

Workshop M4

Monday, October 27, 9:00 a.m.-noon and 1:30-4:30 p.m.

BUILDING A BETTER WRAP-UP

Presented by



Jill B. Berkeley
Partner
Howrey LLP



Jim Gloriod
Managing Director
Aon Risk Services

Wrap-up insurance programs are a significant segment of construction insurance. While wrap-ups offer a number of advantages, including potential cost savings and consistency in coverage, they also pose some significant challenges. This workshop outlines strategies for improving the effectiveness of wrap-ups, from the design of coverages to defense of claims.

- Identifies potential coverage gaps in participating contractors' insurance programs and makes recommendations for filling these gaps.
- Provides suggestions for improving the way wrap-ups are administered and serviced.
- Offers insight into the complexities of defending multiple parties against claims and the benefits of a properly drafted joint defense agreement.

THE CONSTRUCTION EXPERTS®

“Aon has been a great partner in helping us lead the industry in innovative solutions to complex problems. Hands on and working smart is a key to Aon’s excellence.”

Robert G. Clark
Chairman and CEO
Clayco, Inc.

Built by Clayco, Inc.

Protected by Aon Construction Services Group.
Protect Your Business From The Ground Up.

built by Clayco, Inc.

CHAIFETZ ARENA AT SAINT LOUIS UNIVERSITY



For more information contact
Aon Construction Services Group
at 888.678.7310 or www.aon.com/construction.

protected by

AON
Construction Services Group

Jill B. Berkeley
Partner
Howrey LLP

Ms. Berkeley is one of the presenters for Workshop M4, "Building a Better Wrap-Up," on Monday. She is a partner in the Chicago office of the law firm Howrey LLP, where she co-chairs Howrey's national Insurance Recovery practice. She has concentrated in insurance law and coverage litigation for over 25 years, including the supervision of tort and coverage litigation on the primary and excess levels. Ms. Berkeley has extensive experience in the representation of insurers and insureds in coverage litigation involving declaratory judgments, bad faith, toxic tort and hazardous wastes, and excess liability matters.

Ms. Berkeley is an active member of TIPS and has held various committee and leadership positions, currently serving as chair of the ICLC. She is also a frequent speaker and has been widely published on insurance, self-insurance, and risk management issues. Ms. Berkeley is active in the American Bar Association, the Illinois State Bar Association, and the Association of Professional Insurance Women. Since 1986, Ms. Berkeley has served as author and executive editor of the *CGL Reporter*.

Ms. Berkeley graduated Phi Beta Kappa, *magna cum laude*, with a bachelor of arts degree from the University of Michigan in 1972 and received her juris doctor degree from Northwestern University School of Law in 1975.

Jim Gloriod
Managing Director
Aon

Mr. Gloriod is one of the presenters for Workshop M4, "Building a Better Wrap-Up," on Monday. He is a managing director Strategic Account Management in the Saint Louis office of Aon Risk Services. He has 18 years of insurance experience including 10 years with Aon. He specializes in bringing value to global risk management clients with a concentration on energy and construction industry risks. In the past year, he has assisted in the design, development, and implementation of six wrap-up projects, including the largest energy construction project in the Midwest. He has extensive experience in developing strategic solutions to complex claim and coverage issues, including wrap-up and construction defect claims involving multiple insurers.

In 2008, Mr. Gloriod was selected as a Risk & Insurance Power Broker. He is also a member of the American Bar Association, TIPS, and the Missouri State Bar Association. He has spoken at numerous events, including the American Bar Association, Risk & Insurance Management Society, and other industry conferences.

Mr. Gloriod graduated with a bachelor of arts degree in economics from Trinity University and received his juris doctor degree *cum laude* from Saint Louis University School of Law.

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.

Building a Better Wrap-Up: Defending Claims

**Presented By:
Jill B. Berkeley
Howrey, LLP
Chicago, IL**

**Jim Gloriod
Aon Risk Services
St. Louis, MO**

GENERAL OVERVIEW

- Provisions of Wrap-Up That Impact Claims Handling
- General Assumptions re Defense
- Coordinating Insurance Provisions with Defense
- Conflicts of Interest
- Hypotheticals re Conflicts of Interest

2

Provisions of Wrap-Up That Impact Claims Handling

- Business Deal Must Reflect Wrap-Up Concept
- Provisions in Owner-General Contractor Agreement
 - Indemnity
 - Additional Insured Requirements
 - Off-Site Insurance Requirements
 - Wrap-Up Specifications
- Provisions in General Contractor-Subcontractor Agreement
- Wrap-Up Manual

3

Provisions of Wrap-Up That Impact Claims Handling (continued)

- Define Wrap Insurance in Contract and Manual
- Coordination between Builder's Risk and Liability Insurance
- Joint Defense Agreement
- Specify Responsibilities of Wrap-up Procurement
- Coordinate with Off-Site Work Insurance
- Definition of Named Insured
- Completed Operations vs. Products Exposure

4

General Assumptions re Defense

- Claims Against Multiple Insureds
- No Cross-Claims or Finger-Pointing
- Employer Not Named in BI Claims by S/C Employees
- Joint Defense Must Avoid Adversity Among Defendants
- Insurer-Selected Counsel
- Wrap Primary and Umbrella Policies Applicable

5

Coordinating Insurance Provisions with Defense

- No Tender as Additional Insured to S/C Insurer
- Protect Employer Liability Cover in Actions Over
- No Allocation of Fault
- No Claim for Indemnity
- Self-Insured Retention or Deductible
- Wrap-Up Exclusion
 - Insolvency of primary wrap insurer
 - Exhaustion of primary wrap insurer
 - Denial of coverage
 - Off-site work

6

Coordinating Insurance Provisions with Defense (continued)

- Post Substantial Completion Punch List Work
- Warranty Work versus Occurrence
 - No voluntary payments defense
 - No late notice
- No Faulty Work Exclusion
- Completed Operations Period
 - Define when it begins in the contract
 - May not be the same for all parties
 - Limits per occurrence/aggregate

7

Coordinating Insurance Provisions with Defense (continued)

- Focus on Risk Reduction Rather Than Risk Transfer
- Avoid Chasing Uninsured Subcontractor
- Unified Defense
- Protect Attorney-Client Privilege
- No Secrets Rule
- Multiple Party Representation Engagement

8

Conflicts of Interest

- Conflicts Arising from Representing Multiple Defendants
 - Business interests of contracting parties
 - Payment to employee of subcontractor
- Conflicts Arising from Reservation of Rights by Insurer
 - Covered damage vs. non-covered damage
 - Intended and expected
 - Post substantial completion work
 - Number of occurrences

9

Conflicts of Interest

- Independent Counsel
 - Can erode limits
 - Limited communication with insurer
- Multiple Counsel
 - Can erode limits
 - Conflicting information re liability and damages

10

Hypothetical re Conflicts of Interest

- Bodily Injury Claim by Employee of Subcontractor
 - Employee of crane operator seriously injured by falling carpenter's debris
 - Notice to wrap-up insurer for workers compensation
 - Over \$500,000 paid under workers compensation creating lien
 - Employee sues owner, general contractor, and carpentry subcontractor
 - Wrap insurer retains one defense lawyer to represent all defendants

11

Conflicts of Interest—Issues

- Joint Defense Issues
 - Is the strategy to deny liability for control of project or file cross-claim against employer?
 - If the potential damages exceed the primary layer, should the defense lawyer tender to the umbrella insurer?
 - How does defense lawyer settle without compromising workers compensation lien?
 - Does the wrap insurer have a financial interest in protecting the lien over paying on the liability policy?
 - What happens if the umbrella insurer denies on the basis that not all available primary insurance has been exhausted?

