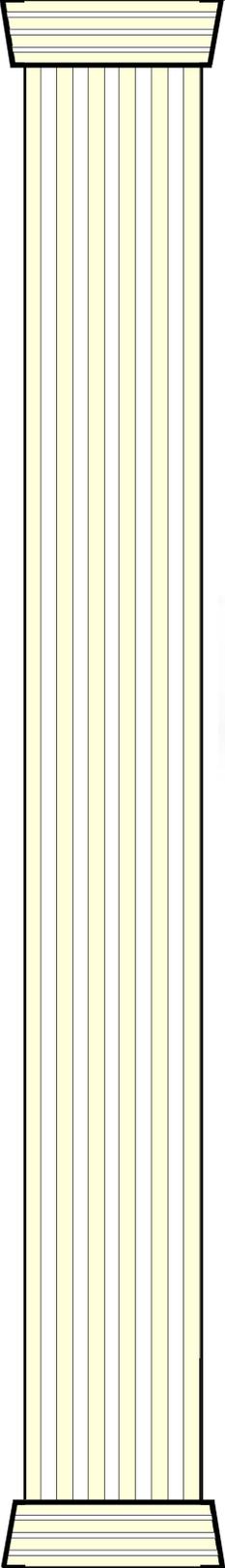

PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 01/2008: "Why Your Clients Don't Want to Be an Insured on Your Professional Liability Policy"

January, 2008



Why Your Clients Don't Want to Be an Insured on Your Professional Liability Policy

Article courtesy of Professional Liability Agents Network (PLAN)



Why You Should Not Make Your Client an Insured

Professional liability coverage is typically issued to a design firm and it specifically covers the firm's registered professionals who sign and seal instruments of service. This type of coverage was created to give design professionals adequate financial resources in the event that

Insured (continued on page 2)

It is neither uncommon nor unreasonable for a client to demand that its design firm carry adequate professional liability insurance. However, when a client goes one step further and asks to be added as a "named insured" or "additional insured" on that policy, it's time for a little client education.

We know of many cases where a client, a client's risk manager, or attorney requests an architect or engineer to make the client (or the client's client) an insured on the design professional's professional liability policy. They mistakenly believe that having the client named as an insured provides an added measure of protection. But these clients, risk managers and attorneys are ill-informed, since obliging the request could actually cause client protection to evaporate should he or she file a claim on the policy.

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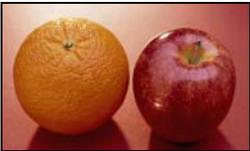
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their errors, omissions, or negligent professional acts damaged a client.

Professional liability insurance is not like other policies that compensate insureds who are damaged by their own negligence. For example, drivers who negligently wreck their cars and are injured receive compensation from their own insurance company. If a homeowner smokes in bed and his house burns down, his insurance will compensate the negligent owner for the self-inflicted damages.



Professional liability insurance is different. It is designed solely to make payments to people *other than* the insured professional in the event the insured's negligent act, error or omission causes damage to a third party.

The clients' failure to understand how professional liability insurance works is the crux of the problem. They don't understand that being named an insured on the policy does not provide added protection against a design firm's negligent acts. And they need prompt, patient explanations as to why being an insured is a bad idea.

Why is it a bad idea? If a client becomes an insured under your policy, the client would be covered to the same extent as your firm. In other words, the policy would protect your firm and the client in the event either was accused of an error, omission or negligent professional act. As such, were an "insured" client to file a claim against you, 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 an insured under a design professional's policy.

There is another reason why it is disadvantageous for your client to be an insured. If a third party files a professional liability claim against your firm, your client could be jointly liable for your acts. Your client could find itself having to defend a claim involving design activities it had absolutely nothing to do with.

It could get even worse. A claim against the client might be denied by the insurer since the client has voluntarily assumed a *contractual* liability it would not otherwise have under common law. The client would likely have to pay for its own legal counsel to extricate itself from a situation and pay any damages assessed against the firm.

Now consider the situation where your client has one or more registered design professionals on staff. Were the client to become an insured, its design professionals might be automatically covered by your

policy, too. Your policy 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 the project you are working on. **This can be unfortunate for your client as well**, for a number of reasons:

1. Suppose the client's on-staff architect performs moonlighting design work for a disabled elderly homeowner on a fixed income. The architect makes several serious errors and omissions, causing expensive damages. Through discovery, the homeowner's attorney learns that the architect lacks the assets to defend a suit, let alone pay damages.

