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Enhancements and Pitfalls in Insurance Coverage for Development Projects

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Owner controlled insurance programs (OCIPs) and contractor controlled insurance programs (CCIPs), also referred to as "wrap" policies, are relatively new insurance products that are commonly used to provide general liability, workers' compensation, and other forms of insurance for commercial and residential development projects. OCIPs are purchased by real estate development project owners to provide coverage for the project owner, eligible and enrolled contractors, subcontractors, and other designated parties for work performed at a covered project site. Similarly, CCIPs provide coverage for the same parties but are purchased by general contractors for work performed at a covered project site.

In many jurisdictions, especially with respect to residential multifamily projects, an OCIP or CCIP may be the only option for general liability coverage due to rampant construction defect claims in the real estate development industry. Details of the placement and participation requirements of wrap policies should be clearly articulated in the relevant construction contracts entered into by and between the owner, contractor, and subcontractors. Special attention must be paid by the parties engaged in a development project to clearly detail wrap policy requirements, enhancements, exclusions, and enrollment to ensure that proper coverage is obtained and that all required parties are properly enrolled and covered. Practitioners who represent parties utilizing wrap policies must be aware of the coverage gaps and limitations that can arise under such insurance policies.

Additionally, the real estate development industry has recently seen the rise of a new insurance product commonly referred to as owner's protective professional indemnity (OPPI) coverage. Real estate and development practitioners should consider this coverage to protect against a project owner's risk that can arise out of design-related deficiencies and delays on a project.

Wrap Policies

Workers' compensation insurance and the exclusive remedy defense. Not all wrap policies include workers' compensation coverage. In Colorado, for example, the primary provider of workers' compensation insurance is a statutorily created political subdivision called Pinnacol Assurance. The competitive rates offered by Pinnacol make purchasing workers' compensation through a wrap policy financially unattractive in most cases. However, in other jurisdictions, it is more common to see requirements in development contracts that workers' compensation be provided as part of a wrap program.

Texas, like many states, provides an exclusive remedy that bars employees injured on the job and covered by workers' compensation from asserting a tort claim against an employer, thereby limiting an injured employee's recovery for damages solely to the benefits provided by the employee's workers' compensation insurance.[1] In fact, an upstream party to a development contract, such as the owner and/or a general contractor, may benefit greatly from assuming responsibility for the workers' compensation coverage of all downstream parties and obtaining that insurance through an OCIP. Moreover, if such coverage is provided through such an arrangement, each contracting party should strongly consider including language in their respective contracts that obligates them to provide workers' compensation for their employees and downstream workers to allow them to benefit from Texas's exclusive remedy defense.

In *Halferty v. Flextronics America, LLC*,[2] the issue was whether Flextronics was entitled to the exclusive remedy defense. In this case, Flextronics contracted with Titan Datacom to provide certain technological infrastructure installations at a Flextronics facility in Austin, Texas. In that contract, Titan agreed to "provide, pay for and maintain in full force and effect" workers' compensation insurance that complied with Texas law.[3] Titan subcontracted with Outsource to provide network cabling installation. Appellant Patrick Halferty was an employee of Outsource. There was no dispute that Titan and Outsource both provided workers' compensation insurance to all of their employees, including Halferty. Halferty was injured on the job by a Flextronics employee. Halferty sued Flextronics for damages. Flextronics filed a motion for summary judgment based on the exclusive remedy defense. That motion was granted, and the appeal followed.

The Texas Workers' Compensation Act (TWCA) outlines a process by which a general contractor qualifies for immunity from common-law tort claims brought by the employees of its subcontractors known as the "exclusive remedy" defense.[4] The key first step of this process is that an upstream party to a contract who wants to benefit from Texas's exclusive remedy defense, such as Flextronics, must agree to provide workers' compensation insurance to downstream parties, such as Titan, Outsource, and Outsource's employee, Halferty. Such an agreement would have made Flextronics a statutory employer under Texas law and therefore provided Flextronics with immunity from common-law tort claims. In this case, Halferty successfully argued that Flextronics was not a statutory employer because Flextronics was not obligated to and did not provide workers' compensation insurance to Halferty. The court determined that Flextronics was therefore not entitled to the benefits of the exclusive remedy defense.