12

Hypothetical—Completed Operations Claims

- Water damage to interior caused by defective patio door(s)
 - 800 condo units in complex—not all had damage
 - Notice to wrap-up insurer for general liability (completed ops)
 - Notice to wrap-up insurer for builders risk
 - Door manufacturer is not enrolled in wrap-up
 - Owner makes claim against general contractor and subcontractor
 - Wrap insurer retains one defense lawyer to represent general contractor and subcontractor defendants

13

Conflicts of Interest: Issues

- Joint Defense Issues
 - Is the strategy to deny liability and make a claim against manufacturer?
 - One or more occurrence(s) under the general liability policy?
 - When was the project “completed”?
 - Do you pursue coverage under the builders risk policy?
 - How does the “your work” exclusion apply to subcontractor and general contractor?
 - How do you align the business interests of the parties?

14

Conclusion

- Consider claims-handling issues when drafting insurance specifications and insurance manual
- Have contractual requirements reflect wrap-up concepts
- Add flexibility to claims handling to provide defense from perspective of all insureds, not just first named insured

Defending Claims Under Wrap-Ups: Not As Simple As It Seems

Jill B. Berkeley

**28th IRMI CONSTRUCTION CONFERENCE
Building a Better Wrap-Up: Defending Claims**

Las Vegas

October 27, 2008

**Howrey LLP
321 N. Clark Street
Suite 3400
Chicago, IL 60654
T: 312.846.5675
F: 312.275.7780
berkeleyj@howrey.com**

Defending Claims Under Wrap-Ups: Not As Simple As It Seems

**By Jill B. Berkeley
Howrey LLP**

I. INTRODUCTION

For all the good reasons that wrap-ups are purchased, certainly seamless claims handling is high on the top of the list. As an obvious extension of claims handling, the defense of claims is part of the services provided in any wrap-up. With all the hype given the benefit of insuring all parties to a construction project under one policy, there is very little said about what happens when one or more of those parties are sued for claims covered by the wrap-up. This paper will examine several actual cases involving claims made under wrap-up policies and attempt to focus on several issues – third party liability, subrogation, and other insurance – in which the outcome may be different from the enrolled parties' expectations.

II. BENEFITS OF THE WRAP-UP

Before examining how wrap-ups may not work as expected, the beneficial effects on claims handling of the wrap-up need to be acknowledged. Some examples include:

- The significant third party liability for all upstream parties from claims of injured employees of subcontractors can be reduced;
- The coordination of litigation and input from all parties on the project significantly assists in the defense;
- Elimination of subrogation actions by multiple insurers;
- Elimination of tenders to additional insurers;
- Adequate limits; solvent insurers; extended completed operations coverage;
- Consistency of claims handling, defense counsel, and document control;
- Elimination of the need to notify multiple insurers or lines of insurance;
- Elimination of cross claims by and against insured parties;
- No allocation of fault;
- No increased litigation costs by defending cross-claims;
- No artificial inflation of the value of plaintiff's case by defendants' cross-claims.

The main impact of the wrap-up on claims is the elimination of cross-claims among parties on the project. Without the distraction of having to prosecute a case against other defendants, the defense can be handled more vigorously and economically.

The second impact is the elimination of the need to procure additional insured coverage. The owner and general contractor do not have to spend the transactional time

and expense of securing certificates of insurance, verifying Additional Insured Endorsements, tracking updates, tendering coverage and pursuing coverage. The advantage of the wrap-up is the “buck stops here,” a refreshing change from the insurer attitude, “anyone but us.”

III. WRAP-UP PROBLEMS

Other than potential coverage issues (discussed in other papers presented at the conference), the biggest problem with the defense provided by a wrap-up insurer is the gap in the relationship between the OCIP or CCIP insurer and all the parties insured. The insurer negotiated with a broker representing only the Named Insured; it does not have any business relationship with any of the other parties who are enrolled. Therefore, when the claims come in, all parties have to rely on the structure of the program designed for the benefit of the Named Insured.

As the authors from *The Wrap-Up Guide* noted:

From the perspective of the involved contractors, relying primarily on insurance purchased by the owner or prime contractor, while remaining contractually responsible for the risk of loss can be a problem. While they are “insureds” under these policies, the insurer, administrator, and agent/broker personnel who service the program can fall into the trap of considering the CIP sponsor as “the client,” forgetting that all the project participants are actually insureds under the program and also “clients.” CIP sponsors also sometimes fall into this trap, in effect demanding that the broker, administrator, and insurer(s) look at them as the primary client. This attitude will often result in service deficiencies for the insured contractors, and can cause other problems due to certain conflicts of interest that can arise when one party buys insurance on behalf of another. These situations will be avoided if the sponsor of the program realizes that it will be necessary to sometimes make decisions in the best of interest of the project rather than looking solely at its own perspective and also insists that the CIP team consider all the involved contractors to be clients who deserve superior service and fair treatment.

**Construction Publications > The Wrap-Up Guide (4th ed.) >
Chapter 2: Construction Wrap-Ups > Benefits of a CIP**

In most cases, there shouldn't be a problem. After all, each insured will be provided an attorney who has the professional responsibility to zealously defend the client, even if all parties are represented by the same counsel. The problem lies in the fact that the defense lawyer may devise a strategy that will protect the Named Insured and CIP insurer, but the result may in fact adversely impact another insured. This scenario is played out in the specific circumstances which are described below by

examining specific cases. It may be argued that the situation is no different from the more typical circumstance in which an upstream defendant (Developer, Owner, General Contractor), as an additional insured, has to rely on the insurance provided by the subcontractor's insurer. However, the liability situation is reversed. In the wrap-up, the defense may be handled from the viewpoint of a unified defense, but the wrap-up insurer is interested in pushing liability downstream.

