Welcome and thank you for joining us for today's presentation. Our topic is **“Current Trends in Insurance for the Construction Industry”.**

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Trends In Insurance for the Construction Industry:

OCIPs, CCIPs, Additional Insured Status, & Business Interruption Insurance

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January 12, 2020

Trends in the Insurance Industry

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Trends in the Insurance Industry

Robert Rubin
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Simon Braithwaite
Quantum Damages and Delay Expert

Agenda

1. Property and casualty insurance marketplace update
2. Comparing owner-controlled and contractor-controlled insurance programs to traditional market
3. Additional insured: latest pitfalls and challenges
4. Update in legal challenges to business interruption coverage in the United States
5. Case studies in construction related insurance issues (domestic and international).

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Insurance Market Overview

Property & Casualty Rates in the United States were up an average of 11.7% overall through the 3rd quarter of 2020 according to the Council of Insurance Agents & Brokers (CIAB).

Large and medium sized accounts were hardest hit, recording average increases of 15.3% and 12.7%, respectively.

The CIAB noted that All lines of business, including Workers Compensation, experience slight-to-significant premium increases in Q3 2020.

Umbrella premiums increased by far the most in Q3 2020, at 22.9% respectively. Notably, this marked the end of 21 quarters of decreasing prices for Workers Compensation.

Workers Compensation Renewals

MORE CAPACITY KEEPS RATES DOWN

INCREASED MEDICAL CLAIMS

- Medical and prescription drug costs surpassing wage costs
- Increased lost-time claims
- An aging workforce
- Rate reductions in some jurisdictions

Property Renewals

Property pricing is increasing due to reinsurance costs, flood/earthquake/windstorm exposure and loss history.

For tougher risks, carriers are looking to change terms and conditions, and reduce capacity.

Liability Renewals

Auto rates and retentions are increasing.

Increased focus on loss control measures.

General Liability Rates fluctuate based on class of risk.

Excess market is seeing the most rate pressure. Expect higher attach-ment points and rate increases.

Executive Liability Renewals

DIRECTORS & OFFICERS

EMPLOYMENT PRACTICES LIABILITY

FIDUCIARY LIABILITY

- Rate Increases of 10% with higher increases for Healthcare & Public D&O
- Retentions Up
- Restrictions in Coverage
- Wage & Hour Limitations/ Exclusions

Cyber Liability

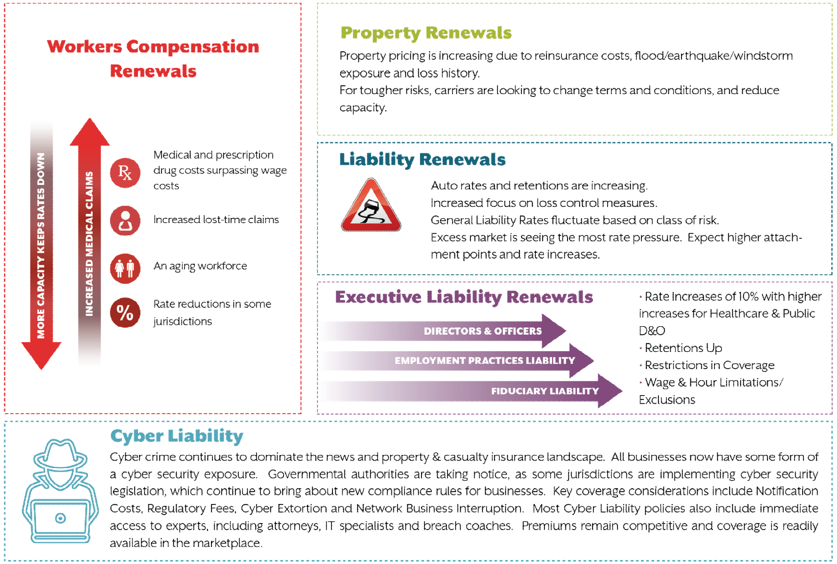
Cyber crime continues to dominate the news and property & casualty insurance landscape. All businesses now have some form of a cyber security exposure. Governmental authorities are taking notice, as some jurisdictions are implementing cyber security legislation, which continue to bring about new compliance rules for businesses. Key coverage considerations include Notification Costs, Regulatory Fees, Cyber Extortion and Network Business Interruption. Most Cyber Liability policies also include immediate access to experts, including attorneys, IT specialists and breach coaches. Premiums remain competitive and coverage is readily available in the marketplace.

