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# PROFESSIONAL LIABILITY UPDATE

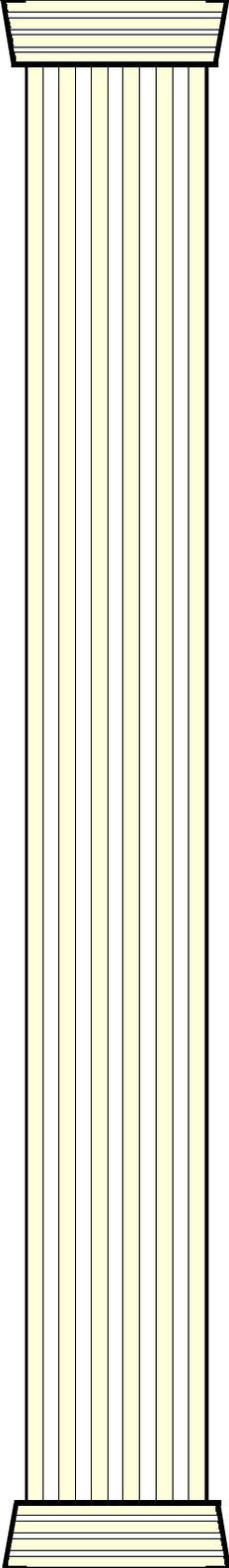
A Loss Prevention Newsletter for the Design Profession

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MSP PL 09/01: "Make Insurance Requirements a Two-Way Street"

September, 2001

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## Make Insurance Requirements a Two-Way Street

Almost every professional service contract contains detailed and often confusing insurance requirements. To make sense out of these requirements, design professionals need an understanding of insurance basics. They need to know the various types of policies owners ask for, what these policies cover, and what extra endorsements to the standard policies can be obtained if needed.

Design professionals must be able to spot impossible or ambiguous insurance requirements in client-written contracts and negotiate reasonable alternatives. Perhaps because clients are used to specifying insurance requirements for contractors, they think design professionals should carry the same types of coverage. But quite often, agreements drawn up by clients or their attorneys will specify insurance requirements that are impractical or impossible for design firms to meet.

Alternatively, design consultants must understand what type of insurance requirements to require of their clients. The best resource to help sort out all of this complex information is a specialized insurance agent who is knowledgeable about and experienced in working with the design professions and the construction industry.

### Contractual Insurance Requirements

When dealing with a client's insurance requirements, the best approach is to take the initiative. Offer an agreement in simple, straightforward language that says you will attempt to maintain appropriate insurance with reasonable limits of coverage. Then list current coverages on an addendum attached to your contract. For example:

#### *Insurance*

*During the term of this Agreement, the Design Professional agrees to provide evidence of insurance coverage as show on Addendum 1 attached hereto.*

An example of what this addendum would look like is shown on page 5.

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## **Professional Liability Insurance**

Most client insurance requirements focus on professional liability coverage. Professional liability insurance protects designers from claims arising from negligent acts, errors or omissions in the performance of professional services. Professional liability policies have several unique features that owners must be made aware of:

- Policies are written on a **claims-made and reported** policy form. The policy covers claims made against design firms during the policy period and requires that the claims be reported to the insurance carrier in accordance with policy terms. To be covered, such claims must have arisen from acts, errors or omissions occurring after the retroactive date stated in the policy.
- To keep its **retroactive date** and have **prior acts** covered, a design firm normally must continue to renew its policy every year. In other words, if the firm doesn't renew its policy, it won't have coverage for projects designed while previously insured if the claim is made after the policy expired.

- Professional liability policies have **aggregate limits**. The policy limit purchased is the total amount the insurer would pay for both defense costs and indemnity, regardless of the number of claims made during the policy period.
- These policies are **expense within the limits** policies. This means that after a firm meets its deductible, additional defense costs paid by the insurer will decrease the policy limits available for payment of that claim or other claims.

Clients often confuse professional liability with general liability and try to specify the same coverage they require of contractors. Because of this, it is important to review and negotiate client-drawn contracts and to delete unattainable or unreasonable requirements such as the inclusion of "additional insureds" on your professional liability policy. Although this is permissible on a general liability policy, it is not generally allowed on a professional liability policy.

## **Project Insurance**

One solution to the limitations of professional liability practice policies is to obtain a professional liability project policy. Project insurance can cover the entire design team with a single policy and provide **extended coverage** for the design and construction period of a single project, plus a pre-selected **discovery period** after substantial completion of the project.

What's more, these policies provide a separate project limit so that claims on other projects do not erode the limits available. Because project policies are written on a multi-year basis and guaranteed non-cancelable under most circumstances, there are fewer burdens on the design team and the client to ensure continuous coverage.

