

PROFESSIONAL LIABILITY

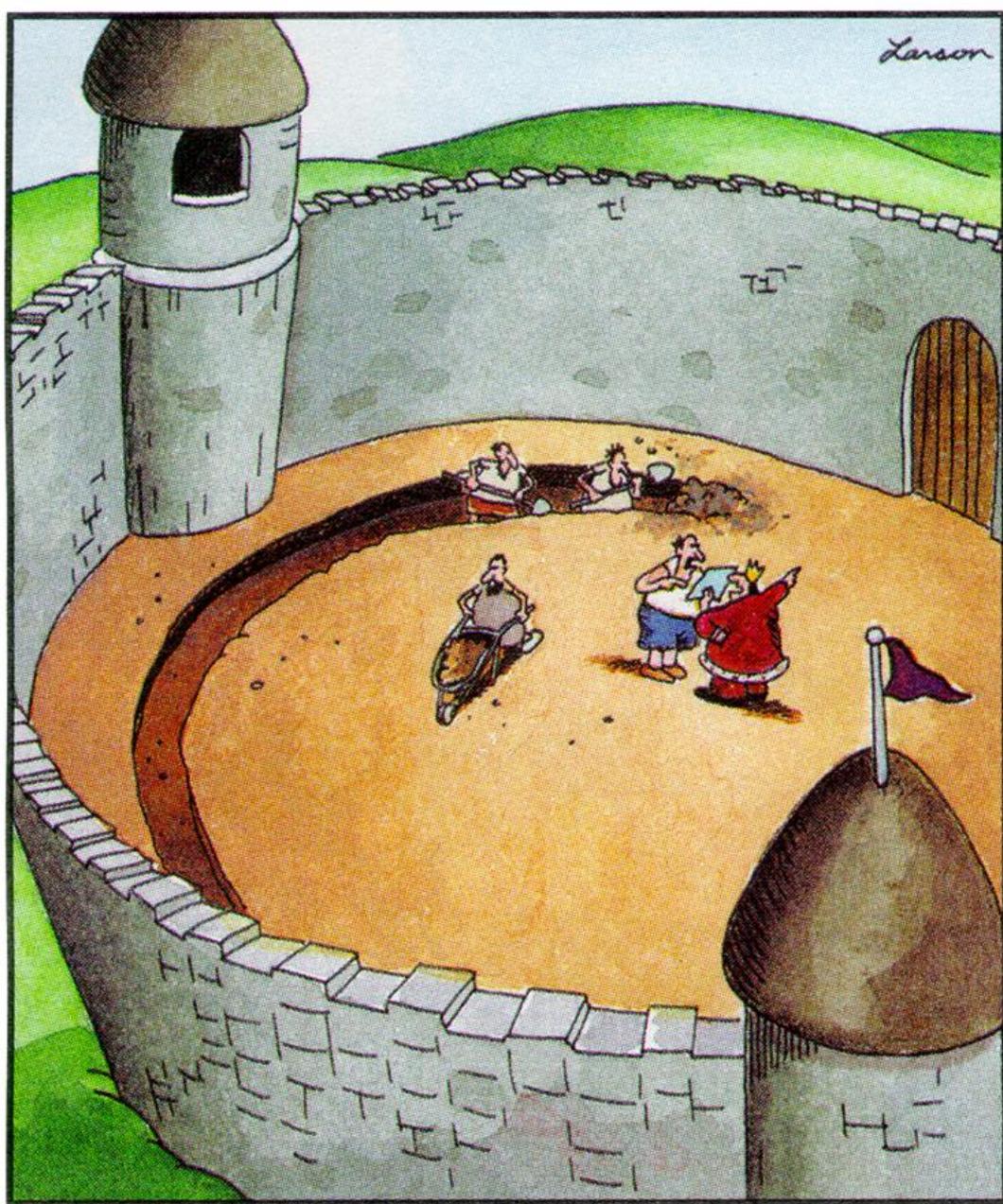
You may need it more than you think

CFMA Day 2015
November 2, 2015

Willis

AGENDA

- Professional Liability Coverage Under the General Liability (GL) Policy
- Construction Professional Liability Exposures
- Contractor's Professional Liability Insurance (3rd Party Liability)
- Protective Indemnity Insurance
- Optional Coverages
- Questions



Suddenly,
a heated
exchange
took place
between
the King
and the
Moat
Contractor.