Insurance Market Overview

The hardening of the Commercial Auto insurance market is also driving the overall rate increases. Commercial Auto rates continue to be assessed with more aggressive increases of up to 11% in Q3, according to MarketScout.

As in the past, the increase is being driven by large jury verdicts as well as distracted driver claims, the costs per auto claim, due in large part to increasingly expensive repair parts for vehicles, and more people on the road.

The Umbrella market continues to make corrections in an attempt to reverse unprofitability. Social inflation is leading to larger jury verdicts.



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Insurance Market Overview

Through Q3, the CIAB reported average increases of 22.9%.

Expect rate increases, higher attachment points, and reductions in capacity.

This is especially true for risks in high hazard industries and those with large fleets.

Generally, we see increases in pricing continuing well into 2021.

Workers Compensation Renewals

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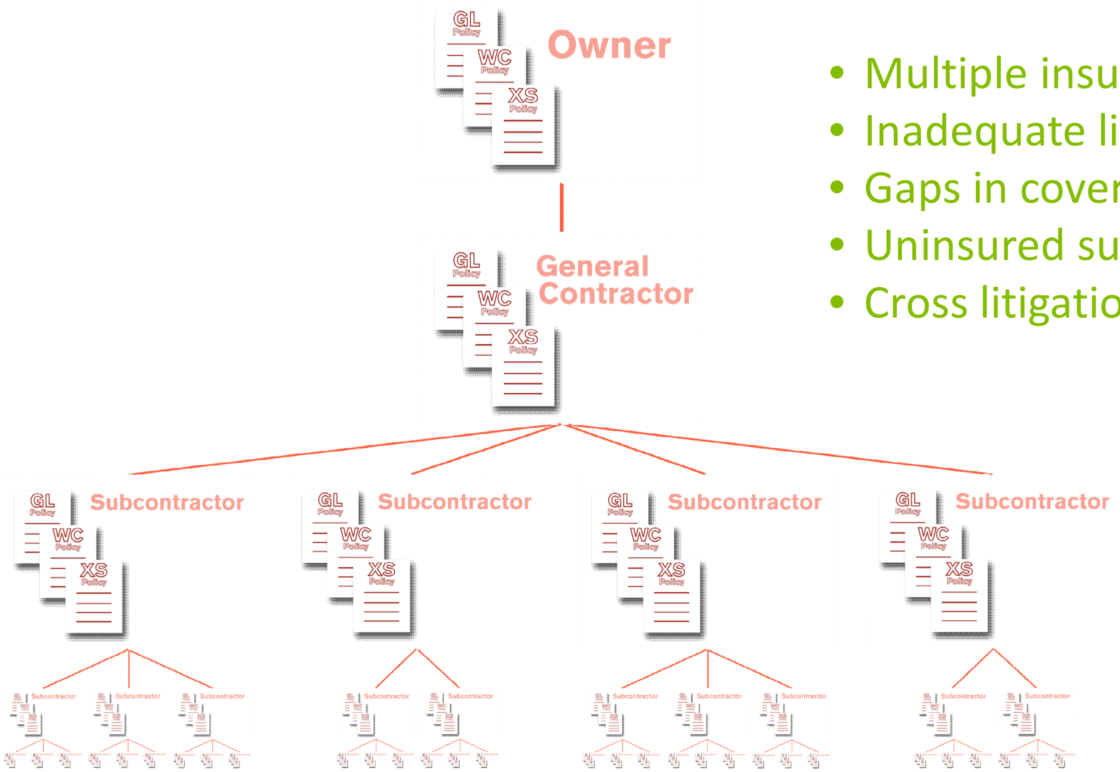
Traditional Program