Counsel then decides to move on the theory that the ability to moonlight was a salary-supplementing benefit provided by the architect's employer and, accordingly, your client shares some liability. The counsel assumes, with good reason, that a judge will permit this approach due to the plaintiff's wretched situation. Given the green light, counsel then files suit against your client and, through discovery, learns that the client is an insured under your policy, thus creating professional liability protection for the defendant architect. Assuming your insurer agrees to defend and indemnify its newfound insured, and settles the matter for the full

Insured (continued on page 3)

2008 FOCUS Seminars

Cavignac & Associates' FOCUS Room
Bank of America Plaza
450 B Street, 18th Floor, San Diego, CA

- **Sexual Harassment Prevention Training**
Satisfies requirement for AB 1825 Training
Friday, March 7, 2008 — 9:00 AM - 11:00 AM
- **Competent Person Training**
Excavation and Trenching
Friday, March 14, 2008 — 9:00 AM - 11:00 AM

All training sessions available to our clients
Reserve early / seating is limited! *

For more information about upcoming seminars:

- Visit our Web site at www.cavignac.com
- Contact Darcee Nichols at dnichols@cavignac.com or 619-744-0596

* NOTE: Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.

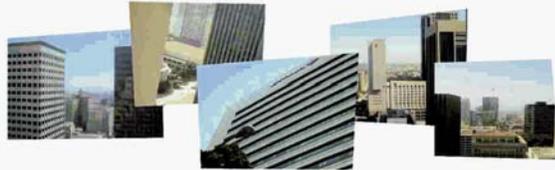
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15 Years

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acceptable to the Client, and the Design Professional shall make the Client an insured under said policy.

What do you do?

The first course of action is to educate the client. Explain why the request is not in the client's best interest. The client may only half hear you, however, and say something along the lines of, "So & So Associates accepts this provision all the time." To that remark, your best response may be, "They may accept it, but I doubt they can insure it. Do you have anything on file indicating that the condition has been accepted by So & So's insurer?"

Also, given the liability exposures that a firm can create for itself by accepting this request, you might wish to add, "A firm that apparently is unconcerned about its own liability exposures can hardly be expected to care about yours."

Suppose that a professional liability insurer actually agrees to accept your client as an insured. Does that mean your client has extra protection? Absolutely not. Remind your client that a professional liability insurance policy has a stated amount of capacity – the policy limits. Being an insured does not increase that amount. However, a possibility exists that, should a client make a claim against the insured architect or engineer, the insurer that permitted the client to be named on the policy could deny coverage. "Why," ask your client, "should you take that chance?"

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 include language that demonstrates your intent to be insured under reasonable circumstances. Consider offering the client the following language:

Insurance

The Consultant agrees to attempt to maintain professional liability insurance coverage for a period of 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.

For the purposes of this Agreement, "reasonably available" and "commercially affordable" shall mean that more than half the consultants practicing the same professional discipline in the state where the project is located actually obtain such coverage.

Insured (continued from page 2)

amount of coverage available, the aggregate amount left in the policy to protect the client becomes zero!

2. Suppose your client has its own coverage for professional liability exposures. In that case, given the same hypothetical circumstance of the moonlighting staff architect, a question would arise about which insurer should provide protection. Because the situation would be such a complex mess, your professional liability insurer would probably decline to provide coverage – and the other provider may do the same. As such, your client would probably have to sue both insurers in order to get either to cover.
3. Suppose you agree to a client's contractual request to be an insured on your professional liability policy. You later discover that your insurer refuses to cover the client. If you do not advise your client that your insurer has declined coverage, you have now 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 provide 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 professional, *most likely without the help of your professional liability insurer.*

Dealing with a Client Request

Sooner or later you will be presented with an onerous contract condition like this:

The Design Professional shall carry professional liability insurance of a type and in an amount

Insured (continued on page 4)

Summary

Your client may request to be an insured on your professional liability policy in the mistaken belief that it provides “extra” protection. In such instances it is your duty to educate your client and explain that being an insured only muddies the waters and may actually decrease the protection your client desires.