DOES THE GL POLICY PROVIDE PROFESSIONAL COVERAGE?

The GL policy typically excludes coverage for professional services:

- CG 22 43: Exclusion - Engineers, Architects or Surveyors Professional Liability
- CG 22 34: Exclusion - Construction Management Errors and Omissions

Potential GL Coverage Gaps

- Exclusionary Language
- Damages claims (i.e. Economic Loss) do not constitute “property damage” as defined by the GL policy
- Damages claims do not arise from an “occurrence”

COVERAGE UNDER THE GL POLICY

Limited Coverage Provided Via Endorsement:

- CG 22 79: Exclusion – Contractors – Professional Liability
 - Provides BI and PD giveback for Professional services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor

- CG 22 80: Exclusion – Contractors – Professional Liability
 - Provides BI and PD giveback for professional services with respect to your providing engineering, architectural or surveying services in your capacity as an engineer, architect or surveyor for operations in connection with construction work performed by you or on your behalf (Design-Build Extension)

CONSTRUCTION PROFESSIONAL SERVICES



DO YOU NEED PROFESSIONAL LIABILITY?

Do you or your sub-consultant/sub-contractors...

- provide in-house design, with or without construction responsibility?
- subcontract design or engineering services to other parties?
- participate in joint venture projects with an architect or engineer?
- provide agency or at-risk construction management services?
- provide value engineering services?
- provide revisions to architectural or engineering designs?
- provide services that include the arranging for permits and approvals?
- act as the owner's agent during construction?
- have responsibility for project coordination or scheduling?

If you answered “Yes” to ANY of the questions above, you need professional liability coverage to provide defense and protection for your firm

WHO IS A PROFESSIONAL?

For purposes of construction professional liability...

- One who possesses “specialized skills and experience” in **architecture, engineering, design-building, or construction management services**. The professional may or may not be licensed or regulated, but performs consultative services or actual design and engineering
- A professional possesses a special form of competence, which is the result of acquired learning and aptitude developed by special training and/or experience

WHAT IS A PROFESSIONAL SERVICE?

Architects, Engineers, Design-Builders and Construction Managers

- An act or service that puts to use the application of special knowledge
 - Consultative services, advice, stamped drawings, planning value engineering
- It is more than mere proficiency in the performance of a task
 - It is the delivery of knowledge, output and/or intellectual capital
- The service is provided to a third-party for a fee via a contract.
- The labor or skill is predominantly mental or intellectual, rather than physical or manual
 - i.e. NOT means and methods in constructing a design from a specification

OVERVIEW OF CONTRACTOR'S PROFESSIONAL LIABILITY

- Claims-made and reported coverage
 - Claims must be made and reported within the policy period or Extended Reporting Period
- Retroactive Date
- Inability to Trigger Multiple Policy Periods
- More Stringent Notice Requirements
- Available on an annual (practice) basis or project-specific basis
(project-specific coverage is subject to market terms and conditions)

CONTRACTOR'S PROFESSIONAL LIABILITY

- Covers contractor for Damages/Loss to third parties arising from the failure to perform / performance of Professional Services by the contractor or others from whom the contractor is legally responsible
 - Vicarious liability for work performed by subcontractors with professional liability
 - Direct liability from design or engineering work performed in house
 - Direct Liability from subcontracted work to design firms (Design/Build)
 - Direct liability from construction management services (At-Risk or Agency)
- Negligence based professional trigger

STANDARD OF CARE

- In the most basic terms, this **represents a standard of performance** and conduct on the part of a professional which, the recipient of the services and third parties affected by them have a **right to expect** as part of the practitioner's recognized professional standing
- Where do professionals' duties come from?
 - Statutes
 - Case Law
 - Common Law
 - Generally Accepted Standards Within Their Profession
- When these duties are breached and damages are the proximate result, **liability** is established.
- Conversely, **if the professional meets this standard**, having done so **provides a defense to claims** of professional negligence by parties seeking recovery.

