IRMI®

Workshop P

RESPONDING TO INSURER INSOLVENCY

Presented by

Mark E. Christensen
Managing Partner
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Rick Shamis
Executive Vice President
Willis

The recent demise of several large insurers, including Reliance, Fremont, and others, has left the construction industry with substantial uninsured exposures that have severely impacted profitability. What can a risk manager do to protect the company's interests when its insurer becomes insolvent? This session will walk attendees through the detailed provisions of the statutory guaranty funds and analyze business and legal options in responding to insurance insolvency. The speakers will show how to avoid additional liabilities arising from contractual obligations when your insurer becomes insolvent; offer insight into the unique impact insurer insolvency has on wrap-up programs, the role of the insured's broker in anticipating future coverage needs, and the likelihood of recovery from the insurer's estate via reinsurance or as an unsecured creditor; and provide claims and litigation management guidelines for claims that must now be handled internally.

Wednesday, November 19, 1:30–3:00 p.m. and 3:30–5:00 p.m.

Workshop P

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Susan Dunham
Director, Member Services
membership@cfma.org

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Mark E. Christensen
Managing Partner
Christensen & Ehret

Mr. Christensen is copresenting Workshop P, "Responding to Insurer Insolvency," on Wednesday. He is a respected trial attorney and former president of the Illinois Division of the National Association of Railroad Trial Counsel. He represents the interests of businesses and their insurers in catastrophic property and bodily injury claims. Mr. Christensen has a breadth of experience in products, construction, and directors and officers liability defense, having represented boat manufacturers, crane and hoist companies, construction contractors, and financial and nonprofit institutions in litigation throughout the Midwest. He is also coverage and reinsurance counsel for various London-based and domestic insurance companies and has an intimate knowledge of these practice areas, including coverage trial experience. Finally, Mr. Christensen has a unique maritime practice in admiralty claims, charterer's, and stevedore's liability and cargo loss in the Great Lakes region.

His educational background includes: Wheaton College (B.A., with high honors, 1977); Northwestern University (J.D., *cum laude*, 1982). Admitted to bar, 1982, Illinois and U.S. District Court, Northern District of Illinois including Trial Bar; 1989, U.S. Supreme Court; 1988, U.S. Court of Appeals, Sixth and Seventh Circuit; 1992, U.S. District Court, North Dakota; 1993, Western District of Wisconsin, Eastern and Western Districts of Michigan; 1994, Southern District of Illinois; 1999 Eastern District of Wisconsin. Member: Chicago and Illinois State Bar Associations; National Association of Railroad Trial Counsel; Association for Transportation Logistics and Law Policy; Committee Member, Board of Ethics, City of Chicago (1999–2001).

Rick Shamis
Executive Vice President
Willis

Mr. Shamis is copresenting Preconference Workshop 6, "Construction Insurance and Bonding Overview," on Monday, and Workshop P, "Responding to Insurer Insolvency," on Wednesday. He joined Willis in September of 1984, and is currently co-managing director—Construction Team Leader for the Willis Construction Practice in the Chicago office. He has also worked for Willis in Dallas; Charlotte, NC; and Atlanta. Prior to accepting his position in Chicago, Mr. Shamis served as the director of National Accounts for the Willis Construction Risk Management practice. His last 17 years of experience have been in casualty marketing, servicing, and troubleshooting for the risk management departments of contractors who are involved in large construction projects.

Mr. Shamis has also been involved in the program design and insurance/reinsurance marketing of owner controlled or contractor controlled wrap-up projects such as the Hartsfield International Airport Project, North East Electrification of Amtrak Project, and the Continental Airlines Expansion project.

