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Controlled Insurance "Gotchas": What Every Participant in Controlled Insurance Programs Should Know

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I. INTRODUCTION

In today's construction industry, controlled Insurance programs are beneficial tools for providing worker's compensation/employer's liability and/or commercial general liability and excess liability insurance coverage ("CGL/XS") at a construction project sites for all enrolled contractors and subcontractors. The benefits of using controlled insurance are numerous, but not all controlled insurance coverage and programs are created equal. It is important for any participant in a controlled insurance program to become familiar with the program, the coverages, the exclusions from coverage, how the controlled insurance coverages may interact with the participant's own corporate insurance policies, and how the program will be administered. Through due diligence, contractual risk transfer and active management of certain exclusions and subjectivities, a participant in a controlled insurance program can avoid the "gotchas" that may otherwise occur.

II. WHAT IS A CONTROLLED INSURANCE PROGRAM AND WHAT ARE THE BENEFITS OF USING A CONTROLLED INSURANCE PROGRAM

A controlled insurance program ("CIP") is a mechanism where a sponsor (typically either the developer/owner or the general contractor for a construction project) procures policies of insurance that provide coverage at the project site for most of the participants in the construction project. The coverage provided under a CIP varies, and CIP programs most often provide CGL/XS, workers' compensation/employers' liability or a combination of these coverages. Other project specific policies may be added to the offerings (e.g. contractor's pollution liability; professional liability; protective professional liability, and others) but worker's compensation and general liability are the "core" policies in a CIP because they are policies that are sold on an auditable basis, and casualty insurance carriers will provide audit credit when the insured participates in a CIP offering CGL/XS and/or worker's compensation.

There are numerous benefits realized by construction projects that use CIPs. These benefits range from superior coverage, lower costs to ease of managing claims and broader trade partner participation in projects (by those who may not otherwise meet project insurance requirements using their own corporate policies).

Superior Coverage: In the current insurance climate, many of the contractor and subcontractor participants in a construction project are not able to procure the same robust insurance coverage and limits which are potentially available under a CIP. Plus, in most U.S. states, construction projects and their participants are subject to potential construction defect liability for a period that may last ten years or more after a project is completed.[v] By using a CIP, a sponsor can procure insurance coverage, up front, with adequate limits and coverage, to protect the project during construction, during the warranty call-back period and for the statutory period of time that participants may be at risk for construction defect litigation. Using a CIP, the sponsor can assure that all enrolled participants have the same coverage for risks at the project site. This can be extremely important in certain types of construction projects, e.g. those using EIFS and those with residential components, where many participants will have exclusions for these risks on their corporate CGL/XS policies. This can also be important when certain desired trade contractor participants do not have the insurance coverage in place to otherwise qualify to work on the project.[vi]

When using a CIP, the sponsor negotiates its own coverage for the project and does not have to rely upon each participant's corporate insurance program renewal results to protect it and the project from future claims.

Lower Costs of Coverage and Price Certainty: Sponsors of CIPs can achieve economies of scale by procuring the on-site workers' compensation and on site CGL/XS for participants in the project. Using a CIP allows each enrolled participant to avoid the cost of providing these coverages through its own corporate insurance policy(ies) and the economies of scale allow the sponsor to procure better coverage with higher limits for all enrolled participants. The coverage is procured for the life of the project at the beginning of the project, so there is both coverage certainty and price certainty that is otherwise unattainable when not using a CIP. CIPs can potentially save sponsors between ten and fifteen percent on the overall insurance spend for the project.[vii]

Better Claims Management: When using a CIP, claims become much easier to manage and easier to resolve at a lower cost. This is due to the fact that in a CIP, the same carrier(s) are covering all enrolled parties, so there is often no ability for a CIP carrier to push claims to other potentially responsible parties and their insurance policies. This makes it simpler to settle claims without all the finger pointing that can otherwise become a part of the claims resolution process.[viii] Further, many CIP programs are sponsored by general contractors who have developed the internal personnel and expertise to manage claims well, and have developed great relationships with their CIP carriers and adjusters over years of working collaboratively together. All of these factors work together to streamline claims handling with better results.

III. IMPORTANCE OF CONDUCTING DUE DILIGENCE ON CONTROLLED INSURANCE PROGRAMS

While CIPs are great tools for managing and transferring risks at construction project sites, not all CIPs provide their projects and enrolled participants with the same coverages or limits. In order to assure that coverage is robust and that participants are well protected, it is important to conduct due diligence on the CIP program as well as the Project's contract documents. It is also important for a participant to understand how the CIP coverages will impact coverage under their corporate insurance programs. A great initial starting point for conducting CIP due diligence can be found on the IRMI website Contractor's Guide To CIPs | Home Page | IRMI.com.[ix]

Not all CIPs are Created Equally

"One size fits all" is NOT a good descriptor when referring to a CIP program. CIPs may provide CGL/XS coverage and/or workers' compensation and employers' liability coverage. CIPs can be sponsored by the owner/developer ("OCIP") or the general contractor ("CCIP"), and sometimes a CIP can be sponsored by a third party, like a construction manager-agent. Some projects have both an OCIP and a CCIP in place at the same time. For example, the owner/developer may sponsor the commercial general liability and excess/umbrella liability, while the general contractor sponsors a worker's compensation CIP on the same project. Also, state laws can affect whether and how a CIP can be administered for a project. And, while many CIP CGL policies are initially written on the ISO CG 00 01 policy form, the coverages in a CIP can vary greatly, and many CIP CGL policies are riddled with exclusionary endorsements, at both the primary and excess layers.

For sponsors of CIP programs, it is important, prior to deciding to use a CIP, to have a good understanding of the state laws that may impact the program; to assess the risks at the project site and make sure to solicit coverage that does not exclude those particular project risks. Sponsors should thoroughly review all quotes, binders and the policies themselves, to assure that coverage is bound as it was negotiated, and there are not any undue subjectivities in the quotes and binders. Sponsors should also make sure that contract documents thoroughly and adequately describe the CIP program and how it will be administered. Sponsors also need to put the infrastructure in place so that the programs are managed well, fairly and in accordance with the contract documents.