If your client or its attorney balks at your explanation, schedule a meeting with your client, its legal counsel, your firm and your professional liability agent to explain the facts about professional liability insurance:

- Being an insured in no way provides added protection – it can only decrease protection or, at the least, muddy the waters.
- Being an insured may make the owner liable for claims filed by third parties.

- Most, if not all, professional liability insurers will not allow the client to be an insured on the policy.
- If the client is added as an insured, the insurer may deny an owner’s claim against the designer.
- This increased exposure may lead to third-party claims that exhaust the policy limits – thus stripping away the client’s protection.

To agree by contract to add your client as an insured only creates risks for you and your client that are wholly unnecessary. This is a situation in which you and your client are both likely the losers. ✂

Disclaimer: This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.

Driving in the Rain



Should I alter the way I drive when it's raining?

Yes! When you’re driving in rain, there are certain things you need to do. One is to watch your speed — if you’re driving a little too fast in the rain, you could start hydroplaning on the wet roads. If you do it too close to a curve, you could lose control of the vehicle.

Article Courtesy of [Stuart Nakutin, CSIT, CSA, CEET, WCCP](#)
Safety and Loss Control Department

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Don’t try to stop too quickly in the rain, because your vehicle could slide out of control.

What is “hydroplaning?”

Hydroplaning occurs when water builds up so rapidly on the road that your tires can’t channel it away. As a result, your tires lose contact with the surface of the road and start riding on a thin layer of water, a condition called hydroplaning. Hydroplaning is extremely dangerous because your car can spin out of control.

What can I do to avoid hydroplaning?

To avoid hydroplaning, make sure your tires are in good condition. Your tire treads need to be deep enough — the balder the tire, the more easily your car will hydroplane. Also make sure your tires are properly inflated. It’s a good idea to follow in the tracks of the car in front of you — the car ahead has already displaced a certain amount of water on the road.



Rain (continued from page 4)

Always attempt to avoid driving where water tends to pool. On freeways or Interstates, this most often occurs in the outer lanes .

What do I do if my car skids or loses traction in the rain?

If you have an anti-lock braking system, hold your foot on the break and let the car do the braking for you — it will actually pump the brakes for you. If you don't have anti-lock brakes, tap gently on the brakes— slamming on the breaks could cause you to lose control of the vehicle.

Whichever kind of braking system you have, you want to steer the car in the direction you want the vehicle to go.

Is it safer to "steer into the skid"?

This can be confusing. Just turn the wheel in the direction you want the front wheels to go. That will allow you to recover from the skid and straighten the vehicle out.

Should I use cruise control when driving in the rain?

No! If you hydroplane or skid in rain, slush, ice or snow conditions, you should immediately *reduce* power. However, an activated cruise control will continue to apply power, keeping the wheels spinning. By the time you deactivate it, you'll have lost control.

Should I always use headlights in the rain?

Yes! Whenever you're driving in bad weather conditions, especially rainy conditions, you should always turn on your headlights. This will help you see

others, and will help others see you — it could mean the difference between driving safely or being involved in a collision.

Tips for Being Seen

The most important factor in safe wet driving is the ability to see and be seen. Being seen by other drivers is easy - simply turn on your low-beam headlights when it rains, even during the daytime. (In some states, this is the law.) This simple action will allow other drivers to notice your car from the front (headlights) and the rear (tail lights).

In a really heavy downpour, when you either have stopped on the shoulder or are moving at less than 10 or 15 mph in the slow lane, you should consider turning on your four-way flashers to alert other drivers that you are there. (State laws vary about this practice, so check your local driving codes.)

Tips on Seeing Others

Seeing out of your vehicle requires several important considerations:

- Windshield wipers must be new enough to remove water from the windshield without streaking.
- Windshield defogger must be powerful enough to keep the windows clear.

Most defoggers use the car's air conditioning (A/C) system to help with the process. With some cars, you have the ability to turn the A/C on and off separately from the defroster function. If so, turn on the A/C to help dehumidify and defog.

Some cars also have an air recirculation switch. If so, make sure that it is set on "fresh air" rather than recirculation. These steps will help speed up defrosting.

