UNDERSTANDING OCIP AND CCIP "WRAP" POLICIES

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Owner-controlled insurance programs ("OCIP's") and contractor-controlled insurance programs ("CCIP's") are being used with increasing frequency and on smaller projects then in times past. This article provides a basic explanation of OCIP and CCIP insurance policies and identifies potential areas of concern. Please note that every OCIP or CCIP policy is different, therefore, at a minimum, you should consult your legal counsel and insurance broker to ensure that you are fully covered on any particular project for all types of insurable loss.

WHAT ARE OCIP'S AND CCIP'S?

A.   General Explanation:

Owner controlled insurance programs (OCIPs) or contractor controlled insurance programs (CCIPs) are also commonly known as "wraps" or "wrap policies." In such policies, the developer, general contractor and all of the subcontractors become named insureds under a single general liability and/or workers' compensation insurance policy covering a single construction project, or in some cases, multiple projects. The OCIP/CCIP policy is either administered by the owner (thus, an OCIP) or the general contractor (thus, a CCIP). Such policies are obviously keenly distinct from prior methods where each contractor and subcontractor was to provide its own insurance coverage (and subcontractors were required to name the general contractor and owner as additional insureds).

B.   More Specifically, What Is An Owner Controlled Insurance Program?

The coverage provided by an OCIP is typically summarized in a document known as the

"OCIP Manual." The OCIP Manual also should describe the bid-deduct process, claims management and safety requirements. You should have a copy of the OCIP Manual at the time you are preparing your bid and be familiar with its terms and conditions as you prepare your bid.

If you are going to be part of an OCIP controlled project, then your subcontract price will ultimately be determined by subtracting the estimated cost of insurance for general liability and/or workers' compensation coverage under the OCIP policy from your bid.

C.   Which Trades Are Generally Covered Under An OCIP Policy?

Typically, the general contractor, eligible subcontractors (except those who are typically excluded (fabricators are a common example), all lowers tiers of subcontractors (with some exceptions; see below) and other parties enrolled at the sponsor's or underwriter's discretion.

Conversely, those parties engaging in demolition, hazardous materials contractors/transporters, architects, surveyors and engineers, vendors, suppliers, fabricators, material haulers, truckers, subcontractors not performing on-site labor and, sometimes, prime-tier subcontractors with contracts less than a certain amount (such as $5,000.00), are typically excluded under a traditional OCIP policy.

WHAT ARE THE KEY DIFFERENCES BETWEEN TRADITIONAL COMMERCIAL GENERAL LIABILITY ("CGL") COVERAGE AND OCIP'S?

Under the "traditional method," the general contractor and each subcontractor would have their own commercial general liability ("CGL") policies, and the subcontractors would name the general contractor and developer as "additional insureds" on their policy as well as provide broad indemnity agreements to the general contractor and owner/developer. In this circumstance, if there were 20 subcontractors on the project and each had a $1 million dollar policy limit, then

theoretically, there was $20,000,000.00 available from the subcontractors to fund any construction defect or injury claim, in addition to any money from the general contractor's policy. In such circumstances, there is a vast pool of money available to fund litigation and any resulting settlement.

Even under the pre-litigation and "right to repair" tenants of the Calderon Act (Civil Code section 1375) and SB800, the traditional model allows the attorneys and experts to run rampant and use this vast pool of resources to create an adversarial process that depletes the subcontractors' policy limits. For instance, the Building Industry Association once estimated that defense costs (attorneys' fees, expert fees and litigation costs) exceeded indemnity costs (damage claims) paid out by approximately 5-1. However, under an OCIP, the parties aren't suing each other, litigation can be avoided and, when examined in conjunction with the pre-litigation requirements of SB800 and the Calderon Act (California *Civil Code* section 1375); a tremendous amount of money can be saved should a claim arise under an OCIP policy project.

Under the OCIP model, however, there is only one "policy," and the policy limits are generally sufficient to cover any "construction defects" but nowhere near the amounts available if each subcontractor had its own policy. Furthermore, in a traditional construction defect lawsuit, the project owner or homeowners sue the developer and general contractor who in turn cross-complains against the subcontractors. The subcontractors will often file their own cross-complaints and each party will have its own legal counsel.

In the OCIP model, the entire claim will often be handled by one "administrator" with legal counsel and the various subcontractors do not need to have their own counsel. The benefits include (1) reduced legal, expert and litigation costs; (2) one policy with an overall lower limit but which should theoretically cost less than if each subcontractor had its own policy; (3)

speedier resolution of claims due to a central administrator and only one attorney resolving same; and (4) less "participation" in the claim resolution process from the subcontractors (which allows you more time to spend on working and less time wasted trying to assist your insurance-retained counsel in litigation).

It should be noted that OCIP policies are similar to the modern CGL policy in that they generally do not have a separate line for defense costs; i.e. defense costs, if litigation arises, come out of the policy limits.

WHY ARE OCIP's AND CCIP'S NOW BEING USED

ON SMALLER RESIDENTIAL PROJECTS?