For participants in CIP programs, it is important to understand the structure of the CIP (who is the sponsor, what coverages are being provided, limits, term, etc.) and how the CIP will be administered, especially how insurance credits will be taken at the time of bidding and how these will be verified. Reading all the contract documents related to the CIP coverage and program is important, but it is even more important to get copies of the CIP policies (or binders if policies have not been issued) to review for any pertinent exclusions or conditions that may affect coverage. Finally, it is critical for a participant to understand its own corporate coverages and how those will respond (or not respond) to claims on a project that sponsors a CIP. Sometimes corporate policy endorsements need to be amended to assure full coverage for those who participate in projects with CIPs.

State laws that may impact the ability to use a CIP

Before a sponsor decides to underwrite a CIP in a state where it has not sponsored a CIP previously, it is important to research the laws that may affect CIP sponsorship in the state. State laws vary, and states may regulate multiple aspects of CIP administration and coverage, including, but not limited to: the type of construction projects where a CIP may be used[x]; the size of the construction projects required for sponsoring a CIP[xi]; the state approval process for a CIP[xii]; and the length of the completed operations tail for a CIP[xiii]. Sometimes the CIP approval process in a state can take months, so it is important to gain an understanding of the approval processes and timing of those processes, prior to making a go/no go decision related to using a CIP on a particular project. Insurance underwriters and brokers are helpful advisors in researching the rules and helping determine feasibility.

Some states sponsor worker's compensation insurance "monopolistically", which means that, instead of buying worker's compensation coverage from a third-party insurance carrier, employers are required to procure their workers' compensation coverage from the state workers' compensation fund.[xiv] In a monopolistic state, unless the sponsor qualifies as a self-insurer in that state, it will not be able to sponsor a CIP that offers workers' compensation coverage. Since worker's compensation credits often weigh heavily into the financial feasibility of using a CIP, CIPs often do not make financial sense in monopolistic workers' compensation states. Notwithstanding, CGL/XS liability CIPs are important tools in monopolistic states when there are coverage concerns due to particular risks on a project, like residential construction or use of materials which are difficult to insure, like EIFS.

Project Risks That May Impact the CIP Program

Having a thorough understanding of the project parameters, logistics, schedules and other site-specific risks is critical in designing a CIP that will provide adequate coverage for the participants.

Schedules: As a starting point, it is important to analyze the project schedule. If the sponsor plans to enroll a project into a pre-established rolling CIP program, the sponsor should analyze the pre-negotiated provisions in its rolling policies to make sure the project is a good fit for the program. A rolling CIP program is subject to an enrollment term (typically five years in duration) as well as pre-negotiated products-completed operations tail. Some large project schedules may come close, or fall outside of, the programs timeframes, and as such, may not be good candidates to enroll in the pre-negotiated program. The “gotcha” here is that it can sometimes be quite difficult to get reasonably priced extensions to both the primary and umbrella/excess policies in a rolling program. Where the sponsor knows a project schedule may not be a good fit for the rolling program’s term, is much better to establish a CIP that is tailored to the project specifically, as opposed to relying on the ability to negotiate an extension to the rolling program to accommodate that project. As a best practice, sponsors of CIPs should monitor their project pipelines and schedules to make sure to establish a new rolling CIP prior to encountering a project whose schedule does not fit into their current program term.

Innovation/Technology: Innovation and use of technology at a project site should be taken into consideration when designing and negotiating CIP coverage. For example, in the construction industry today, it is quite common for projects to employ drones for various reasons, including “pre-construction site review; aerial surveying and mapping; measurement of excavation depths and material stockpiles; monitoring and documenting jobsite progress; productivity, safety and security; and inspecting work that is difficult or dangerous for human inspectors to reach.” [xv] Many parties who will be enrolled participants in the CIP may procure liability coverage for their drone operations (which would otherwise be excluded on an ISO CGL policy due to aircraft exclusions[xvi]) through attaining a manuscript endorsement to amend Exclusion G in their CGL policies. If a CIP project is planning on using drones, the CGL policy should be negotiated to include a similar amendment.

Site Specific Risks: Sometimes there are risks posed by certain project-types that are so difficult to insure in the standard insurance marketplace, the best way to manage the risks is by sponsoring a CIP. Two examples of these types of risks are projects that use Exterior Insulation and Finishing Systems (“EIFS”) and projects with residential components.

EIFS: The problem with insuring projects that use EIFS as a cladding is that most insurance carriers are now automatically placing EIFS exclusions on trade contractors’ corporate CGL/XS policies, regardless of whether the trade contractor is responsible for the EIFS installation. The standard ISO EIFS exclusionary endorsement, CG 21 86 12 04, is worded very broadly to make clear that insurance coverage “does not apply to "bodily injury", "property damage" or "personal and advertising injury "***arising out of***, caused by, ***or attributable to***, whether in whole or in part, the following: 1. The design, manufacture, construction, fabrication, preparation, distribution and sale, installation, application, maintenance or repair, including remodeling, service, correction or replacement, of any "exterior insulation and finish system" or any part thereof, or any substantially similar system or any part thereof, including the application or use of conditioners, primers, accessories, flashings, coatings, caulking or sealants in connection with such a system; or 2. "Your product" or "your work" with respect to any exterior component, fixture or feature of any structure if an "exterior insulation and finish system", or any substantially similar system, is used on the part of that structure containing that component, fixture or feature."[xvii] Arguably, wording as broad is found in the CG 21 86 12 04 exclusionary endorsement, could nullify CGL coverage even when the trade contractor's work had nothing to do with the EIFS installation.[xviii]

Also, it is not unusual to find EIFS exclusions in the XS policies of EIFS installers. These installers may not have an exclusion in their primary policies (which incidentally are often are written with very low per occurrence and aggregate limits) but when the first XS liability policy is reviewed, there will be a full EIFS exclusion which will preclude any coverage in the excess tower, leaving inadequate limits for issues involving the EIFS installation itself.

For the above reasons, and because it is very difficult to negotiate with each trade contractor's corporate insurer and successfully remove EIFS exclusions for projects that involve EIFS, the best way to manage a project that uses EIFS is to use a CIP and to make sure the CGL/XS CIP policies do not contain any EIFS exclusions. (A "gotcha" is to make sure to actually read all of the quotes and binders at every level of coverage to assure that an exclusion is not inadvertently placed on one of the CIP policies!)

