCIP claim, it is important to first contact the Administrator and obtain copies of the enrollment forms as well as any and all portions of the policies under the OCIP and OCIP Manual.

### **Contractual Indemnity Issues for Enrolled Parties; Rights of the Enrolled Parties.**

Enrolled parties often have what appears to be conflicting issues between the coverages and obligations under the OCIP and obligations under their respective contracts. As noted, the enrolled parties generally cannot bring claims against one another without causing coverage to be disclaimed. However, the parties still have contractual indemnity obligations that are not eviscerated by the terms of the OCIP policies. It behooves enrolled parties to be sure to notify any indemnitors that their contractual obligations are not eliminated and that a tender will be issued if and when the OCIP policy is exhausted. Issuing a notice of the claim from the claimant to the indemnitors in this fashion should be carefully crafted to ensure that it is not a tender of the claim but just putting the parties on notice. However, such notice will not toll any statute of limitations, so that must be evaluated and kept in consideration as well.

### **Ethical Considerations for Defense Counsel in Construction Claims**

Simply because parties are enrolled in an OCIP and cannot bring claims against one other under the policy exclusions or provisions does not mean that defense counsel do not need to evaluate ethical concerns. Defense counsel must carefully review and understand the OCIP terms of the insurance policies; in particular, many insurance policies include a waiver of conflicts allowing one attorney to defend all of the enrolled contractors in the OCIP. If representation of more than one enrollee will pose a potential conflict of interest, counsel must take any necessary steps to obtain a formal conflict and should consult with the state bar association about any preclusions from doing so under the OCIP context.

### **Efficiency in Handling OCIP Construction Claims**

While a construction OCIP claim can be handled very efficiently, this does not happen on its own. Rather, the claims professional and defense counsel must work closely together to establish a plan of action, determine how the case should be defended, develop a reasonable budget and reserves for the claim, and evaluate the liability for the enrolled OCIP parties.