

# California Insurance Law Coverage Newsletter for Attorneys

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## Wrap-Up Consolidated Insurance Program

### § W26.02:1 In general; wrap-up insurance policy defined

A “wrap-up” insurance policy is an insurance policy, or series of policies, written to cover risks associated with a work of improvement as defined in Civil Code § 3106, and covering two or more of the contractors or subcontractors who work on that work of improvement. [Insurance Code § 11751.82(b)]

Wrap-up insurance coverage is a Consolidated Insurance Program (CIP). These programs are used primarily for major construction projects. As a general rule, construction projects in excess of \$50 to \$100 million dollars are best suited for CIP treatment. [Vol. 4 Brunner & O’Connor Construction Law § 11:124] By obtaining a CIP [also known as OCIP], the owner, or sponsor, procures insurance for himself, the general contractor, subcontractors and employees working on the construction project. [*Liberty Mutual Ins. Co. v. Louisiana Ins. Rating Comm’n* (1997, La. App.) 696 So.2d 1021, 1023]

#### *Endorsements*

Given the nature of a “wrap-up” policy or owner-controlled insurance program (OCIP), various policy endorsements, when read in conjunction with a standard CGL liability policy as a whole *restrict* and/or *limit* rather than expand coverage to liability arising out of construction-related incidents in conjunction with the described project. The endorsements describe in particular:

1. The project under construction,
2. The project site,
3. Describe that the products-completed operations hazard applies, but perhaps with limitations such as a time period of 3 years after final completion,
4. stating that the ‘coverage afforded by the policy’ is for the ‘term of the project’ commencing on a specified date. See *Zeitoun v. Orleans Parish*

*School Board* (2010 La.App.) 33 So.3d 361, 366

### § W26.02:2 Purpose of Controlled Insurance Programs (CIPs)

The purpose of Controlled Insurance Programs (CIPs) is described in 29-SUM CONSLAW 11 (2011) (Reprint of 2009 American Bar Association Article by Kaplan, Bunting, Hobbs entitled OCIPS, CCIPS, and PROJECT Policies).

A CIP (Consolidated Insurance Program) insures loss exposures for its participants of a single construction site (or, if so described, multiple sites). The sponsor procures the coverage on behalf of participants, rather than requiring participants to maintain the coverage themselves. The range of insurance coverage in the 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. [29-SUM CONSLAW 11 (2011)]

#### *CIPs not always looked upon favorably*

CIPs are not always looked upon favorably by the participants that are asked to enroll in them. The common complaints include poor coverage; coverage gaps; administrative burdens; disputes related to insurance credits; and a participant’s loss of control over its own claims handling. [29-SUM CONSLAW 11, 13]

*What coverage is typically included in a CIP*

The CIP provides coverage only for exposures at the “project”.

The *core coverage* provided in a CIP is commercial general liability (CGL) insurance. CGL policies cover property damage, bodily injury, personal and advertising injury, premises and occupational 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.

CIP policies either are specifically crafted ‘manuscript’ policies [see § M16 MANUSCRIPT POLICY] with specific exclusions tailored to a particular project, or are written on a standard form policy. The Insurance Services Office (ISO) [§ 185 ISO (INSURANCE SERVICES OFFICES, INC.)] 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 interests: contractual liability; broad-form property damage; CIP liability (usually written on a separate project-specific policy); collapse and underground coverages; personal injury liability, and employee-as-insureds.

*Exclusions*

*Off-site exposures-exclusions*

CIPs do not cover off-site workers compensation, off-site employer’s liability, off-site general liability, nor excess liability exposures including products liability. 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. [29-SUM CONSTLAW 11, 15]

*Excluded professions/trades*

Certain professions and trades are often excluded from controlled insurance programs. 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. 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 exclusion*

Aircraft and watercraft liability are typically not covered under a CIP.