Residential Risks: Over the past several decades, CGL/XS liability carriers have experienced high volumes of construction defect losses related to residential construction projects, especially when such projects have multiple owners with a fee simple interest in their residential units. For this reason, insurance carriers now routinely place residential exclusions in CGL/XS liability policies, and it is not unusual for trade contractors to demand to see that adequate CIP coverage has been arranged before they will even entertain providing pricing for a residential project. For residential construction projects in today's insurance marketplace, it essential to sponsor a CIP that does not exclude residential risks. Failure to use CIP insurance on a residential project may expose both the owner/developer and the general contractor to inadequate limits and large uninsured claims exposure.

Because residential construction has not been profitable for carriers due to construction defect litigation, the coverage the carriers offer for residential projects is typically not as robust as coverage that would be offered for a commercial project, and it is not as easy to vet or negotiate the CGL/XS CIP coverage for a residential project. There are many "gotchas" that sponsors and participants in these CIPs need to be aware of. Two of the most critical issues encountered are (1) inadequate limits; and (2) condo conversion exclusions.

Residential projects often have inadequate limits, simply because there is not capacity in the marketplace to cover these risks. Carriers have seen an uptick in losses in certain geographic areas (e.g. Florida and California) and in connection with certain types of construction (e.g. wood frame versus commercial grade structures) and there is no appetite to underwrite these risks. Depending upon the attributes of the project (e.g. number of units, for sale or for rent, wood frame or commercial grade, mixed use or residential-only) there could be very few markets willing to provide coverage for a residential project. Further, most residential CIPs dictate that defense costs will erode the available limits (as opposed to being outside of the available limits as is the norm in CGL policies). The situation is made worse by the current market trend of carriers placing controlled insurance ("wrap up") exclusionary endorsements on many trade contractors' commercial general liability policies. These endorsements keep trade contractors, that may otherwise have coverage under their own commercial general liability programs, from using their corporate coverage when participating in a CIP, even if the CIP does not provide the coverage available under their corporate programs.[xix] Both sponsors and participants have to be very cautious in vetting the coverage under a residential CIP. Defense costs in construction defect claims can often be larger than the indemnity exposures. With defense costs inside limits, the liability tower covering the project should be large enough to accommodate the defense spend. The limits themselves should be vetted based on the type of construction, the geographic location, the likelihood of construction defect litigation, and other factors. The coverage exclusions and subjectivities should be vetted since many participants will only have the CIP coverage available to them if a claim occurs. Participants and Sponsors should consider the limits being purchased in light of whether they are dedicated to the project, or shared amongst several projects. Brokers can be helpful in providing advice on the adequacy of limits for a particular project.

Sometimes residential construction projects are initially developed on a "for rent" basis, only to convert, post-construction, to "for sale" units. This can be risky from an insurance-coverage perspective because many CIPs that are originally written for "for rent" projects contain a broad "condo conversion" exclusion. These exclusions are often worded as complete exclusions for any residential project, but with an exception to the exclusion when the project is an apartment.[xx] In other words, the moment the project "converts" to "for sale" units there is no longer coverage available under the policy, there is no option to buy back the coverage, and likely no other market willing to cover the condo exposures post-construction. As such, participants need to be on the lookout for these types of exclusionary endorsements in the CIP policies, and need to be very wary of participating in any residential construction CIPs that contain these sorts of exclusions. Especially considering that many of the policies containing these exclusions are procured by developer-sponsors, who create a "single purpose entity" to hold the contract with the general contractor. Even if the general contractor is successful in negotiating contract language that states the developer will not convert the project to for sale units, and even if the developer agrees to indemnify the general contractor for any claims related to a conversion, the general contractor needs to be cognizant that the entity making these contractual promises, if set up as a single purpose entity, is likely not to be well-capitalized after the project is complete. The best approach for participants is to make sure that these sorts of exclusionary endorsements are not included in CIPs for the residential projects in which they participate.

On-Site Versus Off-Site Exposures

Prefabrication: It is important for both sponsors and participants to be aware that CIPs generally only provide insurance coverage for risks occurring at the project site. Notably, this means that pure product liability risks are not covered by a CIP. The "gotcha" here is that in the current construction industry, more and more projects employ off-site prefabrication, and the lines between what would be considered a pure products liability claim (not covered) versus an on-site occurrence (covered) are not always clear. While many insurance carriers that underwrite CIPs are often willing to endorse the coverage to include certain off-site pre-fabrication sites, their willingness to do this does not generally extend to prefabrication facilities that are not 100% dedicated to the particular CIP project. As such, participants in a CIP that have a combination of on-site and off-site exposures need be aware of the terms in their own corporate insurance programs. If they have "wrap up" exclusions in their corporate CGL/XS programs, they need to assure that these do not impact coverage they will need to rely upon for claims related to their prefabrication operations at an off-site location that is not endorsed for coverage by the CIP carrier. Similarly, sponsors who are administrating CIPs where a participant has off-site manufacturing exposures should review any "wrap up" exclusions in the participant's corporate insurance programs to make sure any "wrap up" exclusion would not apply to the participant's work at the offsite prefabrication facility.

Developers as Named Insureds: More and more frequently, developers are asking to be added to general contractors' rolling CIP programs as "named insureds" so that they can avoid buying an owner's interest policy to protect themselves for liability related to their development risks. Many contractors and carriers are unwilling to endorse their rolling programs in this manner because the rolling CIP is underwritten based on the underwriters' assessment of that general contractor's overall risk profile, and it does not contemplate covering liability risks that developers face that are unrelated to the construction project. Further, in certain rolling programs, there are large deductibles or retentions that are being managed by the general contractor in its corporate loss pools, and it would be unreasonable to ask that general contractor to cover or assume development risks into its corporate loss pools. Unfortunately, because of this trend, many of today's construction projects end up being covered by CGL/XS liability-only OCIP programs, where the developer can be added as a named insured to the coverage, but where the coverage procured is far inferior to what would have been provided under the general contractor's rolling CIP. When this happens, the project also loses the benefits of the workers' compensation credits that would have otherwise been achieved if the general contractor's rolling CIP program was used instead. In many instances, the perceived cost savings by going this route is actually not achieved, as the overall cost of insurance to the project (even when the owner's interest policy cost is factored into the equation) is still less when using the rolling CCIP program plus the owner's interest policy. And, because so many trade contractor corporate policies have "wrap up" exclusions, using inferior coverage can put many participants at risk of experiencing uninsured losses on the project using such an OCIP. This is an unfortunate result because the additional insured status provided to the developer by the rolling CIP should provide more than enough protection to the developer for any claims involving the construction operations. Also, if the OCIP coverage is not specifically negotiated to make sure that for the developer, it covers both the developer's on-site and off-site development exposures, the named insured status that the developer achieves on the OCIP would only provide the developer with coverage for its "on-site exposures". Since many of the development activities occur off-site, developers choosing this approach without also buying an owner's interest policy may inadvertently fail to cover all of their liability exposures.