- Most rear window defoggers use electrical heating wires on the rear glass. It's common on older cars for a few of these "lines" to become broken, usually from someone cleaning the window too vigorously. In most cases, this can be repaired.
- Use your low-beam headlights at night to avoid excessive glare from the raindrops. Remember: High beams do not help visibility in the rain.
- The inside of your car's windshield and window glass must be clean and free from any oily films that may cause bad reflections or distortions as you drive. Cleaning the inside of the windshield is particularly critical.
- If you use an automated car wash, the spray wax can sometimes build-up on the windows, causing the water to stick to the glass and making vision a problem. Clean your windows even after a car wash. ✂

The Obesity Epidemic

Article courtesy of [Employee Benefits Department](#)

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Being overweight or obese poses a major risk for serious diet-related chronic and life-threatening diseases, including Type 2 diabetes, coronary heart disease, high blood pressure and high cholesterol, stroke, gall-bladder disease, cancer, osteoarthritis, sleep apnea and respiratory problems, and reproductive complications.

What Counts as Obese?

Weight is commonly assessed by using Body Mass Index, or BMI, defined as the weight in kilograms divided by the square of the height in meters (kg/m²). A BMI over 25 kg/m² is defined as overweight, and a BMI of 30 or more is considered obese. Go to www.nhlbisupport.com/bmi to figure out yours.

Living a Healthier Lifestyle

It's easier than you think to start implementing healthy choices into your life. Little changes can go a long way:

- **Substitute** water for one sugary drink every day.
- **Add** 1 to 2 more fruits or vegetables to your meals each day.
- **Plan** a healthy snack for every day of the week.
- **Switch** to a low-fat version of your favorite food.
- **Eat breakfast!** It keeps you from overeating throughout the rest of the day.
- **Watch your portion sizes!** A serving of meat should be no more than the size of a deck of cards, and one serving of pasta or rice is only half a cup.
- **Stop** eating when you feel full.
- **Be conscious** of what you are consuming. Read the labels on food you purchase and know the serving size.
- **Stay away** from trans fat, a formerly healthy fat which has been chemically processed into an unhealthy fat. Even something labeled "low-fat" may still contain trans fat.

Try New Things!

To lose weight, you must eat fewer calories than your body uses. This doesn't necessarily mean you have to eat less food. You can create lower-calorie versions of your favorite dishes by substituting fruits and vegetables in place of higher-calorie ingredients. The water and fiber in fruits and vegetables will add volume to your dishes, so you can eat the same amount of food with fewer calories – yet feel just as full. Here are some examples:

- **Cut back** on the amount of cereal in your breakfast bowl to make room for cut-up bananas, strawberries, or peaches.
- **Substitute** spinach, onions, or mushrooms for one of the eggs or half the cheese you would have in an omelet.
- **Exchange** 2 ounces of cheese or 2 ounces of meat in your sandwich for extra lettuce, tomatoes, cucumbers, or onions.
- **Add** one cup of chopped vegetables and **remove** one cup of pasta or rice from your entrée.
- **Try** hummus and whole-wheat pitas or baked tortilla chips with salsa instead of potato chips and dip as a snack.
- **Store** cleaned, cut up vegetables in the fridge at eye level and keep a low-fat or fat-free dip on hand.

Tips for Eating Out

Yes, you can still eat at your favorite restaurant, provided you make some different choices:

- **Ask** for sauces, gravy and dressings on the side – or avoid them altogether. You can use a squeeze of lemon instead of dressing, or ketchup instead of barbecue sauce.

- Order foods that are not breaded or fried.
- Drink water, low-fat or nonfat milk, or diet soda.
- Ask for substitutions – a vegetable instead of fries, or for the high-fat food to be left off your plate.
- Order fruit for an appetizer or as a dessert.
- Choose broth-based soups rather than cream-based.
- If offered, choose the “lunch” or “kids” portion over the “dinner” portion.
- Avoid buffets – not only are they normally stocked with unhealthy choices, it can be hard to stop yourself from overeating.
- Immediately ask that half your meal be wrapped to go – most restaurants serve portions double or even triple the size of what you should be consuming.

Dread Exercising?

