

OCIPs, CCIPs, and Project Policies

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Controlled insurance programs (CIPs) are insurance programs that are purchased by a single entity (the Sponsor) to provide a range of insurance coverages to a group of enrolled participants. An owner-controlled insurance program (OCIP) is a CIP where the owner of the construction project serves as the Sponsor. A contractor controlled insurance program (CCIP) is a CIP where

the general contractor, construction manager, or design-builder (for simplicity, this article will use the term *contractor* for all three) serves as the Sponsor.

Although these programs promise better coverage at lower cost, critics find problems, such as coverage gaps, mismanagement of claims, perceived injustices in insurance credit tracking, and less than adequate cost savings. The truth is that CIPs have the potential to provide participants better coverage at lower cost, especially on larger projects. But these benefits are realized only when the CIP is properly set up and administered. Otherwise, a CIP will end up costing more and exposing the participants to greater liability. The same is true about other project-

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specific insurance policies. Such policies offer benefits but only if procured and administered with care.

This article describes the key features of CIPs and project policies, and describes the many factors that have to be kept in mind so that such programs and policies can deliver better coverage at lower cost.

CIP Basics

A CIP insures loss exposures for its participants on a single construction project (or, in the case of a rolling CIP, on multiple projects). The Sponsor procures the coverage on behalf of the participants rather than requiring the participants to maintain the coverage themselves.

The range of insurance coverage in each CIP varies. Many CIPs include coverage for commercial general liability (CGL), workers' compensation, and employer's liability. The underlying coverage is characteristically provided through the same insurance carrier, while excess limits are typically purchased from various carriers. CIP programs are often called "wrap-ups" because they consolidate insurance, claims management, and safety and loss control into one integrated program.

In both OCIPs and CCIPs, the contractor and all subcontractors at every tier are typically covered for project site exposures, subject to certain exclusions (e.g., hazardous materials abatement). A rolling CIP, or rolling wrap-up, is a CIP that can be used by its Sponsor (owner or contractor) on multiple projects. A rolling wrap-up is typically sold to the Sponsor on a multiyear basis. The terms of a rolling program require the Sponsor to make minimum volume commitments to the carriers.

How CIPs Save Costs and Minimize Risks

CIPs are a desirable way for the Sponsor to cover liability insurance risks on a project, because a CIP allows the Sponsor to choose the carriers that are providing the coverage and to negotiate the terms, conditions, and limits included in the policies for the life of the project. Without a CIP, liability coverage is subject to the terms and conditions of the project participants' standard liability policies, which are renewed annually, and which vary depending upon the participants' size, specialty, bargaining position, and market conditions. CIPs have the potential to save costs. As the Sponsor purchases a large volume of coverage from a single carrier, the pricing for such coverage may be obtained at a discount. Also, because the underlying coverage in a CIP is provided by a single carrier, claims handling and litigation costs may be reduced. Whether a Sponsor actually experiences cost savings in a CIP is dependent upon program design, loss experience, ability to obtain meaningful insurance credits from project

participants, and insurance market conditions.

For a project utilizing a CIP, the bid packages issued to contractors and subcontractors will contain an “Instructions to Bidders” section stating that bids are to be submitted with and without insurance costs. That is, the contractors and subcontractors are instructed that the cost of insurance is to be included with their bids, as either an alternate/add or an alternate/deduct. This procedure allows the Sponsor to gauge the potential cost savings before deciding to purchase the CIP coverage, and also provides the Sponsor with a reference point to monitor insurance credits for each participant during the course of the project. By combining the insurance coverages into a CIP, a Sponsor can obtain substantial leverage in the insurance market. This leverage results in lower insurance rates as well as broader coverage terms. A Sponsor can realize cost savings of as much as 10–15 percent on insurance costs due to volume purchasing. The general rule of thumb is that an OCIP/CCIP can result in potential savings between 1 and 3 percent of construction values.

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Sponsors also can significantly reduce project insurance costs through risk retention. This is achieved by assuming a higher deductible (e.g., \$100,000–\$250,000) per loss. Additional savings can be realized if project loss experience is better than the actuarial loss experience factors contained in the insurer’s guaranteed-cost rates. In other words, if a Sponsor takes a \$250,000 deductible in the CIP, as opposed to buying dollar one coverage, it will be able to buy the policy at a discounted rate. If the CIP is very successful, with few or no claims, the Sponsor saves the money it would have spent by buying dollar one coverage in the market. Additional benefits include control by the Sponsor, which reduces administrative costs and reduces coverage and indemnity disputes among the parties. There also are improved risk management, claims handling, and loss prevention services in a CIP.

An important benefit of a CIP is that insurance limits are available for losses related to the project (known as *dedicated limits*) and are not eroded by losses from other projects. Of course, this benefit is reduced in a rolling program where the Sponsor shares limits across multiple projects. Given that many contractors and subcontractors do not carry very large limits in their corporate programs, dedicated limits are frequently a major benefit to

participants. Additionally, utilizing a CIP ensures bulk buying, which in turn supports the procurement of proper insurance coverage and the ability to buy higher levels of protection than might otherwise be available to the typical contractor and subcontractor.

The benefits of a coordinated safety and loss control program cannot be overstated. Even if there is a central plan, relying upon each contractor and subcontractor to provide its own safety and loss control services creates the potential for significant inconsistencies, overlapping responsibilities, and potentially increased costs and losses.

Another benefit of a CIP that is often overlooked is the ability to facilitate DBE, MBE, and WBE requirements on public projects. A CIP may be the only means available to provide consistent coverage to all participating contractors. Without the coverage provided by the CIP, many minority contractors cannot obtain the required coverage and therefore cannot participate in the project.

Central management of claims, safety and loss control, policy issuance, and payroll audits are significant benefits of a CIP. Centralized safety and loss prevention results in fewer accidents, and when accidents do occur, having a centralized program to manage the loss and direct medical treatment often reduces the cost of the loss and time in claims handling, and can reduce or eliminate cross-claims and indemnification claims among the parties.

Obstacles in Sponsoring a CIP

Some potential disadvantages of sponsoring a CIP include the increased responsibility of the owner and contractor for implementing safety and loss control programs, and monitoring claims (e.g., to make sure claims sustained on other projects are not charged to the CIP or that claims of one enrolled participant are not mistakenly assigned to another). Another potential disadvantage is that CIPs are more frequently “loss sensitive,” meaning the premium ultimately paid to the insurer is calculated on actual losses during the policy period, so the participants have the risk that premiums will increase.¹ In a CIP, even when the project is completed, the potential for claims exists, so Sponsors must be prepared to be involved for the duration of the completed operations tail provided by the CIP. Also, the additional administrative burdens of a CIP must be taken into account in determining the true costs of the program. Enrollment, policy issuance, and monitoring of insurance costs and credits from enrolled participants can require a substantial level of effort, and Sponsors should consider outsourcing these tasks to a CIP administrator.

If the insurance market hardens, there is a potential financial risk inherent in loss-sensitive programs, resulting in premium cost increases and coverage reductions. Most CIPs are written using large deductibles, large retentions, or retrospective rating plans. Under these programs, the total CIP cost depends on the actual losses incurred. One disadvantage to this is the continuation of premium adjustments years after the project is actually

completed. CIPs also can be written at fixed rates for the project term, but these plans are more expensive because of the risk associated with the uncertainty of large losses.