Mr. Shamis is responsible for coordinating the delivery of construction risk management products and services to clients in Chicago and the surrounding area. Included in those responsibilities are leading the insurance and surety sales effort of large construction projects and individual contractors; managing all aspects of the account service work for clients; and remaining up to date on "state-of-the-art" coverage enhancements and program design issues. He is a results-driven professional who motivates employees and other team members to solve complex insurance and risk management problems for clients and prospects. He leads by example in the acceleration of Willis clients' most important projects and most vexing challenges. He has developed a network of relationships with senior home office and local underwriting staff of insurance and reinsurance companies that specialize in the construction industry.

Beyond assisting Willis staff, Mr. Shamis has taught many casualty coverage courses, has made presentations to state organizations such as the AGC and CFMA, and has been a frequent IRMI Construction Risk Conference speaker—earning IRMI's 1997 "Words of Wisdom" Award.

Mr. Shamis graduated from Northern State University in Aberdeen, South Dakota, in 1977 with a bachelor of science degree in Business Administration. He earned his Chartered Property Casualty Underwriter (CPCU) designation in 1985.

RESPONDING TO AN INSURER'S INSOLVENCY—AVOIDING THE SPECTRE OF AN UNINSURED LOSS

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Willis Construction of Illinois

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RESPONDING TO AN INSURER'S INSOLVENCY—AVOIDING THE SPECTRE OF AN UNINSURED LOSS

I. INSURER INSOLVENCY

A. Impact of Liquidation

1. Suspension of Obligations under Policies

Once an insurance company goes into liquidation, under various state departments of insurance regulation or pursuant to court order, all obligations under policies issued by the insurance company are cancelled, usually within 30 days of the court order. The judicial order in the *Reliance* liquidation read as follows:

> All policies and contracts of insurance, whether issued within the Commonwealth or elsewhere, in effect on the date of this Order shall continue in force only with respect to risks in effect at that time, for the lesser of the following: (a) thirty days from the date of this Order; (b) until the normal expiration of the policy or contract providing insurance coverage; (c) until the insured has replaced the insurance coverage with equivalent insurance with another insurer or otherwise terminated the policy; or (d) until the Liquidator has effected a transfer of the policy obligation pursuant to Section 221.23(8). All policies or contracts of insurance issued by Reliance are hereby cancelled and terminated for all purposes effective thirty days from this Order.

The impact of the policy's termination relieves the insolvent insurer from any defense obligation as well as any indemnity obligation. All insureds, third-party beneficiaries and/or claimants, guarantors, reinsurers and creditors of the insurer have claims against the insolvent insurer's estate.

2. Priority of Claims

Similarly to bankruptcy, a claimant's ability to recover depends on the priority of its claim based on the insurer's estate. Priority of claimants' claims falls into six broad categories that vary depending on the state's liquidation statute. Those categories are as follows:

a. Cost and administration of the estate;

b. All claims under the policies for loss, including third-party claims. This is a claim against an actual policy, including funding of claims by state guaranty funds;

c. Claims of debts owed to employees (usually with a cap);

d. Claims of the federal government;

e. General creditors' claims, refund and unearned premiums; and

f. Claims of shareholders or other owners.

Generally speaking, a class of claims must be paid in full before the next class of claimants are entitled to recover any percentage of their claims. The likelihood that there will be money for any claims after administration and policy claims is remote.

3. Termination of Reinsurance Obligations

Typically, an insurer not only issues direct insurance policies to insureds but is involved in facultative or treaty reinsurance obligations. The insurer's liquidation results in a termination of all reinsurance obligations. This impacts solvent insurers who establish fronting arrangements with the insolvent insurer. Fronting policy premiums become insufficient for what results in undertaking the entire risk on the loss. Usually, a whole new system of claim administration must be undertaken by the fronting policy insurers once the reinsurance support ceases.

