OCP Liability versus Additional Insured Coverage

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In my yellowed "Policy Kit," acquired sometime in the last century, buried along with policies with monikers such as "OL&T," "M&C," and "SMP," is an "OCP" or owners and contractors protective liability policy. While M&C, OL&T and SMP had their glory days and have since faded into nothingness, OCP is alive and well, albeit a bit obscure.

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Often confused with OCIP (owner controlled insurance program or "wrap-up" program), the OCP policy has been with us quite a while. But like its brethren the M&C and OL&T policy, is the OCP policy ancient history?

Ancient History

Sooner or later we all figure out the oft-mentioned "old days" is relative. For example, when my friend, who is an Episcopal minister, refers to the "old days," we immediately demand clarification—are you talking Moses or Bruce Springsteen? Because ancient history is also relative, a better question is whether the OCP policy has outlived its usefulness. Of course, this begs the question, what was the OCP designed to do in the first place? In particular, how is the OCP usually used, and how does it "stack up" to more commonly used alternatives?

OCP Liability Form

The complete title of this general liability form is Owners and Contractors Protective Liability Coverage Form—Coverage for Operations of Designated Contractors (CG 00 09 12 07), which is a lengthy and descriptive title. As suggested by the title, the policy is intended to protect certain owners and contractors, but only for operations performed for the named insured by the contractor listed as the "Designated Contractor" on the Declarations Page.

Protective Liability Coverage

One of the distinguishing features of the OCP liability policy is that it is a *protective* liability policy. A protective liability policy is arranged a bit differently than most liability insurance—the policy is usually purchased by a contractor for the *sole benefit* of another person or organization. An example will help illustrate.

A construction agreement between a project owner and the project's general contractor might require the general contractor to purchase an OCP policy for the owner, listing the owner as the policy's *named insured*. Although the general contractor in this example will pay the entire premium for the OCP policy, only the owner, with the status of a named insured, receives any protection from this policy; the general contractor is provided no liability insurance protection and thus receives no benefit from the purchase of the policy.

Limited Coverage

While the nature of a protective policy may seem like the best of all possible worlds to a project owner, it is crucial to recognize that the OCP policy provides *substantially less* protection to the owner then would a commercial general liability (CGL) policy.

In our previous example, the project owner is protected by the OCP policy in only two circumstances: if the owner is held *vicariously* liable for acts or omissions of the general contractor or if the project owner is held directly liable for its acts or omissions in the *general supervision* of the operations of the general contractor. In fact, the policy expressly excludes coverage for the project owner's liability arising out of the owner's (or the owner's employees) acts or omissions if not arising out of "general supervision" of the general contractor's operations.

This alone should strongly indicate to a project owner that relying solely on an OCP policy for liability protection is not recommended. Even the most cursory consideration of the potential *direct* liability that project owners may face reveals the exposure is far greater than that of general supervision of construction. Thus, it is axiomatic that the project owner needs a full-blown CGL policy, even before taking into account numerous other limitations found in the OCP when compared to a CGL policy.

Purpose and Use of OCP

Given the limited coverage offered, it might seem the OCP is past its prime and of little practical use. However, the OCP is not designed to be a substitute for a CGL; it is most effective when written in *conjunction with* a CGL. Most commonly, an OCP policy is usually an alternative to adding the owner or contractor as an additional insured on the CGL policy of the general contractor or subcontractor.

What follows are some the benefits and drawbacks of the OCP policy compared to the more common additional insured endorsements. To make the explanation more concrete, let's apply each situation to a hypothetical general contractor called Great Big General Contractor, Inc. (GBGC), and its subcontractor, Not So Big Subcontractor, Inc. (NSBS).

Benefits of the OCP

The following are some of the benefits of an OCP policy.

