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ADDRESSING RISK IN A CHANGING ENVIRONMENT – OCIP'S, CCIP'S AND BEYOND

Marc Sanchez
Moderator
FRANTZ WARD LLP
Cleveland, Ohio
msanchez@frantzward.com

Reed Grimm
TAYLOR DAY, PA
Jacksonville, Florida
rwg@taylordaylaw.com

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WRAP INSURANCE

A. What is it?

A wrap-up policy is a risk financing option. It makes sense only on larger projects because of the increased cost of administration. Also known as a Controlled Insurance Program ("CIP"), it is centrally purchased and administered for a single project or a series of projects. CIPs provide insurance coverage for all or most of the project participants—owners, general contractor, and subcontractors are on one policy. This differs from the traditional risk management approach where each project participant purchases its own insurance program and relies on contractual indemnity provisions and additional insured endorsements to provide insurance coverage for the project as a whole. See, e.g., *Factory Mut. Ins. Co. v. Peri Formworks Systems, Inc.*, 223 F. Supp. 3d 1133, 1143 (D. Ore. 2016).

CIPs are typically sponsored, controlled, and paid for by an owner ("OCIP") or by a general contractor ("CCIP"). They usually include worker's compensation coverage, as well as general and excess liability coverage. These types of programs "seek[] to distribute, share, and manage risk at construction sites." *Kraft Co. v. J & H Marsh & McLennan of Florida, Inc.*, 2006 WL 1876995, at *1 (M.D. Fla. July 5, 2006).

Most CIPs are designed for a single, mega-project. The added administration costs dictate that these programs make financial sense only on larger projects (or series of projects); any savings are driven by the insurance cost savings minus the added administrative fees. The underlying purpose of a wrap-up policy "is to make the insurance programs used primarily for construction projects more equitable, uniform, and efficient. [Wraps] eliminate the costs of overlapping coverage and delays caused by coverage or other disputes between the parties involved in a project and, at the same time, protect all the contracting parties by bringing the risk of loss from the project within the insurance coverage of the [wrap]." *Virginia Sur. Co. v. Adjustable Forms Inc.*, 888 N.E.2d 733, 737 (Ill. App. 1st Dist. 2008).

General program sponsors purchase combined-line CIPs (workers compensation and liability) for two reasons—cost savings and to ensure sufficient insurance coverage.

In addition to single project use, owners can create "rolling" CIPs for a series of their projects when any single project does not make financial sense. Large contractors can also sponsor "rolling" CIPs that cover multiple projects on an on-going basis. Other CIPs are maintenance CIPs that cover contract maintenance and renovation at a large plant or facility; environmental CIPs; and international CIPs.

B. Risk Not Covered by Wraps

While CIPs offer a unique solution for most parties participating in a project (and any losses that may be sustained therein), it is important to note that not all parties, and not all losses are

covered. The CIP manual and wrap-up contract addendum to the construction agreement will usually define "Enrolled Parties" vs. "Excluded Parties." Most parties will be enrolled in the wrap-ups unless their scope of services falls within the definition of "Excluded Parties".

Most "Excluded Parties" fall into one of the following categories: (a) Hazardous material remediation and abatement; (b) architectural, engineering, and other professional design services; (c) material supply and manufacturing; (d) equipment rental; (e) trucking, hauling and other transportation services; and (f) services that exclude on-site labor. The wrap-up sponsor may define any project participant as an "Excluded Party." Conversely, a typically excluded party can be defined as an "Enrolled Party" subject to underwriter approval. The decision to include or exclude certain parties is usually determined by insurance market conditions, state regulations, underwriter appetite, the wrap-up program sponsor, or some combination thereof.

It is important to note that architects, engineers, and other design professionals are typically not included as "Enrolled Parties" in wrap-up programs. Most risk inherent with these services is covered by the participants' own professional liability insurance coverage. Moreover, most CIPs (like most commercial general liability policies) contain a total or substantial exclusion for professional services. Accordingly, there is usually no need to include design professionals within the wrap-up program.