CIPs are not always looked upon favorably by the participants that are asked to enroll in them. Common complaints include poor coverage; coverage gaps; administrative burdens; detrimental effects on participants' corporate insurance costs (due to decreased volume); disputes related to insurance credits; and a participant's loss of control over its own claims handling. These are real concerns that must be properly managed by the Sponsor in order to achieve a successful CIP.

It is highly recommended that prior to enrollment, contractors and subcontractors that participate in CIPs thoroughly review the CIP policies and coordinate the coverage provided by those policies with the coverage provided under their standard corporate policies.² Contractors and subcontractors should negotiate with their own carriers to remove any wrap-up exclusion endorsements from their own corporate policies. Contractors and subcontractors also should attempt to negotiate "drop down" or difference in conditions (DIC) coverage with their own carriers, so that they are fully protected in the event there are gaps in the CIP coverage. DIC coverage allows the contractor/subcontractor's own policy to step in and cover claims that may not be covered under the CIP.

Many disputes arise because participants mistakenly think that they are losing money when providing the Sponsor with close-out credits at the end of the project. In reality, the net effect of the credit should not affect the participant because the participant's own insurer is giving it a corresponding credit in premium under its corporate policy. Explaining the process carefully to the participants at the outset of the program can aid in avoiding these types of disputes.

As the Sponsor of a CIP takes on the risks under the program, the Sponsor rightfully handles the claims decisions. It is important for the Sponsor to be sensitive to the fact that claims in a CIP, especially workers' compensation claims, still affect the participants. Importantly, in almost every state, claims experience in a CIP is included in a participant's experience modification rate (EMR) calculation.³ EMR is an important measure in the construction industry. Not only is it used to calculate a contractor's workers' compensation premium, it is also often used by owners and contractors as a gauge of the safety culture of a contractor and subcontractor they may hire, and could affect a participant's ability to be awarded subsequent work. Making sure that workers' compensation claims are handled quickly and that workers are brought back to work as soon as possible are critical elements of handling these claims and minimizing the impact on a participant's EMR and insurance costs. Another complaint often made by participants related to EMR is that CIP administrators sometimes do not accurately report CIP payroll dollars to the carriers, and

this also can skew a participant's EMR because the ratio used to calculate EMR contains a payroll component. Sponsors of CIPs should make a concerted effort to ensure that CIP administrators are properly reporting payrolls and to keep the affected participant in the loop as to status of its workers' compensation claims and to seek the participant's input in the claims handling process.

What Coverage Is Typically Included in a CIP?

It is important to note that CIPs provide coverage only for exposures at the "project." As such, it is critical for the Sponsor to define the project site carefully in its program. It is also critical for each enrolled participant to make itself aware of the definition of "project" so that exposures that fall outside of the definition may be properly insured.

The core coverage provided in a CIP is comprehensive general liability (CGL) insurance. CGL policies cover property damage, bodily injury, personal and advertising injury, premises and operational liability, medical payments, and contractual liability, all subject to policy terms, conditions, and exclusions. CGL policies provide coverage during both ongoing (occurring while work is being performed) and completed (occurring after the work is completed) operations, again subject to policy terms, conditions, and exclusions.

CIPs are not always looked upon favorably by the participants that are asked to enroll in them.

CIP policies either are specifically crafted "manuscript" policies with specific exclusions tailored to a particular project or are written on a standard form policy. The Insurance Services Office (ISO) CGL Coverage Form, CG 0001, 1986 or later, is the form used on most projects; it provides bodily injury and property damage liability coverage. Regardless of the specific form used, CGL coverage for a CIP should include (but not be limited to) several key provisions to safeguard the Sponsor's interest: contractual liability; broad-form property damage; CIP liability (usually written on a separate project-specific policy); explosion, collapse, and underground coverages; personal injury liability; and employees-as-insureds. In addition, there are a number of endorsements that can be used with the CGL form to broaden or reduce coverage.⁴

Whether a manuscript or standard CGL form insurance policy, the CIP will provide for a specified policy

term that should match the period of time from the start of the project to final completion. In this way the policy provides all participants with ongoing operations coverage and coverage for personal injury and ongoing operation property damage claims, no matter when they start and complete their work. Policies often are purchased for a specified term before construction begins. If the start of the project is delayed or if the project extends beyond the scheduled completion date, the policy period should be adjusted so that the policy term coincides with the actual work. Failure to extend coverage to final completion could result in uncovered personal injury or property damage claims that occur after the policy period ends as such claims occurring during construction are not covered by the completed operations coverage provided at the end of the policy period.

Completed operations coverage is designed to provide insurance for property damage claims occurring after the project is finished.

Completed operations coverage is designed to provide insurance for property damage claims occurring after the project is finished. The commencement of the completed operations period is defined by the policy and usually begins upon final completion or close of escrow. To provide maximum coverage to all participants, the completed operations period of coverage should coincide with the applicable statute of limitations or statutes of repose⁵ for the state in which the policy is issued. If the completed operations coverage period does not match the state's statute of limitations period, then each of the participants in the CIP is at risk for claims made after the end of the policy term for which there may be no coverage.

If the policy limits its completed operations coverage to a specific time period, then tolling of the statute of limitations by repairs or agreement of counsel may result in the period of time a claim may be filed against the contractor extending beyond the policy term.⁶ Consequently, before repairs are made that may toll the statute of limitations, the insurer should be notified of the claim and, if possible, consent to the repairs in writing.

In some CIPs, the Sponsor chooses not to purchase completed operations coverage for the entire statute of repose or is unable to find a carrier willing to provide such coverage. This can be a huge problem for participants because many contractors and subcontractors have CIP exclusions in their CGL policies. Some of these exclusions are absolute, indicating that when participating in a CIP, the contractor's or subcontractor's own

program will not respond to a claim, even in cases where the CIP does not respond to the claim either. It would be very dangerous for contractors and subcontractors faced with such exclusions to participate in a CIP that did not provide full protection during completed operations. As such, contractors and subcontractors that participate in a CIP that does not provide full coverage during the statute of repose are advised to discuss with their own insurance carriers the possibility of purchasing "tail coverage" (which can be endorsed on their own CGL policy) to extend permanent completed-operations coverage beyond the expiration of the CIP-provided project insurance. The cost of purchasing such coverage should be charged to, and reimbursed by, the Sponsor of the CIP, so it is actually in the Sponsor's best interest to buy the full tail coverage for all participants in the first instance, in order to capitalize on economies of scale.

Workers' compensation coverage pays medical expenses and wages for employees who are injured in the course of their employment. There is not a fixed limit for coverage because the benefits are determined under individual state workers' compensation statutes. Employer's liability is a coverage that protects employers from third-party liability arising from an employee's injury (e.g., suits from spouses and children). The coverage is necessary because these types of lawsuits are typically excluded from CGL coverage. Workers' compensation and employer's liability coverage are often included in a CIP, but not always. In certain states (e.g., Ohio, North Dakota, Wyoming, and Washington), workers' compensation is run by a monopolistic state fund.⁷ As such, in these states, including workers' compensation in the CIP is generally not possible.

