



BUILDING A BETTER WRAP-UP

COVERAGE ISSUES—WRAP COVERAGES/ CONTRACTOR NON-WRAP COVERAGES

Presented by

Scott R. Whiteside
Senior Vice President
Gallagher Construction Services

Douglas Bowring
Vice President
Gallagher Construction Services

As their popularity has grown, owner controlled insurance programs—or wrap-ups—have been the subject of much scrutiny. Critics question the ability of such arrangements to achieve their stated objectives, and claim these programs pit the owner and contractors as adversaries. Further, wrap-ups create potential coverage gaps in contractors' insurance programs and can hinder their competitiveness on other projects. Even supporters acknowledge that an owner's ability to meet its objectives for the OCIP depends heavily on how it manages the program—especially safety. In this session, attendees will hear experts discuss strategies for designing a wrap-up insurance program that address contractors' coverage and contractual concerns and provide appropriate incentives to get contractors on board. Find out how one organization realized annual savings of \$6 million by implementing an OCIP and by working with contractors to implement and enforce an aggressive safety management program. Finally, find out how other contractors and owners are utilizing the wrap-up concept and what kind of results they have realized on a sampling of projects.

Monday, November 13, 9:00 a.m.–5:00 p.m.



May we wrap that for you?

At ACE USA, our approach to wrap-ups is simple: every program is customized. Our National Wrap-Up Center, with dedicated resources in underwriting, claims management and risk control services, will design a program that makes sense — just for you. And with us doing what we do best, you're bound to look better yourself.

Take away the risk and you can do anything.

For further information, please email our National Wrap-Up Center Manager at: Barbara.Matthews@ace-ina.com.

ACE USA, headquartered in Philadelphia, is the U.S. operation of the ACE Group of Companies, headed by ACE Limited (NYSE: AGL). ACE USA provides insurance products and services through the U.S. operating subsidiaries. The ACE Group of Companies provides insurance and reinsurance for a diverse group of clients around the world.

ACE USA provides two types of risk control services. Insurance-related services are an adjunct to underwriting and support that function through risk assessment and improvement. Consultative services are sold directly to our clients for a fee. Neither is intended as a substitute for legal counsel, or to supplant any duty to provide a safe premises, operation, product or workplace.

The ACE Group of Insurance & Reinsurance Companies.

www.ancelimited.com



ace usa

Scott R. Whiteside
Senior Vice President
Gallagher Construction Services

Mr. Whiteside is one of the presenters for Monday's all-day seminar, "Building a Better Wrap-Up." He is a founding partner and senior vice president of Arthur J. Gallagher & Co., located in San Francisco. He began his insurance career in 1973 as an adjuster for a national insurance company. In 1982, he was appointed technical services manager (claims and loss control) for the San Francisco Office of Willis Corroon. He has developed into an expert in construction insurance claims involving large property losses and complex liability issues from both a coverage and indemnity perspective. Mr. Whiteside is a member of Arthur J. Gallagher & Co.'s National Wrap-Up Team and is a designated wrap-up "Center of Excellence," specializing in contractor controlled insurance programs. He has developed a program for residential builders for the difficult western United States market. Mr. Whiteside is also involved in new product development and recently launched an exclusive construction defect insurance program that is a useful tool in settling construction defect litigation. He is a member of the Property Claims Association of the Pacific and the San Francisco Insurance Forum and is an associate member of the National Association of Home Builders.

Lamberson Koster & Company is dedicated solely to serving the surety and risk management needs of the construction industry. It was founded in 1992 and is now a wholly owned subsidiary of Arthur J. Gallagher & Co.

Douglas Bowring
Vice President
Gallagher Construction Services

Mr. Bowring is one of the presenters for Monday's all-day seminar, "Building a Better Wrap-Up." He is a vice president at Arthur J. Gallagher in San Francisco. With a degree in business administration from the University of Georgia, Mr. Bowring began his insurance career in 1988 in the Los Angeles market and has continued this focus throughout California and the Midwest. This geographical diversity has given him a unique perspective regarding the tailoring of programs that address the traditional insurance needs of Lamberson Koster & Company's customers, as well as the structuring of alternative "risk financing" programs designed to help large customers take advantage of potential cash flow opportunities. He has been involved with industry associations such as Associated General Contractors, EUCA, CFMA, and the Road Builders of Michigan.

Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

COVERAGE ISSUES—WRAP COVERAGES/ CONTRACTOR NON-WRAP COVERAGES

***Scott R. Whiteside
Douglas Bowring
Gallagher Construction Services***

I. Introduction of Goal for Discussion

II. Introduction of Case Project Description

III. Introduction of Claim Scenarios

IV. Coverage Issues

A. General Liability

1. OCIP Coverages, Terms & Conditions
 - (a) Contractual Liability
 - (b) Broad Form Property Damage
 - (c) XCU Coverage
 - (d) Personal Injury Liability
 - (e) Employees as Insureds
 - (f) Completed Operations (Exhibit A)
 - (g) Action-Over Claims
 - (h) Named Insured Issues (Exhibit B & C)
 - (i) Knowledge of Occurrence (Exhibit D)
 - (j) Application of Limits —Annual Aggregate vs. Individual “per occurrence” Limit

(k) Force Majeure Coverage
(i.e.: Stadiums)

(l) Rework Endorsement

(m) Continuing Damage—Clash
Deductible

B. Contractor Coverages

1. Wrap-Up Insurance Extension:
Excess & DIC (Exhibit E)
2. Wrap Up Exclusion
3. Non-Owned Aircraft

C. Claim Scenario

D. Workers Compensation

1. Subrogation Issues
2. Who Has the Bidding Advantage?
3. Alternative Dispute Resolution
4. Claim Scenario

E. Builders’ Risk

1. Coverages
 - (a) Earthquake/Flood
 - (b) Resultant Damage from Design
Error

Wrap-Up

- (c) Landscaping
 - (d) Property while Waterborne
 - (e) Collapse
 - (f) Deletion of “Weather Conditions” exclusion
 - (g) Settling, Cracking, Shrinking, Bulging or Expansion of Foundations, etc.
 - (h) Overhead and Profit Included—Stated Amount
 - (i) Coinsurance Imposed
 - (j) Value of Earth Included (Site Preparation)
 - (k) How is “Flood” Defined
 - (l) How is “Water Damage” Defined
 - (m) Sewer Backup, Mudslide or Flow, Water Seepage Excluded
 - (n) Territorial Boundaries Adequate
 - (o) Reinstatement of Limits if Exhausted/Reduced
 - (p) General Contractor, Subcontractors and materialmen included as insureds
2. Claim Scenario

- F. Pollution Liability
 - 1. Claim Scenario
- G. Design/Build Professional Liability
 - 1. Are all Design and Install Subcontractors Included as Insureds
 - 2. Claim Scenario

V. Administrative Concerns

- A. Primary OCIP Administrator Responsibilities
 - 1. Loss Runs
 - 2. Claim Administration—During and Post OCIP
 - 3. Claim Review Coordination
 - 4. Workers Compensation Unit Statistical Reviews
 - 5. Enrollment of Subcontractors
- B. Miscellaneous Administrative Concerns
 - 1. Safety - \$ Incentives To General Contractor for Successful Program tied to Number of Lost Time Injuries
 - 2. Copies of Insurance Policies (Exhibit B)

VI. Contractor’s Checklist

CASE PROJECT DESCRIPTION

Project involves the rehabilitation and additional construction of a 20 story, steel frame mixed-use tower in a downtown business district. The final building will be used partially for office space, and the balance for residential condominiums. The existing structure is a 6 story office building which has been vacant for several years due to structural damage from an earlier earthquake.

In addition to the tower, the project included the rehab or construction of adjacent properties including five 2 story buildings to be used as a retail center. The existing structures are of brick construction and protected by the local historical preservation committee. Several of the existing buildings are currently occupied by tenants who expect to continue their use of the properties while construction is ongoing.

The entire project has a construction term of 3 years, after which severe liquidated damages will be imposed on the General Contractor.

Introduction of the OCIP

The project owner has been approached by ABC Insurance Broker who advocated the use of an Owner Controlled Insurance Program (OCIP), since the estimated cost of construction would exceed \$250,000,000. The owner was quickly convinced that the savings on the insurance costs for the project (expected 4-5%) would free-up enough additional capital to provide funding for another smaller project, as well as a statue of himself in the lobby of the tower.