Don't! There are many ways you can incorporate fitness into your daily routine:

- Park your car in an area that forces you to walk a significant distance to and from your destination.
- Take dance lessons!
- Instead of rewarding your kids with food, involve the family in activity such as a game of Frisbee or rollerblading.
- Ride your bike to do errands on pleasant days.
- Walk your dog one block further than usual every week.
- If security permits, take the stairs instead of the elevator – this includes at work!

Even a weight loss of 5% to 15% of your total body weight dramatically decreases your risk of weight-related diseases, so start your healthy life today! ✨



Did you know...?

Obesity has reached epidemic proportions globally, with more than 1 billion adults overweight, and at least 300 million of them clinically obese. It is a major contributor to chronic disease and disability.

Why is obesity considered an epidemic? There are many reasons, including the fact that Americans are eating more energy-dense, nutrient-poor foods with high levels of sugar and saturated fats. Society's fast-paced mindset encourages eating food on the go, and the family dinner table is all but obsolete.

Don't become part of the epidemic. Learn how to manage your weight effectively and live the healthiest lifestyle possible!



Community Bulletin Board

"Neighbors helping neighbors in San Diego"



Save the Date! Puppy Love Party

Join us for the hottest singles event on Valentine's Day as Buy Me Love Benefits helps raise funds and awareness for the San Diego Humane Society and SPCA!

Date packages with San Diego's finest men and women will be auctioned off, with proceeds to benefit the San Diego Humane Society. Don't wait until the last minute to plan your Valentine's Day — take love into your own hands!

Location: The Witherby, 526 Market Street
San Diego, CA

Date: Thursday, February 14, 2008
Valentine's Day!

Time: 7:00 - 8:30 mix and mingle
8:30 p.m. Auction

Host: Monique Marvez from Jack 100.7

Live Talent: DJ Ideal

Dress Code: Cocktail attire

Age Limit: 21 and up

General Admission: \$35 in advance or

\$50 at the door

VIP Tickets: \$75



General admission includes hosted red and white wine for the first hour and delectable tray passed hors' d'oeuvres. Chuao Chocolatier will also be serving tasty samples of their famous chocolates.

VIPs will enjoy a "Mutt-ini" bar for the first hour as well as premier reserved seating. A VIP gift bag sponsored by Sephora is also included.

For more information or to purchase tickets, please contact Kimmy O'Connor, Development today!

Phone 619-243-3434

E-Mail koconnor@sdhumane.org

Attention Bachelors and Bachelorettes!

Are you interested in being a bachelor or bachelorette — or know someone who is? Contact Kimmy today at koconnor@sdhumane.org for more information! ✨



11th Annual Heroes Luncheon

Join us on May 9, 2008 to honor Heroes in Our Community at the Annual Heroes Luncheon at the Manchester Grand Hyatt from 11:30 a.m. — 1:30 p.m.

The Heroes Luncheon is Senior Community Centers' annual fundraising event. Over 800 corporate and community members come together each year to honor heroes in our community who make life better for seniors who otherwise might be forgotten.

Proceeds from this event will provide seniors living in poverty with the critical services they desperately need — food, housing and healthcare.

Sponsorship Opportunities

If you would like to help ensure that the seniors in our community have a hot meal, a safe place to live and have access to health services, please consider purchasing a table or corporate sponsorship.

➤ [Heroes Luncheon Sponsorship Brochure](#)

➤ [Special Offer From bizSanDiego](#)

Questions

If you have questions about the luncheon, or would like additional information about sponsorships or volunteer opportunities, contact Sheona Richardson at 619-235-6572, Extension 305, or e-mail her at sheona.richardson@servingseiors.org. ✨



Benefit Concert

for Monarch School on March 31, 2008

Featured singers are Bishop School senior Cressy Birder, La Jolla Country Day School junior Charlotte Ostrow, and Francis Parker senior Claire Thiemann.

"All of our schools stress the importance of community service, and already have a relationship with Monarch School," Ostrow said. *"When we heard that Villa Musica was creating a music program for Monarch School this summer, we decided to hold this concert to raise money for that program."* The concert will be held at University Lutheran Church in La Jolla. Tickets are \$12 at the door.

For more information, visit:

www.monarchschoools.org/documents/MonarchBenefitPR.pdf