Limits Considerations

Limits generally: Both sponsors of CIPs and participants in CIPs should be aware of the limits that will be provided by the CIP and make a determination as to whether those limits will be adequate for the particular project. Whether limits are enough for the CIP will depend upon the actual risks and whether and how limits are shared between different projects/risks.[xxi] A general rule of thumb is to make sure that available limits would equal at least fifty percent of the construction volume for the project. Of course, this rule of thumb needs to be employed in concert with an assessment of the actual risks at the project site, as well as other considerations as explained below.

Shared limits: Some CIPs (especially rolling programs) may cover more than one project and in these CIPs, various projects may share some or all of the CIP limits. Some programs are hybrid and have some layers of project-dedicated limits, followed by higher layers of coverage that are shared with other risks. Some programs are written to allow a reinstatement of limits when limits are exhausted by claims. Sponsors and participants that are analyzing a CIP program should make sure to understand the details of the coverage, whether limits reinstate in a program and how limits are shared with other projects/risks.

How Limits May Impact Coverage Under Corporate Programs: A participant in a CIP should also carefully review its own corporate CGL/XS policies in considering the limits. Many corporate programs have endorsements that make clear that the corporate coverage will not sit excess over any CIP if the CIP is not providing a certain level of coverage (e.g. 15 Million Dollars or greater). Further, many corporate program XS policies have anti-stacking provisions which should be taken into consideration when enrolling in a CIP.[xxii] Many CIPs also contain anti-stacking endorsements. Anti-stacking language dictates that only one limit of coverage is available from a particular insurance carrier. So, if one or more of the CIP carriers are the same carriers writing coverage for the corporate program, the participant's access to its corporate excess/umbrella liability coverage may be impacted by participation in the CIP.

Aspects of Coverage Under the CIP that Can Affect Limits: As mentioned in the "Residential Risks" section above, a big consideration in determining whether limits will be enough for a particular project is to determine whether the CIP considers the costs of defense to be "inside" the limits or "outside" the limits. Defense costs in a civil lawsuit will vary, depending upon facts and circumstances of the lawsuit, and depending upon how many defendants need to be represented by separate counsel.

One positive aspect of using a CIP is that it is often easier to consolidate defense amongst multiple defendants, but consolidation cannot occur if there are conflicts between the defendants. As such, sponsors and participants need to consider the possibility that some suits under the program may require the carrier to hire multiple attorneys to represent multiple defendants. If defense costs are "inside the limits" it is easy to see how a large contentious lawsuit could quickly erode the CIP limits, especially if limits are not plentiful, or if they are shared amongst different projects/risks. Because of this, limits on CIPs that dictate defense costs erode limits should be quite a bit higher than limits for CIPs where defense costs are counted outside the limits.

Another aspect of coverage that should be analyzed carefully, and which could affect limits available under the CIP, is whether the CIP policies, both at the primary CGL and at the XS levels have been properly endorsed to provide "primary and non-contributory" coverage for the participants. If CIP policies have not been specifically endorsed to provide primary and non-contributory coverage for enrolled parties, a participant may find itself in a lawsuit where the CIP carrier demands that the participant's corporate coverage "share" defense and indemnity costs, on a pro rata basis, with the CIP coverage. Much of this will depend on the "other insurance" clauses in both policies, but suffice it to say, sponsors and participants in CIPs need to understand the CIP language in this regard and how it will interact with corporate insurance policies.[xxiii]

Enrolled versus Excluded Parties

It is not unusual for certain operations to be excluded from CIPs. Sometimes this decision is made by a carrier or a sponsor because of the risks involved in the exposure (e.g. most CIPs exclude hazardous materials abatement activities and demolition); other risks are excluded for because the CIP does not, or should not, provide coverage for those exposures (e.g. professional services and suppliers who do not perform any on-site work on the Project site); and some risks are excluded for administrative reasons (e.g. haulers, and delivery services whose exposure to the site is very limited, and the administrative burden of enrolling these entities outweighs any benefit). Whenever a sponsor decides to exclude a certain risk, it is important for the sponsor and CIP administrator to assess whether it makes sense to conduct additional due diligence on the excluded parties' corporate insurance policies. For example, if a demolition contractor is an excluded party, it is in the best interest of the sponsor to make sure that the demolition contractor does not have a "wrap up" exclusion in its CGL policy that would preclude coverage under the demolition contractor's policy, even when such contractor is not actually enrolled in the CIP.[xxiv] Also, sponsors should make sure that the CIP policies themselves are going to provide the enrolled parties with coverage, despite the exclusion. For example, if a sponsor excludes crane operations from the program (because the sponsor wants to assure that the crane operator's CGL is primary and non-contributory to the CIP coverage), the sponsor will want to make sure that the CIP policies do not actually contain an exclusion for crane operations.

Deductibles and Self-Insured Retentions

Those sponsoring CIPs and those participating in CIPs should make sure they understand whether the CGL coverage under the CIP is subject to any deductibles or retentions. If there are deductibles or retentions, it is important to discern whether those deductibles are actually secured through side-agreements with the carrier, or whether they are truly "self-insured" retentions, where the carrier has no obligation to defend a claim, until the self-insured retention is satisfied.[xxv] A large self-insured retention can become a problem for CIP participants in claims scenarios, because the CIP CGL carrier for a program with a self-insured retention endorsement does not have a legal obligation to defend a claim, until the claims costs exceed the self-insured amount. This may not pose a huge concern if the self-insured retention is in a reasonable range (e.g. $10,000 - $25,000 per occurrence), but there are many CIPs being sponsored today where the self-insured retentions on the CGL policies are $1,000,000 or greater. If the CIP sponsor does not have a clear contractual obligation to defend all claims within the self-insured layers, participants could find themselves in scenarios where they are involved in a liability claim, and the CIP sponsor refuses to defend it, or does not have the financial wherewithal to defend it. The lesson learned here is to make sure that if you are the sponsor of a CIP with a high CGL self-insured retention, or if you are a participant in such a program, you have reviewed the self-insured retention endorsement on the policy and find it to be reasonably drafted. Further if you are a participant in a CIP with a high CGL self-insured retention, you should make sure that either you, or the general contractor for the project has negotiated contractual language that makes very clear how claims will be handled within the self-insured retention, including a clear contractual obligation for the sponsor to defend and indemnify all claims within the self-insured layer.