4. Cut Through Reinsurance

The greatest asset of the insolvent insurer is its reinsurance. Insolvent insurers become tenacious about collecting reinsurance to meet the claims of the various classes of creditors. When an insured pays a claim with its own funds, or the guaranty fund pays, or a claimant takes a proof of claim against the estate as satisfaction for a loss, the insolvent insurer takes the position that these events trigger a reinsurance obligation to the insolvent insurer. The insured may attempt to directly seek the benefit of that reinsurance to recover its loss. However, unless there is a cut through reinsurance provision in the reinsurance contract between the insolvent insurer and its reinsurer, it is highly unlikely that the insured can reach those funds due to lack of contractual privity. Rather, the reinsurance is collected for the benefit of the entire insolvent insurer's estate.

B. Guaranty Funds

The fund of first resort for insureds facing an insolvent insurer is the applicable state guaranty fund. Guaranty funds collect a percentage of the premium on each policy to create a fund to protect certain classes of insureds when insurers become insolvent. Each state's guaranty fund is different and should be carefully scrutinized for its applicability to an insured's particular claim or loss. There are several key issues with respect to guaranty fund applicability. A tremendous resource is the National Conference of Insurance Guaranty Funds web site, which analyzes each state's statute. See www.ncigf.org.

1. Admitted or Non-Admitted Paper

The seminal issue is whether one's claim under a policy issued by an insolvent insurer qualifies for the respective state guaranty fund. Typically, an insolvent insurer is defined as a licensed insurer within the state against which a final order of liquidation has been entered by a court of competent jurisdiction in the insurer's state of domicile. This means that non-admitted paper, surplus lines policies and potentially excess and umbrella policies are not subject to the protective provisions of the guaranty fund.

2. Net Worth of Company

Almost every guaranty fund has a net worth provision that limits covered claims to those companies having a certain net worth on a particular date prior to the insurer's insolvency, usually the net worth on December 31 of the year immediately preceding the date of insolvency. The named insured's net worth is calculated by including the net worth of subsidiary corporations or affiliated corporations or even joint ventures. The public policy behind the net worth provision is to provide guaranty fund protection only for those insureds who have limited resources, and not insureds with substantial assets. For example, in Illinois, the net worth limit is $25 million. In Arkansas, it is $50 million. Although much of the guaranty fund revenue is generated from policies purchased by these insureds with substantial assets, these insureds unfortunately face the specter of handling the loss on their own, as they do not qualify under the net worth provision.

3. Limits on Guaranty Fund Payments

Most guaranty funds will pay up to policy limits for workers' compensation claims on behalf of insolvent insurers. However, on third-party claims or other lines of business, there may be caps in place under the state statute. Thus, if the cap is at $500,000 on a $1 million general liability policy, there remains a potential $500,000 exposure for the insured above the $500,000 guaranty fund limit and the remaining policy limit.

4. Deductibles

The guaranty funds also have deductible requirements varying from state to state on the claims they have paid. Usually the deductibles are minimal and, in many states, only $100. Given the substantial impact of insurer insolvency on the state guaranty funds, it would not be surprising if state legislatures begin to rewrite their guaranty fund statutes, which have not been updated for 20 to 30 years, to address the unique and substantial problems that have been generated by nationwide insurers writing large accounts.

5. Other Insurance

Many guarantee funds also have provisions that other insurance that should respond to the claim must be exhausted before the funds will respond to a claim arising from an insolvent insurer.

6. Automatic Stays

To sort out the problems as to whether a claim is a covered claim under a guaranty fund and the need for proper administration of those claims, many state guaranty funds have automatic stay provisions involving pending litigation where the insolvent insurer is a party or insuring a party. Once again, prudent insureds need to have their counsel seek an order staying the pending litigation until the defense of a file can be properly transferred to the appropriate guarantee fund representative for administration and payment of defense.

II. THE UNIQUE PROBLEMS OF WRAP-UPS

Particularly in the construction industry, wrap-ups have been used to minimize losses on large construction projects. Often the wrap-ups have either a high self-insured retention or a deductible. A loss fund is usually established and paid to the insurer to cover losses within that deductible or SIR, or a letter of credit is posted. The amount of the loss fund collateral or letter of credit may be merely for the SIR or deductible amount, or the total potential aggregate under the rolling wrap-up policy with limits that are reinstated annually.

