

ProNetwork News

Risk Management Tools for the Design Professional

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Insurance 101: The Things You Always Wanted to Know About Liability Coverage But Were Afraid to Ask

By members of a/e ProNet

As a change of pace from our usual fare on risk and practice management, this issue of *ProNetwork News* is meant to serve as a basic reference guide to the liability insurance coverages typically purchased by design firms.

Let's start with a key definition.

CLAIMS-MADE vs. OCCURRENCE Most liability policies are written on an Occurrence policy form. Coverage is triggered on the date of the "occurrence" (defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions, causing damage). A claim asserted against the insured may be brought well after the occurrence.

In contrast, professional liability claims are often brought many years after an alleged act, error or omission. Insurance companies had to evaluate their exposures and better determine the premium necessary to cover such risk, so the Claims-Made policy form was created. The coverage trigger is the date the claim is made, and coverage applies only to alleged wrongful acts that happened after the retroactive date of your policy. Once the policy is canceled or not renewed, all coverage will cease.

Today, virtually all professional liability policies are provided on Claims-Made forms. In order to establish coverage, three conditions must be met:

- 1) a policy must be in place at the time a claim is made
- 2) the "retroactive" or "prior acts" date on the policy must be dated at least as far back as the services giving rise to the claim were provided
- 3) notice must be provided to the insurer within the policy term or during a specified grace period

The advice of your insurance advisor is essential when reviewing Claims-Made policies with respect to mergers, acquisitions, splits and retirement.



This information is provided as a service of a/e ProNet, an international association of independent insurance brokers dedicated to serving the design profession since 1988. We are dedicated to representing the best interests of our design clients as a trusted and impartial source of information on professional liability insurance, risk management, loss prevention and continuing education. Please visit our website www.aepronet.org for additional information

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PROFESSIONAL LIABILITY INSURANCE

- Sometimes known as *Errors & Omissions*, (*E&O*) or *Malpractice* insurance
- Defends and indemnifies against claims alleging negligent acts, errors or omissions in the performance of professional services (wrongful acts).
- Wrongful Acts are not limited to defects in plans and specifications, but extend broadly to encompass most of the professional services rendered by A/E firms.
- Deductibles usually apply to each claim, and may or may not apply to the cost of defense.
- Limits of liability typically include defense costs, meaning that they can be eroded, even exhausted, by legal fees and other defense costs.
- Typically excludes express warranties or guarantees; obligations under worker's compensation laws; claims by employees for employment practices and the costs to repair/replace faulty workmanship on construction performed by the insured.
- Coverage is written almost exclusively on a Claims-Made form. Retroactive or prior acts coverage is rarely available to a previously uninsured firm, so it is advisable to begin a professional liability insurance program early in one's practice.

COMMERCIAL PACKAGE AND BUSINESS OWNERS PACKAGE POLICIES

Frequently requested coverages are combined under one economical package known as Commercial Package Policies or Business Owners Policies (BOP). One policy is designed to include, among other coverages:

- General Liability
- Commercial Property
- Non-Owned/Hired Automobile
- Valuable Papers and Records
- Business Interruption/Business Income/Equipment Breakdown
- Accounts Receivable
- BOPs tend to be prepackaged policies available to smaller firms, with little flexibility (other than limits) on available coverages.
- Commercial Package policies are offered to larger firms and provide a wider range of coverage options.
- Insurance companies that offer these policies to design professionals may require the insured to maintain professional liability insurance as a prerequisite to obtaining a package policy.

COMMERCIAL GENERAL LIABILITY INSURANCE

* General Liability insurance is designed to pay on behalf of the insured firm, all sums which the insured becomes legally obligated to pay as damages because of bodily injury or property damage caused by an "occurrence," defined as an accident including continuous or repeated exposure to substantially the same general harmful conditions.

* The policy typically includes coverage for "personal injury" including libel and slander.

F. David Shipley was founder and President of Shipley & Associates, Inc. Mr. Shipley had specialized in risk management and insurance placement for design professionals, land surveyors, landscape architects and environmental consultants prior to the sale of his business.

Earleen R. Thomas, of Cornerstone Specialty Insurance Services, has provided insurance and supportive risk management services to design professionals across the country and also has worked as a specialist broker for finance and accounting firms.

Michael Welbel is founder and President of M.G. Welbel and Associates, Inc. With a background in the resolution of professional liability claims, his business is focused on helping design firms avoid claims, and manage their risk and insurance needs.



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* An A/E firm's employees are regularly at job sites, so it is important to purchase a policy that will insure against claims arising from operations away from the office premises in addition to premises accident claims. Project owners often require A/E consultants to maintain General Liability including the owner as an "additional insured." General Liability will specifically exclude coverage for architects and engineers professional liability.

* Design professionals usually obtain this coverage as part of a package policy as described above, that may include coverage for business owned property, business interruption, hired and non-owned automobiles and other coverage extensions.