Products-Completed Operations and Warranty Call Back Coverage

Products-Completed Operations: When procuring a CIP that provides CGL/XS coverage, the standard ISO CG 00 01 policy form must be amended to add a completed operations tail. Sponsors and participants should make sure that any CIP in which they participate has a products/completed operations tail period that is at least as long as the statute of repose in the state where the project is being built.[xxvi]

In adding the products/completed operations tail coverage to a CIP, the endorsement that adds the tail coverage needs to be reviewed carefully by the sponsor and by participants. These are manuscript endorsements drafted by the carriers, and sometimes they need to be modified because they change the standard definition of "products/completed operations" in the ISO form in an undesirable way.[xxvii] There are some endorsements in the marketplace that modify the ISO definition of products and completed operations in such a way that the coverage does not "kick in" until completion of the project. This type of modification can be dangerous for participants whose work is completed earlier in the project or when programs are suspended before substantial completion. There are also some endorsements in the marketplace that modify the ISO definition of products and completed operations so that it no longer triggers based on an "occurrence" but rather "defective construction" which is a term that is not even defined in the ISO CG 00 01 policy form. Finally, some of these endorsements include unreasonable subjectivities. A recent policy reviewed by one of the authors of this paper contained a provision that the carrier could "cancel" the products and completed operations tail in its entirety if premium payments were not made, even those payments were billed to the sponsor after project completion during an audit. It would obviously be very dangerous for a participant to enroll in a CIP with this type of subjectivity language since a participant has no control over whether the sponsor will pay its audit premiums in a timely manner. This would be especially dangerous for participants who have strict "wrap up" exclusions on their corporate CGL policies that restrict coverage if the Project was covered by a CIP, even if the CIP does not provide coverage to the participant for the loss in question.[xxviii]

Warranty-Call Back Coverage: It is also important for participants and sponsors to make sure that the CIP program has a provision that indicates that any warranty or call back services provided by enrolled parties will be covered by the CGL coverage under the CIP program. Without this sort of an endorsement to the policy, many enrolled participants could find themselves without any protection under their own corporate insurance programs for claims occurring while they are conducting these services.[xxix] Since these type of services theoretically may be conducted at any time between completion of the project and the date when the state statute of repose extinguishes claims against the project participants, the warranty-call back period will ideally apply for the whole term of the CIP, including during the products-completed operations tail period. If it is impossible to negotiate such a long warranty-call back provision with the carrier, a next best position would be to negotiate a warranty-call back coverage period that is at least the same length as the warranty-call back period set forth in the construction contract documents (this would typically be between one to two years following substantial completion of the Project).

Conditions and Subjectivities

Quotes and binders for CIP coverage need to be reviewed very carefully by sponsors for conditions and subjectivities that need to be negotiated and/or managed. While many conditions and subjectivities are not too concerning and manageable (e.g., providing the CIP carrier with information on the project team; promising to use certain third-party inspectors; giving the carrier copies of standard site/environmental reports); others can be unreasonable and should be negotiated (e.g., coverage cancellation clauses when audit premiums are not paid or for other arbitrary reasons; asking the general contractor to sign off on and "agree to comply" with the geotechnical studies conducted for the project when these studies are not even considered contract documents.) It is important for sponsors of CIPs to always choose brokers who are very knowledgeable about construction coverage and controlled insurance placements so that their brokers can help assure that quotes and binders for the program provide the right coverage for all participants and do not contain unreasonable provisions.

Some Common CIP Exclusions and Managing These Exposures

In addition to some of the topics touched on in other sections of this paper (e.g. modifications to the products-completed operations definition in the ISO policy form; EIFS exclusions; residential and condo conversion exclusions) there are some other concerning CIP exclusionary endorsements that are often encountered in today's insurance marketplace. These exclusions quite often need to be modified or completely removed from policies to protect the participants in the CIP.

Course of Construction Property Damage: Course of construction property damage exclusions are problematic. Without careful drafting, these exclusions modify the standard property damage coverage that is provided under a CGL policy in a way that takes important coverage away from CIP participants that is normally available under the corporate CGL policies.

An example of such an exclusion from a CIP policy recently reviewed by one of the authors of this paper is as follows: "*This insurance does not apply to "property damage" to the Project(s) or any part of the Project(s) that occurs during the course of construction. The Project(s) or any part of the Project(s) will be deemed to be within the course of construction until the Project(s) is "completed.""* Even though a CGL policy contains standard property damage exclusions that act to preclude coverage for certain property damage during the course of construction (e.g. damage to personal property in the insured's care custody and control), the standard ISO CG 00 01 policy form does not completely exclude property damage during the course of construction. For example, if while completing its work one subcontractor causes damage to another subcontractor's work, it should be able to rely on its corporate CGL policy to protect it from a liability claim related to such property damage. With the broad language cited above however, there would be no coverage under the CIP for the exposure. Some CIP carriers would argue that these types of exposures "should be" covered by builder's risk policies. However, that is not always the case. Many builder's risk policies do not fully cover property damage for the work itself because of exclusions in the builder's risk policy, high deductibles or low sub-limits. Also, many builder's risk policies do not provide every enrolled participant in a CIP additional named insured status or the protection of a mutual waiver of subrogation related to the builder's risk policy, and in such instances, the builder's risk carrier who pays out a loss can subsequently subrogate against the responsible trade contractor. For all of these reasons, a CIP provision that completely excludes coverage for damage to the project during the course of construction should not be accepted by a sponsor.

Ways to manage this risk are to ask for the exclusion to be removed or amended. Most carriers will remove the exclusion as long as the builder's risk policy for the project provides broad coverage for the CIP participants. Some carriers are only willing to remove the exclusion if the CIP provides broad coverage for losses due to construction defects or design errors (a.k.a. "LEG 3" coverage)[xxx]. If a carrier will not remove the course of construction property damage exclusion completely, the sponsor should require the carrier to amend the exclusion to make it apply ***only*** when the participant actually has coverage for the loss under the builder's risk policy.

