

For the Client: Owners May Want It, But Insurance Carriers Can't Give It

BY RICH HARTMAN

Owners often request to be added as an additional insured to a design professional's professional liability policy. They are often surprised, however, when insurers refuse because this status is ubiquitous with other lines of coverage. Design firms are frequently skittish about confronting this issue with project owners, but experience indicates that owners, when properly educated, eventually conclude that they really don't need or want to be an additional insured.

Why professional liability insurers won't name project owners as additional insureds

The fundamental reason why professional liability insurers won't name a project owner (or any other entity not related by common ownership to the design professional) as an additional insured relates to the nature of the coverage. For any entity to be "eligible" to be named as an insured, additional or otherwise, under an architects and engineers professional liability insurance policy the entity must be 1) legally qualified to and 2) actually perform the professional services that are insured under the policy, that is architectural or engineering services. Typically, project owners do not render professional services, nor are they legally qualified to do so. Therefore, they are simply not eligible for coverage under the policy.

Suppose the owner was an architect or engineer. What would happen if the insurance company did name the owner as an additional insured? In that event, the policy would provide coverage not only for damages resulting from the design firm's negligent acts, errors, or omissions, but also for damages resulting from the owner's negligence. The insurance company never contemplated that exposure when underwriting the design firm's practice policy. The policy is only intended to provide coverage for claims resulting from the negligent performance of architectural or engineering services by a firm performing those services.

Why the design firm doesn't want the owner named as an additional insured

If a design firm were able to add the owner as an additional insured, its policy would cover the additional insured for damages resulting from the additional insured's negligence in addition to those resulting from its own. The result is one or more of the following:

1. The design firm's deductible obligation will be required for claims that may not be the result of its negligence;
2. The design firm's limit of liability is exposed to erosion due to the actions of a party for whom coverage was never contemplated under the design firm's policy;
3. The design firm's policy/insurance company may be required to provide coverage for claims beyond those for which the policy is intended to cover; and
4. The design firm's premium may be adversely affected by claims that were not the result of the design firm's negligent acts but rather the acts of an unrelated entity for whose acts the design firm should bear no responsibility.

Why owners don't want to be an additional insured under a design professional's professional liability policy

Think about what it is the owner is really seeking when making the request, or imposing it as a contractual requirement. The intended result is financial protection in the event the owner incurs damages as a result of the design firm's negligent performance of professional services on their project. As a professional services firm, the most viable financial protection

a design firm can afford to the owner will come from the design firm's professional liability policy. The result the owner is seeking will not be realized, however, if the owner is also named on the policy.

Why not? Let's pretend for the sake of illustration that professional liability insurers were willing to name the owner as an additional insured. Taking this illustration further, let's assume the worst-case scenario that the owner (now also an additional insured in our illustration) has allegedly suffered damages as a result of the design firm's alleged errors or omissions, and they are making a claim against the design firm to recover those alleged damages. The design firm's professional liability carrier will deny coverage for that claim, citing a standard exclusion in

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all professional liability policies called the "insured versus insured" exclusion. This exclusion simply means that there is no coverage afforded by the policy for any claim made by one insured against another insured. Clearly, the anticipated benefit and desired result the owner was seeking when originally imposing the obligation to name them as an additional insured will not be realized.

Owners simply want financial protection from damages caused by the design firm's negligent acts, errors, or omissions. The professional liability policy can and does provide that financial protection, and it does not have to name the owner as an additional insured to afford that financial protection.

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