Potential implications do exist with respect to "Excluded Parties." As discussed above, wrap-ups are typically procured for larger projects. Given that larger projects carry larger risk and larger losses, it is of the utmost importance to ensure that any "Excluded Parties" carry adequate coverage. This is most commonly seen with respect to professional liability. Insurance markets have similar products available to design teams, owners, and contractors to ensure that adequate limits covering any professional losses can be obtained.

First, and most commonly utilized, is the Project Specific Professional Liability Insurance Policy. This type of policy is purchased by or for the design team and covers the prime design consultant and each of its subconsultants. The most significant advantage of a Project Specific Professional Liability Policy is that the available limits are intended only for one specific project. The policy limits would, therefore, not be subject to erosion by claims brought against those design professionals on other projects. The policy attaches to a specific project on a primary basis and converts the design team's own policies into excess coverage. Coverage will typically apply from the onset of design through the conclusion of construction with 3–10 year tail coverage included as well. Coverage can be extended to consultants, construction managers, and subcontractors performing delegated design work. Typically limits of $1,000,000 to $100,000,000 are available. Limits typically represent 10% of total construction value. Premiums can vary widely depending on the parties involved, geographic location of the project, and type of project.

Owners may also avail themselves of an Owner's Protective Policy. An Owner's Protective Policy is meant to provide coverage to an owner with respect to any losses resulting from a professional error or omission. This policy typically has two (2) ensuring agreements. The first protects the owner against third-party claims alleging professional errors and/or omissions. These types of losses are generally limited to defense costs, as owners do not typically engage in

professional design services. It is important to note that vicarious liability may be an issue in instances where the owner's design team fails to carry adequate limits of insurance. More importantly, the Owner's Protective Policy also provides for coverage in excess of its design team's policy limits. This coverage applies in the event that an owner files a claim and obtains a judgment against its design team in excess of the design team's professional liability insurance limits. This coverage can be quite important as owner's often carry outsized risk when engaged in large projects. Owner's Protective Policies are typically cheaper to procure than Project Specific Professional Liability Policies.

Contractors who are either: (a) engaged in design work directly; or (b) directly retain the prime design consultant, may also consider purchasing a Contractor's Professional and Protective Policy. This policy is most often carried by design builders who regularly engage in large projects. It is similar to the Owner's Protective Policy as it provides coverage for any vicarious liability that may exist, and also provides protective coverage in excess of the design team's professional liability policies.

Two other important types of coverages may also be necessary/beneficial to serve as adjacent risk transfer tools, alongside the policies already discussed. The first is a Payment and Performance Bond ("Bond"). A Bond is a contract entered into by three parties (owner, contractor, and bonding company) and most often comes into play if a contractor performs poor workmanship, fails to pay its subcontractors, or abandons a project. The Bond ensures that any defective work will be corrected, the subcontractors will be paid, and the project will be completed. The Penal Sum of the Bond is typically the amount of the construction contract between the owner and general contractor. The second product is Subguard, which provides coverage for losses or damages sustained in the event of a subcontractor or supplier's default.

Given the multitude of products available and the limitations of CIPS, it is of the utmost importance that the stakeholders understand the risks of a specific project and, perhaps more importantly, the risk transfer tools available to address the various losses that may occur.

C. History of Wraps in the US

In the United States, "CIPs were used for the construction of defense plants during World War II, New York City's Public Housing, the United Nations Building, the third Lincoln Tunnel, and the headquarters of Chase Manhattan Bank. Pacific Gas and Electric Company, the California utility, explored the concept of a CIP with its insurance brokers in the late 1930s and launched its first wrap-up in 1952. Bethlehem Steel Corporation sponsored a 'rolling wrap-up' at multiple plant locations during the 1960s and 1970s. A CIP covered the World Trade Center from 1975 to 1985. During the last 30 years, especially from the 1990s to the present, CIPs have become increasingly more common." The Wrap-Up Guide, 5th ed, International Risk Management Institute.

For condominium projects and multiple residence building projects, the use of CIPs has dramatically increased in the past 20 years. This has been driven by the increase in construction defect claims, especially the long-tail losses covered under typical completed operations hazard

provisions in commercial general liability policies. This, in turn, caused a lack of available insurance for contractors working on these types of projects, particularly in the western United States.

Now, CIPs are not at all uncommon. By way of example, Zurich has about 250 wraps on any given day and there are about 2,000 active wraps at any given time in the US.

