

## WHY YOU MUST UNDERSTAND “CLAIMS MADE” INSURANCE...

“Claims Made” insurance and the implications of such policies can be misunderstood by architects and their engineering consultants. Failure to understand the features and consequences of a “Claims Made” insurance policy may lead to loss of insurance coverage.

In any discussion of the features of professional liability insurance for architects and engineers, it will be described as “claims made”. This means the policy you purchase covers claims made and reported to the insurer in the policy period, regardless of when the alleged error, omission or negligent act actually occurred, subject always to the terms and conditions of the policy.

If your policy runs from January 1, 2008 to January 1, 2009, its coverage and limits apply to claims that are first known by you and reported to the insurer between those dates. Even if the project was carried out and completed years earlier, if the claim first arises and is reported to your insurer between January 1, 2008 and January 1, 2009, it is that policy that provides the coverage to you...NOT the policy that you may have had in place at some earlier time when the error actually occurred.

However, at the end of the policy period the insurance ceases and no on going coverage exists. It is critical that claims made insurance is maintained continuously to ensure that you are effectively covered. You must renew your insurance before the end of each policy period to ensure continuity of coverage for past work.

Understanding the consequences of claims made insurance will be particularly important when a practice:

- first learns of a claim or circumstance that may result in a claim
- renews its policy and completes a renewal application,
- changes its limits,
- changes a professional liability insurer,
- obtains Single Project insurance,
- establishes a separate practice outside Ontario,
- merges with another practice, or
- breaks up into several practices, and when a member of the OAA retires from practice.

Each of these circumstances is briefly addressed in turn in the following discussion.

## **CLAIMS REPORTING: TIMING IS CRITICAL !**

Each professional liability insurance policy covers claims that arise in a defined policy period, usually one year. The insurance will respond and defend a claim that you first become aware of and report within the policy period as long as you were not aware of the circumstances or actual claim at the time you applied for the insurance. The current policy responds, even though the events giving rise to the claim may have occurred at some time in the past.

If you fail to report a claim to Pro-Demnity or to a current Excess or Single Project insurer when you first become aware of the circumstances, any protection afforded by the policy respecting that claim would expire at the end of the policy period. If you have changed Excess or Single Project insurers, the new insurer would not be prepared to accept such a claim; they would not defend the consultant or pay damages awarded against it that arose from the claim.

Even though you are required to maintain annual practice insurance with Pro-Demnity, each renewal of your insurance is a new, distinct policy covering a specific annual policy period. Should you fail to report a claim prior to the expiry of the policy period, the next policy will not provide coverage.

The clear and simple message is to report all claims and circumstances that might reasonably give rise to a claim to your current insurer promptly. Failure to do so can have severe consequences including loss of insurance coverage.

## **POLICY RENEWAL:**

When your annual policy is renewed, the renewal policy is a “new” policy, and the application must accurately reflect the circumstances and claims that you are aware of at the time of the renewal application.

Knowledge of a possible claim would be a material consideration that would impact the decision of an insurer respecting the provision of the insurance. The signed “No Claims” declaration you provide that accompanies any insurance application reinforces the importance of reporting any claims to your insurer during the appropriate policy period. An inaccurate or false “No Claims” declaration may trigger a denial of coverage by the insurer.

## **CHANGES IN LIMITS:**

Pro-Demnity provides the mandatory insurance coverage and limits required by the Architects Act and Regulation. A practice seeking increased limits, whether through Pro-Demnity or another insurer, will be required to provide a statement to the insurer that the applicant knows of no

claims or circumstances that might reasonably give rise to a claim that have not already been reported to the insurer (a “No claims” declaration). The declaration is required because no insurer will be prepared to provide insurance (or increased limits) respecting a claim or circumstances of which you are already aware.

To obtain increased limits without disclosure of the exposure to the insurer could constitute misrepresentation or fraud.

If for any reason a practice should decide to reduce coverage limits, it should be aware that the reduced limits will come into effect at the date of the change and any unreported claims thereafter will be subject to the new, lower limits.

Be sure to review any insurance commitments included in Client / Architect agreements before reducing your limits.

## **CHANGING INSURERS:**

If a practice decides to change Excess or Single Project insurers, the new insurer will require a “No Claims” declaration in the application as a condition of providing the insurance. If you or any member of the firm knew of any unreported circumstances or claims at the time of the change, the new insurer would not provide coverage.

Should the firm subsequently change to a new insurer after a claim was first reported, the old insurer, if it was properly advised of the claim within their policy period, would continue to be responsible for the defence of the claim and for any damages that might eventually accrue to your practice within the terms and conditions of its coverage.

However, any subsequent new claims, including those added to an existing Statement of Claim already reported, would not be insured and it cannot be certain that the new insurer would provide coverage unless specific arrangements had been made with the new insurer.

## **SINGLE PROJECT INSURANCE:**

It is a condition of your Pro-Demnity Annual Practice insurance policy that no coverage is afforded where you are insured by another professional liability policy.