Both Halferty and Flextronics cited the *HCBeck, Ltd. v. Rice*[5] decision in support of their position. In *HCBeck*, FMR Texas contracted with HCBeck to provide certain construction services. That agreement required FMR to provide workers' compensation insurance for enrolled parties on the project through an OCIP. The contract allowed FMR to terminate the workers' compensation coverage, and if it did, HCBeck was required to secure workers' compensation coverage at FMR's expense. HCBeck subcontracted with a company called Haley Greer in a contract that incorporated FMR's OCIP language and requirements for enrollment in the wrap program. Charles Rice, an employee of Haley Greer, was injured during the project and received benefits under the OCIP workers' compensation policy. Rice sued HCBeck

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TIP: Ensure that proper coverage is obtained by clearly detailing wrap policy requirements, enhancements, exclusions, and enrollment.

for negligence, and HCBeck moved for summary judgment, claiming that HCBeck's contract with FMR gave rise to the obligation for FMR to provide workers' compensation insurance. Rice countered, arguing that HCBeck's contract with Haley Greer obligated Haley Greer to provide workers' compensation coverage if FMR terminated coverage under the OCIP, and therefore workers' compensation coverage for Rice came at no cost to HCBeck, which was not entitled to the exclusive remedy defense.

The Texas Supreme Court ultimately held that HCBeck provided workers' compensation coverage under the TWCA because (1) "the insurance plan incorporated into both its upstream contract with FMR and its downstream subcontract with Haley Greer included workers' compensation coverage to Haley Greer's employees"; and (2) "the contracts specify that HCBeck is ultimately responsible for obtaining alternate workers' compensation insurance in the event FMR terminated the OCIP."[6] The court reasoned that HCBeck was contractually required to provide workers' compensation insurance for the project in the event FMR terminated coverage and that the TWCA does not "require a general contractor to actually obtain the insurance, or even pay for it directly," only that there be a written agreement to do so.[7] The *HCBeck* court determined that the exclusive remedy defense is available to a general contractor that, by use of a written agreement, provides workers' compensation insurance to an injured party.

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The *Halferty* court distinguished the *HCBeck* case from the instant case. Notably, the insurance provided in *Halferty* was not an OCIP, and nothing in the contracts between Flextronics, Titan, and Outsource required Flextronics to provided workers' compensation for the project. Rather, workers' compensation coverage obligations were pushed down to Titan. Moreover, Flextronics did not guarantee workers' compensation coverage in the event Titan canceled its own coverage. As a result, the *Halferty* court determined that Flextronics was not entitled to the benefits of the exclusive remedy defense.

Practitioners should familiarize themselves with the limitations related to their local exclusive remedy defense and carefully consider the benefits and burdens of incorporating workers' compensation insurance coverage and requirements into their clients' contracts and risk management strategy.

OCIP exclusion in annual renewable general liability insurance policies. Typically, practitioners should expect their construction clients to have a wrap exclusion on their annual renewable general liability insurance policies. It is important for practitioners to consider potential coverage gaps such exclusion may cause and what changes to typical contract language may be necessary when an OCIP is provided for a project. The case of *Metropolitan Transportation Authority v. James River Insurance Co.*[8] provides a good example of what can happen when a subcontractor agrees to provide additional insured status to an upstream party where the project is covered by an OCIP, and an OCIP exclusion applies to the subcontractor's policy. In this case, failure to consider the effects of the wrap exclusion ultimately led to avoidable and costly litigation. However, in the end, the insurance company that provided the subcontractor's annual renewable general liability insurance policy prevailed, and the OCIP exclusion was upheld while the additional insured status demand was rejected.

