

Coverage Simplified

Professional Liability Coverage for a Design Professional

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We expect that very few of our clients actually read their insurance policies. Often the perception is that policies have been written in confusing language with the insurance companies intentionally trying to hide things. Fortunately, that is not the case and insurance policies today are pretty straight forward.

Professional Liability is a coverage that all design firms need, and is generally a company's first line of defense against liability arising out of a firm's performance of professional services. Even if you choose not to dissect your insurance contract word by word, it is a good idea to have a basic understanding of how your coverage works.

The purpose of this article is to simplify and clarify a professional liability policy written for a design professional. In simple terms, coverage is provided under the policy insuring agreement, and then restricted by the exclusions. The balance of the policy typically includes terms, conditions and extensions of coverage.

There are roughly 50 insurance companies writing professional liability coverage for design professionals, and each policy is written on its own unique policy form. This article is based on general coverages, terms and conditions typically found under these policies, however, it is important to review your own policy to confirm the actual coverage provided to you.

This article will review the following elements commonly found in a professional liability (PL) policy:

1. Declarations Page
2. Insuring Agreement
3. Supplementary Payments
4. Definitions
5. Territory
6. Exclusions
7. Extended Reporting Period
8. Limit of Liability and Deductible
9. Defense Settlement and Cooperation
10. Notice
11. Other Conditions

1. DECLARATIONS PAGE

The policy declarations or "dec" page identifies the entity or entities for whom coverage is being written, the nature of the insured operations, the limits of insurance that will apply, the retroactive date (explained later), and a number of other features of PL coverage that can be central to questions of what is and is not covered under the policy.

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2. INSURING AGREEMENT

It is common to have multiple coverages included under the insuring agreement. The primary coverage, and typically the coverage listed first under the insuring agreement, is Professional Liability. This provision explains that the policy will provide: coverage after the deductible is paid, for costs the insured becomes legally obligated to pay, and expenses incurred from claims made against the insured arising from a Wrongful Act (which is defined in the policy), and committed on or after the retroactive date.

The PL policy is a Claims-Made policy form and not an Occurrence form (which is often the case under a General Liability policy). What this means is the PL policy's coverage is triggered when a claim is made during the policy period, so long as the wrongful act that gave rise to the claim took place on or after the retroactive date. The retroactive date is specifically listed on the policy, and is typically the date the firm first purchased professional liability insurance or the date they opened their doors. The retroactive date eliminates coverage for claims or wrongful acts that took place prior to this date. We have written a full newsletter explaining the Claims-Made coverage provision, which can be found under the Publications section of our website.

Some PL policies will also include coverage for Contractors Pollution Liability as well as some sort of Network or Cyber Liability exposures. These coverage parts will have a separate insuring agreement and coverage will be tied to a wrongful act by the insured arising from the performance of professional services. Discussion of these coverages are not addressed in this article.

3. SUPPLEMENTARY PAYMENTS

The supplementary payments section of the policy sets out types and amounts of expenses and costs the insurer will pay with respect to any claim or suit it defends. The payments made under this section are typically not subject to the deductible and are in addition to the policy limits. Some common coverages found here include:

- **Defendant Reimbursement:** Covering loss of earnings and reasonable expenses incurred by the insured as a result of attendance in a dispute resolution process (mediation, arbitration, litigation, etc.) Coverage is typically limited to a couple hundred dollars per day, with a maximum amount often between \$10,000 to \$30,000.
- **Disciplinary, Regulatory or Administrative Expense Reimbursement:** Covering fees and expenses incurred by the insured in responding to any disciplinary, regulatory or administrative action.

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4. DEFINITIONS

The Definitions section of the policy provides definitions of important terms used throughout the policy form. Typically, these words are in bold, indicating that they are defined in the Definitions section. It is a good idea to go through and understand all defined words, however, at minimum you should review the following: **Circumstance, Claim, Damages, Insured, Professional Services, and Wrongful Act**. Each of these definitions significantly impact the coverage that is being provided.

5. TERRITORY

This section is short and defines where coverage applies. Most of the top PL policy forms provide coverage for claims made against the insured anywhere in the world. Some policies will state that coverage applies anywhere in the world, as long as the suit is brought in the U.S. Typically, there will be a condition that the coverage will not apply to any projects or services in violation of the laws of the U.S. including economic or trade sanction laws or export control laws.

6. EXCLUSIONS

This is one of the most important sections of the policy as the Exclusions explain what is *not* covered. There are three basic reasons for exclusions: 1. The coverage should be provided elsewhere; 2. The exposure is considered uninsurable; 3. It represents an increased exposure for which you can generally buy coverage at an additional premium.