*“Ongoing operations exposures” limited coverage*

Most CIPs stop the “ongoing operations coverage” when the project is completed, and do not extend it to the warranty period. [29-SUM CONSTLAW 11, 16]

*Purpose of CIP policies*

Due to the proliferation of construction defect litigation [wrap] insurance policies are fast becoming the only option for developers, general contractors and subcontractors who build sing-family or multi-family homes in California. [50 No. 8 DRI For Def. 24, pg 6]

Because wrap insurance is, by definition, shared risk management, wrap programs constitute a ‘drastic departure from the previous insurance model’. Most CIPs reverse the previous risk transfer model which model relied upon a false premise that construction defects and job site injuries were caused by subcontractors and not be builders/general contractors. [50 No. 8 DRI For Def. 24, page 4-5] This premise, coupled with superior market power, allowed builders and general contractors to transfer virtually all risks, even for claims arising out of the general contractor’s sole or contributory negligence, to trade (subcontractors) contractors. As a consequence, a builder’s strict reliance on risk transfer to subcontractors explains the persistent increase in defect litigation and job site injuries.

Contrary to the conventional wisdom that subcontractors cause virtually all construction defects and need incentive to perform quality work, subcontractors do not control the work sequences

creating the circumstances under which accidents happen and construction defects occur, nor do they 'enforce fast-track schedules'. Moreover, subs do not design buildings. They do not approve value engineering corner-cutting. They cannot always insure that their work will properly fit with the work performed by later finishing subcontractors, much less that their work will not be wrecked by a later finishing subcontractor in a hurry. [50 No. 8 DRI For Def. 24, page 5] Numerous studies of construction losses have concluded that jurisdictions allowing broad risk transfer provisions experience less safe and poorer quality construction than those that do not. [50 No. 8 DRI For Def. 24, page 6]

Absent the purchase of an umbrella policy by the participant - subcontractor to the wrap policy, there are numerous gaps and defects. They are:

1. Some general contractors continue using contractual indemnity provisions on wrap projects, which cause a conflict of interest between the parties, who are otherwise "co-insureds" under the wrap policy.
2. A wrap policy for a large project often will not have adequate limits to resolve the claims including defense costs. Multiple defense costs incurred in defending the general contractor and subcontractors accelerate the "burning limits" provision in the wrap policy.
3. Wrap policies incorporate "burning limits" policies in which defense fees erode policy limits. See § **D20 DEFENSE COSTS - SEPARATE FROM OR INCLUDED WITHIN POLICY LIMITS**.

§ **W26.02:3 California law; indemnity agreements contained in the contractor/subcontractor agreement are void and unenforceable**

An agreement entered into on or after January 1, 2009 for residential construction that is covered by a wrap-up insurance or other consolidated insurance programs that requires a subcontractor to *indemnify, hold harmless or defend* another for any claim or action covered by the program is VOID AND UNENFORCEABLE. The parties may not waive or modify this restriction. [Civil Code § 2782.9] See § **C105 CONTRACTOR, GOALS OF** [§ **C105:1**]; § **S100 SUBCONTRACTOR** [§ **S100:5 Indemnity agreement**]

◆ **OBSERVATION [Exceptions set forth in Civil Code § 2782.9]** By express provision in Civil Code § 2782.9, the unenforceability of an indemnity, hold harmless or defense provisions in a subcontract does not preclude any party from pursuing claims for *equitable contribution* if those claims are not otherwise covered by the policy. Additionally, the statute does not preclude a contractor from requiring that the subcontractor contribute to premiums, retention or deductibles under the policy, so long as certain statutory disclosure requirements are met. [Civil Code § 2782.9]

*Co-insureds*

Under a wrap-up policy, all named parties are designated co-insureds. The OCIP "wrap policy" which is purchased by the owner of the project or in some cases general contractor procures insurance for itself, as well as for the general contractor (if the policy is purchased by an owner), subcontractor, and employees working on the described "project". [*Zeitoun v. Orleans Parish* (2010 La. App.) 33 So.3d 361-366]