Many pundits believe, as suggested above, that OCIP's are gaining in popularity because of widespread construction defect lawsuits. Many subcontractors, and some general contractors, are unable to obtain, or cannot afford the cost of, traditional CGL policies for residential projects, particularly condominium projects. In fact, many insurance carriers will exclude condominium or townhome work absent a huge increase in the policy price, which prevents many subcontractors from working on such projects.

IN AN OCIP POLICY PROJECT, I'M FULLY COVERED

FROM WHEN I START WORKING, RIGHT?

Not always; read the policy. First, determine if the enrollment date is prior to or after you started working on the project.

Some OCIP policies, but not all, provide a "basket" aggregate that combines operations losses and completed operations losses under one aggregate limit. However, you are only covered from the date you actually enrolled and the policy begins. Keep in mind that if you start working before being enrolled in the OCIP program for the project, you will need your own

policy(ies) to cover the time before (or after) the OCIP policy ends.

Also, be especially aware of whether or not a deductible or self-insured retention ("SIR") might apply. We saw one recent example where a claim was made by the homeowners and, upon receipt of the claim, the attorneys for the OCIP administrator demanded our client immediately remit the $25,000 self-insured retention ("SIR"). However, upon closer review we determined that a subsequent amendment to the OCIP policy had changed the SIR to a "deductible." Ultimately, the client would still likely be liable for a portion of the $25,000.00 but only (1) at the conclusion or resolution of the claim; (2) upon a proper apportionment and explanation from the administrator as to how the amount due was calculated; and (3) upon some reasonable basis that the client's work was a part of the claim.

In another recent case, our client asked us to review the insurance policy provisions and clauses in a subcontract for work on a small condominium project (6-units). The subcontract indicated there was an OCIP policy but many of the trades had started working before the OCIP policy administrator had completed enrollment. In fact, all subcontractors working before OCIP enrollment would be "on the hook" for any claims arising before the OCIP enrollment date. Furthermore, our client's CGL policy had previously excluded condominiums. Therefore, there was a potential concern of a gap in coverage if they started working before the OCIP enrollment was completed.

We also noted that the terms of the OCIP policy, as expressed in the subcontract, regarding an SIR or deductible were confusing and contradictory. The subcontract indicated that one or the other would apply and that, unless stated in the OCIP program manual, the SIR or deductible would be equal to the amount of the subcontractor's SIR or deductible under the subcontractor's CGL policy (for this particular client, that meant $25,000.00 and represented

approximately over one-fourth of the subcontract price).

The subcontract or OCIP policy manual should have clearly spelled out whether it would be an SIR or deductible and the amount should be, more appropriately, a pro-rata share of the trades and claims involved.

WHAT'S COVERED UNDER AN OCIP POLICY

This depends on the terms of the policy. Under a typical OCIP policy the following types of claims are generally covered: worker's compensation and employers' liability for all enrolled subcontractors' employees working at the project site, general liability for bodily injury and property damage claims; products and completed operations liability and, sometimes, excess liability.

However, builders' risk, the property of the subcontractors (whether owned, rented, borrowed equipment), materials which are not incorporated into the project, automobile liability; and the subcontractors' off-site workers' compensation and liability exposures, are typically not covered (although builders' risk is now being included with increasing frequency).

CHECKLIST OF THINGS TO LOOK FOR IN AN OCIP POLICY

As a general rule, you should familiarize yourself with the terms of the OCIP policy but also consult your insurance broker to determine if you are fully covered and your legal counsel to determine if there is potential exposure to your company outside the OCIP policy protections. It is important to avoid gaps in coverage and understand that, even under an OCIP, you could have exposure in the form of a deductible or SIR. In addition, you should determine the following:

- Who is the sponsor (owner/developer or general contractor)?
- Who/What is covered (design professionals, residential projects, completed

operations, etc.)?

- Is there a deductible or SIR? If so, which is it, how much, and to whom and when is it to be paid if a claim arises?

- Is my company covered from the date we started working (i.e. were we enrolled in the OCIP program policy at the time we started working)?

SUMMARY AND CONCLUSION

Most people understand the famous quote from Ben Franklin: "an ounce of prevention is worth a pound of cure." More appropriately, perhaps, is the concept that a little precaution before a crisis occurs is preferable to a lot of cost and expense to fix the damage afterwards. And remember that no two OCIP policies are identical. In an environments where virtually every tract home development is or will be involved in a construction defect lawsuit, the increasing use of OCIP's/CCIP's, and the current state of the construction economy, a contractor must be more careful than ever. As Plaintiffs' attorneys looking for more and more ways to line their pockets, it is more important than ever that you ensure you are fully covered to the maximum extent possible on any construction project. Always get a <u>written opinion</u> from your insurance broker regarding your potential coverage and exposure on any project, especially one involving an OCIP or CCIP policy. Finally, consult your legal counsel to gain a full understanding of the potential legal "fallout" should something go awry.