The most common exclusions found under the Professional Liability coverage part are included below:

- a. **Intentional Damages & Dishonest Acts:** There is no coverage for an intentional error or omission, or an intentional dishonest, wrongful or fraudulent act.
- b. **Ownership Interest:** Usually limits coverage for claims made against an insured from a separate entity in which the insured has an ownership interest (often 50% ownership or more).
- c. **Insured vs. Insured:** Excludes any claims made by an insured under the policy against another insured.
- d. **Contractual Liability:** Excludes claims based upon or arising out of liability assumed under the contract, except for liability the insured would be responsible for in absence of the contract. This is the exclusion that is often the driving factor in contract review discussions.
- e. **Products Liability:** There is no coverage for the sale or distribution of a product developed by the insured. There usually is a carve back in coverage for software designed or modified for a client of the insured in the rendering of professional services.
- f. **Construction:** actual construction performed by the insured or any subcontractors is excluded. Coverage for drilling, excavation or other sampling or testing procedures necessary to perform the insured's professional services is often given back.

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- g. Nuclear Hazard: Claims based upon or arising out of nuclear materials, activities, or incidents are typically excluded. If you perform professional services for any nuclear projects, it is important to review and amend coverage as needed.
- h. Employer Liability: Any claims relating to the insured's employment obligations, decisions, practices or policies is excluded.
- i. Asbestos Liability: Coverage is often excluded for the insureds specification of any asbestos-containing materials or products.
- j. Property Liability: Claims arising out of the insured's ownership, rental, lease or maintenance of real or personal property is excluded.
- k. Warranties & Guarantees: Express warranties and guarantees are excluded. However, there is often an exception for a warranty or guaranty that the professional services are in conformity with the applicable standard of care.
- l. Vehicles: There is no coverage for auto liability under the policy, this should be purchased separately under an Auto policy.

7. EXTENDED REPORTING PERIOD

The Extended Reporting Period (ERP) is a designated period after the policy has expired (typically between 60-120 days) in which a claim may be made and coverage triggered as if the claim had been made during the policy period.

The ERP section of the policy also provides details on an Optional Extended Reporting Period available for purchase. Typically, an insured may purchase up to three years of an extended reporting period for a specific charge, typically a percentage of the current annual policy premium.

8. LIMIT OF LIABILITY AND DEDUCTIBLE

The limit of liability and deductible section set forth the rules regarding the most the insurance company will pay with respect to a specific claim or the sum of all claims covered by the policy. The specific limit and deductible amounts will be listed on the Declarations page.

9. DEFENSE SETTLEMENT & COOPERATION

This section explains the insurance company and insured's obligations and rights with the cooperation, defense and settlement of any claims. This section will also include what's known as a "Hammer Clause". The Hammer Clause usually requires the insurance company to obtain consent of the insured before settling a claim, and in the absence of the insured's consent, it limits the insurance company's liability for costs exceeding the amount of the recommended settlement.

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10. NOTICE

This section spells out exactly what the insured must do in the event of a claim. This is a very important section to be familiar with and should be reviewed anytime you have a claim, or a situation you feel may give rise to a claim.

11. OTHER CONDITIONS

The Other Conditions section of the policy outlines different parameters of coverage. This will usually include the following:

- a. **Action Against Company:** This spells out what the insured must do before bringing a suit or action against the insurance company.
- b. **Assignment:** This typically explains that the policy cannot be assigned or transferred without written consent of the insurance company.
- c. **Cancellation:** This summarizes the rights and duties the insured and insurance company have with cancellation of the policy.
- d. **Examination, Audit & Inspection:** This gives the insurance company the right to examine, audit or inspect the insured's books and records.
- e. **Liberalization:** If the insurance company changes their policy forms during the policy period, this provision will typically afford the insured with the additional coverage provided under the new policy.
- f. **Other Insurance:** Spells out how the insurance will be allocated in the event more than one insurance policy pertains to a given loss.
- g. **Subrogation:** The subrogation provision usually provides the insurance company with the right to pursue recovery of the amount of a loss from another party they deem legally liable for it. This provision can also include a Waiver of Subrogation (often required in client contracts) that allows the insured to waive the insurance company's right to subrogate, or seek recovery for a paid loss.

SUMMARY

Professional Liability is a complex coverage and it is imperative you work with a specialized insurance broker and attorney who understand your unique risks. Although the professional liability policy can provide broad coverage for mistakes in the performance of your professional services, there are exclusions as well as terms and conditions that limit the coverage. It is important to understand the insurance coverage that you have purchased and have the right team working with you when questions or issues arise.