D. The Basics

a. The Players

CIP Sponsor – Typically the developer / project owner ("OCIP") or the general contractor ("CCIP"). The sponsor selects the broker, administrator, safety professional, or other vendors—such as an on-site medical provider. The sponsor may choose to perform some of the administrative duties itself or delegate these activities to the CIP Administrator.

CIP Broker – The Broker markets the project to insurance carriers and places the CIP. These brokers are typically large and sophisticated. Some brokers have in-house administration capabilities and retain the functions of both broker and administrator. If not, the sponsor will choose an administrator (most likely, recommended by the broker). Payment for broker/administration services varies. It can be lump sum, based on payroll or overall contract value, or on a time and expense basis.

CIP Administrator – Sometimes called a Third-Party Administrator or TPA. Retaining a knowledgeable and experienced administrator is the key to realizing the savings possible with CIPs. The administrator is at the center of the implementation of the CIP. They must be knowledgeable regarding both large scale construction finance, safety and claims management. Some large CIP administrators are CR Solutions, Wrap Up Associates and Construction Insurance Partners. These three (3) companies make up about 80% of the market.

Some tasks the administrator may perform are:

- Negotiate terms and conditions with the CIP Insurer
- Draft the CIP Manual
- Review participants' insurance programs and compile the certificates of insurance
- Determine how to price the CIP participation (deduct or credit for saved insurance costs)
- Establish and operate the enrollment process
- Prepare progress reports
- Communicate with participants
- Review monthly payrolls and conduct the final audit

- Supervise the safety program
- Handle claim administration

General Contractor – Under a CCIP, the general contractor is the sponsor. Even under an OCIP, however, a general contract buy-in is key to success. Because of its contractual relationship with the subcontractors, the general contractor is in a prime position to ensure compliance with project safety program, which drives savings. The general contractor is also in daily contact with its subcontractors and can relay CIP information efficiently and effectively. Under an OCIP, an owner may need to add additional (administrative) responsibilities to its contract with the general contractor. For example, the owner may require the general contractor to participate in feasibility and other pre-construction meetings, subcontractor vetting and enrollment, claims management, program administration and/or final audit. These will increase the general contractor's costs and are typically captured with an increase to the general contractor's general conditions.

CIP Participants – These are the trade contractors or subcontractors. They are enrolled into the CIP and are required to flow CIP information and requirements downstream to their lower-tier subcontractors. This information would include advising them regarding how to price their work in light of the CIP deduct or credit. They are further required to incorporate the terms of the CIP in their subcontracts, including participation in the claims program and final audit.

CIP Insurer – The insurance carrier will underwrite the account, as well as negotiate the price of the policy and terms of coverage. It will provide the policy forms, manual and any related documents. Some of the insurers in the CIP marketplace are Traveler's, Hartford, Liberty Mutual, Chubb, Arch, Markel, and Zurich.

b. The Coverages

A typical CIP will provide commercial general liability and excess coverage, as well as worker's compensation protection. CIPs provide coverage for all participants, as defined within the policies, and the owners as named insureds through one or a series of policies. See *Guarantee Ins. Co. v. Old Republic Gen. Ins. Corp.*, 2012 WL 4468352, at *1 (S.D. Fla. Sept. 26, 2012). As noted above, there are some liability-only programs.

Other coverages can be added to a CIP and every program is different. For example, construction management and other professional liability coverage can be added, as well as builder's risk, environmental, and other coverages. Auto coverage is typically excluded.

Finally, a CIP provides no coverage for off-site contractors or non-enrolled subcontractors or other entities.

When considering a CIP, it is important to understand its terms and conditions and how they will apply to the specified project. Even with a CIP, a participant may need to rely on its own insurance to fill potential coverage gaps and correct other unintended consequences.

E. When Does It Make Financial Sense?

Financially, when does a CIP makes sense? For a combined-lines, single project CIP, total costs should be over $100MM. Rolling CIPs have a lower threshold because the bulk of the administration work is performed on the first project and does not need to be redone for the additional projects. For a rolling program, there should be about 10-15 projects over $30MM. Generally, two-thirds of existing CIPs are for single projects and one-third are rolling (multiple project) CIPs.