Plaintiffs Metropolitan Transportation Authority, the New York City Transit Authority, and El Sol Contracting & Construction sued James River Insurance for breach of contract and declaratory judgment. In this case, James River's insured, Nuco Painting, was hired as a subcontractor on one of the plaintiffs' projects by the prime contractor, El Sol. Nuco's policy with James River included two key provisions: (1) a blanket additional insured provision "[a]s per the written contract" and (2) a wrap exclusion providing that the policy would "not apply to any liability arising out of . . . operations . . . where a Consolidated Insurance Program (CIP), in which you participate, commonly referred to as an Owner Controlled Insurance Program (OCIP) . . . has been provided by the contractor, project manager, or owner of the construction project."[9]

Prior to the start of the project, the parties entered into a contract wherein Nuco agreed to include the plaintiffs as additional insureds on the project. However, the project was also covered by an OCIP that included workers' compensation and general liability coverage for the plaintiffs' and Nuco's on-site activities. During construction, Nuco employee Lance Myck was injured on the OCIP-covered project site. Myck sued the

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plaintiffs for personal injury. In response, the plaintiffs sought additional insured status under Nuco's general liability policy. James River denied the plaintiffs' additional insured status demand and cited to the wrap exclusion in Nuco's policy. After removal to federal court on diversity grounds, James River moved to dismiss the plaintiffs' claims pursuant to Rule 12(b)(6).

The plaintiffs argued that James River breached its insurance contract by refusing to provide additional insured status to the plaintiffs for Myck's personal injury suit. The court determined that James River's wrap exclusion applied and additional insured status was not owed to the plaintiffs for Myck's injuries incurred on the OCIP-covered project site. It was unnecessary for the court to determine whether the plaintiffs would have received additional insured status for any off-site activities that might have resulted in a covered claim, as Myck's injuries occurred on-site and the parties had agreed in the contract that on-site activities were covered by the OCIP provided for the project.

While not a complicated matter, with straightforward coverage and exclusion language, this case highlights an important point for construction practitioners. When reviewing and negotiating construction contracts that include an OCIP or CCIP, take care to eliminate language such as broad additional insured requirements or other obligations that won't be covered or otherwise backed up by a party's insurance program that likely excludes coverage on projects where a wrap policy is being utilized.

Jurisdictional considerations for declaratory judgment actions. When developing large residential or commercial projects that require obtaining a wrap policy, most developers will contact their local insurance broker to obtain the necessary coverage. In many cases, the local insurance broker will contact a wholesale broker that may be located anywhere in the United States. The wholesale broker will then contact various insurance carriers that are willing to write the required coverage, and those insurance carriers can also be anywhere in the United States or even overseas. Further adding to the question of proper jurisdiction for declaratory judgment actions is the fact that the insured project under a wrap policy may be anywhere in the country as well. Determining jurisdiction for declaratory judgment actions is an important question for insurers and insureds alike.

In *Navigators Specialty Insurance Co. v. Kapiolani Residential, LLC*,[10] the U.S. District Court for the Northern District of California dismissed a declaratory judgment action filed by Navigators, a New York corporation, for lack of personal jurisdiction over the insured developer defendants Kapiolani Residential and HHMK Development, both Delaware corporations. In the action, Navigators sought a declaration that there was no coverage under an OCIP policy, provided by Navigators to the developers, for water damage at the covered project site, a mixed-use development in Honolulu, Hawaii.

The Delaware developers maintained offices in Texas and only had operations in Hawaii; they maintained no physical presence in California. The developers hired Albert C. Kobayashi Inc. to provide construction services for the Hawaii project. Kobayashi only had operations and a presence in Hawaii. The developers contacted Monarch Insurance Services, a Hawaii insurance broker with no presence in California, to procure a wrap policy for the Hawaii project. Monarch contacted a wholesale broker, CRC/Crump Insurance Services, to procure the Navigators OCIP policy. CRC was located in San Francisco, California. CRC then forwarded the developers' OCIP application to a Navigators office, also located in San Francisco. The developers had no direct contact with CRC or Navigators during placement of the OCIP.

