



2019 Construction Conference
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Emerging Trends/Changes with OCIPs/CCIPs

I. Optional/Mandatory enrollment in Owner or Contractor Controlled Insurance Programs and when an SIR/SIO is owed

Optional/mandatory enrollment

Numerous projects have some form of wrap up policy, typically OCIPs or CCIPs that are offered. It is important for the client to ensure they know and understand all of the requirements for enrollment, including what paperwork will show confirmed enrollment. This may include an enrollee list that is maintained by the third-party administrator or maintaining copies of the executed contracts. Depending on the statute of repose or limitations in a given jurisdiction, that may also impact how long a client keeps records to show enrollment if there is a later litigation. If a party is permitted (or required) to opt out, that party will want to ensure that there is no premium being charged for enrollment, any necessary insurance requirements to convey to a broker, and to ensure that the general liability carrier does not have an OCIP exclusion that may impact coverage later, even if the client did not enroll. Some policy exclusions apply to any project that offers an OCIP.

One of the biggest issues parties currently face is the question of when enrollment goes into effect. Is it when you pay the premium sign the contract, start the work, or some other date? This information may be included in the contract, OCIP policy, enrollment form, or not be located anywhere discernable. It is imperative for enrollees to ensure they know this critical information to avoid concerns that some work may have been complete outside the OCIP. It is also imperative to carefully review the locations where coverage will apply under an OCIP or CCIP program, as work performed at locations not on the schedule will not be covered under the insurance program. Thus, pre-fabrication at a participant's shop is likely not covered by the OCIP or CCIP, which can lead to subsequent disputes if that work is involved in a claim scenario (especially if the claim involves the products/completed operations hazard).

Another issue common to OCIP or CCIP programs involving general liability coverage is that a single policy limit is shared among all of the participants on the project. If a single claim or series of claims involves multiple contractors, it is certainly possible to exhaust or impair that limit sufficiently to expose the excess insurance, and situations have arisen historically where even that limit is in jeopardy. If larger and more sophisticated contractors are involved in the project, the limits provided by an OCIP or CCIP program may not be as high as those provided by the aggregate of those contractor's individual policies (many if not all of which will contain per-location and per-project aggregate endorsements, at least on the primary coverage).

The original intents of an OCIP are usually stated as effecting an even and predictable level of insurance coverage for a project, and to insurance costs and risks for all parties. It was also intended to reduce litigation costs with less need for separate counsel for each contractor. However, if coverage defenses are asserted or the policy did not have sufficient limits, that may require multiple counsel and extensive costs. The contractor may have bid the project based on the need to obtain general liability insurance or a flat reduction to cover the premium for the OCIP. Further, the reduction in a contractor's standard insurance program achieved by excluding the CIP may not cover the costs of participating in the OCIP or CCIP program.

A subcontractor should also ensure they understand what carrier and limits are involved in the OCIP and if the Developer has an SIR that must be satisfied before the OCIP is triggered. We have seen cases where the subcontractors paid the premiums and believed there was protection. However, the Developer owed an SIR first, which could only be satisfied by the Developer, who was out of business when the claim was made. So even where the subcontractors paid their SIR, there was no coverage. The solvency of the insurance carrier can be of concern as well, as can the admitted or non-admitted (surplus lines) status of the carrier, and the availability of the jurisdiction's insurance guarantee fund if an insolvency occurs (e.g., Legion).

Other risks that one needs to consider when enrolling or opting out concern how long the OCIP will cover a project and the work, if warranty work is included, will the policy pay for right to repair work performed by a party, and litigation years after the project is complete. The policies often include a waiver of conflicts for retained counsel, but sometimes that conflict is un-waivable. There are also questions regarding choice of counsel and the use of in house versus outside counsel.

Typically, the contract refers to the policy and that a party can obtain a copy upon request. The policy may not even be in existence at the time the contract is signed, but you are bound by those terms. One solution is to include language allowing for objections or disputes within a certain amount of time after production of the policy. Always ask for a copy in writing and document any delays. This is important because often, during litigation, efforts to obtain a copy are often very difficult.

When the OCIP involves one project, typically, a high-rise tower or other commercial-type project, there is more clarity as to what parties are enrolled and what risks may be involved. However, the new trend is for OCIPs that involve multiple single-family homes and projects, sometimes that cover multiple states and numerous projects. It is much more difficult to determine the risk involved, potential exposure for lawsuits, and if there is adequate insurance under such scenarios. First, there is an assumption as to the number of homes that will be built, that can increase or decrease based on market conditions. Second, there are unknown laws and risks that a subcontractor in one state may not be aware of but could impact later defense obligations and monies available. Finally, there are questions regarding when the SIR is owed, who is obligated to pay, and the timing. These issues must all be developed and assessed when considering enrollment and other risks in working on a project.

SIR/SIO payment obligations

Suppose a contractor is enrolled in an OCIP and there is a claim by a homeowner or HOA. The Developer or general contractor receives the notices and tells the OCIP carrier. Then notices are sent to the subcontractors for the tiered monies. However, does the contractor have the right to inspect and offer repairs under the applicable statute. Does that toll the timing for payment? Is the payment per project, per subdivision, per home, per claim, per lawsuit, or some other basis? Have you ever even seen the policy to know if it mirrors the contract language? Does the SIR tier a maximum owed or is it owed each time? These are all issues that need to be developed and understood when bidding the project and understanding your insurance risk.

Inherent Issues in OCIP/CCIP programs

One issue that clients often raise concerns defense counsel on a project with an OCIP. If there are 50 subcontractors, can the OCIP or CCIP have one firm defend all of them or is there a need for separate counsel. Are there ethical considerations that the administrator must consider in handling the policy, assigning counsel and determining if the limits are adequate to cover all of the applicable scopes of work?