Limits. As an additional insured, you have to *share* the limits with all other insureds (including the named insured) for the same occurrence and also must share the aggregate limit for multiple occurrences. If you don't yearn to share (at least your insurance), then the OCP policy is an option. The OCP policy limits (the OCP policy has an each occurrence and an aggregate limit) are *dedicated exclusively* to the named insured. In our hypothetical, when GBGC requires NSBS to purchase an OCP with GBGC as the named insured (NSBS would be the contractor "designated" on the OCP Declarations), the OCP policy limits available to GBGC can be exhausted only by payment of claims on behalf of GBGC—there is no sharing involved!

Other Insurance. The battle lines are drawn when the coverage for the additional insured is to be "primary and noncontributory." In our hypothetical, if GBGC was an additional insured on the CGL policy of NSBS, GBGC would likely expect that the liability coverage available to GBGC as an additional insured would be *primary* coverage to GBGC (the NSBS CGL insurer would respond first) and the CGL insurer for NSBS would *not seek contribution* from GBGC's own CGL insurer.

Of course, this doesn't always work as planned. The OCP policy's Other Insurance condition helps resolve this persistent problem by stating:

The insurance afforded by this Coverage Part is *primary* insurance and we will *not seek contribution* from any other insurance *available to you* unless the other insurance is provided by a *contractor* other than the designated "contractor" for the same operation and job location designated in the Declarations. [Emphasis added.]

Simply put, the OCP insurer will pay on behalf of GBGC first and will not seek contribution from GBGC's own liability insurance.

Policy Cancellation. From time to time, a general contractor tenders a claim to the CGL insurer of its subcontractor, seeking coverage as an additional insured and, to its surprise, finds the subcontractor's CGL policy has been canceled. If in our example, GBGC tendered a claim as an additional insured to the CGL insurer of NSBS and found the policy was canceled, GBGC could refer back to the certificate of insurance. However, GBGC would find that NSBS's insurer stated it would *endeavor* to provide GBGC notice of cancellation, but if it didn't, its agent or the insurer of NSBS is not liable. By contrast, the OCP policy is issued to and should be delivered to the named insured (GBGC).

Possibly more importantly, the OCP policy cannot be canceled without giving advance written notice to the first named insured (GBGC) as well as the designated "contractor" (NSBS). Reliance on a certificate of insurance and the "endeavor" wording for cancellation notice is not a concern with the OCP policy.

Losses. While the OCP does not benefit the "designated contractor" in that no liability insurance protection is provided to the "designated contractor" (who in our hypothetical is NSBS), there is a very clear "noncoverage" benefit to the contractor purchasing OCP coverage for another. Losses paid by the OCP insurer are usually outside of the contractor's liability insurance program and therefore there is usually little or no effect on the contractor's own insurance costs. If the insurer of the OCP policy purchased by NSBS for GBGC pays a $1 million liability loss on behalf of GBGC, that loss will usually not be factored into future premiums of NSBS.

This benefit is even greater to the contractor purchasing the OCP *if* the contractor has a loss-sensitive program, such as large deductible program. If NSBS has included GBGC as an additional insured on NSBS's CGL policy, and NSBS's CGL is written with $250,000 each-occurrence liability deductible, the same claim paid on behalf of GBGC as an additional insured would likely cost NSBS $250,000, the amount of the deductible. When considering its deductible, the OCP policy looks much more attractive to NSBS.

The Drawbacks of the OCP

Continuing with our illustration, the following are some of the limitations of the OCP policy compared to the more common additional insured endorsements.

Limited Insuring Agreement. As noted above, the coverage promised to the named insured is indeed very limited in its scope. The insuring agreement has two parts to consider.

First, the named insured is covered only for its liability for the acts of the designated contractor, but only while the designated contractor is performing operations for the named insured at the location specified in the Declarations. In our example, GBGC is covered only if the liability of GBGC is alleged to arise from the *actions of NSBS*. In other words, coverage only applies to GBGC if the allegations are that GBGC is liable because of the *negligence of NSBS*. Imposing liability on a blameless party (GBGC) for the actions of others (NSBS) is often called vicarious liability. Coverage for the actions of GBGC (except for "general supervision") is expressly excluded.