Subsidence: Unfortunately, most likely due to major claims encountered on recent construction projects (including the San Francisco Millennium Tower and the Surfside Tower Collapse in Miami)[xxxi], carriers are attempting to include "subsidence" exclusions in CIP programs. A typical subsidence exclusion would provide:

> *Insurance provided under this coverage part does not apply to "bodily injury", "property damage" or "personal and advertising injury" caused directly or indirectly by, based on,*

or attributed to, arising out of, resulting from, or in any manner related to "subsidence" including: (1) Earthquakes and earthquake aftershocks; (2) Volcanic eruptions, explosion, effusion or volcanic material or lava flow; (3) Mudslide, landslide, avalanche; (4) Sinkhole; (5) Collapse included in the products-completed operations hazard only; or Such "bodily injury", "property damage" or "personal and advertising injury" is excluded regardless of any other cause or event contributing concurrently or in any sequence or manner to the loss. The following is added to SECTION V – DEFINITIONS: 1. "Subsidence" means all earth or soil movement of any kind including, but not limited to, the settling, sinking, falling, falling away, cave-in, shifting, sliding, mud flow, rising, tiling, bulging, shrinkage, expansion, extension, slippage, erosion, mud flow or subsidence of land or soil.

This type of subsidence exclusion should ***never*** be part of a CIP program. While carriers place these exclusions on policies to try to protect themselves from large claims, participants in a CIP are relying on CGL insurance to provide them with protection in claims involving subsidence. Because the industry is so riddled with "wrap up" exclusions on corporate CGL/XS programs, it is not reasonable for a CIP carrier to exclude this risk from a CIP as many CIP participants' own corporate CGL/XS policies will not otherwise provide a CIP participant with coverage when they participate in a CIP.

Cross Suits Exclusion: Cross liability coverage is something that is expected to be a part of every CGL policy. Cross liability coverage treats every insured on the policy as a separate insured with separate rights to sue others that are also insureds on the same policy.[xxxii] A typical cross suit exclusion will take away this standard coverage available under a CGL policy and will preclude insureds from suing other insureds. In other words, it acts as an "insured versus insured" exclusion. Some CIP carriers will agree to amend cross-suit exclusionary endorsements to provide a "carve out" for the owner/developer and the general contractor, so that owner/developer and general contractor do not lose their rights to sue the other CIP insureds, but the rest of the CIP participants are precluded from suing each other under the program. Any cross-suit exclusion (even if amended to carve back coverage for owner/developer and general contractor) is not equitable and does not belong on a CIP policy. All CIP participants deserve the same coverage under a CIP CGL policy that they can get from their own corporate CGL policies. If the CIP does not provide this standard coverage to participants, many participants will have no other insurance to rely upon. Those that find themselves in this scenario should not agree to participate in such a CIP.

Communicable Disease Exclusions: Ever since the COVID-19 Pandemic reared its ugly head in 2020, insurance markets have been, with more frequency, placing communicable disease exclusions on CIP policies. These exclusions are broadly written to preclude any coverage under the CGL/XS policies when the claim involves a communicable disease.[xxxiii] These communicable disease exclusions have no place on a CIP policy. Just like with other unreasonable exclusions discussed above, CIP participants have reasonable expectations that the CIP will provide them with the same coverage they receive on their corporate CGL/XS policies in relation to bodily injury claims at the project site. And, just as with the other exclusions mentioned above, many CIP participants will have no other insurance to rely upon for this coverage due to "wrap up" exclusions which may be included in their corporate CGL programs. CIP sponsors should make sure to require any communicable disease exclusions to be deleted from the policies.

IV. MANAGING CONTRACTUAL RISK TRANSFER WHEN USING CONTROLLED INSURANCE

Contract Language Does Not Need to be Drastically Amended For a Project with a CIP

Since not all liabilities are insurable, it is not advisable or necessary to highly modify a construction contract to accommodate a CIP program. Indemnity and insurance provisions from the standard contract should stay intact, being supplemented by additional contract language that explains the important aspects of the CIP program and how it will be administered. A great way to incorporate this type of language into the contract documents is to create a CIP Manual that becomes an additional contract document for all enrolled and excluded parties participating in the project covered by the CIP.

It is important for a sponsor to decide how it would like to administer the CIP program long before bidding documents are released to the trade contractors. The sponsor should decide whether it would like bidders to include their corporate insurance costs in their bids ("bid gross") or whether it would like bidders to exclude those costs ("bid net"). Bid documents must be modified accordingly to give bidders clear instructions on how to present their insurance credits and/or deducts in the bid form.

Many CIP sponsors have learned hard lessons when bidding documents go out without any explanation of the CIP program or how insurance credits/deducts should be reflected in the bidding documents. It is extremely difficult to extract insurance credits/deducts from bidders after they have already submitted pricing. The best practice is to make sure that the program is fully described and the bidding documents and contract documents amended and shared with the bidders, before the first bid package is released.

As mentioned above in the **Deductibles and Self-Insured Retentions** section of this paper, if the CIP has a high self-insured retention, the contract documents should be carefully amended to make clear that the sponsor is responsible for providing and funding defense and indemnity of all claims that are subject to the self-insured retention, until the self-insured retention is eroded, and the carrier takes over defense and indemnity. The contract documents and insurance manuals should also make very clear the process a participant should use to notify of a claim and retain an attorney. Finally, the contract documents should assert that the sponsor will act in good faith and in the best interests of all participants while managing claims within the retention.[xxxiv]

Waivers of Subrogation

Because many sponsors rely on their brokers or attorneys to draft insurance manuals and contract document language describing the CIP, many broker and law firm "templates" are used as the first step in drafting contract language. Unfortunately, many templates contain undesirable language related to waivers of subrogation as part of the boilerplate. Specifically, it is not unusual to encounter unilateral waivers of subrogation that require the general contractor to "waive subrogation rights" under ALL of its own liability insurance policies in favor of CIP administrators, owner/developer consultants and separate contractors, and even sometimes including the general contractor's own subcontractors. While it may be equitable for the sponsor to require the general contractor to mutually waive subrogation against these parties in relation to the policies that are provided through the OCIP and through a builder's risk policy, it is not equitable to ask the general contractor to waive subrogation with these other entities under its own corporate liability insurance programs. CIP participants (especially general contractors) should be very wary of language like this that is inadvertently placed into contract documents and insurance manuals and should make sure to review contract documents carefully when participating in an OCIP or CCIP.