The general contractor had already been selected, subcontractor packets had not yet gone out. The general contractor was advised that the owner was considering the use of an OCIP, at which time he asked to attend a meeting which was to include the owner and the owner's representative (ABC Insurance Broker). At this meeting, the participants discussed how the program would work administratively, how the subcontractors would be notified of the OCIP, and what responsibilities each party had.

Claim Scenario I

A hauler is delivering a rented crane (with operator) on a flat bed trailer to the job site. The off loading onto a

city street is being supervised by the steel-erection subcontractor. During this process, the weight of the crane collapses a portion of the street and tips over. The boom strikes the project killing the city inspector and an employee of the GC. The crane operator is injured when he jumps out of the crane. The fuel and oil leaks out of the engine and flow into the city storm drain.

ISSUES:

- Fatality to city inspector
- Fatality to GC employee
- Injury to crane operator (employee of crane rental company)
- Damage to the project
- Damage to the city property
- Damage to the crane
- Pollution coverage
- Reverse indemnity agreement between the rental company and contractor.

Claim Scenario II

The steel subcontractor manufactures most the steel floor supports off-site, based on the owner's specifications. Some supports must be manufactured in the field based on certain change orders. Four years after project completion, it is determined that the welds are cracking and the building is unsafe to occupy. It is red tagged by the city and the only tenant, a dot.com start-up, is forced to move out.

ISSUES:

- Completed operations coverage for the subcontractor
 - OCIP
 - Subs own program

- Off-site exclusion
- Adequate limits
- Damage to your work exclusion “That particular part...”
- Professional liability coverage

CLAUSES FROM OCIP PRE-BID INFORMATION MANUAL

EXHIBIT A:

Off-Site Exclusion

The Owner furnished insurance does not provide coverage for products liability to any insured party, vendor, supplier, material dealer or others for any product manufactured, assembled, or otherwise worked upon away from the Project site.

Demonstrates commonly restrictive version of the off-site exclusion. This could be better worded with the inclusion of language such as: “ ... except for that insured party who also installs such a product”.

CLAUSES FROM OCIP PRE-BID INFORMATION MANUAL

EXHIBIT B:

Commercial General Liability Endorsement

Named Insured Endorsement

Named Insured of the policy declarations is completed to read:

- (1) <<Company>>, and ...
- (2) All Contractors, all tiers of subcontractors, each separate contractor of <<Company>>, others to whom <<Short Name>> contracts to furnish insurance under this insurance program for this project but excluding vendors, suppliers, material dealers and others who merely make deliveries to or from the Project Site.

Shows that all contractors, especially the General Contractor, are to be considered Named Insureds, and as such, have the right to review and maintain for their own files, copies of the actual insurance policies, not just certificates of insurance.

Without these policies, the contractor cannot properly structure his primary insurance program around the OCIP. Also, his ability to defend himself down the line is limited without this policy.

CLAUSES FROM OCIP PRE-BID INFORMATION MANUAL

EXHIBIT C:

Damage to Your Work

It is agreed that Exclusion I. Is replaced by the following:

“Property Damage” to that particular part of “your work” that is defective or actively malfunctions.

This exclusion applies only to the “Products-Completed Operations” hazard. It does not apply to the damaged work or the work out of which the damage arises which was performed on your behalf by a subcontractor.

Helps clear up the “who is an insured” issue surrounding OCIPs and the “your work” exclusion. Additionally, confirm that a Severability of Interest clause provides coverage individually for each Named Insured.

CLAUSES FROM OCIP PRE-BID INFORMATION MANUAL

EXHIBIT D:

Knowledge and Notice of Occurrence Endorsement

It is understood and agreed that the following is added to Paragraph 2 of the Commercial General Liability Conditions:

Knowledge of an “occurrence, claim, or suit” by an agent, servant or employee of any Insured shall not in itself constitute knowledge of the Insured unless individuals in the following positions shall have received such notice from the agent, servant, or employee.

(INDIVIDUALS TO BE DETERMINED)

It is further agreed that knowledge of an occurrence by one or more Named Insured or Insureds shall not constitute knowledge of such occurrence by any other Named Insured or Insureds, and notice of any occurrence given to the company or any of its authorized agents by one Named Insured shall constitute such notice by all Named Insured and Insureds.

This, or a similar endorsement, should be attached to all contractor’s primary General Liability policies as well as that of the OCIP.

CLAUSES FROM OCIP PRE-BID INFORMATION MANUAL

EXHIBIT E:

Wrap-Up Insurance Extension

This endorsement changes your Contractor's Commercial General Liability Policy.