Developers and contractors connected to residential projects have begun to sponsor CGL-only CIPs. Residential projects, especially attached housing projects where co-ownership exists, pose higher construction defect liability exposures. The primary reason for implementing these programs is to ensure that long-term construction defect exposures are properly covered. Many subcontractors have residential exclusions in their standard CGL policies for claims occurring during completed operations. These subcontractors simply cannot work on residential projects unless the developer or contractor provides a mechanism for insuring these exposures. Also, it is becoming increasingly difficult to obtain contractually required insurance coverage from subcontractors, including comprehensive additional insured endorsements, coverage for subsidence, primary endorsements, and contractual liability coverage. As such, the CGL-only CIP is a good way to protect the developer and contractor from the risks associated with relying on subcontractors' standard insurance to cover potential claims.

CIPs that provide coverage for large single-family home developments generally provide ongoing operations and personal injury coverage for all occurrences within the policy period and completed operations coverage for homes that close escrow during the policy

period. All enrolled participants in these types of programs should therefore keep precise records of the close of escrow dates for all homes covered under the CIP to ensure that the proper coverage can be accessed in the event of a claim or lawsuit.

Because CGL and employer's liability insurance are usually sold with per-occurrence limits in the range of \$500,000 to \$2,000,000, it is prudent for the CIP Sponsor to purchase umbrella/excess liability coverage. Excess liability insurance provides additional limits that sit over scheduled underlying policies. In a CIP, the excess liability would be endorsed to sit over the CGL and the employer's liability policies. Excess policies "follow form" to the underlying policies, whereas umbrella policies are written on their own forms, and may contain exclusions that are not found in the underlying policies. Excess insurance applies both per occurrence and with aggregate limits, so once the aggregate limit has been exhausted, there is no more coverage under the excess policy. Sponsors and participants in CIPs should always make sure to review copies of the umbrella and excess policies to understand fully the limits of such insurance and which coverages from the underlying policies may be excluded. Common exclusions from umbrella and excess policies include mold, lead, silica, EIFS, and residential exposures. It is important to note that many umbrella policies contain a contractor's limitation endorsement, which may include a blanket exclusion for wrap-up projects. For reasons previously noted, such wrap-up exclusions in the CIP need to be modified.

The Sponsor and participants in a CIP need to fully understand the mechanics of the aggregate limits of liability in the program. An aggregate limit is the most an insurer will pay during a specific policy period despite the number of claims. In a CIP, the Sponsor should make sure to purchase aggregate limits that renew on an annual basis. Note, however, that most insurers will only sell one aggregate limit for the entire completed operations period. Sponsors need to make sure that the one aggregate limit is adequate to account for the multiple claims that might arise during this long exposure period.

Rolling CIPs require even more due diligence as these programs may have aggregate limits for each project or one aggregate for all projects. Participants in rolling programs should carefully review the aggregate limits and understand the mechanics of how they will be applied. If there is only one aggregate applied to multiple projects, a participant would be wise either to ask that the Sponsor amend this feature of the program or to make sure that the shared limits are adequate for the multiple project exposures. Participants in rolling wrap-ups also should be aware that these programs are likely to provide one completed operations aggregate limit that applies during the entire completed operations period as opposed to an annually renewing aggregate.⁸ Participants should ask the Sponsor what other exposures are being covered in the program and, if at all possible, arrange with their

own insurers to have their standard policies endorsed to sit excess over and provide difference in conditions coverage to supplement the Sponsor's program.

Coverage Typically Excluded From a Controlled Insurance Program

Off-site Exposures

As mentioned above, CIPs do not cover off-site workers' compensation, employer's liability, general liability, and excess liability exposures, including products liability. This can be problematic for participants when dealing with furnish-and-install subcontractors. Because these subcontractors have on-site exposures (in installation), they need to be enrolled in the CIP. However, any products liability claims emanating from products manufactured off site will have to be covered by an off-site policy, and all participants need to be aware of what is covered and not covered so that they can coordinate their standard insurance programs accordingly. Sponsors attempting to prepare feasibility studies for a CIP also are advised to make sure they account for and exclude the volume of off-site work, materials, and equipment expected in their payroll estimates. Otherwise, pricing for the CIP may be skewed. This could be detrimental to financial benefits of the program because the insurance policies in a CIP are often subject to high minimum earned premiums.

The Sponsor and participants in a CIP need to fully understand the mechanics of the aggregate limits of liability in the program.

Work at staging areas and fabrication facilities also needs to be considered by Sponsors and participants. A Sponsor can ask the insurers for a broad definition of project site, so that such exposures would be included in coverage. If these areas are not covered, participants need to make arrangements to have proper coverage in place from other sources.

Excluded Professions/Trades

Certain professions and trades are often excluded from controlled insurance programs because of the risks involved in including them, or because their presence on the project site would be so limited, the administrative burden of enrolling these parties outweighs any benefit of enrolling them. Such professions and trades include design professionals, demolition contractors, hazardous materials and environmental remediation contractors and their consultants, and those who merely transport

materials or persons to and from the project site. Sponsors, in setting up programs, need to consult state regulations before deciding which parties will be excluded from a CIP.⁹ Before submitting a bid for a project, participants need to understand which parties will be excluded from the CIP and make sure that their price includes the cost of covering these exposures.

Automobile and Aircraft/Watercraft Liability

Business automobile coverage is routinely excluded from CIPs because of the difficulty in controlling and verifying losses. Participants in CIPs should make sure that they do not inadvertently credit the Sponsor with the cost of continuing this coverage.

Completed operations coverage is designed to provide insurance for property damage claims occurring after the project is finished.

Aircraft and watercraft liability are typically not covered under a CIP. This is likely because the parties fail to recognize the exposure in the planning stages of the program. If these liability exposures are not covered by CIP coverages, participants will need to make sure that they are covered by a separate policy.

Punch List/Warranty Work

There is the potential for a coverage gap when injuries occur after completion but during warranty work. In general, injuries occurring during warranty work are actually “ongoing operations exposures.” Injuries to users of the facility after the work is in place are “completed operations” exposures, even if they occur while warranty work is under way. Suppose six months after completion, the contractor is called out to perform warranty work, and someone is hurt as a result of the warranty work being performed. Most likely, that injury would not be covered by the CIP because most Sponsors stop the ongoing operations coverage when the project is completed, and do not extend it to the warranty period. Contrast that result to a situation where, during the time that the warranty work is under way, a patron of the completed facility trips and is injured on work that was put in place during the term of the CIP. That would be a completed operations exposure, and typically would be covered by the CIP, even if both injuries occurred on the same day.

Participants need to make sure that their standard insurance programs will pick up coverage for losses that occur during the warranty period. Participants should initially check with the Sponsor to determine when the

CIP coverage is likely to cease. Insurance credits should exclude any costs associated with covering claims arising from warranty and punch-list work through the participant’s corporate program. Lack of CIP coverage during the warranty is potentially problematic because if dealing with subsequent claims arising from work that was initially completed while the CIP is in place, but worked on again during the warranty period, it will be difficult to determine whether the CIP carriers or the participant’s own insurers are responsible for the loss.