V. CONCLUSION

No two CIPs are the same, and while controlled insurance programs are fantastic tools to provide better and lower cost insurance coverage for today's construction projects, sponsors and participants in these programs should not assume that every CIP is identical or protects them in the same way. It is important for sponsors and participants to conduct due diligence on every CIP program they sponsor and participate in, to make sure that they avoid the lessons learned described in this paper. It is also critical that participants understand their own corporate insurance coverage and how the CIP may impact coverage under their own programs. Finally, it is important that contract documents are clearly drafted to describe the CIP, the parties' rights and obligations under the CIP, and the claims processes that will be used. Participants and sponsors that know and manage their risks well in a CIP will be able to avoid the "gotchas".

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Aldo joined Liberty Mutual in 2003 and completed the company's Corporate Development Program working for both Commercial and Personal Lines. He is a graduate of the Italian Naval Academy and retired as a Lieutenant Commander after having served 14 years in active duty. Aldo holds a Mechanical & Naval Engineering Master's degree from the University of Genoa (Italy) and an MBA from Boston University. He is also a Professional Engineer and earned the CPCU designation.

iv Mike Phillips is executive vice president, and construction practice leader at Willis Towers Watson. Mike has 35 years of construction broker, underwriting, claims and risk management experience. He started his career adjusting construction insurance claims and then transitioned into an underwriting role with The St Paul Companies. He left The St Paul after 13 years to join Zurich as a Regional Large Account Underwriting Director. Mike was at Zurich for 6 years where he held the following positions: Large Account Underwriting Director, Regional Construction Manager, National Wrap-up Leader and General Liability line of business Vice President. After leaving Zurich, Mike joined Willis Towers Watson as a Senior Vice President and Chief Operations Officer. He then took on the role of Regional Growth Officer after which he moved into a position as Regional Construction Practice Leader. He currently runs the construction practice for Willis Towers Watson in the Northwest and acts as client advocate for Complex Risk

Management clients. Mike leads the San Francisco and Northwest Construction Practice groups and is a Client Advocate for our larger more complex construction clients. Mike holds a bachelor's degree in Economics from University of Missouri.

[v] Most U.S. states (other than New York and Vermont) have imposed a "statute of repose" which acts as an extinguishment of the right to bring claims against the general contractor, architect, trade contractors and consultants related to a construction project on which they performed Work. For a survey of all fifty states statutes of limitation and repose related to construction defects, *see Saxe, Dorenberger & Vita*, 50 State Survey - Statutes of Limitations and Repose for Construction - Related Claims, news.27.pdf (sdvlaw.com), October 12, 2022

[vi] See discussion, *Sandy M. Kaplan, Kimberley S. Bunting, and Amy Hobbs Iannone*, OCIPs, CCIPs and Project Policies, THE CONSTRUCTION LAWYER, Summer 2009, pages 11 – 12.

vii *Id.* at 12.

[viii] *Id.*

[ix] The original form of this checklist was prepared by the OCIP Task Force of the AGC of America and has been modified and updated by IRMI staff with contributions from Kathleen Creedon and Colleen Aegerter. The checklist is free to all visitors to the IRMI site.

x *See e.g.,* Conn. Gen. Stat. § 49-41(e)*(2) (*"No contract for the construction, alteration or repair of any public building or public work of the state or a municipality may include a provision that allows or requires the state or municipality to maintain an owner-controlled insurance program, except for (A) a project approved pursuant to section 10a-109e, or (B) one or more municipal projects totaling one hundred million dollars or more (i) under the supervision of one construction manager, or (ii) located within the boundaries of a municipality if under the supervision of more than one construction manager.")

[xi] *Id. See also MICH COMP LAWS § 418.621(3). Under Michigan law, in addition to other requirements like a full-time safety person being dedicated to the CIP project, 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.*

[xii] *OREGON REVISED STATUTES § 737.602 (One must satisfy nine conditions as per § 737.602 (4)(a) to (i) in order to obtain approval for a wrap-up from the Director of the Dept. of Consumer and Business Services, which oversees the Insurance Division. These nine conditions include, among other things, placing with said* Dept*. a special deposit of $ 25,000 per $ 100 million of construction project value, or an amount prescribed by rule of the director, whichever is greater.*

[xiii] *See FLORIDA STATUTES § 255.0517 (2)(B).*

[xiv] *See* NCCI State Map which shows that currently Washington, Ohio, North Dakota and Wyoming are sponsoring monopolistic programs.
[xv] *Jacqueline DeCamara and Daniel D. McMillan, Use of Drones in Construction, Under Construction, ABA Construction Law Forum, Winter 2019* Use of Drones on Construction Projects: Legal and Contractual Considerations (americanbar.org)

[xvi] *See discussion*, Marsh Insights, Unmanned Aerial Vehicles: Casualty Coverage Implications, September 2016 Unmanned Aerial Vehicles - Casualty Coverage Implications 09-2016 (1).pdf (explaining that drone usage at a construction project site would often be excluded under Exclusion G of the ISO CG 00 01 policy form).

[xvii] *See* Insurance Services Office form CG 21 86 12 04© ISO Properties, Inc., 2003.

[xviii] *See, e.g.,* First Mercury Insurance Co. v. Miller Roofing Enterprises, et al., 2013 U.S. Dist. LEXIS 24728, where the court held that the general liability carrier was not responsible for insuring a roofer for a water intrusion claim on a building that used EIFS, even though the roofer had no responsibility for installation or repair of the EIFS system.

[xix] *See* endnote xxvii for an example of a "wrap up exclusion" on a trade contractor's corporate program.
xx An example manuscript endorsement from a recent OCIP policy reviewed by one of the authors states: "A. This insurance does not apply to: 1. "Bodily injury", "property damage" and "personal and advertising injury" arising out of the construction of "residential properties", except "apartment, faculty housing or student housing" 2. "Bodily injury", "property damage" and "personal and advertising injury" arising out of the construction of any "apartment, faculty housing or student housing" if that "apartment, faculty housing or student housing" is subsequently converted by you or by anyone else to a "condominium, townhome or multi-family dwelling". B. As used in this endorsement, the following terms have the following meanings: 1. "Residential properties" mean single-family dwellings, "condominiums, town-homes or multi-family dwellings". "Residential properties" does not include "apartment, faculty housing or student housing". 2. "Apartment(s), faculty housing or student housing" means a unit of residential real property in a multi-unit residential building where all the units are owned by and titled to a single person or entity. 3. "Condominium(s), townhome(s) or multi family dwelling(s)" means a unit of residential real property in a multi-unit residential building or project where each unit is individually owned and titled.