Second, the named insured of an OCP is covered only for its liability arising out of its acts or omissions in the "general supervision" of the designated contractor and then only for the operations at the location shown in the Declarations. In our example, GBGC is only covered for its direct liability—that is, for its own actions—if the liability arises out of "general supervision" of NSBS. "General supervision" is not defined, so it can be a bit difficult to determine exactly where coverage begins and ends for GBGC.

If GBGC was an additional insured on the CGL policy of NSBS, using the Insurance Services Office, Inc. (ISO) CG 20 10 or CG 20 33 July 2004 edition date, whether the liability alleged against GBGC involved *only* GBGC's vicarious liability for the actions of NSBS or "general supervision" is not decisive as to coverage. Provided the liability was *caused at least in part* by the acts or omissions of NSBS (or in part by NSBS's subcontractors) in the performance of NSBS ongoing operations for GBGC, GBGC is provided coverage as an additional insured. Put another way, if NSBS actions in performing for GBGC are even a slight factor in causing the injury or damage that is alleged to be the liability of GBGC, GBGC is protected as an additional insured.

Vicarious Liability. When coverage is limited to the vicarious liability of the named insured, coverage applies only to liability imposed on the named insured as a result of the designated contractor's acts and not as result of the named insured's own acts or failure to act. Although the OCP does not use the phrase "vicarious liability," one court stated:

> … the courts must construe the "arising out of [the subcontractor's work]" provision as one providing coverage in cases where the alleged liability is *vicarious*. [Emphasis added.]

St. Paul Fire & Marine Ins. and Hardin Constr. Grp., Inc. v. Hanover Ins. and Travelers Ins., 187 F. Supp. 2d. 584 (E.D.N.C. 2000).

However, conventional wisdom to the contrary, one who engages an independent contractor is usually *not* vicariously liable for the acts or omissions of the independent contractor.

> Except as stated in sections 410–429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.
>
> *Restatement of the Law (Second) of Torts.*

While there are clearly exceptions to this general rule, the general rule is still observed in many instances. For example, in a situation where the court was ascertaining coverage for an insured covered only for its vicarious liability for the acts of an independent contractor, the court observed:

> North Carolina courts recognize three exceptions to the rule that general contractors are not subject to liability when their subcontractors have been negligent: 1) situations where the general contractor/employer retains control over the manner and method of the subcontractor's substantive work; 2) situations where the work is deemed to be inherently dangerous; and 3) situations involving negligent hiring and/or retention of the subcontractor by the general contractor. Rather, each of the exceptions to the *no-liability rule suggest forms of direct liability*—liability on the part of the general contractor for something the general contractor has done or failed to do. [Emphasis added.] *St. Paul Fire & Marine Ins. and Hardin Constr. Grp*.

The court went on to find no coverage for the additional insured:

> The complaint does not, at any point, mention vicarious liability, nor does the complaint assert in lay terms that Durham seeks to hold Hardin liable for J&A Mechanical's negligent acts. Thus, it would appear that *Hardin's liability*, as alleged in the complaint, *does not arise out of J&A Mechanical's work but rather, out of its own independent acts and omissions*, alleged in detail in Durham's complaint. [Emphasis added.]

As the court found the insured was provided coverage only for its vicarious liability, and there was no attempt to impose vicarious liability on insured, no coverage was afforded to the insured.

The limited circumstances in which vicarious liability may be imposed on those who engage independent contractors has been the topic of some discussion by a few courts in the context of additional insured coverage. Here is one court's observation:

> We reject Maryland Casualty's argument that the intent of an additional insured endorsement is to "provide protection where the named insured, performing a job for the additional insured, blunders." Where the additional insured is *held no more than vicariously liable for the acts of the named insured*, the additional insured would have an action for indemnity against the primary wrongdoer. "Thus, *an endorsement that provides coverage only for the additional insured's vicarious liability may be illusory and provide no coverage at all*." In this light, it is obvious that additional insureds expect more from an endorsement clause than mere *protection from vicarious liability*. [Emphasis added.] *Marathon Ashland Pipeline v. Maryland Cas.*, 243 F.3d 1232 (10th Cir. 2001).

