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Construction Wrap Trends: What's Working, What's Not

I. What Wrap Policies Were Intended to Accomplish

Wrap-up insurance is a liability policy that serves as all-encompassing insurance that protects all contractors and subcontractors working on large projects costing over \$10 million. The two types of wrap-up insurance are owner-controlled and contractor-controlled. Owner-controlled insurance is set up by the owner of a project for the benefit of the builder or contractor to cover all listed contractors. The general contractor, meanwhile, may use a contractor-controlled insurance program to extend coverage to all the contractors and subcontractors signed up on the project.¹

Wraps have been used successfully for many years as a means to reduce the overall cost of insurance, reduce litigation costs, simplify litigation, and provide broader coverage to participants. Simple in theory to administer, subcontractors were instructed to remove the cost of their own general liability insurance from their bid, and the builder/owner would provide liability coverage to all. In the 1990s, construction defect litigation began to flourish, driving up insurance costs. Homebuilders were no longer able to secure broad Additional Insured coverage from subcontractors and faced increase premiums and limited coverage. Wrap policies were designed to provide coverage for all participants on a project, at little more than their usual cost of insurance coverage.

¹ <https://www.investopedia.com/terms/w/wrap-up-insurance.asp>

However, the way some wrap policies are administered has resulted in increased costs, confusion, and potential for greater exposure for enrollees.

Different Wrap Products Available

There are a number of different wrap products available, the most common include a traditional single site/project wrap policy that would typically include both Workers Compensation and General Liability coverage.

This common type of wrap product can be purchased (sponsored) in the name of either the Owner which would be labeled an Owner Controlled Insurance Program (OCIP) or the General Contractor or Prime Subcontractor could also purchase this product which would be termed Contractor Controlled Insurance Program (CCIP). This type of wrap insurance product has the flexibility and is scalable enough to encompass a variety of commercial and residential products.

Other insurance products which can be purchased by Owners/Developer/General Contractors or Prime Subcontractors include:

- A. Rolling Wrap Insurance Program
- B. A General Liability Only Insurance Program
- C. Work Comp Only Insurance Program

Wrap programs can also be written to encompass ongoing maintenance, repairs or renovation to large complex industrial and commercial projects (refinery, large public works, etc.) Projects that may require remediation or have potential exposure to pollutants can also purchase specialized wrap coverage (so called “Dirty Wrap”).

Positive Impacts and Effects of Wrap Policies

Panelists will discuss their individual experiences with wrap policies, from a cost perspective, litigation perspective, and coverage perspective. Wrap policies can improve insurance costs for general contractors and subcontractors, and provide for better quality assurance, safety programs, and control of the job site. Coverage under these policies can be broader and more protective than CGL policies and allow parties to avoid issues of limited Additional Insured coverage under the traditional CGL structure.

Positive impacts also include streamlining litigation – to the extent subcontractors are properly enrolled in a wrap policy, defense against construction defect litigation can

be streamlined to allow for one defense for all, at least in theory. This depends on the jurisdiction and depends on complications in the litigation. At times, it may be prudent to appoint separate counsel for those enrolled in the wrap policy. Ideally, defense counsel attempt to coordinate document discovery, production, and depositions among all wrap enrollees in order to simplify a defense.

However, some wraps are administered in a way that tends to defeat the purposes of wraps. Often, separate defense counsel is appointed for each enrollee in the wrap, and if the defense for one or more of the enrollees is provided under a strict reservation of rights, this can result in infighting among the enrollees. Whereas each enrollee should be working in a coordinated fashion, given the common policy limit, separate defenses provided to insureds who are unsure whether the carrier will provide indemnity coverage can incentivize the enrollee defendants to seek to push liability onto other enrollee defendants. Further, separate defenses only increase administrative costs – to avoid conflicts, the carrier must have multiple claims adjusters; many enrollees must retain separate experts; etc.

Often wrap policies are “defense within limits” policies, which leads to erosion of available limits through defense costs. When Plaintiff counsel understands this, often defense counsel can push for an earlier resolution of the matter to avoid erosion of limits.

II. Challenges Faced by Wrap Policies

When wrap policies are triggered by claims alleged against various covered entities, issues can arise concerning coordination of coverage with Builder’s Risk and Property policies issued to those entities. Wrap handlers need to be aware of the various coverages afforded under the insureds’ policies.

Further, wrap policy limits often can be \$1 million or \$2 million, burning limits, even for a large project. Sometimes the coverage afforded does not adequately cover the claims related to a large project. Though this issue should be addressed at the broker and underwriting stage of coverage, it is often left to those involved in litigation to deal with such a quagmire. How should claims handlers, coverage attorneys, and defense attorneys handle this situation? Risk transfer and access to excess policies can be critical.

In the event enrolled entities in the wrap are implicated by the claims, another issue is how to handle potential claims against wrap-enrolled parties. Typically, such claims are not asserted, given the typical exclusion for claims against enrolled parties. Defense counsel and claims handlers must work hard early in the case to assess who is enrolled

and who is not, who is implicated in the case and who is not, to determine proper third-party claims and reduce infighting among enrollees.

Another issue concerns obtaining the cooperation from both enrolled parties and non-enrolled parties in the litigation. Often, carriers retain one attorney to defend the suit, usually which involves the developer and general contractor. When implicated subcontractors are identified and defense counsel determines that they are enrolled in the wrap, issues arise when those subcontractors are not willing to provide their project files and the cooperation of witnesses. While it is not wise to file claims against those subs, defense counsel and claims handlers must exercise other measures – typically political pressure – to try to get them to cooperate. Most insurance policies, including wraps, contain cooperation provisions, which comes with the threat of non-coverage should an insured fail to cooperate in its defense. If subcontractors act in a way that may subvert the purposes of the defense provided under the wrap, claims professionals may need to invoke such a provision.

Further complicating matters can be the situation where an enrolled sub is no longer in business. It can often be very difficult to obtain their cooperation in the litigation.

Benefits of Wrap Policies

Wrap policies can be beneficial because they streamline defense and reduce defense costs when administered correctly. Further, coverage afforded under a wrap policy can provide broader coverage than traditional CGL policies. Panelists will discuss the details of how this plays out in litigation.

Parties may be more amenable to early resolution under a wrap policy in cases where claimants recognize that the policy is a “burning limits” policy in which defense costs erode limits available for indemnity. In a case where the parties are not too far apart on their views of the value of the claims, this reality can lead the parties to reach an early resolution.

Construction casts involving wrap policies can also lead to a reduction in the number of litigants involved in a lawsuit, which can also decrease defense costs and simplify the litigation.

Enrolled subcontractors typically are not named in the litigation, avoiding extensive discovery costs and allowing the developer/general contractor to streamline a defense. In addition, with conflict waivers in place and all conflict considerations in the clear, one defense firm often can represent multiple parties to the litigation therefore decreasing costs and enabling better coordination of a defense.

III. Suggestions for Improvement/Working with Wraps

Panel to discuss, with input from audience.