- Multiple insurers
- Inadequate limits
- Gaps in coverage
- Uninsured subcontractors
- Cross litigation

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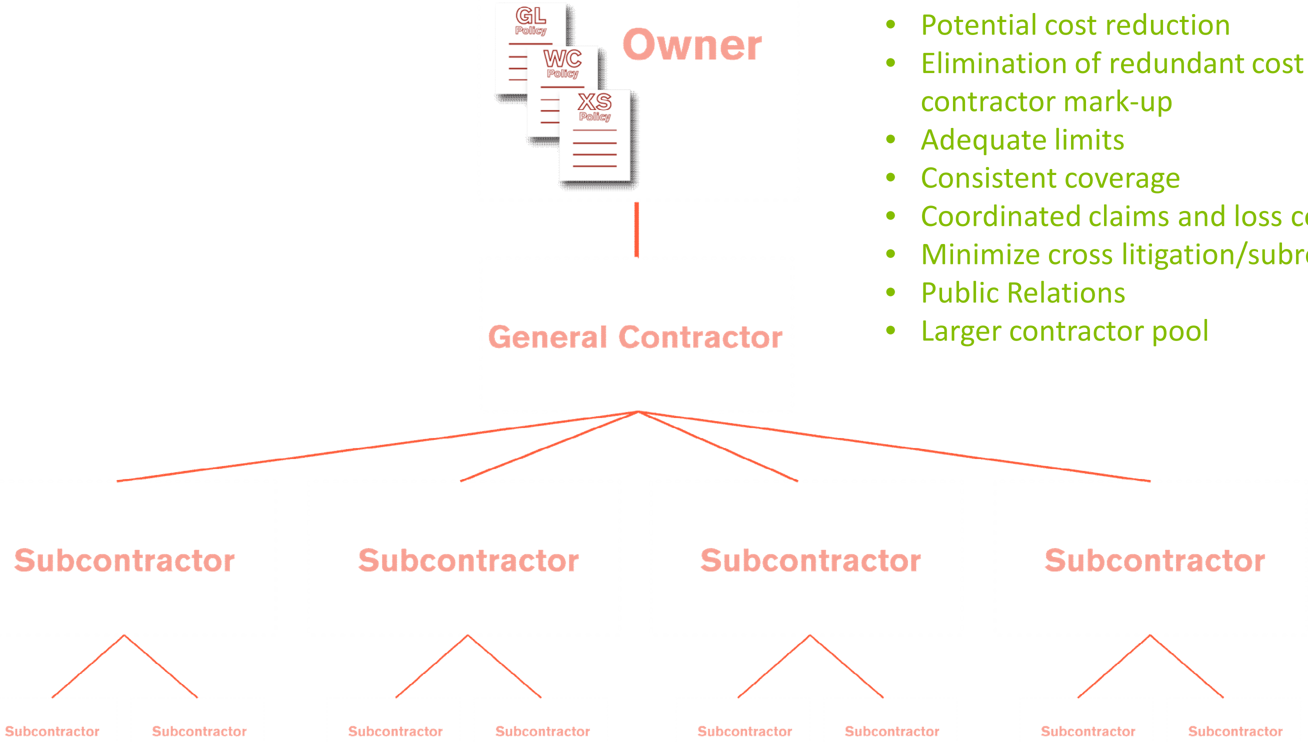
Consolidated Program



- 2-3 insurers
- Control of insurance
- Potential cost reduction
- Elimination of redundant cost and contractor mark-up
- Adequate limits
- Consistent coverage
- Coordinated claims and loss control
- Minimize cross litigation/subrogation
- Public Relations
- Larger contractor pool