A. Loss Funds—Where Are They? Whose Are They?

The key issues are who controls the loss funds, and what is the impact of the letter of credit once the insurer becomes insolvent. Due to the problems associated with the wrap-ups issued by Reliance, it may be prudent for insureds and their brokers to address this issue and draft protective wordings during policy bidding and placement. In the case of Reliance, the loss funds could not be returned to the insureds, but simultaneously could not be utilized to pay continuing claims within the deductible or SIR. Thus, the insureds were put in the position of continued claim administration paying new money to resolve the claims, and upon demonstration of resolution of those claims within appropriate reserves, loss funds were released, and/or the amount of the letter of credit was reduced. This has been and is a tremendous financial burden for insureds who also incurred administrative management costs of workers' compensation claims where a third-party administrator was no longer able to perform this service under its now ineffective contract with the insolvent insurer. In addition, defense costs were paid directly by insureds. In July 2003, guaranty funds in 25 states sued the Pennsylvania insurance commissioner seeking reimbursement for claim payments they had made to Reliance Insurance Company policy holders with large deductible insurance programs. At the time of the preparation of this handout, the issue as to whether the guaranty funds should be entitled to collateral supporting those deductibles still held by Reliance, was unresolved.

B. Contractual Liability Due to Absence of Insurance

When a wrap-up insurer becomes insolvent, it immediately creates a contractual liability for either the owner or the general contractor who agreed to purchase the wrap-up policy. The insolvent insurer leaves not only the purchaser of the policy bare but all participants and subcontractors. The issue is whether the purchase of a wrap-up policy of an A-rated or better insurer at the time of policy procurement is a sufficient defense to a claim for breach of contract when the insurer becomes insolvent. The owner or general contractor who purchased the wrap-up will claim that it fulfilled its contractual obligations by purchasing the policy from an appropriately rated company and that it is not the guarantor of the solvency of the insurer in the future. The contractor's position is that the owner agreed to provide continuing insurance throughout the duration of the project and its failure to do so leaving a gap in coverage before replacement coverage is purchased is a loss the owner agreed to undertake. Most of these issues have been resolved without litigation.

C. Tenders to CGL Carriers

When faced with the specter of an uninsured loss, the search for insurance begins. The first recourse is for the insured to tender to its own CGL carrier. There are typically four defenses to this tender: (i) specific wrap-up exclusion for the project in question; (ii) late "notice of occurrence"; (iii) "late notice of lawsuit"; and (iv) excess wrap-up endorsement. The specific wrap-up project exclusion is usually the death knell to any potential alternative coverage both under a GL and workers' compensation policy. The late notice of occurrence and/or late notice of lawsuit will depend on the actual gap between the normal notice date, the policy wording, and the applicable state law. If it is a prejudice late notice state, and the claim has been defended and is currently in litigation, these defenses are not as strong. Finally, with respect to the excess wrap-up endorsement, this endorsement typically reads that the GL policy is excess any valid and collectible wrap-up insurance or excess any claim covered by wrap-up insurance. Under both types of language, it is unlikely that the endorsement applies, as the wrap-up policy is no longer valid or collectible, and the claim is no longer covered by the wrap-up policy.

D. Tenders to Other Subcontractor Insurers

An additional source of potential coverage is to tender to another contractor's insurer. Whether certificates of insurance are issued may or may not be determinative of coverage based upon applicable state law. Frequently, certificates of insurance are not required because the project was set up with a special wrap-up insurance endorsement.

Because many contractors have standard contracts, there may be conflicting language between the wrap-up insurance endorsement setting up the wrap-up program, and the normal insurance provisions requiring subcontractors to provide additional insurance coverage. This had led to some coverage litigation as to whether the additional insured coverage is triggered under the respective broad form additional insured endorsements of the subcontractor GL policies when the tender is made. The typical policy defenses of late notice and other insurance are also being asserted.