Typical deductibles / SIRs for combined-lines CIPs start at $250,000 per occurrence (liability and workers compensation) and $10,000 per occurrence for liability-only programs. The sponsor is typically responsible for any deductible / SIR but can force this obligation downstream via contract in a variety of ways.

F. The Feasibility Study

Initially, the sponsor will conduct an internal analysis of whether or not a CIP might work for them on a project. If the sponsor believes a CIP would be beneficial, it will then hire outside consultants to perform a more detailed analysis. The consultant can be a potential CIP administrator such as CR Solutions, Wrap Up Associates and Construction Insurance Partners, or a CIP Broker. Either way, it is important for the sponsor to work with a company that has knowledge of construction risk management and insurance, experience with CIPs, and access to industry information regarding rates and the insurance market generally.

Some of the considerations for the feasibility study include state law regulatory and legal requirements for worker's compensation and CIPs generally, minimum project size, coverage requirements, deductible / SIR, bidding requirements, type of job, project duration, safety, and claims management. This usually results in a formal feasibility report.

G. Pros

a. Cost Savings

A CIP permits the sponsor to purchase insurance at a lower cost than its general contractor and subcontractors. Because the sponsor is purchasing insurance for the project, the trade contractors remove insurance costs—which can range from 2% to 4% of construction costs—from their bids. If this outweighs the additional administrative costs, the project will save money on overall insurance costs. In addition, the sponsor has more bargaining power than each subcontractor individually and this too can result in savings.

A CIP also centralizes claim management from a dedicated source. This gives the sponsor more control in dealing with claims and losses and this can also result in savings. CIP programs focus on job site safety. This typically lowers loss frequency and severity. For example, some CIPs require on-site medical personal to treat (and document) injuries immediately. By managing losses effectively, OCIP sponsors typically save between .5% and 1.2% of construction costs.

b. Control Over Scope, Limits, and Gaps

Traditionally, each project participant would purchase its own insurance. Contractually, each lower-tier subcontractor would also agree to indemnify the owner and general contract. Further, they would agree to add both the owner and general contractor to their own insurance policies as "additional insureds." This traditional system of risk allocation is rife with potential problems. First, because these policies are purchased from different carriers, there is no uniformity in the policies' terms and conditions. This means that a subcontractor's policy might contain significant exclusions or other limitations, not present in a CIP. Second, most states have legislated "anti-indemnity" statutes negating the indemnity provisions in the subcontracts, the additional insured coverage, or both. Third, the limits of any lower-tier policies could be eroded by losses on other jobs, completely unrelated to the project. Fourth, a subcontractor's policy may lapse because of non-payment. A CIP removes all these risks.

c. Higher Limits

A CIP gives the sponsor more purchasing power than any individual project participant. Accordingly, the sponsor can negotiate better terms and conditions, and higher limits than the project participants ever could individually. Further, the sponsor can ensure that the limits of the CIP are dedicated to the project and will not be eroded by losses unrelated to the project. This gives the CIP sponsor control and certainty on the available limits applicable to the project.

d. Less Litigation

Another advantage of a CIP is reduced litigation among project participants. Under a CIP, most, if not all participants are insured under one policy. This means that a loss will be paid no matter which participant is at fault. Put another way, there is no reason to sue one another to allocate fault. This provides for expedient and cost-efficient resolution of claims, including costly construction defect claims.

In addition, the fact the all project participants are insured under one policy will preclude most subrogation actions, after a loss has been paid by the carrier. Generally, a carrier cannot pursue subrogation against another insured under that same policy. Further, the typical waiver of subrogation in the construction contracts will ensure this result.

e. Safer Job Sites

CIP proponents claim that CIPs result in safer job sites because of more comprehensive and coordinated safety programs. Effective CIPs will include a project-wide safety program, in addition to each subcontractor having his or her own safety program.

f. Loss Ratio Management

An additional benefit of a CIP is that it takes losses that would typically be covered by a participant's own policy and shifts those losses to the CIP. The ultimate benefit found herein is that any payment, defense or indemnity, will not be paid for by a participant's own carrier and, therefore, will not be reflected in the participant's loss history. This will have a positive result on the participant's premiums and deductible/self-insured retention for years moving forward.