Administration of Controlled Insurance Programs

The administration of a CIP is critical to its success. The CIP administrator’s tasks are many and varied, beginning with start-up and continuing through project closeout and sometimes beyond until all claims are closed. The owner, designers, safety staff, contractor, subcontractors, and insurers depend upon having a single point of contact for all CIP information. During the organization and start-up process, the CIP administrator should prepare administrative manuals, develop contract language, establish claims procedures, and prepare budgets.

The Sponsor should partner with an insurance broker or other professional who is experienced in handling program administration and safety for large projects. A project-specific safety manual will be created for all participants to follow. The right broker will help enforce these requirements. It is the broker’s responsibility to translate the project risks with required coverages, assist with CIP contract language, develop the underwriting submission, suggest and negotiate options, and guide the Sponsor throughout the carrier evaluation and selection process. The broker also must develop the project safety and loss prevention manuals, review and assist in negotiating participant bid deductions, and manage participant enrollment and administration.

Although the larger brokers manage many projects, consideration also should be given to the importance of a local team with knowledge of the contracting community and medical provider organizations. An RFP for broker services can be utilized to determine the qualifications of the various broker candidates and the fees that will be charged for their services.¹⁰

Loss Control Implementation Strategy

To realize the full, potential benefits of a CIP, a comprehensive safety and loss prevention program is essential. Among other steps, the safety programs of the project participants should be reviewed before the contracts are awarded. Before the work begins, representatives from the sponsor and insurer should interview the contractor’s proposed safety superintendent for experience and training suitable for the particular project. A safety manual should be incorporated into the contract documents, and should include requirements for safety meetings regularly conducted for all parties on the job site. Incentives should be

offered for safety-related activities and accomplishments. Training sessions for all participants' employees should be held as soon as they arrive on site. A safety committee with key representatives from all parties should be established to discuss status of work on site, reviewing safety problems reported or noted during job site inspections. Loss prevention staff (including loss prevention representatives from the insurers) should frequently survey the site and report their findings and concerns.

Although all of these steps might be taken on projects that do not employ CIPs, having a CIP in place results in a heightened awareness of safety and loss control issues. This is primarily due to carrier influence over the project. Carriers that cover every participant on one project have much at stake if proper safety/loss control procedures are not implemented. Likewise, Sponsors in loss-sensitive programs are likely to experience monetary impacts where safety and loss control are not a priority.

Project Policies That May Be Included in Conjunction With a CIP

CIPs are often accompanied by other project-specific policies that may cover one or more of the project participants, dependent upon the type of coverage and risk allocation decisions of the Sponsor. These project-specific policies also may be purchased for projects that do not involve CIPs.

Builder's Risk Insurance

Builder's risk insurance is first-party property insurance covering physical losses to the materials and equipment that are incorporated, or destined to be incorporated, into the completed project. Builder's risk policies may be purchased by the owner or the contractor. The coverage may be purchased through the owner's standard property policy (via endorsement), through the contractor's master program, or by either party as a stand-alone project policy.

Because there are several property damage exclusions in standard CGL coverage,¹¹ builder's risk insurance is a significant coverage for the contractor and subcontractors, as well as for the owner. It is important that the owner, the contractor, and the contractor's subcontractors are all added as insureds/additional insureds on any builder's risk policy. If it is not possible to cover the contractor's and subcontractors' interests under the builder's risk policy, these parties are faced with purchasing duplicate coverage (at added costs to the project) to fully insure property damage risk.

Unlike CGL insurance, builder's risk insurance is *not* written on an industry standard form. Every carrier offers slightly different coverage and uses different terminology. As there is little consistency between forms, Sponsors of builder's risk policies should review policy terms carefully, and are wise to work with a broker who is knowledgeable in the various coverages available in the market.

Builder's risk insurance may be sold on an "all risk"

or a "named peril" form. An "all risk" form means that losses arising from any peril are included in coverage unless they are otherwise excluded by the terms of the policy. A "named peril" form means that only losses sustained from the perils specifically named in the policy language are included. Standard construction industry contract forms typically require the builder's risk to be provided on an "all risk" form.¹²

The terminology "all risk" is something of a misnomer. A careful review of policy terms, conditions, and exclusions reveals there are many exclusions in every builder's risk policy.¹³ For an additional premium, certain exclusions may be negotiated back into coverage subject to sub-limits or sometimes with full limits. Because this coverage is complex and market driven, a Sponsor should always thoroughly review a specimen policy form initially, and then consult with a knowledgeable agent or broker on how to obtain more comprehensive coverage.

Participants in, and Sponsors of, builder's risk programs need to understand the sublimits and deductibles under the policy. Most industry-standard contract forms dictate that the owner is responsible for any builder's risk deductible.¹⁴ In practice, oftentimes these sections of contract forms are amended, and deductible risk is assigned to various participants other than the owner. Participants faced with such contract terms need to be aware that, especially if the project is in a catastrophic coverage zone (CAT), deductibles for certain coverages might be exceedingly high. For example, it is not unusual in high-risk wind zones to have a minimum deductible of 5 percent of the loss, or \$500,000, whichever is less. Other coverages that are either excluded, or if covered, are subject to sublimits and high deductibles, include earthquake, windstorm, and flood. A contractor that unwittingly executes a contract that shifts deductible risks to the contractor could be in for a large uninsured exposure if the project is in a CAT zone and suffers a named windstorm, flood, or earthquake.

Participants need to make sure that their standard insurance programs will pick up coverage for losses that occur during the warranty period.

In order to avoid the participants' purchase of duplicative coverage for property damage risks, and to avoid finger-pointing litigation that can be costly and distracting to the project, the parties should seriously consider including a full mutual waiver of property damage claims

in the contract documents.¹⁵ In addition, the Sponsor should make sure that the builder's risk carrier is aware of the waiver and that such waiver is not inadvertently excluded in the policy coverage.

Although industry-standard language typically includes the architect/engineer as a beneficiary of the waiver of subrogation,¹⁶ Sponsors of builder's risk policies need to be careful not to promise a full waiver of subrogation to design professionals in the contract documents unless and until the carrier agrees to support such a promise. Builder's risk policies often exclude coverage for design defects but include coverage for ensuing losses arising from design defects. As such, carriers do not like to waive rights to subrogate against the architect/engineer.

Carriers that cover every participant on one project have much at stake if proper safety/loss control procedures are not implemented.

Note that industry-standard contract forms typically require certain types of soft cost coverage be included in the policy.¹⁷ However, most policy forms do not automatically include soft cost coverage because each added soft cost must be separately underwritten and these coverages are typically subject to sublimits. Sponsors should review what soft cost coverage is available in the market and then make a business decision as to which soft costs to include in the program. Contractors participating in an owner-sponsored builder's risk program should make sure that the owner has included soft cost coverage in amounts adequate to reimburse it for its additional fees and expediting expenses involved in remediating a loss.

Builder's risk policies often provide sublimits protection for materials in transit and materials stored off site. The Sponsor and participants should coordinate this coverage with one another so that duplicate coverage for these risks is not inadvertently purchased.