E. Indemnification

Notwithstanding any of the contractual insurance agreements under a wrap-up program between the owner and contractor or the contractor and the subcontractor, almost every contract contains an indemnification clause. Thus, while a contractor may have expected the owner to provide wrap-up coverage, the last thing the contractor expected was that the owner would turn to the contractor and request indemnification for all uninsured losses arising from an insolvent wrap-up insurer pursuant to the indemnification agreement in the contract. In wrap-up project, construction attorneys, insurance directors and risk managers must carefully scrutinize the indemnification agreements to prevent the purchaser of the wrap-up coverage from making an indemnification claim when the owner has contractually failed to provide viable wrap-up coverage for the duration of the project.

F. Resolution of Contractual Disputes Arising Out of Insolvency

Most construction contracts contain provisions regarding exhaustion of contractual remedies before litigation can ensue under the contract. These provisions control and apply to an insolvent insurer situation in a wrap-up program. Thus, notice of the general contractor to the owner of uninsured claims and requests pursuant to the contract of an adjustment to the contract price must be made on a timely basis in order for the contractor to avoid losing its rights. Once the contractual remedies are exhausted, then arbitration or other forms of litigation can be pursued to protect one's interests. During this exercise of contractual remedies with certain time frames, the employer of an injured worker has a continuing statutory obligation to make temporary disability payments, payments of medical bills, and other payments under the respective workers' compensation acts. This presents an immediate financial burden to the contractor in undertaking the administration of the workers' compensation claims and avoiding liability as an employer through payments of those claims. Tough bargaining usually ensues over this immediate financial issue and ultimately can be resolved through change orders and approval of additional cost under the contract. The continuing obligation to pay workers' compensation benefits as an employer, which was delegated to a third-party administrator under a wrap-up program, cannot be ignored, or additional liability to the employer may be incurred.

III. MANAGEMENT OF UNINSURED LOSSES

A. Who Monitors Workers' Compensation Claims?

1. Investigation

Upon the liquidation of an insolvent insurer, contractors need to immediately investigate how many pending workers' compensation claims are present, the status of the investigation of those claims as to whether they arose out of employment, the status of payment of those claims by third-party administrators, and an accounting of funding of the third-party administrator's accounts responding to those claims. An updated loss run from the third-party should be obtained. Generally, it is wise for someone within the construction company's insurance department to take the point on these issues.

2. Rehabilitation

Frequently, on serious injury cases, a rehabilitation plan with a case manager or a rehabilitation nurse is put in place to facilitate recovery of the worker. Contracts between the third-party administrator and/or the insurer and the case management worker need to be obtained and reviewed and decisions made as to whether that continuing expense should be undertaken by the contractor to get the injured worker back to work.

3. Payment of Benefits

A funding mechanism needs to be established for interim payment of benefits pending an undertaking of the insolvency by the guaranty fund or change order.

B. CGL Losses

1. Who Is Defending You?

Frequently, insurers retain defense counsel in third-party claims. Upon insolvency of an insurer, the insured needs to verify exactly who is defending its interests and who is protecting its now potentially uninsured exposure in the pending litigation. Interim retention agreements should be explored, including substitution of counsel, should current defense counsel need to be changed. The ability to stay the pending litigation under the guaranty fund statute is critical at this time in order for the proper due diligence to be undertaken to maintain the contractor's defense pending a potential uninsured loss.

C. Budgets

If it is confirmed that the loss will remain uninsured and now become an exposure to the construction company impacting its net profit, then it is important for the insurance department or risk managers to develop litigation management guidelines and require budgets of defense counsel to control litigation costs. Aggressive exit strategies should be explored, and reporting requirements clearly articulated and put in place.

D. Settlements

The existence of an uninsured loss as a result of the insurer insolvency can be used as a negotiating tool to achieve an early settlement in the case, thereby decreasing potential costs over time. In addition, if there are aggregate issues within the policy year, it may be prudent to evaluate whether settlement of various large claims, which are clear liability cases be achieved early to exhaust the aggregate and place the defense obligation and any further settlement of other claims within the policy year on the excess insurer.