H. Cons

a. Higher Administration Costs

Additional administrative costs are not simply limited to paying a TPA, such as CR Solutions, Wrap Up Associates and Construction Insurance Partners. The sponsor will also have to dedicate resources or hire others to provide critical interface with the administrator for on-going program management, safety, drug-screening, quality control, and risk management. Further, the sponsor may be required to supply an office trailer, medical trailer, and supplies to maintain an on-site presence. The sponsor will also incur legal costs for review of plan documents and claims.

b. Subcontractor Issues

Subcontractors may refuse to bid if they do not understand the insurance credit process inherent with the implementation of a CIP. Calculating this deduct/credit is not a simple matter. Further, they may be wary of potential responsibility for a CIP's large deductible or SIR, if that risk is pushed downstream contractually. Contractors with superior safety records will lose the benefit of favorable pricing on liability and worker's compensation coverages. Also, by removing a large project from its current insurance program, a subcontractor may lose the benefit of existing insurance cost savings based on volume. Finally, a subcontractor may balk at the increased administrative burdens under a CIP. For example, mandatory participation in job orientation, safety and other meetings, drug screening, learning the online management system, submitting monthly payroll reports, and following specified claims processes. These issues might result in a decrease in the number of subcontractors that actually bid the job, resulting in potentially higher costs.

c. Insolvency

This is the flip side to one of the key benefits of a CIP—consolidation. Under the typical risk allocation model, the subcontractors would be insured by a variety of different insurance carriers, thereby spreading the risk of carrier insolvency, bankruptcy, or liquidation. Under a CIP, there is only one liability carrier and only one excess/umbrella carrier for any given layer of

coverage. If that particular carrier goes out of business, the project is out of luck, unless the state's guarantee fund steps in and provides coverage.

d. Limited market

Not every broker can procure a CIP. (This is particularly true for combined-lines CIPs, as opposed to liability-only CIPs). The bigger and more complex the project, the more limited the market. Accordingly, negotiating with the carrier on price, terms and scope of coverage could present challenges.

e. Higher deductible / SIR

Depending on how the sponsor deals with the policy's deductible or SIR, this could be a very big issue for participants. For example, if this cost is passed through to the negligent party, a subcontractor that started a fire on site could be responsible for paying a deductible / SIR of hundreds of thousands of dollars. Moreover, if the subcontractor's own Commercial General Liability policy contains the standard Wrap Exclusion, no insurance proceeds will be available to fund that deductible / SIR. For this reason, experts suggest that the standard Wrap-Up Exclusion be removed from participating subcontractors' liability policies, and that these policies be endorsed to provide coverage in excess of the CIP coverage where differences in conditions are present.

f. Potential Conflicts and Eroding Limits

At the onset of a claim, it will be incumbent to select counsel to represent the CIP's "Enrolled Parties." This may be more difficult to accomplish than initially anticipated as most attorneys who specialize in construction litigation may have a conflict with respect to one or more of the "Enrolled Parties." A solution to this commonly encountered issue would be to, during the underwriting phase, designate via endorsement which lawyer and law firm will represent the parties in the event of a claim.

Furthermore, in the age of inflation (social and literal), rising litigation costs cannot be ignored. Attorneys' fees, expert fees, and vendor costs have all risen dramatically in recent years. The parties need to acknowledge this at the time of purchasing limits and understand that eroding limits policies can result in lower total limits available by the time a resolution is reached, or a judgment is rendered.

I. Mechanics and Administration

a. Bidding with Insurance Deducts/Credits

Under the traditional risk allocation model, each subcontractor pays for their own insurance and this cost is added to its cost of work or bid. Under a CIP, the subcontractors remove these costs because they are being insured from the project under the CIP. To accomplish this, bids can either exclude subcontractor insurance costs, or include them for later removal or deduction at the end of the project. The excluded price is sometimes called a net bid and the included cost is

sometimes called a gross bid. Under the "net bid" process, the subcontractor works with its agent or broker to identify the insurance costs (liability and worker's compensation) for the project and then deducts it. This does not require a great deal of administrative effort.

