

A/E RISK REVIEW

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Quality Service For Your Insurance Needs

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So Your Client Wants to be an Additional Insured

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.

Insurance provisions are of prominent importance to most clients when negotiating contracts with designers, contractors and other parties working on their projects. After all, these construction projects represent large dollar risks, and clients want to have the greatest amount of financial protection available should something go wrong.

Savvy clients are aware of the major insurance issues that apply to each party to the project. They realize that the terms and conditions of insurance carried by the general contractor will be significantly different than those policies carried by the project's prime designer.

As a for instance, project owners will rightfully insist that they be included as an "additional" or "named" insured on the contractor's general liability (GL) policy. This step ensures that the client receives added protection in the event of, among other things, a bodily injury or property damage claim resulting from a jobsite accident. By being named an additional insured on the contractor's GL policy, the client is protected from legal costs and judgments, per the terms and limits of the policy form and the provisions of the owner-general contractor agreement.

Unfortunately, not all clients are well versed in insurance as it relates to design and construction projects. Such clients may seek contract provisions that

require their prime designers to name them as additional insureds on their professional liability (PL) policies. If it's a good idea to be named an additional insured on the contractor's GL policy, they reason, it must be an equally good idea to be named an additional insured on the designer's PL policy.

What the client does not realize is that being named an additional insured on a design firm's PL policy can actually *reduce* its protection and *increase* its liability should a professional liability claim be filed against the designer. It is your responsibility to explain to your client why it should not – and likely cannot – be named an additional insured on your professional liability policy.

Just Say No to a PL Additional Insured

Professional liability insurance gives design professionals financial protection in the event their negligent professional acts, errors or omissions damage clients or third parties such as building tenants or contractors. In other words, it is designed solely to compensate injured people *other than* the named insured. The policy pays *on behalf of* the insured for its negligent services that result in damages to others.

Professional liability insurance differs from general liability insurance in a number of 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 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 would be a likely target of a third-party lawsuit following 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, explain that:

1. Your insurance company will likely refuse to add your client as an additional insured. It will argue that your client is not a licensed design professional, cannot be held to the standard of care of such a professional and therefore cannot be insured under the policy for negligence acts, errors or omissions.
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 on your PL policy, the client would, theoretically, be covered to the same extent as your design firm. In other words, the policy would cover your firm and your client in the event either faced a claim or demand regarding an error, omission or negligent professional act in the performance of covered design services.

In that light, having your client being an additional insured on your PL policy is unadvisable for a number of reasons. First, your client very likely is not licensed to perform the design services covered as defined in the policy. Thus, being named an additional insured is virtually worthless since the client doesn't have the type of exposure the policy covers.

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 essentially filing a negligence claim against itself. Many PL policies have an "insured vs. insured" exclusion that prohibits one named insured from filing a claim against another named insured.

Third, if a client who is an additional insured files a claim against the design firm, there is an immediate conflict of interest. The client and the design firm named as insureds in the same policy could not be represented by the same legal counsel.

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 your design activities, and its defense costs are likely not covered by your PL insurance policy.

Coverage for 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 would have to pay for its own legal counsel to extricate itself from any liability caused by the fact it is a named insured on your contract.

When Your Client Has Design Professionals on Staff

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 conceivably 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 design activities 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 of your PL policy are now reduced or exhausted, the client has lost protection on your project, and your claims history takes a hit.
2. More likely, your insurer refuses to provide coverage for your client's design work, and your client's PL insurance provider may do the same, saying your policy should cover the claim. As such, your client may have to sue both insurers in an attempt to get either to provide coverage.

And here's yet another potential problem. Suppose during negotiations you agree to a client's 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 having to defend the client's design professionals from a third-party claim, most likely without the help of your professional liability insurance. (Neither professional nor commercial general liability insurance cover liabilities voluntarily assumed by contract except for cases where you would have been liable absent the contract.)

Dealing with a Client Request

Sooner or later, you will be presented with a contract provision 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 to your client why the request is not in its 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 coverage is actually in place. Have you examined the policy to ensure you are a named insured, or 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.

Educate Your Client

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 on a PL policy 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 any 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.

If the client still insists that it be named an additional insured on your policy, you might work with your attorney, insurance agent and insurance underwriter to develop alternate contractual language that would better achieve the clients objectives and be acceptable to the insurer. These might include a "vicarious liability" endorsement which states that your client is not liable for your negligent actions, or a mutual indemnity provision. Such alternatives, while not ideal, may be better than simply telling the client "No."

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.