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Coverage Issues in Wrap Insurance

By Beth P. Evans

When performing a coverage analysis for a new claim involving a wrap insurance policy there are a number of issues to keep in mind. As wrap policies are generally written on standard policy forms, there is a lot of overlap with traditional coverage issues, but because the wrap portion of the policy is heavily negotiated, manuscript coverage, there is a dearth of black letter insurance law on wrap-specific issues. Thus, instead of telling you how these policies work, this article will flag several issues to keep in mind when evaluating coverage and provide some case law that can be used as guidance, recognizing that every wrap policy is different and may implicate additional questions not discussed here.

What Is Wrap Insurance?

A "wrap" policy is a single policy that covers all, or almost all, of the participants on a construction project as named insureds. These policies are "consolidated" programs that generally include several types of coverage, including general liability coverage, excess liability coverage, and worker's compensation. Depending on how the program is organized, it may also be known as an "OCIP" (owner-controlled insurance program) or a "CCIP" (contractor-controlled insurance program).

The wrap program is generally comprised of the insurance policy, the construction contracts, and the wrap manual. One must recognize that each of these documents is drafted by a different party, so they often do not fit together seamlessly. When evaluating coverage issues, it is important to remember that the insurer's obligations are governed by the policy alone, unless, of course, the policy says that it follows the provisions of something else.

By consolidating the coverage, the organizing party (generally through a broker) seeks to centrally manage the insurance on a project with the goal of saving money. Thus, when used, these types of policies generally involve very large construction projects—things like stadiums, convention centers, government-sponsored projects, or other projects that are valued generally at $50 million or more, where a small percentage of savings translates to a large amount of money and is worth the hassle and cost of administering the wrap program.

The theory is that by buying insurance for such a large exposure, a broker can leverage the market to obtain more favorable pricing than individual contractors would obtain if each priced its own coverage separately. Moreover, the consolidated program endeavors to avoid duplicative coverage between the wrap policy and the subcontractor's policies (the "practice policies") and to eliminate inefficiencies by limiting wrap coverage to only project-based, on-site exposures. The players attempt to meet this goal in a variety of ways, which can sometimes lead to uncertainty down the road.

Issues to Keep in Mind

Wrap policies are usually based on standard commercial general liability forms, so one still encounters all of the typical issues that arise in the non-wrap context, but many of these issues have a twist because of the nature and intent of the wrap program. I will not endeavor to list every issue that could come up when evaluating coverage under

a wrap policy, but will instead highlight a few issues to keep in mind.

Who Is an Insured?

While the objective of a wrap policy is to provide coverage for all parties that may be involved in a project, named insured status derives from the express contractual terms of the policy itself.

Wrap policies generally include specific named insured endorsements or provisions indicating that coverage is provided for certain named entities in addition to "enrolled entities." When evaluating coverage, it is imperative to remember that enrollment is not automatic—just because a subcontractor worked on the project does not mean that it is an enrolled contractor.

Some policies may deem any contractor who has received a worker's compensation policy for the project an "enrolled contractor" for purposes of general liability coverage, which is an easy way to tell whether a contractor was enrolled. Other times, you will need to dig further to determine whether the enrollment process, usually spelled out in the wrap manual and/or contract documents, was completed.

Several cases illustrate the importance of parties following the enrollment process. For example, in *Williams v. Traylor-Massman-Weeks*, 2012 WL 1106652 (E.D. La. Apr. 2, 2012), the subcontractor admitted that it never completed the enrollment process specified in the wrap manual, but argued that because its Work Agreement indicated that participation in the wrap is required, it must be covered under the wrap policy. *Id.*, at *2. The court rejected this argument, recognizing that the insurer was not a party to the Work Agreement so it must look to the policy requirements. *Id.*, at *3. The court determined that the subcontractor had not met the policy requirements for enrollment, so it was not entitled to coverage under the wrap policy. *Id.* Any available recourse would be against the general contractor under the Work Agreement, and not the insurer. *Id.*, at *4.