Insurer Insolvency

HISTORICAL BACKGROUND

- AM Best Rating "E" – Under Regulatory Supervision
- AM Best Rating "F" – In Liquidation
- From 1992 to 2002 281 Property/Casualty companies became insolvent or were under Regulatory Supervision
- 30 in 2000; 30 in 2001 and 38 in 2002 compared to 7 in 1999 and 18 in 1998

Insurer Insolvency

HISTORICAL BACKGROUND, *continued*

- Reason for so many Insolvencies:
  - Catastrophic Events
  - Accumulation of years of inadequate pricing and loss reserving
  - Unsustainable growth levels
  - Declining of Investment Income

Insurer Insolvency

***HISTORICAL BACKGROUND**, continued*

- **Future:**
  - In the near term it is anticipated that the P/C insurance industry could experience an elevated rate of insolvencies
  - Year end 2001 saw investors contribute huge amounts of capital to the market
  - Year end 2002 saw an erosion of capital because of loss reserve strengthening and investment losses

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Insurer Insolvency

***HISTORICAL BACKGROUND**, continued*

- **Future:**
  - Compounded annual rate increases and improved underwriting fundamentals will help some carriers
  - Combined (loss/expense) Ratios are starting to fall below 100%
  - Insurers must maintain strong balance sheets, conservatively set loss reserves, AND consistently adhere to strict underwriting disciplines

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Insurer Insolvency

SUSPENSION OF POLICY OBLIGATIONS

- Termination of Indemnity
- Termination of Defense
- Unfunded Settlements
- Uncollectible Judgments

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Insurer Insolvency

PRIORITY OF CLAIMS

- Administration of Estate
- Claims Under Policy For Loss (Guaranty Funds)
- Debts Owed Employees
- Federal Government
- General Creditors, Refunds, Unearned Premium

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Insurer Insolvency

TERMINATION OF REINSURANCE OBLIGATIONS

- Facultative
- Treaty
- Fronting Policies

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Insurer Insolvency

CUT THROUGH REINSURANCE

- Reinsurance Agreement – contract between ceding insurer and reinsurer
- Privity of Contract – contractual relationship between two parties
- "Cut Through" Provision changes this relationship
- Provision: Endorsement or Clause
- Soft Market

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Insurer Insolvency

CUT THROUGH REINSURANCE, ***continued***

WHY use a "cut through"?

Insured:

- ✓Provides "Potential" Security from Insurer Insolvency,
- ✓Avoids filing claims with state Guaranty Funds, thus providing more control over claims during insurer insolvency

Insurer and Reinsurer:

- ✓Insurer can attract more and larger prospects because the "cut through" gives them financial strength,
- ✓Reinsurer can gain the opportunity to sell more reinsurance especially at times when growth is essential to a reinsurer

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Insurer Insolvency

CUT THROUGH REINSURANCE, ***continued***

- **Duplicate Liability – Reinsurer pays twice:**
  - **Once to the insured by use of the "cut through"**
  - **Once to the receiver/liquidator by use of the reinsurance agreement**
- **Does the use of a "cut through" always benefit insured?**
  - **Case Law**
  - **State Guaranty Fund Associations**
- **Reinsurance for Benefit of Estate**

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Insurer Insolvency

***CUT THROUGH REINSURANCE**, continued*

- Settlement or Judgment Triggers
- Insured Proof of Claim
- How Insured Recovers

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Insurer Insolvency

GUARANTY FUND

- Purpose
- Funding
- Order Of Liquidation

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Insurer Insolvency

GUARANTY FUND, continued

- Issues and Concerns:
  - Guaranty Fund – Licensed Insurer Premiums
  - Large Insured Funds But Receives No Benefits
  - No Guaranty Fund Protection For Unlicensed Insurers
  - Business Consideration of Surplus Lines
  - Total loss of control of the claims handling process
  - Problems with Loss Dollars greater than the "Basket Aggregate" or "Maximum Premium" attachment