[xxi] *See discussion*, International Risk Management Institute, Inc. (IRMI), Contractor's Guide to CIPs – CIP Limits at: Contractor's Guide to CIPs - CIP Limits | IRMI.com

[xxii] See discussion, Jennifer Walker, CPCU, CRM, CIC, CEBS, CIT, GBA, ARM, AIM, AIC, ALCM, Identifying Anti-Stacking Provisions in Policy Language, AMWINS Resources + Insights, May 16, 2019 at: https://www.amwins.com/resources-insights/article/identifying-anti-stacking-provisions-in-policy-language_5-19#:~:text=Anti%2Dstacking%2C%20non%2Dpyramiding,designed%20to%20apply%20to%20deductibles

[xxiii] *See discussion*, Craig F. Stanovitch, Expert Commentary: Primary and Non-Contributory, International Risk Management Institute, Inc. (IRMI), December 2018, at: "Primary and Noncontributory" | Expert Commentary | IRMI.com

[xxiv] Some of the authors of this paper have encountered more than a few wrap up exclusions subcontractors' policies that are written to exclude coverage under their corporate commercial general liability program, even when the insured is not enrolled in the CIP.

[xxv] For a good discussion of the differences between deductibles and self-insured retentions *see* Saxe, Dorenberger & Vita, If it Quacks Like a Duck...Ontario's Newest Views on Self-Insured Retentions and Deductibles, SDV Insights, July 9, 2018 at: Saxe Doernberger & Vita, P.C. If it Quacks Like a Duck...Ontario's Newest Views on Self-Insured Retentions and Deductibles (sdvlaw.com)

[xxvi] *See* Endnote v. above for a discussion of statutes of repose and a link to a 50-state survey of statutes of repose and limitation.

[xxvii] *See* Insurance Services Office Form CG 00 01 04 13, Section V.16 - Definitions (""Products-completed operations hazard": a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except: (1) Products that are still in your physical possession; or (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times: (a) When all of the work called for in your contract has been completed. (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site. (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project. Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed. b. Does not include "bodily injury" or "property damage" arising out of: (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured; (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or (3) Products or operations for which the classification, listed in the Declarations or in a policy Schedule, states that products-completed operations are subject to the General Aggregate Limit.")

[xxviii] The following is an example of this type of wrap-up exclusionary language discovered by one of the authors of this paper when conducting due diligence on a subcontractor's commercial general liability policy: ("This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART The following exclusion is added to Paragraph 2. Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability and Paragraph 2. Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability: This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of either your ongoing operations or operations included within the "products-completed operations hazard" relating to "Your Work" or "Your Product" that is in any way performed or provided by you, or on your behalf, and related to a construction project at or away from the construction project site, if the construction project ***is subject to a consolidated insurance program – commonly referred to as a wrap-up insurance program, owner controlled insurance program, or contractor controlled insurance program. This exclusion applies whether or not the consolidated insurance program: (1) Includes you, or anyone working on your behalf, as an enrolled contractor or subcontractor; or (2) Provides coverage identical to that provided by this Coverage Part; or(3) Has limits adequate to cover all claims; or (4) Remains in effect***. However, this exclusion does not apply to your ongoing operations if those ongoing operations are: (1) Conducted away from the location of the project; and (2) Not covered under a consolidated (wrap-up) insurance program.)
ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

[xxix] See example of a potential wrap up exclusion on a trade contractor's policy in Endnote xxvii.

[xxx] "LEG 3 coverage" is a term used in the insurance industry to describe "cost of making good" provisions in standard builder's risk policies. "LEG" stands for the London Engineering Group, which is an organization that develops policy language. The different "LEG" wordings are available for review at: LEG Clauses | London Engineering Group

[xxxi] *See discussion*, CLM, Anatomy of a Defect Claim, December 13, 2021, at: Anatomy of a Defect Claim/Articles/CLM Magazine (theclm.org)

[xxxii] *See definition*, Insurance Risk Management Institute, Glossary, Cross Liability Coverage, at: Cross-Liability Coverage | Insurance Glossary Definition | IRMI.com

[xxxiii] An example of such endorsement encountered on CIP recently reviewed by one of the authors is as follows: ("The following exclusion is added to SECTION I – COVERAGES, COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY, Paragraph 2., Exclusions and to SECTION I – COVERAGES, PRODUCTS / COMPLETED OPERATIONS BODILY INJURY AND PROPERTY DAMAGE LIABILITY and to SECTION I – COVERAGES, BODILY INJURY AND PROPERTY DAMAGE LIABILITY: "Bodily injury", "property damage", "personal and advertising injury" or medical payments arising out of claims, accusations or charges brought by or against any insured(s) for actual or alleged damages arising out of a communicable disease no matter how transmitted. This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the: a. Supervising, hiring, employing, training or monitoring of others that may be infected with and

spread a communicable disease; b. Testing for a communicable disease; c. Failure to prevent the spread of the disease; or d. Failure to report the disease to authorities.")

[xxxiv] A sponsor who is funding a large self-insured retention for a CIP has a potential conflict of interest because the sponsor has to incur costs out of its own pocket to defend and indemnify claims in the program until the retention is eroded. Some sponsors in difficult claims scenarios have refused to actually fund the self-insured retention, which leaves the participant to come up with the funding on its own. For these reasons, many contractors refuse to participate in CIPs that have large self-insured retentions. To avoid the conflict of interest and to encourage bidders to participate in the CIP and the project, sponsors should run their self-insured programs through a neutral third-party administrator who acts completely independently from the sponsor and adjusts the claims as the carrier would if the CIP was a guaranteed cost program. The sponsor should make all of this clear in the contract documents so that participants will be encouraged to participate. Another approach would be to set up the program with the carrier as a "secured deductible" instead of a "self-insured retention". In this way, participants do deal directly with the carrier, and the carrier looks solely to the sponsor to reimburse it for amounts it expends within the deductible layers.