Similarly, in *Workers' Compensation Fund v. Wadman Corp.*, 210 P.3d 277 (Utah 2009), the court also upheld the enrollment process. In *Wadman*, an employee suffered an injury at the project and there was a dispute regarding whether the wrap policy or the practice policy should provide worker's compensation benefits. *Id.* at 279. The subcontractor argued that it was covered under the wrap policy because the general contractor had accepted a reduced bid to account for the subcontractor's premium savings by excluding the project from its own practice policy and the general contractor had paid a premium to the wrap insurer for the subcontractor's work on the project. *Id.* at 280. Even though the financials demonstrated that the parties contemplated the subcontractor being covered under the wrap, the court determined that the wrap policy did not provide coverage because the general contractor had failed to submit the enrollment form, a prerequisite to coverage, for the subcontractor prior to the accident. *Id.* at 285.

Additionally, in *Hartford Underwriters Insurance Co. v. American International Group*, 751 N.Y.S. 2d 175 (N.Y. App. Div. 2002), the practice policy sued the wrap policy, arguing that because the subcontractor worked on the project, it should be covered under the wrap. The court rejected this argument and held that the wrap policy did not provide coverage to all subcontractors, known and unknown, on the project. *Id.* at 177. Rather, coverage was limited to those subcontractors who were enrolled. *Id.* As the subcontractor at issue had not completed the enrollment process, it was not covered under the wrap policy. *Id.*

Another facet of the Who Is an Insured issue is whether a contractor is seeking coverage for an on-site or off-site exposure. Recall that generally wrap policies only cover on-site risks, so this distinction can be determinative.

For example, in *American Protective Insurance Co. v. Acadia Insurance Co.*, 814 A.2d 989 (Me. 2003), there was a dispute between the OCIP and the practice policy over which was responsible to pay worker's compensation for an employee's injury. The OCIP insurer argued that the OCIP did not apply because the employee was injured while unloading prefabricated steel to be used by another subcontractor, and the OCIP did not cover accidents taking place while materials are being transported to and from the site. *Id.* at 993–94. The practice policy insurer argued that the employee's injury should be covered under the OCIP because the subcontractor's scope of work included labor on the project, so it was a covered entity. *Id.* at 994. The court recognized that the dispute was over whether the policy excluded certain types of work or certain types of entities from coverage, and found that it was clear under the facts that even though the accident did not involve labor at the site and occurred prior to the subcontractor's installation work, the subcontractor was an enrolled entity because its scope of work included steel installation and the injury was covered because it happened on-site. *Id.*

In contrast, when a subcontractor simply delivered materials or equipment to a site and did not perform any labor, courts have found the entity is not covered under the

wrap policy. In both *Waco Scaffolding Co. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 1999 WL 980629 (Ohio Ct. App. 1999) and *Higgins Erectors & Haulers, Inc. v. Niagara Frontier Transp. Auth.*, 529 N.Y.S. 2d 654 (N.Y. App. 1988), the wrap policy at issue defined "insured" to include all contractors and tiers of sub-subcontractors. In *Waco*, a worker was injured when scaffolding collapsed and sued Waco, the entity that had provided the scaffolding. *Waco*, 1999 WL 980629, at *1. Waco argued that it was a subcontractor on the project, and thus was an insured under the wrap, despite the fact that it did not perform any work at the project and did not take any steps to become enrolled in the wrap. *Id.* The court rejected this argument, holding that the term "subcontractor" in the wrap policy was unambiguous and that it does not include those, like Waco, who merely supplied materials and did not perform any work. *Id.* at *5.