OCIPs and CCIPs provide coverage for the project owner, eligible and enrolled contractors, subcontractors, and other designated parties.

The underlying claim at the project was related to water damage caused by air conditioner condensation lines that leaked into various units at the project. Navigators participated in the investigation of the claim in Hawaii, hiring an attorney and engineer in Hawaii. Navigators also attended a mediation in Hawaii that was unsuccessful, thereafter filing its declaratory judgment action in California. The court determined that Navigators first had to establish that the developers either purposefully availed themselves of the privilege of conducting activities in California or purposefully directed their activities toward California.[11]

The developers argued that they had not availed themselves of the privilege of conducting business in California, having no operations or presence within the state. Moreover, all facts that gave rise to the dispute occurred in Hawaii. The developers also cited cases holding that "[t]he formation of a contract with a nonresident defendant is not, standing alone, sufficient to create jurisdiction."[12] Navigators argued in response that the developers, through their agent, CRC, in obtaining the OCIP in California, deliberately engaged in substantial contacts with California, and but for those

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actions, this cause of action would not have arisen. The court disagreed and concluded that

> Navigators has not met its burden at step one of the test for specific jurisdiction. Here, defendants' only connection to California is based on the Developers' purchase of a single insurance policy from Navigators' San Francisco office, defendants' enrollment in that policy, and the submission of claims under that policy to Navigators' San Francisco office. This is insufficient to demonstrate a "substantial connection to California."[13]

OPPI coverage protects against a project owner's risk that can arise out of design-related deficiencies and delays.

The court determined that Navigators failed to submit any evidence that supported its position that purchasing one insurance policy was sufficient for the developers to have availed themselves of California jurisdiction.

Owner's Protective Professional Indemnity

Every party involved in a complex construction project faces significant risk. Beyond architects and engineers, construction managers, and other project contractors and subcontractors, that risk also extends to project owners. Depending on the circumstances, project owners may end up being responsible for millions of dollars in potential losses, both during and after construction. Such losses may include economic losses, e.g., those resulting from delays in the project schedule, as well as claims by others outside of the project, e.g., for damage to neighboring properties, injuries to passersby, and the like. Mindful of these risks, which may be exacerbated by relying exclusively on other project participants to purchase insurance coverage on their own, owners increasingly are taking a more hands-on role in procuring insurance and managing project-related professional liability (PL) recovery strategies.

OPPI coverage can be a key part of an owner's efforts to protect against the risk that the design/construction management teams and others involved in the project may fail to deliver their services on time and error free. This section discusses the nature of OPPI coverage, including how it works and, specifically, how it interacts with other types of coverage. Also discussed are the benefits of and potential pitfalls regarding OPPI coverage.

Understanding how OPPI coverage works. OPPI coverage is a fairly recent phenomenon in insurance, with industry reports suggesting that it is currently offered by no more than 10 separate insurers.[14] It is designed principally to provide the project owner with insurance protection for damages arising out of professional liability created by the design team on the project, when the design professional's own PL coverage is either unavailable or insufficient to respond to a given loss. OPPI coverage is commonly considered for large construction projects with values of $25 million or greater, although there may be reasons to consider its application in connection with lower-value construction projects as well.

In general, OPPI policies offer two types of core coverage: first-party indemnity coverage and coverage against third-party claims. The first-party indemnity insuring agreement, also referred to as "protective" coverage, indemnifies project owners for first-party losses in excess of the design professional's available underlying PL insurance. This type of coverage may be available in the event that the design professional's negligence in performing professional services causes the project owner to incur economic losses, such as those encountered following delays in the project schedule or necessary redesign/rework. OPPI policies also provide insurance protection from third-party claims made against an owner arising out of the alleged professional negligence of design professionals involved in the owner's project (e.g., where design errors caused by architects or engineers result in damage to neighboring property or personal injuries to individuals traveling on or near the project site). A third coverage part, excess contractor's pollution liability coverage, may be included in the main policy form or added by endorsement.