Even though the above case concerns interpreting the breadth of an additional insured endorsement, it is revealing to consider how little coverage this court believes is provided for an insured when the coverage is for its vicarious liability for the acts of an independent contractor.

General Supervision. Courts have provided some guidance as to what it considered to be "general supervision." In *Union Electric v. Pacific Indem.*, 422 S.W.2d 87 (Mo. App. 1967), an employee (Palmer) of the subcontractor (Davey) was seriously injured when he came into contact with an uninsulated power line when trimming trees around the line pursuant to a contract with Union Electric. Palmer brought a complaint against Union Electric, alleging Union Electric was negligent in failing to warn Palmer of inadequately insulated power lines. Union Electric's insurer contended that Union Electric's alleged liability did not result from Union's *supervision* of Davey in that Union supervised only the *result* of the work and did not supervise the method, manner, or means of performance of the work.

The court ruled:

> The factual situation presented shows the insured's contract with Davey required the insured [Union Electric] to *designate the areas along the distribution and transmission lines of the insured where Davey would cut and trim trees.* … we hold that the words "general supervision" as used in the policy in question do not mean supervision of the method, manner, and/or means employed by Davey…We hold that the words mean supervision of the work of Davey only to the extent necessary to see that the work was done in accordance with the contract…and *to provide the area of the transmission lines where Davey would cut and trim the trees*. Palmer's claim fell within the coverage of the policy. Insured's failure to warn Palmer arose out of its supervisory function. [Emphasis added.]

In a similar case, *Continental Cas. v. Florida & Light Co.*, 222 So. 2d 58 (Fla. App. 1969), the Court of Appeals in Florida found allegations made by an injured employee of a contractor to constitute omissions of general supervision, requiring the insurer to provide defense to Florida Power & Light. Specifically, the court cited the following specific allegations made by the contractor's injured employee:

> Among other specific allegations were the following: Florida Power & Light (1) negligently failed to provide the employee with a safe place to work, (2) negligently failed to make reasonable inspection of the work site and the equipment on which the contractor was to do the work, (3) negligently failed to take reasonable precautions and adopt proper safeguards to protect him while he was doing the work, and (4) negligently required the work to be done upon a high voltage electrical transmission line which was so situated that there was a great danger of grounded material and equipment thereon being energized. All of *these allegations* may in their implications *charge acts which constitute omission of general supervision* under the broad language of the policy. This interpretation is authorized under the principle that any ambiguous term of an insurance policy will be most strongly construed against the insurance company. [Emphasis supplied.]

While the courts may find the scope of "general supervision" to be quite broad when interpreting the insuring agreement of the OCP liability policy, consider the facts and ruling in *Citizens Mut. Ins. v. Employers Mut. Liab. Ins.*, 212 N.W.2d 724 (Mich. App. 1973). There, a contractor of the City of Alma was installing a new sewer line for the city when an employee of the contractor was killed when the trench in which the employee was working collapsed due to a water main rupture (the rupture caused the side walls of the trench to collapse). Coworkers of the worker could not shut off the water main as the hydrant key necessary to shut off the water was not available. The court observed:

> "General supervision" of the actions of an independent contractor digging a sewer line *does not and cannot*, in our view, extend to keeping a hydrant key available for use in a possible emergency. It was the "act or omission of the named insured [Alma] or his employees". This is just exactly what Employers clearly, plainly, and unequivocally *excluded from its coverage*. [Emphasis added.]