A. Anti-Subrogation Rule

As in the cases in which the subcontractor has named the general contractor as an additional insured, certain rules apply to prevent the insurer from suing its own insured. In the situation in which a wrap-up is provided, the same rules apply.

In *National Union Fire Ins. Co. v. State Ins. Fund*, 623 N.Y.S.2d 558 (A.D. 1st Dept. 1995), an employee of a demolition subcontractor, sustained injuries while working at the NY Port Authority Bus Terminal. He sued the Port Authority and CGR Construction, the general contractor. National Union had issued a wrap-up policy on the project. State Ins. Fund was the worker's compensation insurer for the demolition subcontractor. National Union assumed the defense of the primary defendants and instructed defense counsel to file a third party complaint against the employer and then assumed its defense by appointing independent counsel. National Union settled the case and then sued the State Insurance Fund to collect 50% of all attorney fees incurred in defending the third party complaint.

State Fund raised the anti-subrogation rule (see, *Pennsylvania Gen. Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 510 N.Y.S.2d 67, 502 N.E.2d 982, and *North Star Reins. Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281, 604 N.Y.S.2d 510, 624 N.E.2d 647), based on the fact that the employer was an insured under the wrap-up policy. Under New York law, the third party claim was prohibited because the subrogated claim arose from the same risk that national covered. "The double representation involved herein created the potential conflict of interest..." Had the case not been settled, the third party complaint would have been dismissed.

In *Romano v. Whitehall Properties, LLC*, 18 Misc.3d 343, 852 N.Y.S.2d 645 (N.Y. Sup. 2007), the plaintiff while working for a subcontractor, fell through a hole in the temporary flooring of a building owned by Whitehall. The Project was insured under an OCIP, which included liability and workers comp, paid for by Whitehall but insuring all participants. Travelers issued the primary WC and CGL. Westchester issued the excess. The suit was settled for \$4 million, paid by Travelers as CGL insurer and \$2 million by Westchester Fire as the excess insurer. Defendants asserted that Travelers had no right to assert a WC lien because of the anti-subrogation rule. Although the rule applies to bar an insurer from bringing an action against its own insured, the court held that the anti-subrogation rule does not apply where there are two distinct and separate policies which cover different risks. Travelers issued two policies, one providing general liability coverage and the second providing workers' compensation coverage. Travelers' rights and duties with respect to its lien were created by statute and stemmed from the

third-party settlement and not from the insurance contract. Therefore, the Court ruled that there was no potential conflict of interest and the anti-subrogation rule did not apply. It allowed Travelers to recoup its worker's comp lien.¹

One of the older cases arising out of a wrap-up situation resulted in an unusual situation. *Alyeska Pipeline Service Company v. H.C. Price Company*, 694 P.2d 782 (Alaska 1985). Alyeska, an Alaska pipeline company, contracted with a joint venture, PPCO, to build a pipeline. Alyeska obtained a wrap-up policy, but paid for the insurance through retrospective premiums. A PPCO employee was severely injured and recovered \$3 million. The wrap insurer paid \$1 million on behalf of PPCO and \$1 million on behalf of Alyeska. Because Alyeska had to repay the wrap insurer under its retrospective premium plan, it turned around and sued PPCO for indemnity for the premium attributed to PPCO. PPCO claimed that Alyeska was an "insurer," and therefore not entitled to sue PPCO. Apparently, there was no provision in the contract, under which PPCO was shielded from becoming liable for the insurance that Alyeska was contractually liable to procure. The court agreed that the effect of a wrap-up insurance program with retrospective premiums was to render Alyeska self-insured with respect to losses caused solely by its own negligence. However, that did not make Alyeska an insurer. The court ruled that there was no danger of a conflict of interest, since Alyeska owed PPCO no fiduciary duties. The court held that the indemnity agreement was broad enough to cover the insurance premiums, even though Alyeska was obligated to provide the insurance under the contract. If not universally followed, parties to a contract have learned that the contract obligates the Indemnitee to purchase insurance, the indemnity agreement should exclude Indemnitee's insurance premiums.

B. Third Party Liability

1. Exclusive Remedy Against Employers

As shown above, the elimination of cross claims is one of the major benefits of the wrap policy. The issue of what direct liability still exists for an employer had an interesting beginning under wrap-ups. Should the "exclusive remedy" for employers extend to the provider of the wrap-up, even if not the direct employer?

In *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984), employees of contractors who performed underground work on the Washington Metropolitan Area Transit subway project sustained respiratory injuries as a result of exposure to high levels of silica dust and other industrial pollutants in the subway project. The injured employees all filed worker's compensation claims and received compensation awards. The employees then instituted third-party negligence actions against either the Washington Metropolitan Area Transit Authority (WMATA) or Bechtel, the safety engineer for the project.

¹ The "different policies and different risk" defense is not universally followed. The *Romano* result, however, may be correct because of the statutory creation of the workers' compensation lien, rather than the fact that there were different policies. See *Cox v. International Paper Co.*, 651 N.Y.S.2d 230 (A.D.3d Dept. 1996); *Hailey v. N.Y. State Elec. & Gas Corp.*, 626 N.Y.S.2d 912 (A.D. 1995).

At the time of their alleged injuries, the insured employees were employed by construction companies under contract to WMATA to construct specific segments of the Metro project. These subcontractors did not purchase worker's compensation insurance for their employees; instead WMATA purchased such insurance to cover all laborers and other employees working on the Metro system. asserting that because it obtained and paid for the worker's compensation insurance required by section 904(a) 11 of the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. Sec. 901 *et seq.* (1976 & Supp. V 1981), 12 it was entitled to the statutory immunity accorded to an "employer" under section 905(a). The court of appeals rejected that argument, holding that a closer analysis of the language and purpose of the Act and the relevant case law lead to the conclusion that in these circumstances WMATA was not required to provide the compensation insurance. Thus, it held the voluntary provision of such insurance did not entitle the provider to the statutory employer immunity of section 905(a). [717 F.2d 574 (D.C. Cir. 1983)]

On appeal to the U.S. Supreme Court, WMATA argued that its wrap-up insurance plan was the only effective way to ensure that all employees would be covered by compensation insurance at all times. Justice Marshall agreed, concluding that WMATA was entitled to immunity from the tort actions brought by the injured employees. In order to prevent subcontractor employees from going uninsured, WMATA went to the considerable effort and expense of purchasing "wrap-up" insurance on behalf of all of its subcontractors. Rather than waiting to secure its own compensation until subcontractors failed to secure, WMATA guaranteed that every Metro subcontractor would satisfy and keep satisfied its primary statutory obligation to obtain worker's compensation coverage. *WMATA*, 467 U.S. at 940-941. In a footnote, the Court outlined the procedure for how the wrap-up accounted for all employees. Respondents' employers contributed to WMATA's "wrap-up" policy by reducing the bids they submitted for work on the Metro project. Upon being awarded their jobs, these subcontractors received a certificate of insurance, naming them as insured parties. By thus participating in WMATA's "wrap-up" program, these subcontractors "in substance if not in form" secured compensation for purposes of § 32(a)(1) of the LHWCA. *Id.*, at 946, fn. 14.