An OPPI policy is similar to a project-specific PL indemnity policy in that it can be purchased on a project-specific basis. But there are two key differences that distinguish OPPI policies in this context. First, as the name suggests, a project owner is the named insured under an OPPI policy. The policy thus does not provide direct coverage for design professionals, although it generally requires owners to impose minimum insurance requirements on such professionals. This is because OPPI coverage supplements, rather than replaces, the design professional's annual practice policy. In this way, it helps to improve an owner's overall chance for recovery where significant losses occur. Second, because the policy limits apply in excess of available coverage, an OPPI policy generally is more affordable than a project-specific PL policy that applies on a primary basis. This can result in significant cost savings. Indeed, according to industry estimates, OPPI policies on average cost 35–50 percent less than project-specific PL coverage.[15]

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In addition to these structural and cost benefits, project owners increasingly are turning to OPPI coverage as part of their risk management strategy due to limitations on available design professional liability coverage. Although project owners generally require the primary design professional to maintain annual practice policies, issues with the type and amount of coverage may increase risks from the owner's standpoint. For one thing, as discussed, coverage under the design professional's policy is in the name of the design professional and does not provide any direct protection to the project owner. For another, claims made on projects unrelated to the at-issue owner's project may erode or exhaust the liability limits available under the design professional's policy, leaving the project owner at risk. Further, design professionals tend to carry low limits of PL insurance to cover all work performed by the firm on an annual basis, generally ranging from $2 million or less on the lower end to $5 million or less on the higher end.[16] Those kinds of limits may not go very far when things go wrong on a large, complex construction project valued at tens or even hundreds of millions of dollars.

An additional issue comes in the form of the PL coverage procured, over which the project owner has no control. Whereas a typical PL insurance policy issued to a design professional may contain exclusions relating to, e.g., mold/bacteria-related losses or cost-estimating losses, the coverage offered by an OPPI policy has the potential to be broader and may be specifically negotiated. Nor does the project owner have any control regarding the quality of the coverage selected by the design professional or the renewal process for the same. In the event that a design professional's annual practice policy is changed or not renewed, the owner potentially could be left with an under- or uninsured design professional and, consequently, minimal or no recovery options in the event of a significant loss due to the design team's professional negligence. OPPI insurance provides an advantage in that it is written for the entire length of the project, with no renewal needed.

Importantly, OPPI coverage does not extend to the project's design professionals or to any costs associated with an owner bringing a claim against the design professionals, e.g., for breach of contract, added costs, and/or delay-related losses. A project owner pursuing one or more such claims generally would need to notify its OPPI insurer at the same time the owner brings the claim against the design professional in order to trigger the policy's first-party indemnity coverage part, which would be in a position to respond (provided that all other policy terms and conditions are met) following exhaustion of the design professional's PL policy limits. For third-party claims, the OPPI policyholder generally must provide prompt written notice of any claims received in order to trigger coverage.

OPPI policies typically include a minimum insurance requirement (MIR), which is the minimum limit of liability that the design professional is required to carry during the policy term while under contract to an owner. Since OPPI is structured primarily as an excess policy, the premium is calculated on the excess over a specific amount of potentially collectible PL insurance. OPPI policies also may include a self-insured retention (SIR) requirement, requiring the owner to pay a certain amount before coverage is available.

An OPPI policy generally will not pay a claim under the following circumstances: (1) the amount of the claim is within the applicable SIR, (2) the design professional's PL policy limits are adequate to cover the claim, (3) coverage is excluded under an applicable exclusion, or (4) the OPPI policy limits are themselves exhausted. To understand how the coverage typically works, consider the following two potential claim hypotheticals, where the design professional's practice policy carries limits of $1 million, and the OPPI has $5 million in limits and a $250,000 SIR.[17]

Hypothetical 1 (first-party/protective coverage). An owner's claim against the design professional for added costs and delay has been resolved through judicial decision in the amount of $5 million.