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Insurer Insolvency

GUARANTY FUND, continued

- Net Worth Limitation:
  - Net Worth On 12/31 Of Preceding Year
  - Precludes Participation
  - Subsidiaries/Partners/Joint Ventures
  - Public Policy

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Insurer Insolvency

GUARANTY FUND, continued

LIMITS ON GUARANTY FUND PAYMENTS

- Type Of Claim:
  - ✓ Workers' Compensation
  - ✓ General Liability
  - ✓ Property
  - ✓ Builder's Risk
  - ✓ Excess

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Insurer Insolvency

GUARANTY FUND, continued

LIMITS ON GUARANTY FUND PAYMENTS

- Caps
- Deductibles or SIR
  - ✓ Under Policy
  - ✓ Under Statute
- Other Insurance, Other Funds

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Insurer Insolvency

GUARANTY FUND, continued

- Which Guaranty Fund?
  - Domicile/Residence
  - Location Of Loss – First Party Insurance
  - Examples:

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Insurer Insolvency

GUARANTY FUND, continued

- Delaware Insurance Guaranty Association Act

The claimant or insured is a resident of this State at the time of the insured event. For entities other than individuals, for purposes of this chapter, the state of residence of a claimant or insured shall be the state in which that entity has a principal place of business most closely related to the claim.

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Insurer Insolvency

GUARANTY FUND, *continued*

- Illinois Guaranty Fund

The claimant or insured is a resident of this State at the time of the insured occurrence, or the property from which a first party claim for damage to property arises is permanently located in this State or, in the case of an unearned premium claim, the policyholder is a resident of this State at the time the policy was issued; provided, that for entities other than an individual, the residence of a claimant, insured, or policyholder is the state in which its principal place of business is located at the time of the insured event.

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Insurer Insolvency

AUTOMATIC STAY

- Provision
- Foreign Court
- Uniform Liquidation Statute

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Workshop P

Insurer Insolvency

FILING CLAIM

- Procedure
- Timing
- Failure To Meet Deadline

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Insurer Insolvency

OCIP/CCIP POLICIES

- Hypothetical:
  - Municipal Owner purchases six-year wrap-up policy (WC/GL) for construction of airport with annual reinstatement limits of :
    - ✓ $1,000,000 WC/EL with $100,000 deductible per accident, and

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Insurer Insolvency

OCIP/CCIP POLICIES, continued

- ✓ **$1 million per occurrence, $2,000,000 general aggregate, and $100,000 deductible per occurrence GL,**
- ✓ **Both policies from Unreliable Insurance Co.**

Over 100 WC policies are issued, and Municipal Owner pays $5,000,000 to Unreliable for loss fund. At the beginning of year four, Unreliable goes into liquidation. The loss fund has a balance of $2,500,000.

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OCIP/CCIP POLICIES, continued

OWNER

Purchases OCIP from Unreliable Ins. Co (URIC) and issues WC/GL policies to OWNER, GC and all Subcontractors. Purchases UL from ABC Ins. Co.

General Contractor

✓URIC WC/GL; ABC – UL : Policies
✓GC's WC/GL Ins. Co. issues exclusion for work performed in OCIP,
✓Signs hold harmless/indemnity agreement and agrees to indemnify OWNER for any and all claims.

Sub-contractor

✓URIC WC/GL; ABC – UL: Policies,
✓Sub's WC Ins. Co. issues exclusion for work performed in OCIP,
✓Sub signs Indemnity with GC

Sub-contractor

✓URIC WC/GL; ABC – UL: Policies,
✓Sub's WC/GL Ins. Co. issues exclusion for work performed in OCIP,
✓Sub signs Indemnity with GC

Sub-contractor

✓URIC WC/GL; ABC UL: Policies,
✓Sub's WC/GL Ins. Co. issues exclusion for work performed in OCIP,
✓Sub signs Indemnity with GC

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***OCIP/CCIP POLICIES*, continued**

OWNER

Purchases
Purchases UL from ABC Ins. Co.