The result did not last long. Congress responded by amending the Act, declaring that the decision did not comport with legislative intent. Thus, the majority rule followed by all states is to allow third party claims, even where the worker's compensation insurance is provided by the third party.

2. Retained Control

The Named Insured of a wrap will also be targeted for being liable for the general safety of the project. Given the importance of safety in a wrap, one might assume that the Named Insured's liability for violations of safety rules would be a foregone conclusion. In the world of insurer-controlled defense, however, that didn't stop the wrap insurer from arguing that the Named Insured was not liable for controlling safety.

Two recent cases in Illinois, both arising out of the Soldier Field CCIP, provide an interesting example of how the joint control over defense in a wrap-up policy can lead to

a peculiar defense strategy. In each, a personal injury suit was brought by an employee of a subcontractor against the joint venture that acted as Construction Manager (CM) on the site. Liability was alleged to arise under Section 414 of the Restatement (Second) of Torts, which provides that one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability.

The defense, provided by the wrap insurer on the CCIP, argued that the CM did not have sufficient control over the incidents of the job to be liable under Section 414. In both, the courts that looked at the issue, it was clear that the CM's safety requirements and regular safety monitoring with authority to halt unsafe work, sufficiently affected the means and methods of the work to support a finding of "retained control." In fact, of course, one of the major benefits of wrap insurance is the imposition of a safety program for all subs on the project and a vigorous enforcement of safety rules by the CM or general contractor.

In *Aguirre v. Turner Const. Co.*, 501 F.3d 825 (7th Cir. 2007), an employee of the masonry subcontractor fell from scaffolding. The court emphasized the safety requirements specific to scaffold construction and noted that CM's employees regularly walked the site and could stop unsafe work. Further, the defendants inspected the scaffolds and imposed specific alternative design requirements on the scaffold from which the Plaintiff fell.

In *Hendy v. TBMK Joint Venture*, an unpublished decision from the Illinois Appellate Court, No. 1-07-0124 (2/14/08), the court reversed a decision dismissing the plaintiff's case, concluding that the allegations of the complaint sufficiently stated a cause of action under Section 414 against the CM, for exercising supervision and safety control. The plaintiff was an employee of an engineering company, who was injured when the crane being used in pile-driving operations shifted due to loose fill. Plaintiff alleged the CM allowed loose rock and construction debris to be used as fill to support the crane, which was in contravention of the safety program requirement. The defendant argued that its contractual right to stop unsafe work and the presence of its safety coordinators at the site were not enough to constitute "retained control" under Section 414. The appellate court rejected the argument.

C. Other Insurance

The issue of whether a wrap-up insurer is entitled to take advantage of other insurance, either the subcontractor's existing non-wrap-up CGL or other umbrella coverage, is being litigated in situations in which the OCIP primary insurer is insolvent. The excess umbrella insurers for the wrap-up are continually looking for ways to avoid their insurance obligation. They have relied on horizontal exhaustion principles to assert that umbrella insurance should not be available until the exhaustion of all other primary insurance.

One twist on the issue of what is "other insurance" from the standpoint of an OCIP was addressed by the Illinois Appellate court recently in *Virginia Surety Company v. Adjustable Forms Inc.*, 888 N.E.2d 733 (Ill. App. 2008). Michael Hadrys was injured

at a large construction site known as the River East project while working on a tower crane that allegedly malfunctioned. At the time of Hadrys' injury, he was employed by Adjustable Forms and was performing work on behalf of and in the scope of his duties for Adjustable Forms. Hadrys filed a complaint to recover for his injury against the project's property owners, the general contractors and others. The defendants filed a third party complaint against Adjustable Forms.

Reliance issued a wrap-up as an owner-controlled insurance program (OCIP) policy providing worker's compensation and employer's liability insurance for the River East project and its subcontractors, which included Adjustable Forms. Since Adjustable Forms was included in the OCIP, it reduced its construction work bid by \$526,793, which was an amount representing what Adjustable Forms would have paid for insurance coverage absent inclusion in the OCIP. Adjustable Forms also warranted that it omitted from its bid the cost of coverage provided under the OCIP and that it had the "responsibility to notify [its] own insurance carrier to exclude from [its] regular insurance policies all Work to be done under this Contract."

Reliance became insolvent and was placed in liquidation. In response to Reliance's insolvency, the Illinois Insurance Guaranty Fund ("IIGF") stepped into Reliance's shoes and defended Adjustable Forms against the third-party complaint in the underlying proceedings. The IIGF also paid workers' compensation benefits to Hadrys relating to his injury. The IIGF then proceeded to seek reimbursement from Virginia Surety, Adjustable Forms non-OCIP worker's compensation insurer, for the worker's compensation benefits paid and defense costs incurred in defending the action against Adjustable Forms.

Virginia Surety's first notice of Hadrys' injury was through a letter sent to it by Adjustable Forms approximately 2½ years after Adjustable Forms was served in the underlying lawsuit and approximately 5 years after Hadrys' injury.

Virginia Surety asserted that Adjustable Forms selected Reliance² and not Virginia Surety to pay worker's compensation coverage to Hadrys and to defend the underlying action. Virginia Surety also asserted that Adjustable Forms breached the policy's terms because Adjustable Forms failed to notify Virginia Surety immediately of the injury and to promptly forward the litigation documents. The IIGF responded that the Virginia Surety policy was "other insurance" pursuant to section 546(a) of the Illinois Insurance Code and must be exhausted before the IIGF provides coverage under Reliance's policy.

The appellate court rejected IIGF's claim that the Virginia Surety policy was "other insurance." It recognized the fact that Virginia Surety did not collect and retain a premium from Adjustable Forms for worker's compensation coverage at Illinois work sites. After conducting an audit according to the policy's terms, Virginia Surety returned the estimated premium Adjustable Forms paid since the payroll at the River East project

² The "selection" defense is a reference to Illinois' targeted tender rule. *See Kajima v. St. Paul Ins. Co.*, 879 N.E.2d 305 (Ill. 2007).

was included in the OCIP. Virginia Surety returned the estimated premium before receiving notice of Hadrys' injury.

The court left open the issue of whether primary insurance should be exhausted before excess insurance, an issue still pending in trial court litigation involving Royal, the OCIP excess insurance coverage.