- *Scenario A:* The design professional's policy will pay $1 million in remaining limits, and OPPI will pay $4 million. No SIR is required.
- *Scenario B:* The underlying limits of the design professional's policy have been significantly eroded by other, unrelated claims, but $5,000 remains available. No SIR is required, and OPPI will pay the remainder of the claim over the $5,000 available under the design professional's policy.
- *Scenario C:* The underlying limits of the design professional's policy have been fully exhausted by other, unrelated claims. In this case, the owner would be responsible for the $250,000 SIR, and OPPI would pay $4,750,000.

Hypothetical 2 (third-party coverage). The owner receives a third-party claim in the amount of $500,000, based upon allegations of negligence on the part of the project's design professionals.

- If the claim is resolved by litigation, arbitration, or agreed-upon settlement in the amount of $500,000, OPPI would pay the judgment in excess of the $250,000 SIR.

In sum, OPPI policies, when properly understood and applied, can provide a valuable, cost-effective means to help owners manage PL risk in connection with construction projects.

Things to watch for in OPPI coverage. As with any insurance coverage, however, not all forms or programs are

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alike, and there are policy terms and conditions that may limit the nature and extent of OPPI coverage available to a project owner. It is therefore important to fully understand all aspects of the coverage as well as certain drawbacks that might limit the OPPI policy's reach.

One area of potential concern relates to the underlying contracts between project owners and design professionals. Since OPPI policies typically provide excess coverage to project owners for the negligent acts of the design and other professionals with which they have contracted for a project (directly or indirectly), it is critically important to identify all the relevant contracts in connection with the underwriting process. If the design professional's firm is not listed, the protective indemnity component of OPPI coverage may not apply.

Additionally, it is important to understand whether and to what extent the underlying design/build contracts contain any limitation of liability provisions, which may impact the amount of the project owner's recovery under an OPPI policy's protective indemnity coverage part. Specifically, if the project owner agrees to a limitation of liability provision, this could limit the amount of its recovery from the design professional's PL policy, which is generally a predicate for recovery under an OPPI policy. Absent disclosure to the insurer (which may permit a different arrangement through the underwriting process), an OPPI policy generally will respond in excess of what all available design professional's policies would have paid in the absence of the limitation of liability. Similarly, if the project owner accepts a limitation of liability that is lower than the MIR, the insured may be forced to pay the difference between the limitation of liability and the MIR or forfeit the protective indemnity coverage altogether.

Consider the following example of how a contractual limitation of liability provision may impact the coverage available under an OPPI policy: An OPPI policy is purchased for a \$20 million construction project. Before work commences, the owner enters into a design/build contract with the design professional, which includes a \$1 million limitation of liability. After work begins on the project, a \$5 million loss, caused by design error, occurs. The owner collects \$1 million from the design professional's practice insurer and then attempts to collect the balance from an OPPI policy with a \$5 million policy limit. The OPPI policy will not cover the loss because it only covers the amount the owner is "legally entitled to recover," which in this case is limited to the \$1 million already paid to the project owner by the design professional's practice insurer.[18]

Outside of issues potentially flowing from the underlying contractual relationships, several other OPPI policy provisions may raise concerns. For example, the MIR provision may itself cause confusion, in that it is exactly what it says—a minimum insurance requirement—and not an attachment point for the underlying design professional's PL insurance. By way of example, if the MIR is set at \$1 million per claim/in the aggregate and the design professional's PL insurance has available limits of \$2 million, the OPPI policy's attachment point would be \$2 million (i.e., excess of the underlying PL coverage), not \$1 million.

SIR provisions in OPPI policies also may be difficult to interpret or apply in the context of a particular claim. In many programs, if there are funds available under the design professional's policy to cover an owner's claim against the design professional, OPPI will respond over the remaining limits with no SIR. Under some programs, however, the SIR may apply regardless of the amounts available to the owner from the design professional's policy. Thus, owners seeking to procure OPPI coverage will want to understand the nature and amount of any SIR requirements.

