



RA&MCO QUARTERLY The Design and Construction Newsletter

A publication of RA&MCO Insurance Services Fall Quarter 1999 Volume 17, Issue 4

Insuring Issues For Design Professionals: "Additional Insured" Status Under Professional Liability Insurance Policies

In contracts relating to construction, it is a common requirement by a project owner that the general contractor have its commercial general liability (CGL) insurer name the owner as an additional insured on the contractor's insurance policy. It is a means by which one party, in this instance the project owner, seeks to receive a benefit under another party's liability insurance policy. This may also be accompanied by an express indemnification clause requiring the contractor to indemnify the owner for claims from third parties arising from or caused by the contractor's services. The rationale behind both is based upon risk management principles that hold that the party better able to control a particular risk is the one that should assume and possibly insure it. More practical reasons for seeking additional insured status include the owner seeking a defense by its general contractor's insurer because of the latter's negligence as well as a means of keeping claims from entering the experience of the additional insured's own liability insurance coverage.

In some instances, a project owner may analogize its contractual expectations of a general contractor with those of its design professional though they are, in fact, quite different. An owner may require that its design professional seek to name it as an additional insured on its professional liability insurance policy. While well intentioned, this is usually the result of inexperience in dealing with design professionals or a general ignorance of the differences between the roles of general contractor and design professionals in the construction process. In any event, it is a potentially troublesome requirement and one that requires a careful explanation to a project owner in an educational and non-threatening manner.

As a general rule, professional liability insurers of design professionals will not name a non-professional firm as an additional insured under the design professional's own professional liability insurance coverage. Such requests usually emanate from project owners but occasionally come from the design professional's own professional subconsultants. A professional liability Underwriter will rarely, if ever, grant either. There are good reasons for this.

The first reason is that professional liability insurers intend to provide coverage for actual or alleged liability emanating from a professional's rendering or failure to render competent professional services. This is based upon well-established recognition of standards of care that only apply to members of a given profession, in this instance design professionals. A party who is not a professional in this sense therefore does not face the same exposure and cannot be defended according to this professional standard of care. Owners try to emphasize that it is their vicarious liability to third parties for the design professional's negligent acts, errors or omissions for which they are seeking coverage but primarily for the defense of same. However, the owner's own Commercial General Liability insurer will

normally defend it against this vicarious liability, which also avoids the almost inevitable conflicts that arise between the owner's and design professionals differing interests.

Secondly, professional liability insurers undertake to insure professionals firm, their offices, employees, directors and the like, in other words, those who are under the control and direction of and working for the benefit of the named professional firm. It does not undertake to provide the same benefits to persons who do not perform in this fashion or represent the policyholder's interests. Reinsurance agreements may, in fact, prohibit insuring these non-professionals via additional insured status because the agreed definition of professional services does not apply to them.

A third reason is that an insurer has a "good faith" obligation to represent the interests of its policyholder, without exception. The nature of claims made in the construction process is such that there are notable conflicts when claims are presented by third parties outside of the construction process as regards the design professional and the owner and that the owner will have certain claims or causes of actions asserted against it that are hostile to or in conflict with those of the design professional. Because of these inevitable conflicts, the insurer will find it difficult, if not impossible, to represent both design professional and non-professional owner in a legal proceeding with the same legal counsel.

In summary, one can generalize that professional liability insurers of any type of risk, particularly those insuring design professionals, do not contemplate naming clients or other non-professional entity individuals or organizations as additional insureds on professional liability policies. For this reason, contractual requirements that this be done should be deleted by negotiation, with suitable explanation, or they may likely be breached. A design professional's professional liability insurer, or in many instances its specialized broker, can be extremely helpful in achieving this.

Coming Next Quarter: Express Indemnification Clauses

If you would like more information about this or future publications please contact (800) 684-7475. Or you can reach us by mail at:

RA&MCO Insurance Services
2300 Clayton Rd, Suite 600
Concord, CA 94520-2142
www.ramco-ins.com



This Newsletter is dedicated to its readers as an educational and informational resource and the views and opinions expressed herein are not to be construed as legal advice from the author(s), RA&MCO Insurance Services or any insurer. Readers should seek specific legal advice from competent legal counsel on any issue or topic discussed herein before taking any action.