

## Atty's Guide To Construction Professional Liability Coverage

By Jeff Sistrunk

*Law360 (May 14, 2018, 2:11 PM EDT)* -- Architects and engineers working on a construction project can face substantial liability if they make design errors or other missteps that lead to building delays, property damage or injuries, so design firms would be wise to have counsel help them obtain a robust professional liability insurance policy to protect against those risks.

Here, Law360 provides four tips for construction industry players and their attorneys looking to maximize the benefits of their professional liability coverage.

### Define 'Professional Services' Broadly

Generally speaking, professional liability insurance for architects, engineers and other design firms extends coverage for claims arising out of any errors or omissions the policyholder commits while engaged in "professional services." However, the definition of professional services varies from policy to policy, and sometimes that key term is not defined at all, attorneys say.

"Unlike [general liability] policies, professional liability policies are generally not standard form, and they can vary widely in terms of definitions and exclusions," said Pillsbury Winthrop Shaw Pittman LLP partner Alexander Hardiman. "How a policy defines 'professional services' is critical."

A large body of case law stands for the position that a professional service must involve specialized knowledge or skills, according to attorneys. Under that interpretation, activities such as an architect's drafting of blueprints or a mechanical engineer's designing of machinery would constitute professional services, but purely manual tasks such as excavating dirt or erecting a steel frame would not.

To ensure that professional liability coverage isn't unexpectedly limited, a firm's counsel should negotiate with the insurer on the front end to obtain the broadest possible definition of professional services, attorneys say. For instance, expansive language defining the term as any errors or omissions committed "in the rendering of architectural services" would theoretically encompass every facet of an architect's services on a construction project, from feasibility studies to the production of building documents.

Alternatively, a firm's lawyer can ask the insurer to define professional services as the services that the firm was retained to perform under a contract, according to Hardiman.

"In that case, the contract will define the scope of the coverage," Hardiman said.

Moreover, attorneys say, by linking the professional liability policy to an underlying contract, an architect or engineer can secure coverage for a wider variety of potential claims.

"An architecture or design contract may require that a firm adhere to standards higher than professional negligence," Hardiman explained. "If the scope of coverage is defined by the contract, the policy may cover claims that the insured failed to meet those standards."

### **Close Potential Coverage Gaps**

If a professional liability policy form contains an exclusion for claims involving bodily injury or property damage, a design firm's counsel should ask the insurer to delete that exclusion to avert a potential coverage gap, attorneys say.

Professional liability policies can serve as an important complement to traditional commercial general liability, or CGL, policies, which cover bodily injury and property damage claims but often bar coverage for claims tied to the policyholder's professional services.

However, if a firm's CGL policy contains a professional services exclusion and the firm's professional liability policy excludes bodily injury and property damage claims, coverage wouldn't exist for certain claims under either type of policy.

In that scenario, for example, an architect would have no coverage for a lawsuit alleging that a flaw in its blueprint for a building resulted in a wall collapsing and injuring workers.

"This creates a troubling gap for claims that involve both professional services and bodily injury or property damage," said John L. Corbett, of counsel at Barnes & Thornburg LLP. "To the extent that the CGL policy has a professional services exclusion, contractors with risk of liability due to professional services should purchase professional liability policies without [bodily injury/property damage] exclusions or with contingent [bodily injury/property damage] coverage."

### **Pick the Right Retroactive Date**

Professional liability policies are written on a claims-made basis, meaning they cover claims made against the insured during the policy period, regardless of when the alleged wrongful act giving rise to the claim took place.

To help define the policy's scope, the insurer and policyholder will usually agree upon a retroactive date, which is a provision barring coverage for any claims stemming from wrongful acts that occurred prior to the specified date.

According to attorneys, it is imperative for counsel for an architect or engineer to designate a retroactive date that extends all the way back to the beginning of the firm's work on a project. If the retroactive date doesn't go back far enough, the firm could face coverage denials down the road.

For instance, if a structural engineer is sued over alleged defects in designs completed in October 2016, but the retroactive date on the professional liability policy is Jan. 1, 2017, coverage would be unavailable for the claim.

"It is important to pay attention to the retroactive date when buying a new policy or renewing an existing policy, so no gaps are created," Hardiman said.

### **Carefully Consider Settlements**

Under the so-called "consent to settle" clause found in most professional liability policies, policyholders have the final say over whether a case should settle, even when the insurance company is footing the litigation bill.

Architects, engineers and other design professionals are often reluctant to settle claims alleging deficiencies in their work, for fear of losing business, according to attorneys.

"That can sometimes complicate settlement discussions when design professionals have a strong feeling that they don't want to admit liability," said Allen Wolff, a construction insurance attorney at Anderson Kill PC.

However, if a design professional is presented with an offer to settle within the limits of its professional liability policy, the firm's counsel should thoroughly assess the offer before deciding whether to accept or reject it, attorneys say.

That's because the consent-to-settle clause comes with an important caveat. If a policyholder refuses to grant its insurance company permission to settle a case within policy limits and is later hit with an adverse judgment exceeding those limits, the insurer can sue the policyholder to try to recover that excess sum.

"Policyholders should tread carefully to make sure they don't fall victim to this 'snakebite' later on," Wolff said.

--Editing by Edrienne Su.