IV. SOLVING PROBLEMS

One possible way to avoid the problems that occur when cross claims are considered is to provide a specific endorsement that prohibits the possibility. As a sample, although it was issued in a professional liability policy that was part of a wrap-up, is a Zurich Joint Defense Endorsement. The operative provision is:

No claims, counterclaims, cross-claims or third party claims for negligence, contribution, indemnification, subrogation or otherwise, arising out of any circumstance or claim reported and covered under this policy (regardless whether is or may be less than, within or in excess of the deductible) may be asserted by a Named Insured against another Named Insured. As a condition of coverage under this policy, all Named Insured agree to waive, release and relinquish any such claims to the extent of coverage available under this policy.

The endorsement also put all insureds on notice that a "Unified Defense" approach would be mandatory, which requires implicitly that every insured waive any potential conflict of interest. (See copy attached).

Given the control by the insurer and the unified approach to safety and risk management, it is incumbent upon the Named Insured and wrap insurer to address claims handling issues in the procurement stage. As one commentator has noted, best practices require that these issues be addressed before inception of the program.

In particular, the design of the CIP and the communication process should focus on the common concerns and problems contractors encounter in structuring their administrative functions and insurance programs to accommodate CIPs. Some of the more common complaints are disconnects between the risk allocated in the contract documents and the responsibility for financing them, disruption of their own insurance programs, additional administrative burden, inability to correctly value insurance costs for the CIP bid, higher cost for safety efforts, coordination of general liability and auto liability coverage for loss events, conflicts of interest in the adjustment of claims, inability to manage CIP loss investigation and a potentially negative impact upon the contractor's own insurance program.

Some of these issues are more problematic for contractors that have never before performed work insured under a wrap-up than for contractors who have. Experienced wrap-up contractors adjust more easily to the requirements of the different CIPs under which they are insured. In either case, a well structured CIP, particularly one that allows the general contractor to provide meaningful input into its design on behalf of all the contractors, will overcome these issues. Thus, it is helpful for anyone designing CIPs to have a thorough understanding of these issues so that they can be mitigated or avoided altogether.

**Construction Publications > The Wrap-Up Guide (4th ed.) >
Chapter 2: Construction Wrap-Ups > Mitigating Contractor
Concerns**

V. CONCLUSION

Wrap-ups have solved major problems in the complex world of construction insurance. Even though they have been used for over twenty years, the problems arising from cross-claims, anti-subrogation and other insurance issues have not all been resolved. As litigation ensues, the market matures.

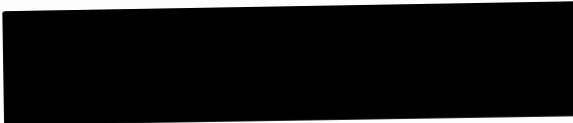
Endorsement #22

Joint Defense Endorsement



Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.	Producer	Add'l Prem.	Return Prem.
██████████	██████████	██████████	██████████	██████████	None	None

Named Insured and Mailing Address:



Producer:



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SPECIMEN

This endorsement modifies insurance provided under the:

Architects and Engineers Professional Liability Policy

In consideration of the premium charged, it is agreed that Endorsement No. 2 is modified as follows:

Project Professional Liability Policy

All circumstances or claims which are reported under this policy shall be addressed, investigated, managed, defended, settled or otherwise solved in accordance with the Unified Defense approach which is a mandatory condition and requirement of this policy. Under the Unified Defense approach of this policy, each Named Insured or covered entity shall have the obligation, as a requirement of this policy, to cooperate with the Company in connection with the investigation, defense and or resolution of any circumstance and/or claim. Any failure to cooperate or otherwise comply with the Unified Defense approach of this policy shall be deemed a material breach of the policy terms and conditions and a violation of the Named Insured's obligations under this policy.

As a condition of the issuance and coverage under this policy, each Named Insured must accept and consent to the Unified Defense approach described by this policy. Moreover, no claims, counterclaims, cross-claims or third party claims for negligence, contribution, indemnification, subrogation or otherwise, arising out of any circumstance or claim reported and covered under this policy (regardless whether is or may be less than, within or in excess of the deductible) may be asserted by a Named Insured against another Named Insured. As a condition of coverage under this policy, all Named Insured agree to waive, release and relinquish any such claims to the extent of coverage available under this policy

The reporting obligations described in this policy apply regardless of whether the incident, circumstance, event or claim involves or may involve an amount less than and/or within the deductible.

All other claims and circumstance reporting provisions of the policy remain unchanged.

Claims or circumstances for Bodily Injury or Property Damage that were the result of a professional act, error or omissions as defined by this policy, but which may be covered on a primary basis by other insurance including but not limited to the general liability and/or umbrella policy (ies) shall also be reported under this policy. Defense for these claims will be provided by the primary insurer(s) and may include a Unified Defense approach. Notice of a claim or circumstance under this policy is nonetheless mandatory.

All other terms and conditions remain unchanged.

Signed by: _____ Date _____
Authorized Representative

Workshop M4

Virginia Sur. Co. v. **Adjustable Forms Inc.**
Ill.App. 1 Dist.,2008.

Appellate Court of Illinois,First District, Fifth
Division.

VIRGINIA SURETY COMPANY, Plaintiff-
Appellee,

v.

ADJUSTABLE FORMS INC., Illinois Insurance
Guaranty Fund, Morse Diesel Inc., AMEC
Construction Company, formerly known as Morse
Diesel International, Inc., AMEC, Inc., MCL
Companies of Chicago, Inc., MCL Construction
Companies, MCL Ventures, Inc., MCL Equities
Corporation, MCL Corporation, MCL Management
Corporation, River East, L.L.C., River East Inc.,
Leam Steel Erectors Inc., Liebherr-Werk Biberach
GmbH, and Morrow Equipment Company, L.L.C.,
Defendants.

(Illinois Insurance Guaranty Fund, Defendant-
Appellant).

No. 1-07-2663.

May 16, 2008.

Background: Subcontractor's workers' compensation and general liability insurer sought declaration that it did not owe coverage to subcontractor relating to worker's injury on construction project. Insurance guaranty fund that assumed responsibility for owner-controlled insurance policy (OCIP) or "wrap-up" policy for the entire project answered claiming subcontractor's insurer provided "other insurance" that was required to be exhausted prior to fund providing coverage under the OCIP. The Circuit Court, Cook County, [Nancy J. Arnold](#), J., entered summary judgment for subcontractor's insurer. Fund appealed.

Holdings: The Appellate Court, [Gallagher](#), J., held that:

(1) policy did not provide coverage relating to worker's injury, and

(2) policy did not provide "other insurance" that had to be exhausted before fund made payments under the OCIP.

Affirmed.

*734 [J. Murray Pinkston, III](#), of counsel, Stone & Moore, Chartered, Chicago, IL, for Appellant.