PROFESSIONAL SERVICES

Professional Services is a key definition in the policy

- It is important to review this definition keeping in mind not only those services performed by you or on your behalf
 - Architecture
 - Engineering
 - Construction Management
 - Value Engineering
 - Design Assist
 - Building Information Modeling (BIM) / Technology Services

OTHER PROFESSIONAL POLICY PROVISIONS



■ Contractual Liability

- Excluded unless the insured would have the liability in absence of the contract or agreement
 - Liquidated Damages
 - Project performance based warranties or guarantees

■ Additional Insured Status

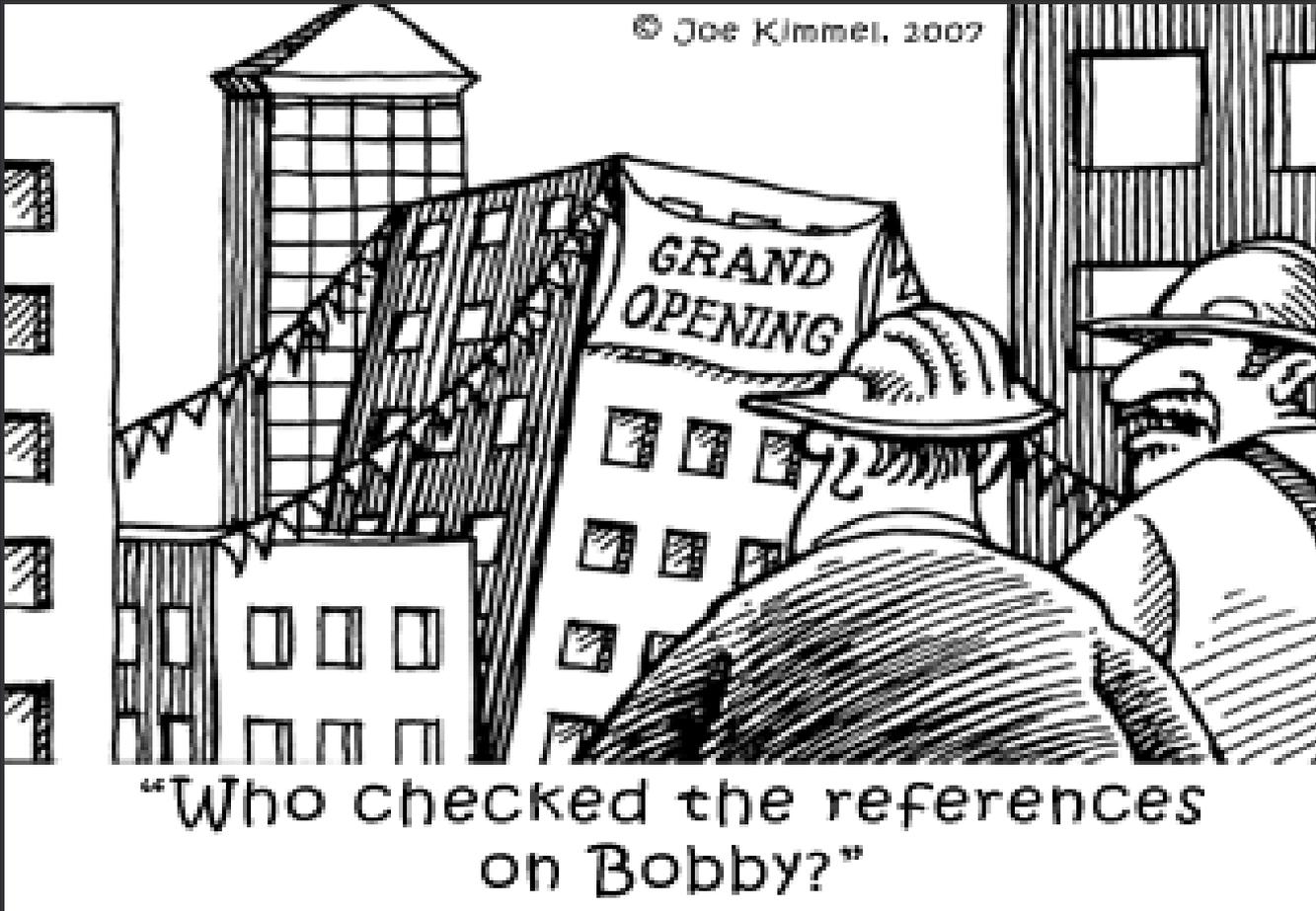
- Owners typically **cannot** be added as additional insureds
- Insured vs. Insured exclusionary language would preclude the owner from making a claim against the professional