Design firms should ask their professional liability specialist to help explain the advantages of project insurance to their clients. If project insurance is appropriate, owners are often willing to pay for a substantial part (if not all) of the cost. Here is a sample provision that incorporates these ideas:

### ***Project Insurance***

*The Design Professional agrees to obtain project professional liability insurance specifically to cover this project. This project policy will cover the*

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*design and construction period and will include a discovery period of \_\_\_ years after substantial completion. The policy will provide a project aggregate limit of \$ \_\_\_\_\_ and a deductible of \$ \_\_\_\_\_. The cost of this coverage shall be paid by the Client as a Direct Reimbursable Cost in accordance with paragraph \_\_, Reimbursable Expenses, hereof.*

## Commercial General Liability

Previously known as (and still referred to in some antiquated contracts) as “comprehensive general liability” or “public liability,” this coverage protects an insured for liability for bodily injury and property damage arising from **non-professional** activities and business operations. For example, this policy provides coverage should a visitor slip and fall while in a design firm’s offices.

Commercial general liability (CGL) insurance is much different from a professional liability policy. For example, professional liability policies are written on a claims-made basis and include defense expenses **within** the policy limit. General liability is generally written on an occurrence basis, and has defense expenses **in addition to** the policy limit.

Professional liability provides **limited** contractual coverage, while general liability provides **broad** contractual coverage. You can’t add additional insureds to a professional liability policy, but you can to a general liability policy.

General liability insurance is sometimes combined with property insurance (covering furniture, fixtures and real property) in what is called an “office package policy.” Such packages often include additional coverage for valuable papers and other exposures common to a professional practice.

## Workers Compensation

Workers compensation is a no-fault type of insurance that protects employers and employees when workers are injured, become ill or are killed on the job as a direct result of employment. It is paid for by the employer and provides benefits for medical costs and lost wages. Although workers compensation insurance is required by statute in every state, client contracts usually require proof of such coverage.

Clients may ask to be added to a design firm’s workers compensation policy as an additional insured (which technically shouldn’t be done). Check with your insurance specialist to be sure that you can meet your client’s request.

Availability of endorsements such as a waiver of subrogation or additional insureds varies from state to state and insurance company to insurance company. Negotiate contract language to agree to provide only that coverage which is available from your insurer.

## Automobile Liability

Clients often require evidence of automobile liability insurance. This may also require you to add the owner to your policy as an additional insured (which is usually not a problem).

However, many firms don’t have owned autos. Regardless, they still should have coverage for non-owned autos (the employer’s vicarious liability for autos it doesn’t own, usually its employees’ vehicles used on company business) and hired cars. This inexpensive coverage can usually be added to the commercial package policy.

## Foreign Projects Coverage

Many insurance policies are limited to providing coverage only in the United States (and perhaps U.S. territories and Canada). If the job is in a country where coverage is not provided under existing policies, separate foreign coverage may be needed for workers compensation, general liability and/or automobile liability.

Professional liability policies provide or can be endorsed to provide international or worldwide coverage. Check with your professional liability insurance specialist before undertaking any foreign project.

## Owner Insurance

Since clients require verification of insurance coverage maintained by design firms, it’s only fair that architects and engineers receive similar verification of the insurance that their clients should be maintaining as well as the coverage secured by the contractor.

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Following is suggested terminology that should be reviewed by counsel prior to inclusion in your contract.

### **1.0 Owner's Insurance**

Owner shall obtain insurance of the types and in the amounts as described below.

### **2.0 Commercial General Liability Insurance**

**2.1** Owner shall maintain Commercial General Liability (CGL) and, if necessary, commercial umbrella insurance with a limit of not less than \$X million each occurrence. If such CGL insurance contains a general aggregate limit, it shall apply separately to this project.

**2.2** CGL insurance shall be written on ISO occurrence form CG 00 01 10 93 (or a substitute form providing equivalent coverage), and shall cover liability arising from premises, operations, independent contractors, products/completed operations, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract). Any endorsements that restrict coverage will be submitted to Contractor for review.

**2.3** Architect/Engineer shall be included as an additional insured under the CGL, using ISO additional insured endorsement CG 20 10 (11/85) or a substitute providing equivalent coverage (acceptable to Architect/Engineer), and under the commercial umbrella, if any. This insurance shall apply as primary insurance with respect to any other insurance or self-insurance programs afforded to Architect/Engineer.

### **3.0 Workers Compensation Insurance**

**3.1** Owner shall maintain in force workers compensation and employers liability insurance.

**3.2** The employers liability limits shall not be less than \$1 million each accident for bodily injury by accident, or \$1 million each employee for bodily injury by disease.

### **4.0 Builders Risk Insurance**

Owner shall secure and maintain on behalf of Owner, Architect, and Architect's Consultants and as their interest may appear builders risk insurance on this project with limits in accordance with the project value and policy conditions.

### **5.0 Commercial General Liability Insurance**

Owner shall require commercial general liability insurance, similar to that which is required of the Owner, of all contractors on the project. Architect and Architect's Consultants shall all be named as additional insured on an ISO CG 20 10 (11/85) form or a substitute form providing equivalent coverage. Owner shall require the Contractor to forward certificates of insurance confirming this to all parties.