OWNERS AND CONTRACTORS PROTECTIVE LIABILITY Although this policy does not insure the design professional directly, many governmental owners contractually require design firms to purchase this coverage. The policy protects the owner or contractor against third party claims arising from hiring independent contractors (including design firms). The owner or the general contractor is designated as the insured, covering bodily injury and property damage arising out of the operations of the design firm at the designated project. Policies are restricted to insure specific projects.

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE

- Part One of this policy (Workers Compensation) pays employee compensation, which varies by state, for lost income and all medical expenses related to bodily injury by accident or disease attributed to job-related activities.
- Part Two (Employers Liability) will pay for damages (resulting directly from an employee's job-related bodily injury) for liability to a third party for damages claimed by the employee against the third party.

UMBRELLA LIABILITY INSURANCE

- Umbrella policies are designed to provide excess limits of liability for General Liability, Automobile Liability and Employers Liability.
- Coverage is provided for many exclusions and gaps in the primary Liability policies designated as the underlying insurance. The Umbrella policy will apply to a claim when the limits of the underlying insurance are exhausted. If the Umbrella policy applies to a claim that is excluded by the underlying insurance, the claim is subject to a self-insured retention (usually a minimum of \$10,000) that the insured must pay before the Umbrella policy pays. Current Umbrella policies contain many exclusions that minimize the application of this coverage.

EMPLOYMENT PRACTICES LIABILITY INSURANCE

- Designed to cover claims of wrongful termination, discrimination (e.g., race, sex, age, disability, etc.), harassment, right to privacy, emotional distress and other employment practices.
- Typically requires the insured to establish employment practices in the form of an employee manual that includes policies relating to harassment and discrimination and establishes company policies and procedures for handling employee complaints.
- Usually a stand-alone policy but sometimes offered, in a limited form, by endorsement to a professional liability insurance policy or packaged with Directors and Officers and Fiduciary.



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DIRECTORS AND OFFICERS LIABILITY INSURANCE

- Addresses claims that are levied against corporate officers and directors by shareholders, employees and creditors who are affected by their business decisions.
- Like professional liability insurance, written on a claims-made policy form,
- Policies contain two separate parts. Part One pays on behalf of any directors or officers for their liability arising out of wrongful acts. Part Two is Company Reimbursement or Company Indemnification coverage, which reimburses the insured company for payment made to its directors or officers for their expenses incurred due to claims made against them for wrongful acts when provided by the company's bylaws or required by law. Wrongful Acts are defined to include errors, omissions, misstatements, misleading statements, breach of fiduciary duty or other duty by an Insured Person while acting in his or her capacity as a director or officer. Wrongful acts also include Securities Activities and sometimes Employment Practices such as wrongful termination, failure to hire or promote, harassment and discrimination.

STATUTORY DISABILITY BENEFITS INSURANCE In addition to Workers Compensation Insurance, many states also require that employees be covered by disability insurance that provides income for the time an employee is unable to work due to a non job-related injury or sickness. Benefits are very limited in terms of duration and amount and are generally not a good substitute for individual or group long-term disability insurance. Pregnancy leave may be considered a disability triggering coverage.

FIDUCIARY Employees and beneficiaries of retirement plans hold fiduciaries responsible for the prudent administration of fiduciary funds. Fiduciary Liability insurance protects the plans and individuals acting as trustees or fiduciaries from lawsuits alleging errors or omissions in the handling of investment funds. The performance of individual investments is not covered by this insurance. This insurance should not be confused with ERISA Bonds.

AUTOMOBILE; HIRED AND NON-OWNED AUTOMOBILE INSURANCE Businesses that own automobiles need to purchase Commercial Automobile Insurance to protect the firm and driver from claims of bodily injury and property damage caused during the operation of business-owned vehicles. Even if the firm does not own any vehicles, Non-Owned and Hired Automobile insurance should be considered in order to cover accidents involving rented vehicles or employee vehicles used during the course of business operations. Note that physical damage to the employee's or hired auto is not automatically covered. Non-Owned and Hired Automobile insurance can be included on a Commercial Automobile insurance policy, a stand-alone policy or by endorsement to a commercial package insurance policy.

INTERNATIONAL LIABILITY POLICY Design firms that have projects outside the U.S., its territories and possessions, and Canada may need an International Liability policy to insure the firm from suits brought against them in foreign countries. Typical General Liability policies insure the operations of the insured worldwide, but only for suits brought within the U.S. or the territories above. This provision may not satisfy the owner who wants protection in the location of the project.



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DISCLAIMER This information is for illustrative purposes only and is intended to provide only a general overview of the insurance policies described. It is important to review actual policy terms, coverage conditions and exclusions with a qualified insurance professional. Not all policies shown are necessarily recommended for all A/E firms.

Broker's Notes



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