Whether the City of Alma would have been covered as an additional insured under the CG 20 10, July 2004 edition, endorsement to the subcontractor's CGL for a similar incident is speculation at best. However, if it could be found that the contractor's acts or omissions had at least been a factor in the death of its own employee, the City of Alma would have had coverage as an additional insured.

For example, if the City of Alma pointed to the contractor's failure to use a trench box to protect its employee, such an omission may be argued as partly causing the bodily injury.

Costs. While a small premium usually is charged for extending coverage to an additional insured, the premium for the OCP policy is based on the contract price between the named insured and the designated contractor (usually with a rate per $1,000 of the contract price). Thus, a separate OCP can be several thousand dollars of premium (or more) depending on the size of the project, the limits required, etc. While it usually is the responsibility of the general contractor or subcontractor to purchase the OCP, such costs must usually be factored into the overall cost of the project by the owner or general contractor.

Limits. Because of the arrangement of the OCP policy—the policy is purchased for the benefit of the named insured by the designated contractor—the named insured will not likely have limits beyond the limits provided in the OCP policy Declarations page. In contrast, although it is sometimes unintended, an additional insured at times has available to it the full limits of not only the CGL policy of the subcontractor, but also the full limits of the subcontractor's umbrella or excess liability insurance program. For example, if GBGC is a named insured on its own OCP policy purchased by NSBS, the umbrella insurer for NSBS will not usually provide limits to GBGC in excess of the OCP policy.

If GBGC was an additional insured on the CGL policy of NSBS, GBGC might have available to it not only NSBS CGL limit, but also the full limit of NSBS umbrella program, even if the limits of NSBS umbrella program exceed what was required of NSBS in its agreement with GBGC.

Completed Operations. The OCP policy excludes coverage for bodily injury or property damage if such injury or damage takes place after the earlier of when the operation has been completed or put to its intended use by anyone other than another contractor or subcontractor working for the Designated Contractor on that project.

The ISO CG 20 37 and many insurers' independently filed additional insured endorsements provide coverage for the additional insured for bodily injury or property damage within the products and completed operations hazard. This coverage option is not available on the OCP policy.

Conclusion

Understanding the benefits and drawbacks of the OCP liability policy is vital to properly evaluate whether an OCP liability policy is a workable alternative to ISO's or an insurer's independently filed additional insured endorsements. While the limited insuring agreement of the OCP liability policy needs to be carefully considered, in certain circumstances the OCP liability policy may actually provide broader coverage than ISO's or an insurer's own additional insured endorsement forms.

For example, if GBGC was deemed to be solely negligent in causing an injury to an employee of NSBS, in most instances, coverage would likely be denied to GBGC as an additional insured, despite the fact that the ISO CG 20 10 (July 2004 edition) additional insured endorsement *does not require* NSBS to be negligent. The requirement is only that NSBS or its subcontractor cause *in part* the injury by *its acts or omissions*. At least one court has recognized this by unequivocally stating "…the plain meaning of 'act or omission is not negligence.'" *See Maryland Cas. v. Regis Ins. and RAN Holding Corp.*, 1997 U.S. Dist. Lexis 4359 (E.D. Pa.).

Nevertheless, if GBGC was the named insured on an OCP liability policy purchased for GBGC by NSBS, GBGC would clearly have coverage for is sole negligence provided the sole negligence arose out of GBGC's acts or omissions in the "general supervision" of NSBS. However, if the sole negligence (or any negligence) of GBGC did not arise out of the actions of "general supervision," then an additional insured coverage endorsement may indeed provide greater protection for the additional insured.

Further, to the extent that insurers continue to contend their additional insured endorsements provide *only* coverage for *vicarious liability* imposed on GBGC for the actions of its subcontractors, the OCP liability policy would also afford broader protection to GBGC as the OCP includes, *in addition to coverage for vicarious liability*, coverage for GBGC's acts or omissions for general supervision.

In short, the tradeoffs of OCP versus additional insured are numerous and must be carefully weighed to determine what is and what is not required or needed by the additional insured.

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