[Richard T. Valentino](#) and [Michael Resis](#), of counsel, SmithAmundsen LLC, Chicago, IL, for Appellee.

Justice [GALLAGHER](#) delivered the opinion of the court:

*215 Defendant Illinois Insurance Guaranty Fund (IIGF) appeals the trial court's granting of summary judgment in favor of **Virginia Surety Company, Inc. (Virginia Surety)**. On appeal, the IIGF contends that the trial court erred in granting summary judgment because the **Virginia Surety** insurance policy provided workers' compensation coverage for the injury an employee suffered while working on a construction site. The IIGF also contends on appeal that the **Virginia Surety** insurance policy qualified as "other insurance" pursuant to section 546(a) of the Illinois Insurance Code ([215 ILCS 5/546\(a\)](#)) (West 2004)) that must be exhausted before the IIGF must pay for coverage provided under an insurance policy issued by the now insolvent Reliance Insurance Company (Reliance). For the reasons stated below, we affirm.

On November 9, 2000, Michael **Hadrys** was injured at a large construction site *216 *735 known as the River East project while working on a tower crane that allegedly malfunctioned. At the time of **Hadrys'** injury, he was employed by **Adjustable Forms, Inc. (Adjustable Forms)**, and was performing work on behalf of and in the scope of his duties for **Adjustable Forms**.

Reliance issued a "wrap-up" or an owner-controlled insurance program (OCIP) policy providing workers' compensation and employer's liability insurance for the River East project and its subcontractors, which included **Adjustable Forms**. Since **Adjustable Forms** was included in the OCIP, it reduced its construction work bid by \$526,793, which was an amount representing what **Adjustable Forms** would have paid for insurance coverage absent inclusion in the OCIP. **Adjustable Forms** also warranted that it omitted from its bid the cost of coverage provided under the OCIP and that it had the "responsibility to

notify [its] own insurance carrier to exclude from [its] regular insurance policies all Work to be done under this Contract.”

Hadrys filed a complaint on February 1, 2001, to recover for his injury against the project's property owners, the general contractors and others. The defendant property owners included: MCL Construction Corporation; MCL Ventures, Inc.; MCL Equities Corporation; MCL Management Corporation; River East, L.L.C.; and River East, Inc. The defendant general contractors included: Morse Diesel International, Inc.; Morse Diesel; and/or AMEC, Inc. The other defendants included: Morrow Equipment Co., L.L.C.; Liebherr-Werk Biberach GmbH; and Leam Steel Erectors, Inc. **Hadrys** filed a second amended complaint on October 28, 2004. Defendant Liebherr-Werk Biberach GmbH filed a third-party contribution action asserting contributory negligence against **Adjustable Forms**.

Reliance became insolvent and was placed in liquidation on October 3, 2001. In response to Reliance's insolvency, the IIGF stepped into Reliance's shoes and defended **Adjustable Forms** against the third-party complaint in the underlying proceedings. The IIGF also paid workers' compensation benefits to **Hadrys** relating to his injury. The IIGF then proceeded to seek reimbursement from **Virginia Surety** for the benefits paid and defense costs incurred in defending the action against **Adjustable Forms**. Alternatively, the IIGF asserted it would seek reimbursement for the claims paid to **Hadrys** from **Adjustable Forms**.

Adjustable Forms sent a letter to the IIGF dated January 9, 2006, stating that **Adjustable Forms** was entitled to full insurance coverage by the IIGF due to Reliance's liquidation. The letter also reiterated that **Adjustable Forms** excluded from its bid an amount representing an insurance premium payment for coverage at the River East project. The letter stated that **Adjustable Forms** “credited the general contractor and owner \$526,793 in **Adjustable Forms**' price for work on the River East Project for the savings in not having to pay workers compensation premiums to **Virginia Surety** for the River East payroll.”

Adjustable Forms paid an estimated annual premium in the amount of \$175,775 to **Virginia**

Surety for workers' compensation and employer's liability insurance in Illinois and Indiana for the period of November 28, 1999, to November 28, 2000, under policy number 0200102890. The estimated premium relating to Illinois work sites totaled \$146,308 and totaled \$29,247 for Indiana work sites. According to the policy, the final premium amount would be determined after the policy ended and was subject to an audit. After the audit, the final premium that **Adjustable Forms** paid *217 *736 did not include the payroll for the River East project and **Virginia Surety** refunded to **Adjustable Forms** \$144,743 of the \$146,308 estimated Illinois work sites premium.

Virginia Surety's first notice of **Hadrys'** injury was through a letter sent to it by **Adjustable Forms** on September 12, 2005, which was approximately more than 2 1/2 years after **Adjustable Forms** was served in the underlying lawsuit and approximately 5 years after **Hadrys'** injury.

On February 1, 2006, **Virginia Surety** filed a five-count complaint for declaratory judgment seeking a determination that it did not owe coverage to **Adjustable Forms** relating to **Hadrys'** injury at the River East project. **Virginia Surety** alleged that the final premium **Adjustable Forms** paid did not include the payroll for the River East project and that the Reliance policy provided coverage for the River East project. **Virginia Surety** asserted that **Adjustable Forms** selected Reliance and not **Virginia Surety** to pay workers' compensation coverage to **Hadrys** and to defend the underlying action. **Virginia Surety** also asserted that **Adjustable Forms** breached the policy's terms because **Adjustable Forms** failed to notify **Virginia Surety** immediately of the injury and to promptly forward the litigation documents. In the remaining counts, **Virginia Surety** asserted waiver and estoppel defenses. **Adjustable Forms** filed an answer requesting a declaration that the IIGF assumed Reliance's obligations to provide a defense and indemnity in the underlying proceedings or, in the alternative, that **Virginia Surety** owed **Adjustable Forms** a defense and indemnity in the underlying proceedings.

Virginia Surety filed a motion for summary judgment on April 18, 2007, asserting that the uncontested facts demonstrate that **Virginia Surety**

did not provide workers' compensation coverage to **Adjustable Forms** relating to the River East project. The IIGF responded that the **Virginia Surety** policy was "other insurance" pursuant to section 546(a) of the Illinois Insurance Code and must be first exhausted before the IIGF provides coverage under Reliance's policy. **Adjustable Forms** responded that it did not pay premiums to **Virginia Surety** for the River East project because of its inclusion in the OCIP and that it could not have foreseen that the **Hadrys** lawsuit would have potentially involved the **Virginia Surety** policy. **Adjustable Forms** also asserted that its notice to **Virginia Surety** was reasonable given the IIGF's continued defense of the underlying lawsuit and payment of **Hadrys**' workers' compensation claim.