Project-Specific Professional Liability

Professional liability insurance protects professionals against liability based on alleged or real professional errors and omissions or mistakes. Architects and engineers are not the only parties who need such insurance. Design/builders, construction managers, and even general contractors provide certain professional services and should carry professional liability insurance to protect themselves.¹⁸ Unfortunately, many participants that provide

professional services do not carry adequate professional liability coverage as a matter of course. This is likely due to the fact that this coverage is quite expensive, and, because it is sold on a claims-made basis, the insured must be diligent about renewing it annually to keep the protection in place. Purchasing such coverage in large limits year after year may affect the participant's bottom line because the project volume is unknown at the time of purchase and the expense may not always be passed through. As such, many of those providing professional services go with little or no professional liability coverage.

Similar to builder's risk coverage, professional liability policies are not written on industry-standard forms. These policies generally provide protection for professional negligence only, but some insurers also offer enhanced coverages (e.g., contractual liability, pollution coverage) or include unusual exclusions (e.g., design-build), so it is important to read specimen policies to understand the coverage being purchased under a professional liability policy.

For large projects, the Sponsor may determine that it makes sense to cover professional exposures through purchase of a project-specific professional liability. Project-specific professional liability policies are available for the entire project and may remain in place for several years after the project is completed. Reasons to purchase such a policy include assurance of proper coverage for all project participants; assurance of proper coverage for design joint ventures; consistency of claims handling for project exposures; provision of increased limits compared to coverage under the professional's corporate program; and a desire to assure that professional exposures are adequately covered for all members of the construction team for the life of the project and for a predetermined extended reporting period. Ideally, the participants covered by the project-specific professional coverage would subtract the cost of their own corporate professional liability insurance from their fees. However, this may not always be possible because most professional liability insurance is sold on a fixed-cost basis and is not subject to discounts after it is initially purchased. Regardless of obtaining a premium cost savings, a Sponsor may still want to obtain a project-specific professional liability policy to provide coverage for participants that may not carry professional liability coverage or for those whose coverage does not satisfy the Sponsor's requirements.

The drawback to project-specific professional coverage is that because of unfavorable claims experience on project-specific policies, it is difficult to find insurers willing to provide such coverage at a reasonable price. Also, current insurance markets do not typically sell coverage that protects both construction-related risks (e.g., design-build/construction management) and architectural/engineering risks, so the design professionals and the construction managers typically cannot share the same project-specific policy, adding more cost to the equation. Recently, some carriers have been issuing project-specific

policies with a “material variation endorsement.” The material variation endorsement requires the insured to initially disclose the parameters of the project to the insurer (e.g., schedule, price, type of construction). If any of the disclosed parameters changes during the course of the project, the insured has a duty to notify the carrier and the carrier has the right to stop providing coverage under the policy.

After researching the costs and coverages available under project-specific professional liability policies, some Sponsors opt to purchase a professional protective liability policy instead. Professional protective insurance (PPI) is available for purchase by either design-builders or project owners. PPI is a first-party coverage that sits excess over any other available professional liability policies. The benefit of this coverage is that it can serve to increase the limits of a professional’s corporate professional liability policy at a fraction of the cost of standard professional liability coverage or a project-specific policy. The downside of PPI is that it only provides coverage for the party that actually purchases it, potentially leaving other project participants with inadequate limits. Also, the fact that PPI sits “excess over” all other coverage can make it onerous to trigger.

Contractor’s Pollution Liability/Mold Coverage

Only limited coverage exists for pollution incidents in a standard CGL policy. For example, if a contractor brings a pollutant on site and overspray occurs, such occurrence would likely be covered by a CGL policy. However, if, during an excavation project, a contractor hits a sewer line causing release of sewage into the environment, resulting in government demands for cleanup and third-party liability demands, such an occurrence would not be covered under a CGL policy due to the pollution exclusion. For this reason, owners of construction projects are wise to require the contractor and its subcontractors to carry contractor’s pollution liability insurance (CPL), even when the contractors and subcontractors are not performing remediation or abatement services. Fortunately, CPL is available for purchase as a project-specific policy covering all construction participants.

Most CPL policies provide coverage for environmental hazards arising from three sources: (1) known pollutants existing on the job site that are accidentally released during construction (e.g., pollutants collected by a remediation contractor); (2) unknown pollutants existing on the job site that are uncovered by excavation operations (e.g., buried fuel oil tanks or barrels of toxic waste); and (3) pollutants brought to the job site by a contractor or subcontractor (e.g., fuel, hydraulic fluids, paint, etc.). CPL is available both on occurrence and claims-made forms. Mold coverage can be purchased through a CPL policy, but most carriers will only sell mold coverage on a claims-made basis, even when the underlying CPL policy is occurrence-based. The project owner is not an “insured” under the CPL policy, but typically has rights

under the policy as an additional insured. Owners that are interested in procuring first-party pollution coverage are advised to consider purchasing a pollution legal liability policy as well.

There are certain underwriting considerations that restrict the length of a CPL policy. For example, due to reinsurance restrictions, most carriers cannot sell the coverage to span more than a 10-year time frame. As such, for long projects, a 10-year term for the entire program (both ongoing and completed operations exposures) may not be long enough to cover the applicable statute of repose.

Professional liability insurance protects professionals against liability based on alleged or real professional errors and omissions or mistakes.

Subcontractor Default Insurance

Subcontractor default insurance is an insurance product that substitutes for subcontractor bonding. The coverage is only currently available from one insurance market, Zurich, under the trade name “Subguard.” Subguard provides first-party coverage to the contractor to protect it from risks of subcontractor default. Although in the past Subguard coverage could be sponsored by either the contractor or the project owner, Zurich currently offers the coverage *only* to contractors. In order to qualify for a Subguard policy, contractors must undergo a stringent application process, where Zurich internally audits the contractor’s quality, operating, and subcontractor prequalification procedures. Many large contractors are currently using Subguard for the enhanced coverage that it provides over subcontractor bonding. In particular, Subguard allows contractors to remedy subcontractor defaults without the necessity of putting the subcontractor’s surety on notice, waiting for the surety to conduct its investigation, and eventually accepting (or rejecting) responsibility for the default. With Subguard, the contractor is able to respond to a default situation quickly, using its own internal expertise, and without having to wait for a surety’s response or permission.

Regulatory Considerations in Setting Up CIPs

A number of states regulate CIPs as the result of lobbying efforts by groups that are deemed to have less than equal bargaining power in the decisions surrounding the coverage and administration of CIPs.¹⁹

For example, Florida law prohibits CIPs on public jobs, unless the total project is \$75 million or greater.²⁰ Florida law also requires public owners to maintain

completed operations coverage in OCIPs for no shorter than a 10-year duration²¹ (which is commensurate with Florida's statute of repose).²² In Connecticut, with the exception of the University of Connecticut 2000 Infrastructure Improvement Program,²³ OCIPs may be sponsored only on public projects greater than \$100 million.²⁴ Michigan and New Mexico limit the circumstances in which a CIP may offer workers' compensation coverage.^{25,26} California imposes detailed disclosure requirements on Sponsors of CIPs on residential,²⁷ public works, and commercial²⁸ projects.