The answer will depend on the size of the claim, any coverage issues that exist, or may exist, as well as any inherent conflicts that may not be waivable. For example, if at trial two subcontractors will be pointing the finger at one another regarding the scopes of work and who was responsible, then you cannot have one firm defend all. Such actions would not be in the best interest of the client. Further, it does not present well to a jury when arguing information that is contrary to both clients. If the scopes of work are not at issue and the parties agree as to the scopes, then one firm may be considered. There are also often questions of whether in house counsel or outside counsel can be used. Sometimes clients believe that in house counsel is really counsel for the defending carrier and it causes concerns as to whether counsel is really protecting the client. This should be raised with the client to ensure that counsel is defending the client at all times, regardless of in house or outside counsel retention.

II. Impact of OCIPs and Right to Repair Statutes

Obligations to perform repairs for enrolled parties

The contractor is enrolled and pays the premiums. A warranty notice or Chapter 40 Notice is given. The OCIP carrier is defending. Does the contractor need to spent time and money doing repairs? If so, at whose expense? This is often governed by the contract that requires the contractor to perform repairs or the builder will have someone else perform the repairs and seek reimbursement. However, the conflict arises because the OCIP is supposed to cover any claims, right? This is a developing issue of concern.

If a contractor refuses to perform repairs, can the builder hire someone else to do the repairs? Is the OCIP carrier obligated to fund the repair costs to the “new” contractor? Does the OCIP carrier have an obligation to ensure that the repairs are performed or simply waive those Chapter 40 rights? If the work is called a warranty repair versus a Chapter 40 repair, is there different meaning and obligations owed by the carrier under the policy. The answer is “it depends”. What does the policy language state? Typically, these are not areas addressed and common practice is that the carrier will not refund or reimburse any such expenses.

Offsets for repair/warranty work and SIR

Who pays for warranty/right to repair work? Should an enrolled party be obligated to pay the SIR and also self-fund repairs? The contract and the OCIP will determine these answers. Often the contract is silent as to who bears the costs. Typically, the subcontractors bear those costs. However, if you have leverage, you can try to negotiate that term. Many contracts now include language that precludes the subcontractors from seeking defense costs against the builder regarding the enrollment disputes. This may be a public policy issue because the builder can simply sue parties knowing they are enrolled and seek premiums to avoid defense costs and get other carriers involved. Recent questions have been raised if counsel argues a client is enrolled at mediation where the builder says they are not. The issue arises because other insurance carriers are defending the subcontractor. Remember that the OCIP will not defend until the SIR is paid and if there are allegedly uncovered homes, there is no defense. So, a subcontractor may pay the SIR and still be defaulted and exposed while fighting over enrollment and have no recourse.

Another issue of similar scope arises if the OCIP or CCIP is terminated prior to the completion of all work on the project, or during the final phase of that work such as commissioning, punch-list or call-back and clean-up work. In such cases, contractors may have a potentially uninsured exposure if their standard carrier excludes all work at the site where an OCIP is or was in place (a fairly common form of wording for that exclusion). Even more pronounced problems arise if the OCIP or CCIP is terminated for any reason prior to the ending

stages of construction. In particular middle-market or smaller contractors may not be able to arrange for replacement coverage from their standard carriers at any reasonable price, or at all.

While no longer common, some OCIP and CCIP programs have had inadequate extended coverage for the completed operations hazard, where the coverage did not follow the statute or repose in that jurisdiction.

III. OCIP Complications

Underfunding

One concern for the parties is whether there is adequate insurance for the project and later litigation. An enrollee also should know if the defense costs erode the policy (aka burning limits). Expenses can quickly reduce available under an eroding policy thereby exposing contractors to personal liability. Even though a party may be enrolled, there can also be other general liability policies that do not exclude the project and apply excess to the OCIP.

If there is a large loss or there are depletion issues, other funding sources may be pursued. Suppliers, manufacturers, and design professionals are almost always excluded from the OCIP. It may be necessary to involve those parties. If your work involves extensive design issues, one may also inquire if the design professional has an adequate policy, limit of liability, or reverse indemnity. Such limits can greatly impact a case and the ability to settle or resolve claims.

Underfunding also creates conflicts among OCIP enrollees. A general contractor or developer may seek to assert its contractual indemnity rights against subcontractors to fund a shortfall. All enrollees may take issue with how best to allocate the policy limits to avoid individual uninsured exposure. The subcontractors may take issue with procurement and administration of the insurance program and demand that policy benefits be used to protect them not the owner who controlled the program.

Risks Outside The OCIP

Projects may include construction damages outside the OCIP. This can create conflicts with practice policies or uncovered exposure examples of which are outlined below.

A party may face both pre and post project completion damage claims. Modern OCIP's specifically preclude coverage for damage occurring during project construction but claimants are often silent regarding when damage to the project occurs. This can leave a contractor with an uncovered risk and result in disputes with both the OCIP carrier and the practice policies over the uncovered exposure. Also, the contractor may perform offsite work which is outside the OCIP

Similarly, early termination from a project can place the damages outside the completed operations hazard again leaving the terminate party without OCIP coverage. Early termination leads to disputes related delay damages, completion costs versus repair costs and whether the

trade was terminated or abandoned the project. Each is factually intensive and can expose the contractor outside the OCIP.

When within the completed operations hazard, unanticipated complications can also arise. OCIPs often include high per occurrence deductibles or self-insured retentions. Disputes over the number of deductibles or SIRs owed might shift unanticipated exposure back to the trades. OCIPs generally cover damages because of “property damage.” Disputes over the nature of damages - whether the damages are “property damage” and which trade is exposed noncovered damages -- results in conflicts among parties and contractual indemnity litigation.