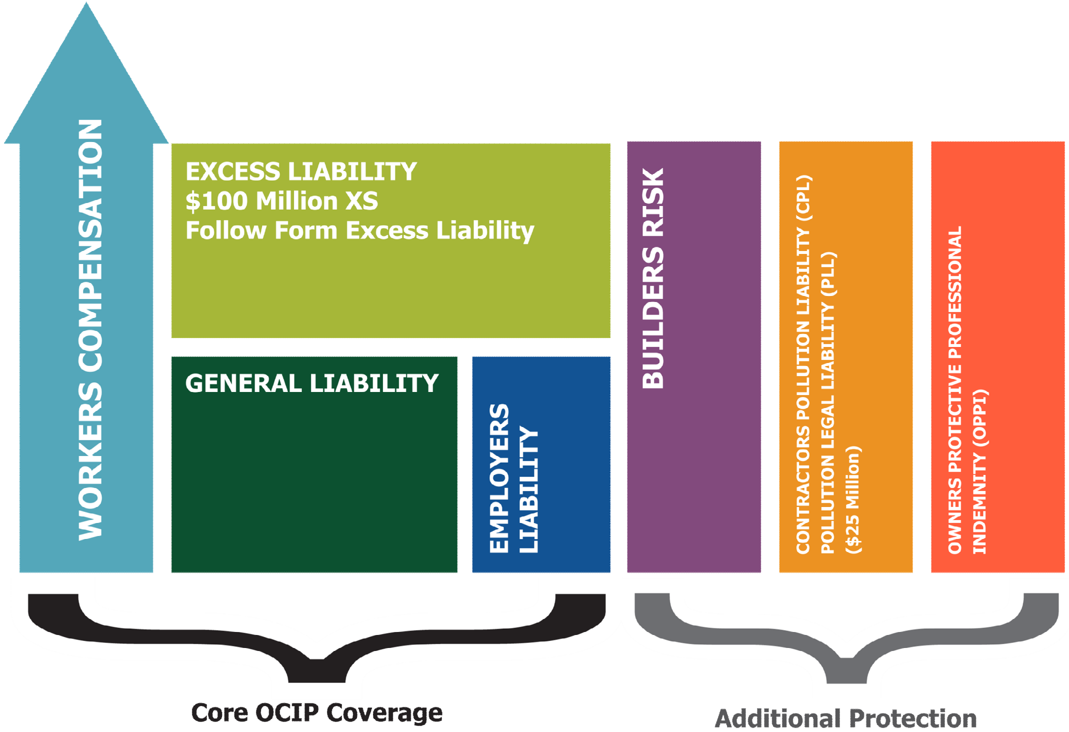
OCIP & CCIP Parameters

1. $100MM Minimum in Construction Costs
   i. Either through single project; or

   ii. Multiple projects to begin during a 3 year period

      a. Projects > $20MM in construction value to be completed within 5 years

CIP Coverages



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Savings Achieved Under a CIP?

1. Bulk Insurance Buying

1. By Sharing in the Risk (applicable to WC & GL)
   i. Per Occurrence Deductible
      a. Typically $250,000 or $500,000 per occurrence (applies separately to WC & GL)
   ii. Per Occurrence "Clash Deductible"
      a. Applies when a single loss impacts both WC & GL
      b. Typically $350,000 or $750,000 per occurrence
   iii. Aggregate Deductible

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Additional Insured Issues

1. Negligence of the Additional Insured
   i. Sole Negligence, Partial Negligence, Vicarious Liability
   ii. "ISO" Endorsements, Carrier Endorsements, "Manuscript" Endorsements

2. Other Insurance Clause
3. Horizontal Exhaustion
4. "Direct" Contract Requirement
5. "Scheduled" Requirements
6. Protection is Limited to the Insurance Policy
7. Erosion of Subcontractor's Limits by Other Claims

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Named Insured vs. Additional Insured

1. Named Insured –
   a. Person(s) named in the policy.
   b. Entitled to 100% of the benefits and coverage provided by the policy.
   c. Has the broadest protection and indemnity under the policy.
   d. Typically in charge of choosing coverage types and amounts, receives premium notice.