On July 20, 2007, the trial court granted summary judgment in **Virginia Surety's** favor finding that Reliance provided the only workers' compensation coverage for the River East project. The trial court modified its judgment in response to the IIGF's motion for reconsideration, but still granted summary judgment in **Virginia Surety's** favor. The trial court held that the **Virginia Surety** policy did not provide coverage to **Adjustable Forms** for the River East project and that the IIGF was not entitled to reimbursement from **Virginia Surety** for the indemnity and defense on **Adjustable Forms**' behalf or for the workers' compensation payments to **Hadrys**. The IIGF timely appealed the trial court's grant of summary judgment.

A trial court grants summary judgment where "the pleadings, depositions, admissions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Moorehead v. Mustang Construction Co., 354 Ill.App.3d 456, 459, 290 Ill.Dec. 307, 821 N.E.2d 358, 360 (2004). Our responsibility in reviewing a trial court's granting of summary judgment*218 *737 "is limited to determining whether the trial court correctly found that no genuine issue of material fact existed." General Casualty Co. of Illinois v. Carroll Tiling Service, Inc., 342 Ill.App.3d 883, 889, 277 Ill.Dec. 616, 796 N.E.2d 702, 707 (2003). We review summary judgment rulings de novo. Gaston v. Founders Insurance Co., 365 Ill.App.3d 303, 314, 301 Ill.Dec. 513, 847 N.E.2d 523, 533 (2006).

[1][2][3] Before addressing the merits of the IIGF's claims on appeal, we deem it beneficial to provide background information about OCIPs. "Under an OCIP, the owner of a large construction project purchases and provides for consolidated 'on-site' public liability and workers' compensation insurance coverage during the construction period. The owner is the 'insured' and policy coverage is extended to all who work 'on-site' under a contract with the owner." Independent Insurance Agents of Oklahoma, Inc. v. Oklahoma Turnpike Authority, 876 P.2d 675, 676 (Okla.1994). The purpose underlying an OCIP is 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." Pride v. Liberty Mutual Insurance Co., No. 04-C-703, slip op. at 2, 2007 WL 1655111 (E.D. Wis. June 5, 2007), citing J. Loveless, "Construction Insurance: Do You Only Get What You Pay For?" 78 N.Y. St. B.A.J. 10 (March-April 2006). With an OCIP, "the owner buys a policy of insurance that will cover all of the subcontractors. By absorbing the cost of insurance itself, the owner averts the need for each subcontractor to include the costs of insurance in its bid." Pride, slip op. at 2. By using an OCIP, "the contract price is reduced because insurance costs are not incurred by the contractors on the project." Pride, slip op. at 2. With this understanding of OCIPs in mind, we will now address the merits of the IIGF's contentions.

The IIGF first contends on appeal that the trial court erred in finding that the **Virginia Surety** workers' compensation policy did not provide coverage to **Adjustable Forms** for **Hadrys**' injury. The IIGF maintains that the **Virginia Surety** policy unambiguously covered the River East project, which was the site of **Hadrys**' injury. The IIGF claims that **Virginia Surety** failed to cite to exclusionary language in its policy that excludes coverage at the River East project, which was its obligation to do to disclaim coverage. Thus, the IIGF contends that the trial court erred in finding that the **Virginia Surety** policy did not provide coverage for **Hadrys**' injury.

We reject the IIGF's contention on appeal.

Adjustable Forms included a credit of \$526,793 in its bid for work on the construction project because of its inclusion in the OCIP. The credit was in lieu of **Adjustable Forms** separately paying a premium for workers' compensation and employer's liability insurance. In return for the credit in the construction bid, **Adjustable Forms** was covered under the OCIP policy issued by Reliance. According to the OCIP policy, **Adjustable Forms** certified that it omitted the cost of workers' compensation coverage from its bid and that it was responsible for notifying its insurance carrier to exclude from its regular insurance policy all work covered by the construction contract.

[4] We acknowledge that the **Virginia Surety's** policy information page states that "Part One of the policy applies to the Workers Compensation Law of the states *219 *738 listed here: IL IN." The policy's information page also indicated that the workers' compensation premium was subject to verification and change by audit. Also, the locations section in the general section of the policy states: "This policy covers all of your workplaces listed in Items 1 or 4 of the Information Page; and it covers all other workplaces in Item 3.A. states [*sic*] unless you have other insurance or are self-insured for such workplaces." The crux of the issue on appeal requires an identification that **Virginia Surety** underwrote a workers' compensation policy for **Adjustable Forms** for the coverage period of November 28, 1999, to November 28, 2000; however, during the same policy period, **Adjustable Forms** participated in and was covered by the OCIP at the River East project. In return for the coverage under the OCIP, **Adjustable Forms** reduced its bid by an amount representing the cost for similar insurance coverage assuming **Adjustable Forms** was not covered under the OCIP. Here, the record reveals that **Adjustable Forms** was covered under the OCIP policy, **Adjustable Forms** warranted that it would contact its insurance company regarding its coverage under the OCIP, and **Virginia Surety**, after conducting an audit, returned the premium **Adjustable Forms** paid relating to the Illinois work sites to **Adjustable Forms** in early 2001. **Virginia Surety** returned the premium because **Adjustable Forms'** actual Illinois payroll after excluding the payroll for work performed on the OCIP project was less than the estimated Illinois payroll during the policy period. Considering these facts collectively, we conclude that the trial court did not err in granting

summary judgment in **Virginia Surety's** favor on the basis that **Virginia Surety** did not provide workers' compensation coverage to **Adjustable Forms**.

[5] Moreover, although **Virginia Surety** fails to cite to a specific exclusion listed in the exclusion section in part two of the policy, this court is not prohibited from concluding that **Virginia Surety** did not provide workers' compensation coverage for the River East project. When reviewing an insurance policy to determine the coverage provided under the policy, we must interpret the policy and the words used according to their plain, ordinary, and popular meaning. *Rich v. Principal Life Insurance Co.*, 226 Ill.2d 359, 371, 314 Ill.Dec. 795, 875 N.E.2d 1082, 1091 (2007). The language used in the locations provision in the general section of the policy states in part that the policy covers all listed workplaces "unless you have other insurance or are self-insured for such workplaces." The term "unless" is commonly defined as: "If it be not that; if it be not the case that; if not; supposing not; if it be not; except." Black's Law Dictionary 1536 (6th ed.1990). The term "other" is commonly defined as meaning "[d]ifferent or distinct from that already mentioned; additional, or further." Black's Law Dictionary 1101 (6th ed.1990). A common definition of the term "insurance" is "[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils." Black's Law Dictionary 802 (6th ed.1990). Interpreting the location provision in the **Virginia Surety** policy's general section using the plain, ordinary meaning of the words "unless," "other" and "insurance" provides an understanding that coverage does not exist if the insured has different or additional insurance. Again, since **Adjustable Forms** was covered under the OCIP policy and **Virginia Surety** did not retain any estimated premiums paid by **Adjustable Forms** relating to Illinois work sites, we do not agree with the IIGF that a genuine issue of material fact exists that the **Virginia Surety** policy did not provide coverage relating to **Hadrys'** injury.