An insurer has no right of subrogation against its own insured with respect to a loss or liability *for which the insured is covered under the policy*. [*McKinley v. XL Specialty Ins.* (2005) 131 Cal.App.4th 1572, 1575] See § **S105 SUBROGATION (PROPERTY POLICY)** [§ **S105:1.1**]. In subrogation, because an insurer is seeking the recovery of benefits paid to the named insured, a suit by the insurer against a named insured is the same as a suit by one insured against another. See § **S105 SUBROGATION (PROPERTY POLICY)** [§ **S105:5 Six essential elements of equitable subrogation**]. An insurer cannot seek equitable contribution from an insured. [*Aerojet-General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 72, 70 Cal.Rptr.2d 118] See § **S110 SUCCESSIVE LIABILITY POLICY** [§ **S110:6**]. And, as described above, a subcontractor agreement which contains a provision requiring the subcontractor to hold harmless a contractor for indemnity and *defense costs* is void. [Civil Code § 2782.9]

**§ W26.02:4 Required disclosure to subcontractor by owner, builder or general contractor**

The owner, builder or general contractor obtaining a wrap-up insurance policy or other consolidated insurance program must disclose the total amount or method of calculation of any credit or compensation for premium required from the subcontractor or other participant for that wrap-up policy in the contract document. [Civil Code § 2782.95(a)]

A contract document must disclose, if and to the extent known:

1. the policy limits,
2. the scope of policy coverage,
3. the policy term,
4. the basis upon which the deductible or occurrence is triggered by the insurance carrier,
5. the policy covers more than one work of improvement, the number of units, if any, indicated on the application for the insurance policy,
6. a good faith estimate of the amount of available limits remaining under the policy as of a date indicated in the disclosure obtained from the insurer.

*Copy of insurance policy shall be provided upon request*

Upon the written request of any participant, a copy of the insurance policy must be provided, if available, that shows the coverage terms and items in paragraphs (1) - (4) above.

**§ W26.02:5 Exclusion contained in CGL (non-wrap) policy**

The individual policy of a contractor or subcontractor may have attached to it an exclusion entitled DESIGNATED OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM. The purpose of this exclusion is to prevent duplicate coverage. If a particular general or sub contractor is covered under the wrap-up insurance program of another, the individual policy will not pay indemnity. The exclusion can take the following format:

“This insurance does not apply to ‘bodily injury’ or ‘property damage’ arising out of either your ongoing operations or operations included within the ‘products-completed operations hazard’ at the location described in the schedule of this endorsement, as a consolidated (wrap-up) insurance program as being provided by the prime contractor/project manager or owner of the construction project in which you are involved.

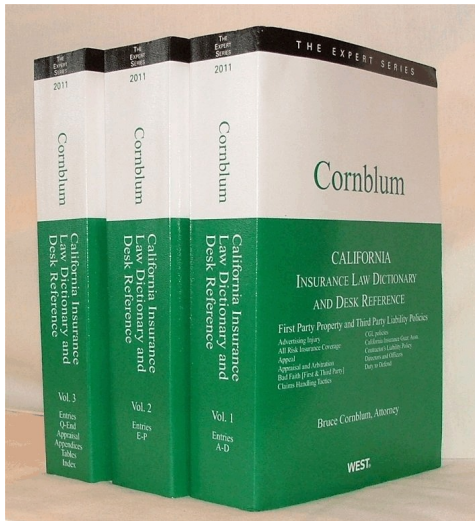
This exclusion applies whether or not the consolidated (wrap-up) insurance program:

- (1) provides coverage identical to that provided by this coverage parts,
- (2) has limits adequate to cover all claims, or
- (3) remain in effect.” [See *Welcome v. Just Appointments* (2008 N.J. Super. A.D.) 2008 WL 2696252, page 2-3]

◆ **OBSERVATION [Unpublished opinions]:** Unpublished decisions by the court of *other jurisdictions* may be cited and considered for their persuasive value. [*Brown v. Franchise Tax Board* (1987) 197 Cal.App.3d 300, 306, 242 Cal.Rptr. 810 (Court of Appeal found out-of-state unpublished decisions ‘thoughtful’, ‘illuminating’, and ‘persuasive’ on the points discussed)] See § **C112 CONTROLLING LEGAL AUTHORITY [§ C112:16.3]**

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**Bolds references** are to sections in Volumes 1, 2 and 3 of *CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE*, 2011 Edition available through Thomson West Publishing at 1-800-344-5008.



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