Before deciding to sponsor a CIP, owners and contractors need to be aware of such regulations, which may impact the availability and breadth of the program.

Self-Insured Retention and Deductibles

A self-insured retention (SIR) is a payment that must be made by the insured before the insurer's obligation to defend or indemnify is triggered. A deductible is the amount of money the insured is obligated to pay back to its insurer to reimburse it for fronting costs under the insurance program. The CGL policies within CIPs have either SIRs or deductibles, and careful reading of the policy to determine what payment obligations are contained in the policy is crucial. For most insureds, deductibles rather than SIRs are preferred as the insurer has an immediate obligation to defend a claim. However, an insurer may require its insureds to post security to protect the insurer in the event that the insured does not satisfy the deductible.

Professional liability insurance protects professionals against liability based on alleged or real professional errors and omissions or mistakes.

The amount of the SIR/deductible is set upon the purchase of the policy in a CIP. The larger the SIR/deductible, the lower the premium. Each enrolled party should be advised of the SIR/deductible, and provisions should be incorporated into the contracts between the enrolled parties specifying who is responsible for satisfying the SIR/deductible. Although the insurer will generally look to the first named insured to pay the SIR/deductible, how this payment is allocated between each of the enrolled parties is subject to negotiation and should be set forth clearly in the contract documents. The failure to clearly define who is responsible for this payment may leave an enrolled party at risk for making a large

payment in order to obtain a defense. A Sponsor that attempts to assign SIR/deductible risk to the CIP participants may find that the overall cost of the program is affected negatively because the participants will charge the Sponsor for the cost of covering those SIRs/deductibles. On the other hand, assigning a small SIR/deductible to participants may not provide adequate incentives to avoid claims.

There are various formulas for how SIRs/deductibles are allocated between the enrolled parties. Examples include (1) allocation based upon each involved participant's fault, (2) payments based upon the size of the SIR/deductible the enrolled party carries on its non-CIP insurance, and (3) preset percentages of payments based upon the type of work to be performed by the enrolled party.

In addition to contract terms that prescribe who is responsible for payment of the SIR/deductible, the contract also should set forth a means to resolve disputes between the enrolled parties that may arise over which of the enrolled parties has responsibility for payment of the SIR/deductible. For example, it is not hard to imagine a Sponsor assessing shares of a SIR/deductible to as many enrolled subcontractors as possible, while a number of enrolled subcontractors deny any responsibility for an alleged defect or damage. To avoid protracted disputes concerning payment of the SIR/deductible, the parties may consider some form of expedited mediation or arbitration.

Collection of the SIR/Deductible

If the claim is made while the project is still ongoing, the Sponsor may be permitted to back charge the participant for its share of the SIR/deductible. Collection of the SIR/deductible will be more difficult if the lawsuit or claim is made years after the project is completed and the enrolled participant has left the job and perhaps has even ceased operating.

Consideration should be given to obtaining some form of security for payment of the SIR/deductible for claims that are made after the project is complete. Many projects are developed by single-purpose entities that are dissolved shortly after completion of the project. Even if the Sponsor has agreed to pay a percentage of the SIR/deductible, collection of the Sponsor's share may prove difficult if not impossible if the Sponsor is a single-purpose entity that has been dissolved. Under such circumstances (especially if the SIR/deductible is hundreds of thousands of dollars), the solvent enrolled participant may be forced to pay the Sponsor's share of the SIR/deductible in order to obtain coverage under the CIP. In order to avoid this unfortunate situation, loss funds or nonrevocable letters of credit should be obtained from the Sponsor or other parties responsible for satisfying the SIR/deductible that may be assessed years after completion of the project.

CGL Policies with Burning Limits

Traditionally, CGL policies provide for the payment of all defense costs and attorneys' fees, and the policy limits are *not* reduced by the amount of fees and costs paid in defending a claim. A major departure from this traditional feature of CGL policies is found in many CIPs where payments made in defending the claim reduce CGL policy liability limits. Policies that reduce limits by the payment of attorneys' fees and costs are generally referred to as "burning limit" policies. Such a policy term may have a significant impact upon the defense of a case and should be kept in mind when reviewing settlement and policy limit demands.²⁹

Other Insurance

The intent of CIP policies is to provide primary coverage for a particular project. These policies are marketed and sold as the "primary policy" for any covered losses that may occur on the identified project. Nonetheless, before purchasing CIP coverage, the "other insurance" clauses should be reviewed to confirm that the CIP policies will be "primary and noncontributing" with any other valid and collectable insurance the enrolled parties may purchase. Conversely, if the other insurance clause in the CIP provides that it is either excess to or will prorate with other primary insurance, then, absent a CIP exclusion in a contractor's or subcontractor's own insurance policy, the contractor's or subcontractor's own insurance may be called upon to participate and contribute to a loss, despite the contractor's understanding and intent to the contrary.³⁰

The presence of other primary coverage in addition to the CIP also may have an impact upon the obligations of an excess carrier. Some states require exhaustion of all primary coverage before excess coverage is triggered.³¹ Depending upon how the excess policy is written, the excess carrier may argue that the insured's other primary coverage must be exhausted before the excess coverage is triggered.

In addition to separate CGL coverage carried by a participant, the participant also may carry professional liability coverage for design-build work. Although design work may not be covered by the CIP, coverage may be found in a professional liability policy. How these two policies share in the defense of a claim and in payment of a loss is uncertain, and subject to negotiation between the carriers.³²

Coverage Issues and CIPs

Many CIPs are issued using standard ISO forms and exclusions. This section discusses typical ISO policy language and exclusions and the implications of such policy language on CIP coverage, but, in all cases, an analysis of the particular language should be made.

Off-Site Work Exclusion

As mentioned above, this exclusion disallows CIP coverage for all off-site activities and damages. As such,

coverage will not be provided to the manufacturer of a product made off site (e.g., window manufacturer). Instead, the coverage will begin for the enrolled party once the product is delivered and then installed at the project. In addition, if material or products are stored off site, coverage is not provided under the CIP (damage to off-site products may be separately covered under the builder's risk coverage). Finally, if the off-site exclusion defines coverage within the confines of the project, then coverage may not be provided for bodily injury claims occurring outside the project boundaries. Because of the types of risks excluded from coverage by the off-site work exclusion, participants need to maintain their own CGL coverage for these off-site risks. In addition, the Sponsor should require additional insured coverage for off-site exposures.

Owners that are interested in procuring first-party pollution coverage are advised to consider purchasing a pollution legal liability policy as well.

Own-Work Exclusion

The own-work exclusion in a standard CGL policy excludes coverage for damages caused to the insured's own work product. If under the CIP each of the enrolled participants is a named insured, then any property damage would be to an insured's "own work," and the insurer may try to argue such damage is excluded from coverage under the policy. Clearly this is not the intent of the CIP, and therefore a careful review of the CIP policy is important to determine if this standard exclusion is either deleted from the CIP or modified to comply with the true intent of the CIP, which is to cover each insured as if it was issued a separate CGL policy.

Cross-Liability Exclusion

This exclusion bars coverage for one insured suing another insured. The purpose of this exclusion is to protect the insurer from defending lawsuits and claims between insureds. However, this exclusion may create problems for coverage between the insureds and under certain circumstances leave a party uninsured for what would otherwise be a covered claim.