OPPI policies also may include difference in conditions (DIC) provisions, which allow the OPPI coverage to drop down into a primary insurance position if a design professional's PL policy has been eroded or offers coverage that is more restrictive than the OPPI policy. Other types of OPPI policies may not allow for DIC at all but instead may provide true "follow-form" excess coverage. Where this is the case, if liability is excluded under the underlying design professional's insurance, it likely will be excluded from the OPPI policy's coverage as well.

Purchasers of OPPI coverage additionally should keep the following in mind:

- Subject to any DIC provisions, the OPPI policy will not provide coverage beyond what is typically found in a design professional's PL policy (e.g., liability assumed under contract is only covered to the extent such liability would exist in the absence of a contract, no coverage for express warranties/guarantees, etc.).
- Coverage for third-party claims is only available where the underlying loss arises from alleged professional negligence (i.e., errors or omissions by the project's design team).
- Although a hallmark of OPPI coverage is more control by the project owner, claims cannot be settled without the involvement and consent of the OPPI insurer.
- And, like any insurance policy, the OPPI policy includes insuring agreements, definitions, exclusions, and other terms and conditions that must be carefully reviewed and understood.

As the above makes clear, project owners involved in large-scale construction projects may find that relying solely on the PL coverage purchased by others is no longer sufficient to manage all of the potential risk flowing from design-related and other contractor errors and omissions on the job. When this is the case, project owners should seriously consider OPPI coverage as part of their overall professional liability management strategy.

Conclusion

Due to widespread construction defect actions across the country, the insurance and real estate development industries

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have had to get increasingly creative in order to effectively and affordably insure development projects. This has led to the creation of new insurance products that have required owners, design professionals, contractors, and subcontractors to revise and rethink their risk management strategies. Practitioners should carefully draft contracts between these parties to avoid gaps in coverage and to properly allocate responsibility for required insurance coverage. Practitioners should also assist their clients in considering new insurance products, such as OPPI policies, which can provide coverage for exposures that their clients may not recognize. ◄

Notes

1. *See* Tex. Lab. Code Ann. § 408.001(a).
2. 545 S.W.3d 708 (Tex. App. 2018).
3. *Id.* at 709.
4. Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433, 436 (Tex. 2009); *see* Tex. Lab. Code Ann. § 408.001(a).
5. 284 S.W.3d 349 (Tex. 2009).
6. *Id.* at 351–52.
7. *Id.* at 353.
8. No. 19-cv-3266, 2019 U.S. Dist. LEXIS 179211 (S.D.N.Y. Oct. 16, 2019).
9. *Id.*
10. No. 17-cv-06575-SI, 2018 U.S. Dist. LEXIS 47770 (N.D. Cal. Mar. 22, 2018).
11. *Id.* at *15 (citing Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004)).
12. *Id.* (quoting Boschetto v. Hansing, 539 F.3d 1011, 1017 (9th Cir. 2008)).
13. *Id.* at *18 (citing *Boschetto*, 539 F.3d at 1017).
14. *See* Jeff Slivka, *The Dangers of OPPI Insurance*, IRMI Expert Comment. (Dec. 2019), https://www.irmi.com/articles/expert-commentary/dangers-of-oppi-insurance.
15. *See Building Effective Professional Liability Programs for Owners*, Marsh, https://www.marsh.com/us/insights/research/professional-liability-programs-for-owners.html (last visited Jan. 19, 2021).
16. *See* Slivka, *supra* note 14.
17. Adapted from *Zurich OPPI Frequently Asked Questions (FAQ)*, Zurich (Jan. 16, 2015), https://www.zurichcanada.com/en-ca/knowledge-hub/articles/2015/01/zurich-oppi-frequently-asked-questions-faq.
18. Adapted from David Collings, *Higher Policy Limits for Specific Projects*, IRMI Expert Comment. (Oct. 2005), https://www.irmi.com/articles/expert-commentary/higher-policy-limits-for-specific-projects. The solution to this issue, from the project owner's perspective, is to amend the OPPI policy (1) so it will respond to a loss regardless of the existence of a limitation of liability clause or, at a minimum, (2) to provide that the underlying contractual limitation of liability is equal to the required PL insurance coverage.

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