[6][7] The next step in the analysis, however, is to address the IIGF's other *220 *739 contention on appeal that the trial court erred in finding that the **Virginia Surety** workers' compensation policy does not qualify as "other insurance" that must be

exhausted before turning to the IIGF for coverage. We consider it necessary here to provide a general background understanding of the IIGF. The Illinois Insurance Code established the IIGF “to protect policyholders of insolvent insurers and third parties who make claims under policies issued by insurers that become insolvent.” *Roth v. Illinois Insurance Guaranty Fund*, 366 Ill.App.3d 787, 794, 304 Ill.Dec. 39, 852 N.E.2d 289, 295 (2006). In Illinois, all insurers conducting business in the state must contribute to the IIGF in direct proportion to the company's premium income. *Roth*, 366 Ill.App.3d at 794, 304 Ill.Dec. 39, 852 N.E.2d at 295. Also, since all insurers must contribute to the IIGF, all claims brought against the IIGF's assets must be first reduced by claims brought against a solvent insurer. *Roth*, 366 Ill.App.3d at 794, 304 Ill.Dec. 39, 852 N.E.2d at 295. Other insurance must first be exhausted when a “claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the Fund.” 215 ILCS 5/546(a) (West 2004).

At issue here is whether the IIGF correctly claims that **Virginia Surety** was “other insurance” under section 546(a) of the Illinois Insurance Code because **Hadrys'** injury “arises from the same facts, injury or loss that gave rise to the covered claim,” which then required the **Virginia Surety** policy to be exhausted before the IIGF provides coverage. See 215 ILCS 5/546(a) (West 2004). The IIGF contends that the common facts at issue here are **Hadrys'** injury on November 9, 2000, when working for **Adjustable Forms** on the River East project. Since a common set of facts exists relating to **Hadrys'** injury, the IIGF contends that the trial court erred in granting summary judgment in **Virginia Surety's** favor because the **Virginia Surety** policy was “other insurance.”

[8] We disagree with the IIGF's contentions. The IIGF relies on this court's decisions in *Illinois Insurance Guaranty Fund v. Farmland Mutual Insurance Co.*, 274 Ill.App.3d 671, 210 Ill.Dec. 661, 653 N.E.2d 856 (1995), and *Harrell v. Reliable Insurance Co.*, 258 Ill.App.3d 728, 197 Ill.Dec. 293, 631 N.E.2d 296 (1994), to support its position that an “other insurance” provision in a policy does not include coverage provided by the IIGF.

In *Farmland Mutual Insurance Co.*, this court

determined whether the IIGF should be considered “any other collectible insurance” after a primary insurer became insolvent. *Farmland Mutual Insurance Co.*, 274 Ill.App.3d at 673, 210 Ill.Dec. 661, 653 N.E.2d at 857. This court rejected the claim that if a solvent insurer's coverage is “excess” in relation to the insolvent insurer's coverage, then the solvent insurer stands in the same relationship with the IIGF as it did with the insolvent insurer. See *Farmland Mutual Insurance Co.*, 274 Ill.App.3d at 673-74, 210 Ill.Dec. 661, 653 N.E.2d at 857-58. This court concluded that the IIGF “is not a source of ‘collectible insurance’ under Illinois statutory and case law.” *Farmland Mutual Insurance Co.*, 274 Ill.App.3d at 675, 210 Ill.Dec. 661, 653 N.E.2d at 858.

The issue this court analyzed in *Harrell* focused on determining the proper allocation of “responsibility among collateral insurers of the same risk when one of the insurers becomes insolvent and its obligations are taken up by the Fund.” *Harrell*, 258 Ill.App.3d at 730, 197 Ill.Dec. 293, 631 N.E.2d at 298. The *Harrell* court concluded that it was incumbent upon the solvent collateral insurers to provide the full amount of coverage stated in the policy before turning to the IIGF for coverage. *Harrell*, 258 Ill.App.3d at 731, 197 Ill.Dec. 293, 631 N.E.2d at 298.

*740 *221 Although we agree with the general propositions advanced by the IIGF from its reliance on the *Farmland Mutual Insurance Co.* and *Harrell* cases, which recognized that “potential claims against the Fund's assets should be reduced by a solvent insurer, rather than the Fund,” we consider the IIGF's reliance on these cases misplaced. *Harrell*, 258 Ill.App.3d at 731, 197 Ill.Dec. 293, 631 N.E.2d at 298. In our opinion, *Farmland Mutual Insurance Co.* and *Harrell* are distinguishable from the instant case because a solvent insurer does not exist here.

The parties agree that Reliance was the insurer under the OCIP and that Reliance is now insolvent. Where the parties disagree is whether **Virginia Surety** was an insurer for injury claims occurring at the River East project. We note that the instant case is not one that involves the determination of whether primary insurance should be exhausted before secondary insurance is to provide coverage or one involving excess insurance coverage. Rather, the analysis of the

issue on appeal turns on the recognition and acceptance of the fact that **Virginia Surety** did not collect and retain a premium from **Adjustable Forms** for workers' compensation coverage at Illinois work sites. After conducting an audit according to the policy's terms, **Virginia Surety** returned the estimated premium **Adjustable Forms** paid since the payroll at the River East project was included in another insurance policy. **Virginia Surety** also returned the estimated premium before receiving notice of **Hadrys'** injury. We are mindful that the legislature in creating the IIGF wanted to prevent depletion of the fund's assets " 'to reimburse solvent insurance companies for payments made to claimants or their insured under policies for which they received a premium.' " Farmland Mutual Insurance Co., 274 Ill.App.3d at 675, 210 Ill.Dec. 661, 653 N.E.2d at 858, quoting Pierre v. Davis, 165 Ill.App.3d 759, 761, 117 Ill.Dec. 392, 520 N.E.2d 743 (1987). We believe our conclusion that the **Virginia Surety** policy did not provide coverage for **Hadrys'** injury does not violate the public policy surrounding the IIGF's creation since the income relating to premium payments for coverage at the River East project was not included in **Virginia Surety's** income. Thus, we agree with the trial court that no genuine issue of material fact exists here relating to the lack of coverage under the **Virginia Surety** policy.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

FITZGERALD SMITH, P.J., and FROSSARD, J.,
concur.
Ill.App. 1 Dist., 2008.
Virginia Sur. Co. v. Adjustable Forms Inc.
888 N.E.2d 733, 321 Ill.Dec. 214

END OF DOCUMENT

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.