Choosing a Professional Liability Insurer

The purpose of this Bulletin is to inform professional engineers and geoscientists in private practice of the criteria which the insurer and the administrators of the professional liability insurance programs (endorsed respectively by the RAIC and jointly by ACEC and CCPE) had to meet when the programs were first established. Design professionals contemplating the purchase of coverage for the first time or considering a change of coverage to another carrier, should weigh a number of factors prior to reaching a decision about which policy to purchase. This Bulletin will review a number of these factors to assist in the evaluation.

Because design consultants’ professional liability policies are written on an annual “claims made” basis, the decision to change from one insurance company to another can have important and potentially disastrous consequences. For example, if a claim arises from services performed prior to a change in insurance companies, the design professional could well be without coverage because the first insurer’s obligations ceased when its policy expired and the new insurance company may try to avoid honouring the claim if it finds evidence that the insured (or any of the employees of the insured) knew, prior to the decision to change coverage, about the circumstances which led to the claim.

In selecting a professional liability insurer, the design consultant must consider a number of factors relating to security, service and cost. More specifically, the criteria for the selection of an insurance carrier are: (1) the scope of insurance coverage offered, (2) claims handling and defence capability, (3) other insurance-related services, (4) degree of financial strength and outlook for longevity, (5) cost.

1.0 THE SCOPE OF COVERAGE OFFERED

1.1 Retroactive Coverage

Under virtually all forms of professional liability insurance policies offered in North America, coverage is triggered by the date when the claim is made against the insured as opposed to the date when the actual error or omission may have been made. It is therefore important that the policy cover liability arising out of prior acts without any time limitation or retroactive date for coverage.
1.2 Scope of Services Covered

The definition of insurable professional services is particularly important. The policy offered under the Association-endorsed programs refers to “services customary to an architect or an engineer”. This should be compared to policies which use the more restrictive wording of “professional services described in the Declaration or for which the design consultants are qualified”.

Thus, if a claim arises out of a discipline not described in the policy Declaration or if the qualifications of the insured for a given service are questionable, there is potential for disagreement.

1.3 Defense Costs

Another important difference among policies is the inclusion of defense costs within the policy limits as done by many insurers. Defending design professionals and attempting to extricate them from lawsuits is often a lengthy and costly process. The legal costs involved in some suits are staggering and may, at times, exceed the limits of liability insurance carried. It is important, therefore, that the professional liability insurance policy chosen contains a clause which states specifically that investigation and defense costs are covered in excess of policy limits.

It is also worthwhile to remember that defense costs are subject to the policy deductible under the terms of some professional liability insurance policies offered on the marketplace. Under the terms of the standard policies offered under the Association-endorsed programs, the defense costs are not subject to a deductible.

2.0 CLAIMS HANDLING AND DEFENSE CAPABILITY OF THE INSURER

When evaluating a professional liability insurance company, the insurer’s claim handling experience, ability and procedures are factors that should not be overlooked. After a claim arises, it may be too late for an insured to do much about an insurer which quoted a low premium to attract the risk but then is unable to provide prompt, efficient and economical claims service.

The factors to be considered when judging claims handling capabilities are:

a) How are claims reported and processed?

b) Do the personnel who will be handling the claims have any background, experience and qualifications in the field of the design professional’s liability?

c) How promptly and in what way does the insurance carrier respond when a claim is reported?

d) How are defense lawyers selected and what are their qualifications?

e) Is there any program for educating claims personnel and defense lawyers about design professionals and the construction industry?
3.0 INSURANCE-RELATED SERVICES

3.1 Loss Prevention and Quality Control Process

Another feature of a comprehensive professional liability insurance program is the ability of the insurer to provide an on-going service of continuing education for the benefit of design consultants with a view to mitigating claims frequency and claims costs. More importantly for the individual insured firms, this service makes it possible for the owners and management of the consulting firm to provide free loss prevention education to the more junior members of their personnel as part of the services provided by their insurer.

3.2 Contract Review Services

An increasing number of project owners demand that design consultants sign contractual agreements which often impose onerous liabilities upon the design consultant at the risk of creating a conflict between the owner/consultant agreement and the professional liability insurance policy. Such contracts often include express warranties and guarantees which are uninsurable. Few insurers offer a contract review service, which enables the insured to consult his insurance carrier before entering into a contractual agreement and thereby ensure that it does not conflict with and possibly void his insurance coverage. Few insurers are willing to confirm in writing that a given contract or clause DOES NOT in fact conflict with an exclusion of the insurance policy. Why risk paying a substantial professional liability insurance premium to discover when a claim is reported that you have no coverage because your contract with your client conflicts with your insurance policy?

4.0 DEGREE OF FINANCIAL STRENGTH AND OUTLOOK FOR LONGEVITY

One should never assume that an insurance company cannot become insolvent. Should an insurance company become insolvent or bankrupt, there are absolutely no government guarantees that unrecoverable losses will be funded for the protection of insurers.

The existing capitalization of some insurance companies is inadequate and the Federal Department of Insurance, recently recognizing this, is seriously considering increasing the requirements for minimum capitalization to $5 million from the current and unacceptably low $1.5 million.

The financial strength of the insurer is more vital in the case of professional liability or malpractice insurance than for any other type of coverage. Claims for this class of insurance usually develop slowly and take years to resolve. By the time a claim is settled, some six, seven or even ten years after the claim was originally reported, it is often necessary for the insurer to make payments well in excess of what was originally estimated. If, in the intervening years, the insurance carrier has met financial difficulties, the insured may find himself without the coverage on which he was counting.
The financial integrity of a given insurer is often mostly affected by the quality and nature of the reinsurance secured by the issuing insurance company. The financial strength of the endorsed insurer and, more importantly, the integrity of its reinsurance treaties have met severe tests before the endorsement was given by the national associations. The same thing cannot be said of all other insurers.

5.0 PREMIUM COST

Last, but by no means least, recognition must be given to the cost of professional liability insurance coverage. There is no denying that this type of insurance is expensive, regardless of the size of the insured firm or the limits of coverage being purchased. However, as can be seen from the various factors reviewed above, it is important to look beyond a simple comparison of premium costs to determine which insurance company’s policy is most appropriate for an architect’s or engineer’s needs. Premium costs should be evaluated on the basis of total service offered and not on price alone.