Under the "gross bid" approach, the subcontractor includes its insurance costs for the project. This option gives the sponsor more ability to identify the insurance costs and adjust them if they prove inaccurate. The "gross bid" option carries the most administrative burden and if subcontractors do not fully understand the process, they will be displeased when their subcontract amount is reduced at the end of the job. There are also many sub-sets of these two general accounting methods.

These costs are generated using estimates of the subcontractor's payroll for the work to be performed on the project. Specifically, estimated payroll for workers compensation and estimated payroll or initial subcontract value (without change orders) for liability. So, if there are changes in the project that impact a subcontractor's payroll, the CIP insurance deduction under the "gross bid" method will have to be adjusted at the end of the project. On the one hand, where payroll and contract scope have increased, thus increasing the subcontractor's insurance costs, the sponsor can increase the deduction. On the other, where payroll and contract scope have decreased and the subcontractor's insurance costs have gone down, the sponsor can decrease the deduction at the end of the job. Sometimes, however, a sponsor will increase the deduction if payroll and scope go up, but not give a corresponding decrease to the deduct if project payroll or scope goes down. It is up to the sponsor. The program may also require change orders to include insurance costs. Again, this adds to the administrative burden of the sponsor.

b. Enrollment

The CIP administrator is responsible for enrolling subcontractors into the program. This is an important process as it initiates coverage for the subcontractors. The subcontractor submits its enrollment form, the administrator determines whether the subcontractor is eligible (not excluded), and then issues evidence of enrollment. Typically, the enrolled subcontractors become named insureds on the CIP liability policies and are issued individual worker's compensation policies. Some subcontractors that may not be eligible to participate include those that do not spend payroll at the project site, such as suppliers, material vendors, haulers, and truckers. It is also common for CIPs to exclude certain high hazard operations, such as blasting, demolition, waste removal, and crane operation.

c. Claims

Subcontractors must be issued information about how to report accidents under the CIP. These procedures and forms can be issued as separate documents, or as part of the CIP manual. These documents typically provide information on how, when, and where to report claims and can include instructions on using the on-site medical services. These forms may include: an incident investigation form, an injured worker statement, a witness statement, a worker's compensation claim form, a liability claim form, and an authorization for medical treatment.

J. Coverage Issues

a. Wrap-up Exclusion Applying to Unenrolled or Off-Site Subcontractors

A CIP will not cover unenrolled subcontractors or off-site subcontractors. For accidents caused by those subcontractors, the owner and general contractor will look to the traditional risk transfer protection of additional insured status on those subcontractors' liability policies. For this reason, it is important for those unenrolled subcontractors or off-site subcontractors to review their own liability programs to ensure that any CIP exclusion will not prevent their own liability policy(ies) from responding to a loss.

There are many different CIP exclusions in the marketplace, but one example is ISO Wrap-Up Exclusion ISO CG 21 54 01 96:

> 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*. [Emphasis added].

As you can see, this CIP exclusion does not only exclude coverage if a subcontractor is actually enrolled in the CIP; it excludes coverage if a subcontractor is "involved" in a CIP. Because of this exclusion, an unrolled subcontractor or an off-site subcontractor will not have insurance coverage under their own liability policies. Further, this is not simply a subcontractor problem, as this exclusion may also nullify any contractually mandated additional insured protection for the general contractor and owner.

ISO recognized this problem and on December 1, 2019, issued new ISO form CG 21 54 12 19, which states that the wrap-up exclusion applies only if the unenrolled or off-site subcontractor is "enrolled in a 'controlled (wrap-up) insurance program' with respect to the 'bodily injury' or 'property damage' described . . . above at such location."

This language closed a major loophole but, as stated, these exclusions vary. For this reason, it is critical that the actual subcontractor policy provisions be reviewed to ensure that outdated or problematic forms that might compromise coverage are not being used.

b. Completed Operations Hazard

These wrap-up exclusions in subcontractor liability policies also create another issue. Because of these exclusions, participants do not have completed operations coverage for the project covered by the CIP under their own insurance programs. For this reason, the CIP must have extended completed operations hazard coverage. Typically, this coverage extends until the end of the applicable statute of repose, which in most states is ten (10) years.