Wrap-Up Insurance. We'll apply this agreement as excess insurance for the conduct of your business in a construction project that's subject to a Wrap-Up insurance program in which you are or were a participant.

We'll apply this agreement as primary insurance for any coverages provided under this policy that are not covered under the Wrap-Up insurance program.

The premium charge for this coverage shall be ___% of the rate indicated in your policy, and using the same basis of premium, payroll or receipts, as used under your general liability coverage.

TOP 20 CHECKLIST ITEMS WHEN NEGOTIATING WITH AN OWNER'S OCIP REPRESENTATIVE

Insurance Coverage Issues:

1. How is completed operations coverage handled under the OCIP? What is the tail?

Many carriers offer 3–5 year tails, maximum. Some offer 10 years, especially on residential projects. Make sure that you obtain the maximum as it relates to latent defect statutes of limitations in your state.

On your primary GL policy, make sure that any OCIP exclusion is restricted to "insured wrap-ups".

2. How do you handle "off-site" manufacturing of products to be installed on site?

This is a completed operations issue. Make sure that coverage is not excluded for such things as mechanical systems assembled/fabricated by the contractor off-site and installed on-site. (See Exhibit A)

3. How do you handle a situation where a sub with a high experience modification results in greater insurance credits, seemingly rewarding the less safe sub?

This can be addressed in a number of ways, including instituting a prequalification program which narrows the ability to bid work with an experience modification no greater than "X". An alternative solution is to implement a credit/debit factor to equalize the impact.

4. How is subrogation of Workers Compensation claims handled?

Typical OCIP answer: It should not matter since all claims are paid from the same policy. The truth is that claims should be allocated to the responsible party via subrogation to the liability policy. What may appear to be a simple workers compensation claim may actually be the responsibility of another on-site contractor. An agreement from the carrier at the onset of the program is required. Look for waiver language in contract.

5. On what Additional Insured Endorsement are the individual contractors provided coverage?

All trades insured under the program should be named insureds. (See Exhibit B)

6. What are the policy terms, conditions and exclusions?

If more restrictive than a contractor's primary liability program, an OCIP Difference-In-Conditions endorsement should be attached to the contractor's GL policy (assuming that there is an OCIP exclusion attached). If unavailable, the OCIP exclusion should be limited to "insured OCIPs".

7. How is the discovery of on-site pollution handled?
8. Is there a reinstatement of limits if exhausted?
9. What are the applicable deductibles per line of coverage, and who is responsible for payment?
10. Are the excess liability layers follow form of the primary?
11. How are losses greater than the Excess Liability limits handled?
12. Does the Excess extend to the same completed operations period as the primary liability policies?
13. How is the builders risk policy structured in terms of coverage, deductibles, and exclusions...
 - Is earthquake and flood provided/applicable?
 - Is testing coverage provided?
 - Is coverage given for damage to existing or adjoining properties?
 - Is there adequate transit coverage for materials stored off-site?
 - Are time element or soft cost coverages given such as business interruption, delay in opening, etc?

Depending on what information is available on the project builders risk policy and how the Indemnification section reads, a general contractor may

wish to cover his exposure via a Difference-In-Conditions policy to fill any coverage holes or buy down large deductible responsibilities. (Please remember that the general contractor has a right to receiving a copy of the builders risk policy since he is an insured under this policy).

Ongoing Administrative Issues:

14. When will individual contractors receive copies of actual insurance policies?

Copies of policies are crucial for two reasons: First, a contractor will have a hard time structuring his primary program around those coverages given under the OCIP unless they have a copy of the actual OCIP policies. Second, it may become necessary to defend oneself in the case of a claim some years after the contractor has left the project. For this reason, it is important that the contractor maintain a copy of the policy indefinitely.

15. Who is responsible for reporting loss and payroll information for unit statistical reports?
16. Who will manage claims during the project? After the conclusion of the project?
17. How often will claim reviews take place during the project? After the conclusion of the project? How often will loss runs be issued?
18. Who will consolidate safety statistics?

For a General Contractor, these statistics may be used to offer incentive participation.

19. Who is responsible for monitoring Certificates of Insurance?

A costly issue for a General Contractor and one which should be considered in offering credits.

20. Is there a full time administrator from the OCIP Administrator (broker) dedicated to the project?