

A/E RISK REVIEW

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Keeping Your Client Off of Your PL Policy

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

Typically, a project owner demands that the contractor and design firms it hires have ample insurance to provide coverage against major project upsets and losses. Some go so far as to demand minimum insurance limits from subcontractors and subconsultants as well.

It is not uncommon for project owners to also insist that they be an “additional” or “named” insured on the contractor’s general liability policy. This is a sensible step to ensure that the owner receives optimum protection in the event of a jobsite accident resulting in property damage or bodily injury.

Some owners go a step further. They ask their prime designers to make them additional insureds on their professional liability policies. They reason that if it’s a good idea to be named an additional insured on a GL policy it must be an equally good idea to be named an additional insured on a PL policy.

But in truth, being named an additional insured on a PL policy can actually *reduce* your client’s protection and *increase* its liability should a claim be filed on your PL policy. (Plus, it also increases your own liabilities since you may be sued for actions of your client rather than your own errors or omissions.) It is your responsibility to make this GL vs. PL distinction and explain to your

client why they should not – and likely cannot – be an additional insured on your professional liability policy.

Why Your Client Should Not Be a Named Insured

Professional liability insurance gives design professionals additional financial resources in the event their errors, omissions or negligent professional acts damage clients or third parties such as building tenants or contractors. Professional liability insurance is not like, say, automobile or homeowners insurance, which compensates the insured who suffers personal damages due to their own negligence. Professional liability insurance is designed solely to compensate people *other than* the insured in the event the insured’s negligent act, error or omission causes damage to another party.

Professional liability insurance also differs from general liability insurance in a number of other important ways. GL insurance provides protection for property damage and bodily injury arising from business operations. For example, it would cover a slip-and-fall accident suffered by a visitor to a building jobsite. Thus, it makes sense for a project owner to be a named insured on the general contractor’s GL policy since the project owner may be a likely target of a third-party lawsuit in a bodily-injury accident on their property.

However, being named an additional insured on a design firm’s professional liability policy does not provide added protection against a design firm’s negligent acts. When clients ask that they be named on your PL policy, you must explain that:

1. Your insurance company will likely refuse to add your client as a named insured and
2. If your client was added as an additional insured, it would more than likely jeopardize your client's coverage, rather than increase it.

If your client became a named insured under your PL policy, the client would, theoretically, be covered to the same extent as your firm. In other words, the policy would cover your firm and your client in the event either was accused of an error, omission or negligent professional act in the performance of covered services.

Your client being an additional insured is inadvisable for a number of reasons. First, your client very likely is not licensed to perform professional services as an architect or engineer. Thus, being named an additional insured is virtually worthless and only clouds the liability issues.

Second, were your client to file a claim against a PL policy on which it was listed as an additional insured, that client – from an insurer's viewpoint – would be filing a negligence claim against itself. Such coverage is not afforded by a professional liability policy. For that reason in particular, most professional liability insurers will not permit a client to become a named or additional insured on a design firm's PL policy.

Also consider this scenario: If a third party files a professional liability claim against your firm, your client – as a named insured – could be sued as being jointly liable for your professional acts. Your client could find itself having to defend a claim involving design activities it had absolutely nothing to do with, and its defense costs might not be covered. And it could get worse. A claim against your client as an additional insured might be denied by your insurer since the client has voluntarily assumed a *contractual* liability it would not otherwise have under common law. The client might have to pay for its own legal counsel to extricate itself from the situation caused by the fact it is a named insured.

Now, consider the situation where your client has one or more registered design professionals on staff – not uncommon for public clients. Were the client to become a named insured, its design professionals could

now be covered by your PL policy. Your insurer might be called upon to pay for claims against your client or the client's design professionals even though those claims have nothing to do with your project and were not taken into consideration when setting your insurance premiums. There are two possible outcomes in such a case:

1. Your insurer agrees to defend and indemnify its newfound insured. The insurance limits covering your project are now reduced or exhausted -- the client has lost protection on your project and your claims history takes a hit.
2. Your insurer refuses to provide coverage for your client's design work on another project -- and your client's PL provider may do the same, saying your policy should cover the claim. As such, your client may have to sue both insurers in order to get either to provide coverage.

And here's yet another potential problem. Suppose during negotiations you agree to a client's contractual request to be a named insured on your professional liability policy. You later discover that your insurer refuses to add the client to your policy. If you do not advise your client that your insurer has declined coverage, you have breached your contract with your client. Now consider that the client has uninsured design professionals on staff. Such a client could state that you failed to live up to your contractual obligation to provide PL coverage to the client's design professionals – something the client bargained for and was counting on. You and/or your firm could wind up having to defend a claim from your client and possibly having to defend the client's design professionals, most likely without the help of your professional liability insurance. (Neither professional nor commercial general liability insurance covers contractual liabilities except for cases where you would have liable absent the contract.)

Dealing with a Client Request

Sooner or later you will likely be presented with a contract condition like this:

The Design Professional shall carry professional liability insurance of a type and in an amount acceptable to the Client, and the Design Professional shall make the Client a named insured under said policy.

What do you do?

Explain why the request is not in your client's best interest. Tell your client that being named an additional insured on your PL policy provides no added protection against your firm's errors and omissions and could, in fact, put coverage in jeopardy since the client cannot sue itself.

Your client may respond to your comment with something along the lines of, "Well, Acme Associates accepts this provision all the time." To that remark, your best response may be, "They may accept the contractual provision, but you may want to check to see if such insurance is actually in place. Do you have anything on file indicating that the condition has been accepted by Acme's PL insurer?"

Given the liability exposures that a design firm can create for itself by accepting this request, you might wish to add, "A design firm that contractually increases its own liability exposures probably doesn't understand that you being a named insured increases your risks as well."

Suppose that a professional liability insurer actually agreed to accept the client as a named insured on Acme's PL policy. Does that mean the client has extra protection? Absolutely not. Remind the client that a professional liability insurance policy has a stated amount of capacity – the policy limits. Being a named insured does not increase that amount. However, a possibility exists that, should the client make a claim against Acme, the insurer that permitted the client to be named on the policy could deny coverage since an insured cannot make a claim against itself. "Why," ask your client, "should you take that chance? Why give an insurance company the opportunity to deny coverage?"

Let's assume you get the client's attention, but the client still wants some contractual language that ensures the project is protected by insurance. While it is foolhardy and indeed impossible to guarantee that you will always have insurance, you can provide the client a certificate of insurance and include language that demonstrates your intent to be insured under reasonable circumstances. Consult with your attorney about offering the client a contract clause that says you agree to attempt to maintain professional liability insurance coverage through the period of project design and construction of the project and for a period of years following substantial completion, if such coverage is reasonably available at commercially affordable premiums.

Do Your Client a Favor

It is your duty to educate your client and explain that being named an additional insured on your professional liability insurance policy is not in his or her best interest. If your client or its attorney balks at your initial explanation, schedule a meeting with your client, its legal counsel, your attorney and your professional liability insurance agent to explain the facts about professional liability insurance. Clarify that:

- Being a named insured in no way provides added protection – it can only decrease protection or, at the least, muddy the waters.
- Most professional liability insurers will not allow the client to be a named insured on the policy.
- If the client is added as a named insured, the insurer may deny the owner's claim against the policy.
- Being a named insured may make the owner liable for claims filed by third parties.
- This increased exposure may lead to third-party claims that exhaust the policy limits – thus stripping away the client's protection.

You can hardly blame clients who go to great lengths to ensure they have substantial financial protection in the event something goes wrong with their projects. You can be the hero by educating your clients that being an additional insured on your PL policy is not in their best interest.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.