Even if this coverage is purchased and present in the CIP, if the CIP is not renewed (for nonpayment or otherwise), or cancelled by the sponsor, the participants have no coverage for latent defect claims. These claims can take years to manifest and be extremely costly to repair. There are work arounds for these situations, but all pose challenges. As a result, it is important for participants, particularly in CCIP programs, to evaluate the risk of non-payment by the sponsor.

Additionally, participants should review their own liability coverage and attempt secure a modification of the wrap-up exclusion itself. One potential fix is an endorsement sometimes called a "difference-in-conditions (DIC)" endorsement. One such endorsement is ISO form 21 31 05 09:

> This exclusion does not apply if the consolidated (wrap-up) insurance program covering your operations described in the Schedule has been cancelled, non-renewed or otherwise no longer applies for reasons other than the exhaustion of all available limits, whether such limits are available on a primary, excess or on any other basis. You must advise us of such cancellation, non-renewal or termination as soon as practicable.

As you can see, this form maintains coverage under the participant's own liability policy, if the CIP becomes unavailable because of non-renewal, termination, or any other reason, except exhaustion.

c. Workers' compensation exclusive remedy

Do participants in a CIP enjoy workers' compensation immunity from claims asserted by injured employees of other participating companies? Courts are split.

By way of example, an Ohio court held that a subcontractor enrolled in a CIP has immunity from a tort claim for workplace injury by an employee of another enrolled subcontractor on the same project. The court held that the Ohio worker's compensation statutes "created a legal fiction that a self-insuring employer for a self-insured construction project was the single employer, for workers' compensation purposes, of all employees working for enrolled subcontractors on that project; accordingly, Ohio's workers' compensation scheme provided immunity to subcontractors enrolled in a self-insured construction project from the claims of employees of other enrolled subcontractors who were injured or killed while working on the project, provided that the injury, illness, or death was compensable under Ohio's workers' compensation laws." *Stolz v. J & B Steel Erectors, Inc*., 146 Ohio St. 3d, 2016-Ohio-1567.

To the contrary, the Mississippi Supreme Court held that an owner who provided workers' compensation coverage to employees of a subcontractor through a wrap-up insurance program (OCIP) was not considered to be the statutory employer of an injured employee of the subcontractor and could not claim worker's compensation immunity. The court reasoned that the owner had no duty as an employer or contractor to secure workers' compensation

insurance, and its act of voluntarily purchasing coverage did not change its status. *Thomas v. Chevron U.S.A., Inc*., 212 So.3d 58 (Miss. 2017).

d. The Cross Suits exclusion

This standard ISO exclusion precludes coverage for claims brought by one insured against another insured. This exclusion is meant to prevent, for example, related companies from suing each other in order to trigger insurance coverage under a policy where both are insureds.

This is a fine concept for a commercial general liability policy, but doesn't work as well with a CIP. Under a CIP, the owner, general contractor, and all subcontractors are insureds. A cross suits exclusion would bar coverage for any claims an owner might have against, for example, a general contractor for losses caused by it or its subcontractors' negligence. Similarly, under a CCIP, the general contractor would have no coverage for construction defect claims against its subcontractors. These types of construction defect claims are some of the major risks that should be covered by the CIP. If a cross suits exclusion is allowed to remain in a CIP, only losses caused by third parties would be covered. Such exclusions can also become relevant to an additional insured. In *Certain Underwriters at Lloyd's of London v. Sterling Custom Homes, Inc.*, 705 Fed. Appx. 259, 264 (5th Cir. 2017), the court found that a policy's cross suit exclusion unambiguously applied to both named insureds, as well as additional insureds. The provision excluded coverage for:

> "Bodily injury", "property damage", "personal and advertising injury" or any injury, loss or damage arising out of any claim, "suit", action or other proceeding or any allegation or expense initiated or caused to be brought about by any insured covered by this policy against any other insured covered by this policy.

The court reasoned that "the cross suits exclusion in accordance with its plain text—'any insured' means any insured entity, without regard to how the entity obtained insurance—does not nullify the policy's additional insured provision." *Id*.