General Contractor

✓ ; ABC – UL : Policies
✓ GC's WC/GL Ins. Co. issues exclusion for work performed in OCIP,
✓ Signs hold harmless/indemnity agreement and agrees to indemnify OWNER for any and all claims.

At the start of the 4th year, URIC files liquidation making the WC/GL policies unusable. What are the options for each of the parties?

Sub-contractor	Sub-contractor	Sub-contractor
✓ ; ABC – UL: Policies, ✓ Sub's WC Ins. Co. issues exclusion for work performed in OCIP, ✓ Sub signs Indemnity with GC	✓ ; ABC – UL: Policies, ✓ Sub's WC/GL Ins. Co. issues exclusion for work performed in OCIP, ✓ Sub signs Indemnity with GC	✓ ; ABC UL: Policies, ✓ Sub's WC/GL Ins. Co. issues exclusion for work performed in OCIP, ✓ Sub signs Indemnity with GC

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Insurer Insolvency

***OCIP/CCIP POLICIES*, continued**

Owners' Options

- **Seek Return Of Loss Fund**
- **Process Change Order For Contractor Purchased Coverage**
- **Explore Cut Through Reinsurance**
- **Facilitate Guaranty Fund defense of WC/EL And GL Claims**

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Insurer Insolvency

OCIP/CCIP POLICIES, continued

- **Owners' Options**
  - Exercise Indemnity Agreement With GC
  - Raise Taxes
  - File Claim
  - Hope GC Misses Required Contractual Remedies

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Insurer Insolvency

OCIP/CCIP POLICIES, continued

- **General Contractor Options**
  - Guaranty Fund
  - Assert Breach Of Contract To Owner for WC and GL Claims
  - Preserve Contractual Remedies
  - File Third-Party Claims

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Insurer Insolvency

OCIP/CCIP POLICIES, continued

- General Contractor Options
  - Indemnity Request of Subcontractor Employer
  - Tender To Their Own GL Insurer
  - Tender to Subcontractor Insurers
  - Notice
  - Exclusions

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Insurer Insolvency

OCIP/CCIP POLICIES, continued

- Subcontractor Options
  - Guaranty Fund
  - Breach Of Contract
    - Exercise Contractual Remedies/Change Order
  - Tender to GL Carrier

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Insurer Insolvency

OCIP/CCIP POLICIES, continued

- Insurer Defenses
  - Notice Of Occurrence
  - Notice Of Lawsuit
  - Excess Wrap-up Endorsement
  - Wrap-up Exclusion

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Insurer Insolvency

MANAGEMENT OF UNINSURED LOSSES

- Monitoring Workers' Compensation Claims
- Third-Party Administration
- Rehabilitation/Case Management Workers
- Funding Mechanism Owners' Options

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Workshop P

Insurer Insolvency

THIRD-PARTY GL CLAIMS

- Evaluate Defense Counsel
  - Interim Retention Agreement
  - Automatic Stay
- Litigation Management Guidelines
- Budgets
- Settlements Owners' Options

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Insurer Insolvency

Miscellaneous Ideas

- Ask your carrier who underwrites reinsurance treaties
- Seek "cut through" endorsement whenever possible after proper research
- When involved in OCIP/CCIP's, ask your carrier to provide excess coverage for General Liability
- If you are in a Loss Sensitive program:
  - Accelerate the payment of claims to the extent you can
  - Work as diligently as possible to reduce Collateral
  - Incurred Loss Programs or Paid Programs collateralized by cash could create added Risk for an insured
  - Seek reimbursement from "Second Injury" funds, if applicable, as soon as possible
  - Address insurer insolvency in TPA contracts whenever possible

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