PROFSSIONAL LIABILITY – CLAIMS EXAMPLES

1. A Construction Manager providing value engineering services directed the Architect to change the design of mechanical system from four separate chiller systems to one central chiller plant. After startup, it was determined one plant was not sufficient enough to cool the entire facility. Project owners made a claim against the Construction Manager for cost overruns of \$8,000,000.
2. The Design-Build delivery method was utilized for a new state-of-the-art medical diagnostic and treatment center project. The project experienced significant cost overruns and delay due to design errors in the HVAC, MEP and structural steel plans and failure to coordinate design with original owner-specified equipment. The \$15 million claim amount exceeded the available professional liability insurance.



PROTECTIVE INDEMNITY



PROTECTIVE INDEMNITY

- Design-build Coverage
- Allows contractor to make a first party claim under their policy for Damage/Loss to the contractor arising from the failure to perform/performance of Professional Services by the design professional and potentially entities for whom the design professional is legally responsible
- Coverage is excess and potentially DIC of design professional's insurance policy.
- Over 90% of damages paid by A/E insurers are to Contractors and Owners

WHY PROTECTIVE INDEMNITY?

- A/Es and other consultants purchase professional liability insurance that are **annual and “claims made”**. Therefore, their coverage is not guaranteed for the life of your project and is subject to annual market availability.
- Primary policies **insure all historical work** under one aggregate limit of liability via a retro-active date on claims made policies.
- A/Es and other consultants typically **purchase low limits** of professional liability insurance and rarely have the assets to back a significant loss, absent their insurance.
- A/Es may negotiate **Limitations of Liability** to their fee, a dollar figure, or the proceeds of insurance.
 - Consider having the owner contract directly with geotechnicals and land surveyors
- A/E may **cancel or non-renew** insurance or significantly reduce their limit
- **Defense costs erode the limits** and are costly to litigate.

PROTECTIVE INDEMNITY – CLAIMS EXAMPLES

1. Contractor incurred in excess of \$6,000,000 in costs due to significant structural design flaws at a mixed use retail condominium project parking deck. The Engineer had \$1,500,000 in available insurance coverage. Protective coverage paid the difference between the available limit and the total loss.
2. 2 Years post completion the owner of office building brings a demand against Design Build contractor for building damage resulting from settlement. DB pursued subcontracted geo-tech firm. Geo-tech firm is out of business with no insurance to pursue.



OPTIONAL COVERAGE

- Rectification/Mitigation

First-party coverage pays to mitigate or rectify an act, error or omission from the work of the contractor or an entity that the contractor is legally liable for that would reasonably result in a Professional loss.

- Contractors Pollution Liability (CPL)

Provides BI, PD and Clean-up resulting for pollution conditions associated with construction operations

OPTIONAL COVERAGE – CLAIMS EXAMPLES

1. A general contractor was retained to construct a retail center using the design-build delivery system. During construction, an error is discovered in the site plan and the problem is corrected at a cost of more than \$1 Million.
2. A general contractor was hired to construct a new wing onto an existing high school. An environmental watchdog group alleged that pollutants including sediment and silt material were discharged into a nearby estuary and required cleanup. It was claimed that the damages were due to a failure to follow and implement the project specific erosion and sedimentation control plan.

QUESTIONS?

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