

PRO-FORM INSURANCE SERVICES

15 Allstate Parkway, Suite 220
Markham ON L3R 5B4
Tel: (905) 305-1054 Fax: (905) 305-1093
www.hubinternational.com



Should Your Client Be a Named Insured?

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

You can hardly blame clients who go to great lengths to ensure they have substantial financial protection in the event something goes wrong with their projects. Typically, a project owner demands that the contractor and prime designer have ample insurance to provide coverage against major project upsets. Some go so far as to demand minimum insurance limits from subcontractors and subconsultants as well.

Once insurance is in place, prudent clients will often seek contract language that optimizes their coverage. For example, it is common for owners to insist in their contracts that they be named an “additional insured” on the contractor’s general liability policy. This is a sensible step to ensure that the owner receives optimum protection in the event of a jobsite accident resulting in property damage or bodily injury.

So, is there any harm when clients ask that you make them a named or additional insured on your professional liability policy? What’s good for the GL policy is good for the PL policy, right? Wrong!

Project owners mistakenly believe that being a named insured on a design firm’s professional liability policy provides an added level of insurance protection. In truth, being named an additional insured can *reduce* your client’s protection and increase its liability should a claim be filed on your PL policy.

Why Your Client Should Not Be a Named Insured

Professional liability insurance was created to give design professionals adequate financial resources in the event that their errors, omissions, or negligent professional acts damage a client or third party, such as a contractor. Professional liability insurance is not like, say, automobile or homeowners insurance, which compensates insureds who suffer personal damages due to their own negligence. For example, drivers who negligently wreck their cars and are injured receive compensation from their own insurance company. If a person leaves a fire on the stove and burns down his kitchen, homeowners insurance will compensate the negligent owner for the self-inflicted damages. Professional liability insurance does not compensate the insured. It is designed solely to compensate people *other than* the insured professional in the event the insured’s negligent act, error or omission causes damage to another party.

Professional liability insurance also differs from general liability insurance in a number of important ways. GL insurance provides protection for property damage and bodily injury arising from business operations. For example, it would cover a slip-and-fall accident suffered by a visitor to a jobsite. Thus, it makes sense for a project owner to be a named insured on the general contractor’s GL policy since the project owner may be a likely target of a third-party lawsuit in a slip-and-fall case.

However, being named an additional insured on a design firm's professional liability policy does not provide added protection against a design firm's negligent acts. When you receive such a request, you must explain that:

1. Your insurance company likely won't add your client as a named insured and
2. If it did, it would more than likely jeopardize your client's coverage, rather than increase it.

If your client became a named insured under your policy, the client would, theoretically, be covered to the same extent as your firm. In other words, the policy would cover your firm and your client in the event either was accused of an error, omission or negligent professional act in the performance of covered services. As such, were your client to file a claim against your PL policy, 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 a named insured.

Also consider: If a third party files a professional liability claim against your firm, your client – as a named insured -- 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. And 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 it.

Now, consider the situation where your client has one or more registered design professionals on staff – not uncommon for public clients. Were the client to become a named insured, its design professionals could now be covered by your PL policy. Your insurer 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 your project. There are two likely outcomes in such a case:

1. Assuming your insurer agrees to defend and indemnify its newfound insured, the limits of insurance covering your project are now reduced or exhausted and your claims history takes a hit.
2. Your insurer refuses to provide coverage for your client's design work on another project -- and your client's PL provider may do the same. As such, your client may have to sue both insurers in order to get either to provide coverage.

And here's yet another potential problem. Suppose during negotiations you agree to a client's contractual request to be a named insured on your professional liability policy. You later discover that your insurer refuses to add the client to your policy. If you do not advise your client that your insurer has declined coverage, you have 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 live up to your contractual obligation to provide PL 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 professionals, most likely without the help of your professional liability insurance. (Neither professional nor commercial general liability insurance covers contractual liabilities except for cases where you would have liable absent the contract.)

Dealing with a Client Request

Sooner or later you will likely be presented with a contract condition like this:

The Design Professional shall carry professional liability insurance of a type and in an amount acceptable to the Client, and the Design Professional shall make the Client a named insured under said policy.

What do you do?

Explain why the request is not in your client's best interest. Tell your client that being named an additional insured on your PL policy provides no added protection against your firm's errors and omissions and could, in fact, put coverage in jeopardy.

Your client may respond with something along the lines of, "Acme Associates accepts this provision all the time." To that remark, your best response may be, "They may accept the contractual provision, but you may want to check to see if such insurance is actually in place. Do you have anything on file indicating that the condition has been accepted by Acme's PL insurer?"

Given the liability exposures that a design firm can create for itself by accepting this request, you might wish to add, "A design firm that contractually increases its own liability exposures probably doesn't understand that you being a named insured increases your risks as well."

Suppose that a professional liability insurer actually agreed to accept the client as a named insured on Acme's PL policy. Does that mean the client has extra protection? Absolutely not. Remind the client that a professional liability insurance policy has a stated amount of capacity – the policy limits. Being a named insured does not increase that amount. However, a possibility exists that, should the client make a claim against Acme, the insurer that permitted the client to be named on the policy could deny coverage since an insured cannot make a claim against itself. "Why," ask your client, "should you take that chance? Why give an insurance company the opportunity to deny coverage?"

Let's 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. Consult with your attorney about offering the client the following or similar 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 are able to obtain such coverage.

Winning the “Named” Game

It is your duty to educate your client and explain that being a named insured on your professional liability insurance policy is not in his or her best interest. If your client or its attorney balks at your initial explanation, schedule a meeting with your client, its legal counsel, your firm and your professional liability insurance agent to explain the facts about professional liability insurance. Clarify that:

- Being a named insured in no way provides added protection – it can only decrease protection or, at the least, muddy the waters.
- Many professional liability insurers will not allow the client to be a named insured on the policy.
- If the client is added as a named insured, the insurer may deny the owner’s claim against the policy.
- Being a named insured may make the owner liable for claims filed by third parties.
- This increased exposure may lead to third-party claims that exhaust the policy limits – thus stripping away the client’s protection.

To simply agree by contract to add your client as a named insured only creates risks for you and your client that are wholly unnecessary. This is simply a situation where you and your client are both likely to lose.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We’re a member of the Professional Liability Agents Network (PLAN). We’re here to help.