2. Additional Insured –
   a. Someone who is not the owner of the policy, added to the policy by endorsement.
   b. But, under certain circumstances, may be entitled to some of the benefits and a certain amount of coverage under the policy.
   c. Endorsement will provide coverage only for claims arising out of the act and omissions of the primary insured.

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Litigation Update – COVID-19 Claims

1. At the outset of the COVID-19 pandemic, businesses around the country sought recovery under their Business Interruption insurance policies as a result of government mandated closures.

2. Legal and insurance experts largely opined that, while recovery was possible, it was an uphill battle for several reasons, including that such policies largely require “**physical loss or damage**.”

3. According to a preliminary analysis performed by the University of Pennsylvania Law School, courts have dismissed more than four times as many business-interruption lawsuits as those that have been permitted to proceed.

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Litigation Update – COVID-19 Claims

Examples of recent cases **dismissed** by Courts:

MICHAEL CETTA, INC. d/b/a SPARKS STEAK HOUSE v. ADMIRAL INDEMNITY COMPANY (S.D.N.Y. Dec. 11, 2020):

The Court dismissed Plaintiff's claim for recovery under business interruption insurance.

"None of the facts pleaded in the Complaint suggest that the suspension in Sparks' operation was "caused by direct physical loss of or damage to property." Policy at 56. Sparks therefore has failed to plead allegations that would entitle it to the requested declaratory relief as to the Policy's business income provision."

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Litigation Update – COVID-19 Claims

Examples of recent cases **dismissed** by Courts:

TAPPO OF BUFFALO, LLC and Tappo Pizza, LLC, v. ERIE INSURANCE COMPANY (W.D.N.Y. Dec. 29, 2020):

The Court dismissed Plaintiff's claim under business interruption insurance.

"While there is no doubt that COVID-19 and the New York State Executive Orders relating to COVID-19 have had a devastating impact upon the restaurant industry, this Court agrees with the overwhelming majority of courts to have considered this issue that plaintiffs cannot plausibly allege that this impact is the result of direct physical loss of or damage to covered property as required to establish coverage under their insurance policies."

Litigation Update – COVID-19 Claims

Examples of cases that have **permitted** lawsuits claiming business interruption coverage for COVID-19 losses to proceed:

BLUE SPRINGS DENTAL CARE, LLC, v. OWNERS INSURANCE COMPANY (W.D. Mo. Sept. 21, 2020):

The Court permitted claim seeking coverage under business interruption policy to proceed because **Plaintiffs plausibly allege that COVID-19 physically attached itself to their dental clinics, thereby depriving them of the possession and use of those insured properties**."

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Litigation Update – COVID-19 Claims

Examples of cases that have **permitted** lawsuits claiming business interruption coverage for COVID-19 losses to proceed:

Optical Services USA/JCI v. Franklin Mutual Insurance Co. (Superior Court of New Jersey, Law Division, Bergen County (Sept. 16, 2020):

The Court denied insurer’s motion to dismiss, holding “there is an interesting argument made before this Court that physical damage occurs where a policy holder **loses functionality of their property** and by operation of civil authority such as the entry of an executive order results in a **change to the property**.”

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Litigation Update – COVID-19 Claims

Examples of cases that have **permitted** lawsuits claiming business interruption coverage for COVID-19 losses to proceed:

NORTH STATE DELI, LLC, v. CINCINNATI INSURANCE COMPANY (N.C. Sup. Ct. Oct. 7, 2020):

The Court permitted claim seeking coverage under business interruption policy to proceed holding that "Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. **These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.**"

Litigation Update – COVID-19 Claims

Examples of cases that have permitted lawsuits claiming business interruption coverage for COVID-19 losses to proceed:

Elegant Massage LLC v. State Farm Mutual Automobile Insurance (E.D. Va. Dec. 9, 2020):

The Court denied insurer's motion to dismiss, holding "while the Light Stream Spa was not structurally damaged, it is plausible that Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus. That is, the facts of this case are similar those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss."

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Questions?

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