**Note:** *These are suggested provisions only. They should be reviewed by your legal representative and insurance broker prior to becoming a part of your contract.*

## **Conclusion**

One of the purposes of a contract is to allocate risk, and the purpose of insurance is to finance risk. It is crucial to review and negotiate the insurance terms of any contract offered by a client. In return, design firms should specify the coverages that they expect the client, contractors and other parties to secure in order to provide proper protection. An insurance specialist well versed in the design and construction industry is a valuable business partner when negotiating contracts and obtaining needed coverage. \*

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**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.*

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# Addendum 1

## Design Professional's Insurance Requirements

These provisions are intended to reflect your current insurance program and provide model language only. There is no single "correct" way to draft such requirements, and all insurance requirements must be tailored to your particular coverage.

It is recommended that you have any proposed contractual provisions reviewed by legal counsel.

### 1.0 Minimum limits and conditions of insurance provided by the Architect.

- 1.1 **Professional Liability** – Not less than \$1 million each claim/aggregate, including limited contractual liability coverage. Insurance will be maintained in force, assuming it is available at a rate similar to what the Consultant is now paying, for a period of three (3) years after substantial completion of the project.
- 1.2 **Workers Compensation Insurance** – As required by law.
- 1.3 **Employers Liability Insurance** – Not less than the following:

Each Accident Limit	\$1 Million
Disease/Policy Limit	\$1 Million
Disease/Each Employee	\$1 Million

- 1.4 **General Liability Insurance** – Bodily Injury, Personal Injury and Property Damage with a combined single limit of not less than \$1 million each occurrence and \$1 million aggregate.  
The general liability insurance policy shall be written on an "occurrence" basis.
- 1.5 **Automobile Liability Insurance** – Bodily Injury and Property Damage coverage with a combined single limit of not less than \$1 million for each occurrence.

### 2.0 Each policy of insurance required above shall be written by an insurance company licensed to do business in California with a minimum rating by A. M. Best & Company of A- VI.\*

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# A Buyer's Checklist

When most people purchase professional liability insurance, they typically look for two things: **price** and **coverage**.

That's not enough. Professional liability insurance should be more than an expensive necessity. It should be a genuine business asset, helping your firm perform at its best. Price and coverage matter, of course. We think that **value** matters just as much. You have the right to expect more from your insurance company than a policy and a bill.

What follows is a list of attributes that every carrier, broker and policy should have in order to provide genuine value. Go through the list and check off the items that are important to you. Then go through it again, and check off the ones your current carrier, broker and policy provide.

If there's a perfect match between your interests and your current coverage, congratulations! You've found an insurance partnership that works for you. If, on the other hand, there are gaps between what you care about and what your carrier, broker and policy provide, it suggests that you could be getting a lot more return on your insurance investment. \*

	Important	Currently Provided
<b>The Right Carrier</b>		
Financial stability	<input type="checkbox"/>	<input type="checkbox"/>
Integrity	<input type="checkbox"/>	<input type="checkbox"/>
Quality of reputation	<input type="checkbox"/>	<input type="checkbox"/>
Focus on risk management and policyholder education	<input type="checkbox"/>	<input type="checkbox"/>
Premium credits and financial incentives offered to policyholders	<input type="checkbox"/>	<input type="checkbox"/>
Involvement before a claim	<input type="checkbox"/>	<input type="checkbox"/>
Dedication to early resolution and efficient claim handling	<input type="checkbox"/>	<input type="checkbox"/>
Support for alternate dispute resolution	<input type="checkbox"/>	<input type="checkbox"/>
Options for coping with the cost of a claim	<input type="checkbox"/>	<input type="checkbox"/>
Continued relationship after a claim	<input type="checkbox"/>	<input type="checkbox"/>
<b>The Right Broker</b>		
Service is a top priority	<input type="checkbox"/>	<input type="checkbox"/>
Experience with my profession	<input type="checkbox"/>	<input type="checkbox"/>
Focus on loss prevention / risk management	<input type="checkbox"/>	<input type="checkbox"/>
Advocate in negotiating the most appropriate terms and ensuring service from the carrier	<input type="checkbox"/>	<input type="checkbox"/>
Partner in developing programs and policy features tailored to my firm	<input type="checkbox"/>	<input type="checkbox"/>
Influential with insurance company	<input type="checkbox"/>	<input type="checkbox"/>
<b>The Right Policy</b>		
Limits and deductibles	<input type="checkbox"/>	<input type="checkbox"/>
Exclusions	<input type="checkbox"/>	<input type="checkbox"/>
Coverage that matches my professional objectives	<input type="checkbox"/>	<input type="checkbox"/>
Coverage tailored to my firm's unique risks	<input type="checkbox"/>	<input type="checkbox"/>
Rewards for good management and risk prevention	<input type="checkbox"/>	<input type="checkbox"/>
<b>The Right Value</b>		
Partnership that helps conserve resources	<input type="checkbox"/>	<input type="checkbox"/>
Partnership that helps maintain my firm's financial health	<input type="checkbox"/>	<input type="checkbox"/>
Partnership that helps to operate efficiently	<input type="checkbox"/>	<input type="checkbox"/>
Partnership that helps sustain peace of mind	<input type="checkbox"/>	<input type="checkbox"/>