This particular exclusion may create significant coverage issues for an enrolled party if the Sponsor constructs and then elects to keep a property (e.g., an apartment building or office building). If construction defects are discovered after completion of the project, and the

Sponsor files a claim or lawsuit against the responsible contractors, the cross-liability exclusion may exclude coverage for such suits. Similarly, cross-complaints for indemnity between insureds also would be barred by this exclusion. Consideration therefore should be given to removal of this exclusion, especially if the Sponsor intends to keep the property after completion.

Timely Enrollment of Contractors and Subcontractors

Almost every CIP requires some enrollment or notice to the insurer identifying the participants that are to be included in the CIP. Responsibility for enrollment is generally handled by the broker or CIP administrator. However, it is ultimately the Sponsor's obligation to ensure that an enrolled party does not begin work on the project before the proper paperwork has been submitted to the carrier. This obligation may be overlooked or missed in the rush to begin a project, and it is easy to imagine a contractor beginning work before a final contract is signed or notice of the contractor's enrollment in the CIP is provided to the carrier. A claim caused by a party that is not properly enrolled in the CIP may give rise to coverage defenses by the insurer and could present significant uninsured risk. Consequently, the Sponsor should ensure that proper procedures are in place that do not allow participants to begin work on a project until all necessary paperwork is submitted to the carrier.

The failure to clearly define who is responsible for this payment may leave an enrolled party at risk for making a large payment in order to obtain a defense.

Subsidence Exclusion

Many CGL policies contain subsidence exclusions that preclude coverage for damages caused by earth movement. In some instances, such damages could be significant. In evaluating the scope of coverage, the Sponsor should consider purchasing subsidence coverage from the CIP insurer.

Traps in Defending and Adjusting a CIP Claim

Reservation of Rights

Even when insurers agree to provide a defense, they are obligated under state law to advise insureds of potential coverage defenses to raise in the future. Although the terms of what must be outlined in a reservation of rights letter vary by state, the purpose of such a letter is to put the insured on notice that some or all of the

claims in a lawsuit or arbitration may not be covered. The issuance of such a reservation of rights letter in a CIP creates several additional issues for both the insured and defense counsel.

Each enrolled participant is an insured under the CIP and therefore each participant that tenders its defense under the CIP must receive a copy of the reservation of rights letter if the carrier intends to reserve its rights to contest coverage. Failure to provide such notice by the insurer may result in the carrier waiving its coverage defenses.

Attorney Representation of All Defendants in the Lawsuit

The intended purpose of a CIP is to allow one attorney to represent all of the enrolled contractors in one lawsuit. However, the ABA Model Rules of Professional Conduct³³ do not allow an attorney to simultaneously represent two or more parties that are either adverse or potentially adverse to each other. Such conflicts may be created when an insurer reserves rights, thereby telling one or more of its insureds that some part of a claim may not be covered under the terms of the CIP. Under such circumstances, the Sponsor or enrolled participants may elect to pursue either equitable or contractual indemnity against each other for the potentially uncovered claim. The assertion or possible assertion of an equitable or indemnity claim between two parties represented by the same attorney will create a conflict of interest that must be disclosed and waived if the attorney wishes to continue to represent both parties.

In order to avoid this conflict of interest, some CIP policies include provisions that require all insureds to waive all future conflicts and agree to be represented by one attorney. Similar terms are sometimes included in either the CIP manual or contracts. Although case law is scarce interpreting such provisions, the Model Rules of Professional Conduct require a knowing and written waiver of conflicts before an attorney may represent two or more adverse parties.³⁴ Policy terms or contract provisions that require prospective conflict waivers in the event of a conflict are likely to be found void as against public policy.

In the event the attorney cannot secure conflict waivers, the carrier may be required to retain separate attorneys for each affected enrolled party. In recognition of this conflict, insurers have in some instances retained one attorney to represent groups of subcontractors that are not adverse to each of the others while retaining separate counsel to represent the project owner and contractor. Although separate counsel may be required, this will result in an accelerated decrease in the amount of insurance under burning limit policies. For those policies that may not have adequate limits to respond to a large claim, attorneys must be instructed to work together to preserve the limits of coverage as much as possible.

Settlement Demands

CIPs provide unique issues and challenges as demands

to settle may be made to some but not all of the enrolled parties. How an attorney analyzes and makes recommendations for settlement of some but not all enrolled participants may create conflicts of interest for defense counsel. Insurers and attorneys also must be aware of “policy limit demands” to all enrolled parties, and special consideration should be given to settlements when there is a potential for a verdict in excess of policy limits.

Contractual Indemnity

Almost all construction contracts contain a written indemnity agreement for those claims that are not covered under the CIP. In addition, the indemnity provision also may provide for the mechanism for the recovery of a share of the SIR/deductible. The assertion of these indemnity rights between enrolled parties for uncovered claims under a CIP may create nonwaivable conflicts of interest for the attorney retained to represent all of the affected participants.


Early Tender of a Claim

Most CIP policies require notice of a claim before the carrier’s obligation to defend and indemnify for a covered loss is triggered. Failure to put the carrier on timely notice of a claim may result in a carrier’s denial of payment for a claim that may otherwise be covered. Therefore, CIP insurers should be put on notice as soon as a third-party claim is made.

Joint Defense Agreement

Joint Defense Agreements (JDA) allow counsel for different parties to share information without waiving attorney-client and work product privilege. In the event the CIP insurer retains different counsel to represent its insureds, counsel should consider, where possible, the retention of joint experts to preserve policy limits. JDAs are, therefore, important to protect all privileges and allow defense counsel to work together in a joint defense of a claim.

Avoiding Pitfalls

Controlled insurance programs provide an important mechanism for owners and contractors to manage risks and optimize insurance dollars on large construction projects. A well-planned and properly administered CIP will provide benefits to all participants. But not all CIPs are created equal. It is important for Sponsors and participants to do their homework in deciding whether to sponsor or participate in a CIP. Careful preplanning can help avoid the pitfalls that have given these programs a bad reputation. 

Endnotes

1. See www.irmi.com/online/insurance-glossary/terms/loss-sensitive-plans.aspx.
2. A very useful checklist for reviewing CIP coverage has been published by the Associated General Contractors, *Look*

Before You Leap: A Contractor’s Guide to Owner Controlled Insurance Programs, May 10, 2001, www.agc.org/galleries/conrm/OCIPS%20-%20Look%20Before%20You%20Leap.pdf.

3. EMR is a calculation used in the insurance industry to determine an insured’s workers’ compensation rates. It is based on a company’s workers’ compensation claims experience over a three-year period (not including the most recent completed year). In an oversimplification, EMR is a ratio in which the “actual” loss experience is the numerator and the “expected” loss experience is the denominator. Expected losses are determined by payroll volume and the level of hazard associated with job classifications. The first \$5,000 of actual losses (“primary losses”) are given more weight than the amounts in excess of the primary loss (“excess losses”), and these are capped at different levels, depending upon state law.