The court in *Higgins* reached a similar result, but took a different route to get there. In *Higgins*, the entity that unloaded light rail cars for the Light Rail Rapid Transit System Project sought coverage under the wrap when a car was extensively damaged while being unloaded and set on the track. *Higgins*, 529 N.Y.S. 2d at 655. The court determined that the term "subcontract" was ambiguous, so looked to extrinsic evidence consisting of the insurance manual and contract documents. *Id.* The court then determined that Higgins Erectors, as a mere deliveryman that did not perform any work on the project, was not insured under the wrap policy. *Id.*

Notice Issues

When evaluating coverage, one will encounter typical notice issues with additional complexity because under a wrap policy there can be hundreds of insureds. The language of the documents will play a large role in deciphering when notice must be given, by whom, and to whom.

This issue can be especially problematic in the litigation context when multiple project subcontractors are sued after project completion. It may be the case that not all of the contractors are still in business or that not all of the contractors maintained records concerning the wrap insurance. So, what happens when one or more, but not all, of the sued contractors put the wrap policy on notice? Can that notice by one be imputed to provide notice on behalf of all enrolled subcontractors?

The court in *Continental Casualty Co. v. Employers Ins. Co. of Wausau*, 85 A.D. 3d 403 (N.Y. App. 2011), dealt with this issue, in a unique context. In *Continental*, the contractor, Robert A. Keasbey Company's, practice policy defended against numerous asbestos liabilities but eventually exhausted its coverage. Subsequently, the practice insurer identified two project-specific policies under which Keasbey would have been covered and gave notice of the asbestos-liabilities to that insurer, seeking reimbursement of certain defense costs. *Id.* at 404–05. Among other issues, the court rejected the theory that the wrap insurer had received adequate notice of the action against Keasbey because it received notice from a different insured under the wrap policy, stating that "[w]here each insured has an independent duty to give timely notice under the policy, notice by one insured cannot be imputed to another." *Id.* at 409.

There is not a lot of case law in the wrap context, but the policy language may provide guidance, as it appears to be trending toward not imputing notice to a non-tendering subcontractor.

It is important, however, to consider the practical consequence of this standard. In some circumstances, an insurer may wish to be proactive and reach out to enrolled subcontractors that have not tendered to, for example, shore up the joint defense or to raise money for a potential settlement. Doing so, however, in light of the trend to not impute notice, can raise questions concerning calculating the date of tender and calculating pretender defense costs, which in many jurisdictions need not be reimbursed to an insured. The best strategy, then, is to be consistent and reach out to all potentially implicated enrolled parties, if you reach out to any.

Availability of Other Insurance

As a practical matter, it is important to remember that the existence of a wrap program does not negate the possibility of other available insurance. Often there may be other insurance available from which the wrap insurer can seek contribution or indemnity. Additionally, litigation involving wrap projects is of a high value, so it is likely that excess or umbrella coverage will be implicated. To avoid any late notice denials down the road, it is important to put all insurance on notice at the outset of a claim or litigation, and to follow up regarding the tenders to determine their status. One should also obtain contact information so that the appropriate carriers are updated as the litigation progresses.

Unique Provisions

Given the manuscript nature of wrap insurance programs, it is also important to be on the lookout for unique policy

provisions that may bear on a particular claim. Many of these provisions will restrict typical CGL coverage to the exposure that is underwritten, generally a construction project. Some policies, for example, are tailored so that they will not cover any work performed outside the operations period, and will not respond to any post-construction obligation of contractors, including repair or warranty work.

Final Thoughts

Wrap insurance is a unique product tailored to specific projects and specific customers. There is little case law directly on point, so the best strategy is to be informed about what law there is and to provide guidance to your client consistent with the law and the documents expressing the purpose and intent of the specific wrap program at issue.

Beth P. Evans is an associate with the Baltimore law firm, Kramon & Graham, P.A. Ms. Evans focuses her work in insurance coverage and is barred in Maryland and the District of Columbia, but handles litigation for insurers throughout the country. She is a member of the DRI Insurance Law Committee and several sub-committees, including the DRI ILC-Construction Law Subcommittee.