



2020 Construction Conference
September 29 – October 1

How to Maximize Insurance Coverage for Construction Contractor's Growing Risk of Professional Liability

I. Overview of Relevant Coverages

A. Understanding Commercial General Liability Coverage

Commercial General Liability (CGL) Policies issued in a standard form protects business organizations, including construction companies as well as professionals engaged by construction companies, to protect them against all sums they are obligated to pay because of liability claims for bodily injury (BI) and property damage (PD) arising out of premises, operations, products, and completed operations; and advertising and personal injury (PI) liability.

Business Risks Exclusion in CGL Policies

CGL Policies contain exclusions known in the insurance industry as the “Business Risks Exclusions” (BRE). BRE include four independent provisions contained in every standard CGL Policy currently offered in the marketplace. The BRE are Damage to Property, Damage to Product, Damage to Work and Impaired Property. Insurance carriers have a tendency to appeal to the BRE to deny coverage for risks arising out of a policyholder’s business, especially the business of construction.

The Damage to Property exclusion precludes coverage to “that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations,” and “that particular part of your property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.”

The exclusion above is generally implicated when faulty workmanship by the general contractor or its subcontractors cause property damage while the building is

under construction. However, the exclusion does not apply once the building is completed and put to its intended purpose.

The Damage to Your Product exclusion precludes coverage for property damage to “your product” arising out of it or any part of it. The definition of “your product” excludes real property from the definition and thus should rarely be successfully raised by insurers to deny coverage ongoing or completed operations in construction projects that involved real property as opposed to products.

The Damage to Your Work exclusion precludes coverage for property damage to “your work” arising out of it or any part of it. The definition of “your work” is key in the professional liability context in construction projects. CGL Policies define “your work” as i) "Work or operations performed by you or on your behalf" and ii) "Materials, parts or equipment furnished in connection with such work operations." This exclusion however does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor. This is key because a majority of claims in the construction business arise out of faulty work performed by subcontractors.

Lastly, the Impaired Property exclusion is usually implicated in defective manufactured products that have not been physically injured but that has made other property impaired or unfit for its purpose. This exclusion is often raised by insurers in construction defect cases but are rarely upheld by the courts when there is direct physical damage to real property.

Courts are Divided on Whether Faulty Workmanship can be an Accident Covered under CGL Policies

Most state supreme courts have held that faulty workmanship is an accidental and, therefore, covered by liability insurance. A few states however have courts that have held that CGL Policies are not meant to cover faulty workmanship based on one or more of the BRE.

The Engineers, Architects or Surveyors Professional Liability Exclusion

CGL Policies do not apply to bodily injury, property damage or personal and advertising injury arising out of the rendering of or failure to render any professional services by the named insureds or any engineer, architect or surveyor who is either employed by the named insured or performing work on the named insured’s behalf in such capacity.

Professional services include: 1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders

or drawings and specifications; and 2. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Some of those exclusions contain a construction means and methods exception that is heavily litigated because it is the battleground where insurers argue that the work of professional falls under the professional services definition and insureds argue that the work falls under the construction means and methods exception to the exclusion.

B. Understanding Professional Liability Coverage

Professional Liability Policies (PL Policies) are a subtype of liability coverage that protects traditional professionals (e.gr. architects, engineers, accountants, attorneys, insurance brokers) against liability arising out of errors and omissions in performing their professional services. A particularity of PL Policies is that, unlike CGL Policies, the insured limits are usually depleted by defense costs incurred by the insurer in defending claims against the insured professionals. There may also be retroactive dates embedded into Professional Liability Policies which bar coverage for wrongful acts that occurred prior to certain specified date. Coverage under these types of policies may also be written to cover professional services based on a contractor's operations or on a project-specific basis.

Defining Professional Services

The policy definition of "professional services" is key because that will drive whether the acts, errors or omissions of the insureds are covered or not in the context of construction projects. Some policies provide a pre-arranged definition of "professional services. For example, those architectural, engineering, landscaping, surveying, consulting, project management or construction management services that are performed by the named insured or on the named insured's behalf.

Some carriers allow their insured to be involved in crafting the definition of "professional services". Here, it is important that contractors involved in complex design build projects make sure the definition encapsulates the potential acts, errors and omissions that could be incurred as part of their performance of duties in the project.

Contractors must assess and produce an exhaustive list of services they will perform that may be deemed professional in nature. Each carrier will have their own particular risk appetite to expand or narrow the definition of “professional services” depending on the qualifications and experience of their insureds to provide professional services.

Another key aspect is to ensure that the professional liability coverage covers both the insured’s own errors or omissions in providing professional services and those provided on its behalf (i.e. vicarious liability). Since design-build contractors can be sued for damages stemming from a design subcontractor’s work like failure to supervise, negligence in hiring, etc., contractors must ensure they have coverage for both direct and vicarious liability.

Contractors should also pay particular attention to whether the policy affords joint venture coverage covering the insured’s liability arising out of its participation in a joint venture.

Relevant Exclusions

Most Professional Liability Policies exclude express warranties. As such, if a contractor promises warranties beyond the legal standard of care of negligence, the policy will not cover liability for such additional assumed liability. Contractors should request a modification to such an exclusion so that it does not apply to liability the insured would have had in the absence of such warranty.

The other relevant exclusion is the faulty workmanship exclusion. Contractors in this case normally push for an exception to the exclusion that covers faulty workmanship that is the result of negligent acts errors, or omissions in the performance of professional services so that coverage is preserved if a design error produces faulty work.

C. Understanding Construction Coverage

Builders Risk Policies are “first party” insurance that covers property in the course of construction. There is no single standard builders risk policy. Coverage is normally written on an “all risks unless excluded” basis. The insured limit is the estimated completed value of the project.

Relevant Exclusions

Almost all builders risk policies contain exclusions for faulty or defective design, materials and workmanship, as well as fault, defect, error, deficiency or omission in design, plan or specification. However, if direct physical loss or damage by an insured peril ensues, then the policy will cover for such ensuing loss or damage.

Builders Risk Policies also exclude consequential loss, damage or expense of any kind or description including, but not limited to, loss of market or delay, liquidated damages, performance penalties, penalties for non-completion, or non-compliance with contract conditions, whether caused by an insured peril or not.

II. Practical Implications of Risks Associated with Intellectual or Technical Aspects of Construction Project in Light of the Coverage Landscape

- A. Architectural Design Work**
- B. Engineering (Structural, Mechanical, Electrical)**
- C. Construction Management**
- D. Solid/Landscape Design**
- E. Land Surveying**