It is important to strike this exclusion from a CIP's general liability policy *and* any excess or umbrella policies.

e. CIP excess / umbrella issues

Like the general liability policy forms, CIP excess and umbrella policies are not standard ISO forms. Even though these polices may be "follow the form" and (supposedly) track the language of the underlying general liability policy, it is critically important to make sure that these policies (the "excess tower") do not contain exclusions for completed operations hazard coverage and do not contain problematic "other insurance" clauses, which might improperly interact with a participant's own general liability coverage. It is further important that defense costs are not within the policy limits of these polices, e.g. defense costs (attorneys' fees and expert costs) do

not cannibalize available indemnity dollars. This is a big risk on every layer of excess protection because a failure to trigger an intermediate layer of coverage may bar access to any layers above it. It is critical to protect all layers of coverage because CIPs are designed to protect a project from *all* claims and losses. These losses can be quite substantial and easily exhaust several layers of coverage.

Additionally, in a situation in which an insured may have coverage under both a standard commercial general liability policy and a CIP policy, one should be particularly aware of the other insurance language within the policies. In *Zurich Am. Ins. Co. v. Acadia Ins. Co.*, 243 F. Supp. 3d 1201 (D. Colo. 2017), the court found the relevant commercial general liability policies to be excess to the CIP policy, stating in relevant part:

> Owner–Controlled Insurance Programs (OCIPs) were developed to make the insurance programs used primarily for construction projects more equitable, uniform and efficient. OCIPs eliminate the costs of overlapping coverage and delays caused by coverage or other disputes between the parties involved in a project and, at the same time, protect all the contracting parties by bringing the risk of loss from the project within the insurance coverage of the OCIP.
>
> Id. at 1208.

Conversely, in *Muss Dev., LLC v. Nationwide Ins. Co.*, 13 CV 4848 RJD MDG, 2015 WL 6160240 (E.D.N.Y. Oct. 20, 2015), the court found the commercial general liability policy to be primary to the OCIP. In that matter, the OCIP manual, which was incorporated into the subcontract agreement, required that the contractor name the owner as an insured on a primary and non-contributory basis. Therefore, the court concluded that the OCIP was excess to the commercial general liability policy. *Cf., Certain Underwriters v. Illinois Nat. Ins. Co.*, 99 F. Supp. 3d 400 (S.D.N.Y. 2015) (holding that the liability policy was primary, while the remaining available policies incorporated into an OCIP provided the same level of coverage, requiring a *pro rata* division of all costs in excess of the primary policy); *Axis Surplus Ins. Co. v. Glencoe Ins. Ltd.*, 139 Cal. Rptr. 3d 578 (Cal. Ct. App. 2012).

A. Statutes That Impact

Apart from insurance and worker's compensation laws that may impact the feasibility and implementation of a CIP, many states have enacted statutes specifically limiting when and how CIPs may be utilized in their states. These laws generally apply differently to private and public jobs.

Some states require a minimum total project cost before a CIP is permitted. For example, Alaska requires a total project cost of $50MM for public and private projects, Connecticut requires $100MM, and Arizona requires a total cost threshold of $50MM, but only for public works. Michigan does not allow workers' compensation insurance to be provided through a CIP unless

construction costs exceed $65 million, and authorization is given by Michigan's insurance director.

Other states provide specific reporting requirements and some issue rate and rule handbooks. California and Texas have enacted legislation requiring disclosure to subcontractors of key CIP provisions in bid and contract documents. Still others mandate specific safety standards or limit who is eligible to sponsor a CIP, or require approval from the state to use a CIP.

States typically don't regulate the terms and conditions of liability policies to be used on CIPs, but parties always need to be aware of a state's anti-indemnity laws and other legislation and case law impacting insurance generally.

B. Conclusion

CIP policies can offer great advantages over standard risk allocation methods. They can result in cost savings and increased control over the availability and quality of insurance available to cover losses on a project. They can also centralize and streamline the claims process and make for an overall safer job site. Obviously, CIPs only make financial sense on larger projects because of the up-front costs and administrative burdens ultimately chargeable to the sponsor.

Selecting an experienced team, particularly the CIP administrator, is key to the success of any CIP program. As discussed above, however, any feasibility study must include careful review of the liability terms and conditions to ensure any gaps are covered, and close review of all applicable laws and regulations.