4. See generally www.irmi.com/products/store/the-wrap-up-guide.aspx.

5. A “statute of repose” is a statute that cuts off certain legal rights if they are not exercised prior to a certain legal deadline. Statutes of repose for making claims related to a construction project vary by state. For example, the statute of repose for construction claims in Michigan is six years, except that an action in gross negligence may be maintained for up to 10 years. See MICH. COMP. LAWS § 600.5839 (West 2008). The statute of repose in Florida was recently reduced from 15 years to 10 years. See FLA. STAT. ANN. § 95.11(3)(c) (West 2008).

6. CAL. CIV. CODE §§ 927, 1375 (West 2008).

7. www.irmi.com/online/insurance-glossary/terms/monopolistic-state-funds.aspx.

8. See Richard Resnick, *Rolling Wrap-Up Programs*, IRMI.COM EXPERT COMMENTARY, May 2005, www.irmi.com/expert/Articles/2005/Resnick05.aspx.

9. For example, in Michigan, a Sponsor must have special permission from the insurance commissioner to exclude any parties from coverage under the CIP.

10. The following is a list of important information to obtain from broker candidates for evaluation purposes:

- Descriptions of the proposed team with details regarding relevant experience.
- List of CIP or construction clients.
- Information regarding access to specialized or technical expertise in construction-related areas.
- How and by whom program administrative functions will be handled.
- Type of documents or manuals recommended for project contractors.
- Process used to close down a multiyear program.
- Compensation issues.

11. See the Insurance Services Office’s 2001 CGL Policy Form, CG 00 01 10 01, §§ 2j, 2k, and 2l.

12. See, e.g., AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A201 GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION [hereinafter “A201”], A201-2007 ¶ 11.3.7, A201-1997, ¶ 11.4.1.

13. Common exclusions include various “soft costs” (e.g., architects’ and construction managers’ fees, extra and expediting
(Continued on page 51)

OCIPs, CCIPs, AND PROJECT POLICIES

(Continued from page 23)

expenses, delay costs, interest, legal fees, refinancing charges); subsidence; law/ordinance; sewer backup; flood; false-work; named windstorm; earthquake; mold; design errors and omissions; fraud; inherent vice; liquidated damages; faulty workmanship; pollution; terrorism; unexplained loss or inventory shortage; and software and data-related losses, among others.

14. A201-1997 ¶ 11.4.1.3.

15. Examples of such a clause are found in A201-2007 ¶ 11.3.1.1 and A201-1997, ¶ 11.4.1.

16. *Id.*

17. *See, e.g.*, A201-1997, ¶ 11.4.1.1: “. . . and shall cover reasonable compensation for Architect’s and Contractor’s services and expenses required as a result of such insured loss.”

18. Note that standard CGL policies contain exclusions for professional liability exposures. Even if such coverage is “added back” to a CGL policy, the coverage is still subject to standard policy terms and exclusions, so coverage is generally limited to occurrences of bodily injury or property damage. In comparison, a stand-alone errors and omissions policy will provide the insured coverage for economic losses arising from negligence or allegations of negligence.

19. *See generally* National Fire Safety Association, *OCIPs, CCIPs and the Bottom Line*, www.nfsa.org/departments/regional/regionaldirector/OCIPs.html.

20. FLA. STAT. ANN. § 255.0517 (West 2008). The \$75 million threshold applies unless the public entity intends on building two public schools in one fiscal year, in which case the estimated cost of the total project must be \$30 million or greater, or where the public entity intends to build one public school, the estimated total cost of the project must be \$10 million or greater, regardless of duration. *Id.* § 255.0517(2)(a).

21. *Id.* § 255.0517(2)(b).

22. *Id.* § 95.11(3)(c).

23. CONN. GEN. STAT. ANN. §§ 49-41(e)(2) and 10a-109e (West 2008).

24. *Id.* § 49-41(e)(2).

25. MICH. COMP. LAWS § 418.621(3). Under Michigan law, in addition to other requirements, a CIP may not offer workers’ compensation coverage unless the cost of construction at the site (not including land) exceeds \$65 million and the period for construction is not more than five years. *Id.*; *see also Chase v. Terra Nova Indus.*, 728 N.W.2d 895, 900 (Mich. Ct. App. 2006). In *Chase*, the Michigan Court of Appeals remanded a case where the lower court initially held that the workers’ compensation carrier for a CIP on a large shopping mall project was liable for a workers’ compensation claim filed by the employee of a subcontractor on a completely unrelated project that happened to be in the confines of the project description that was appended to the insurance director’s order authorizing the CIP.

26. N.M. STAT. ANN. § 52-1-4.2(b) (West 2008). Under New Mexico law, it is illegal to sponsor workers’ compensation insurance in a rolling CIP. *Id.* Workers’ compensation insurance may still be sponsored in conjunction with a New Mexican CIP as long as the project in question is at a single site and exceeds \$150 million in aggregate construction value that will be expended within a five-year period. *Id.* § 52-1-4.2(a).

27. CAL. CIV. CODE § 2782.95.

28. *Id.* § 2782.96 (applies to “a public work . . . or any other project other than residential construction”).

29. Such “burning limit” policies are common on the errors and omissions/professional liability coverage issued to most design professionals.

30. Although a contractor may elect to have the CIP insurer defend the claim (having made an *Armstrong* election, based on *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1 (Cal. App. 1st Dist. 1996)), the defending carrier will have an equitable contribution right against all other insurance.

31. *See, e.g.*, *Cmty. Redevelopment Agency v. Aetna Cas. & Sur. Co.*, 50 Cal. App. 4th 329 (Cal. App. 2d Dist. 1996).

32. *See generally* Sean T. Devenney & Gregg Bundschuh, *Is the Line Blurring Between General and Professional Liability?* 29 CONSTR. LAW. 15 (Spring 2009).

33. MODEL RULES OF PROF’L CONDUCT R. 1.7.

34. *Id.*

WHEN THE SHOES DON'T FIT

(Continued from page 28)

that the release of a duty to pay money pursuant to the underlying obligation would otherwise cause the secondary obligor a loss; and (iii) that the release discharges a duty of the principal obligor other than the payment of money.”

23. 183 F.3d 935 (9th Cir. 1999).

24. RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 48 (1996).

25. 74 P.3d 268 (Ariz. 2003).

26. 40 U.S.C. § 270(a)(2).

27. *See Naylor Pipe Co. v. Murray Walter, Inc.*, 421 A.2d

1012, 1013 (N.H. 1980); *United States ex rel. Bergen v. DeMatteo Constr. Co.*, 467 F. Supp 22, 24 n.5 (D. Conn. 1979).

28. RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 36 (1996).

29. Whether a principal—and, by implication, the surety—can assert a setoff defense against the claims of a sub-subcontract is unclear. In *United States ex rel. Martin Steel Constructors v. Avanti Constructors, Inc.*, 750 F.2d 759, 762 (9th Cir. 1984), the Ninth Circuit held that the principal can assert a setoff defense in situations “limited to those in which the plaintiff is a subcontractor or materialman of the general contractor and thus is in direct contractual relations with the counterclaimant.” This approach was rejected by the First Circuit in *United Structures of Am. v. G.R.G. Eng’g S.E.*, 9 F.3d 996