If you purchase Single Project insurance, there will be no coverage under your Annual Practice policy unless the Single Project insurance is specifically arranged to be excess to your ProDemnity Annual Practice insurance. In that case, your Pro-Demnity coverage continues for at least the mandatory limits and the Single Project excess limits are available in addition should your

underlying Annual Practice insurance be insufficient to resolve a claim.

Where Single Project insurance is purchased that is not specifically arranged as excess to the ProDemnity Annual Practice insurance, it replaces your Annual Practice insurance during the time the Single Project policy is in force. In these circumstances, once the Single Project policy is in effect, your Annual Practice coverage ceases respecting all claims on the project that are first reported during the Single Project policy period.

It is important to understand that where a Single Project policy replaces your Pro-Demnity Annual Practice policy, your Pro-Demnity Annual Practice policy will NOT provide coverage for claims arising during the term of the Single Project policy, even if the Single Project insurer declines coverage for some reason.

Claims that first arise after the expiry of a Single Project policy would be covered by the Annual Practice coverage and limits that you maintain at that time.

## **OFFICES OUTSIDE ONTARIO:**

Ontario firms may consider opening a new practice in another province. The mandatory program provided by Pro-Demnity for Ontario practices extends only to work carried out from the office of a holder of an OAA Certificate of Practice situated in Ontario. If you were to open a new office outside Ontario you will have to address the insurance needs of that office with Pro-Demnity.

Where you elect to purchase insurance for an out of Ontario office, you must review the coverage carefully.

In certain areas and provinces outside Ontario, there have been serious losses incurred by providers of architects' professional liability insurance. It is not unusual for an Insurer to include restrictions on past work which might not have applied to your Pro-Demnity coverage. For instance, an insurer offering claims made insurance to a new client or practice may specifically EXCLUDE coverage for past work of the practice in order to not be exposed to past problems that have led to many claims in that area. This exclusion of past projects may expose the practice to claims that would have otherwise been covered by a claims made policy.

You must review the policy provisions and any implications with your insurance broker respecting the insurance you purchase for the out of Ontario office and for your Ontario practice as well, to avoid gaps in coverage.

## **MERGERS:**

When two practices merge, the principals must address the consequences respecting the on-going liabilities of the merging practices and continuity of insurance. No one should settle on such arrangements without legal, accounting and insurance advice.

Each Ontario practice that carries at least the mandatory limits with Pro-Demnity and the new practice is assured coverage under the mandatory program. However, every circumstance is unique and special care must be taken to ensure that insurance expectations and requirements of all parties to the transaction are fully understood and continuity of coverage maintained.

Issues to be addressed include limits of coverage for the on-going practice, deductibles, claims reporting, maintenance or not of the merging firms separate insurance policies and for how long, continuity of coverage for the work of predecessor firms, continuity of coverage for any retiring members, and responsibility for resolution of any claims, whether on-going or that may arise in the future.

Pro-Demnity is available to review issues and questions that arise and can assist with appropriate measures respecting the mandatory program.

If an excess insurer is involved with one or another of the original practices, it will be critical to seek your broker's advice respecting the requirements of that insurer as well.

## **BREAK UP OF A PRACTICE:**

Practices break up or change their ownership. One or more of the principals may wish to retire from active practice or, even establish new practices.

Again, legal, accounting and insurance advice is a prerequisite. The break up of the firm does not end the principals' obligations respecting their own services or for the past work of the practice. Insurance to cover the liabilities of the old practice must be maintained by the individuals and the new practices.

Each practice or Holder of a Certificate of Practice that emerges will be required to maintain the mandatory insurance and limits with Pro-Demnity. Continuity of insurance for past work can only be maintained if the previous practices or the interests of the previous principals are listed as "Insureds" on the new firms' policies by appropriate Endorsements on each policy.

Should a claim arise after the break up of the earlier firm, at least one of the Pro-Demnity insurance policies being maintained by the "new" firms will respond; currently the policy with the

higher limits at the time the claim arises. Pro-Demnity may defend the claim as if only one practice was involved and the former principals will be required to cooperate in the defence as determined by Pro-Demnity.

Upon resolution, any deductible will be assessed against the principals of the former firm in proportion to their ownership interest in the previous firm.

## **RETIREMENT FROM PRACTICE:**

Where an OAA member retires from an on-going practice that continues to maintain its Certificate of Practice, the firm's insurance continues to provide claims made coverage respecting the activities of the retired individuals while they were employed by the practice. Since a retired principal or partner of an on-going practice will be relying upon the practice's on-going insurance for personal protection, it would be prudent for shareholders' and partnership agreements to include specific provisions respecting the maintenance of insurance. A lawyer's advice and assistance will be required.

When a firm surrenders its Certificate of Practice, and has met the eligibility requirements for participation, OAA members are covered under the Retirement from Practice Program unless an individual continues in practice in their own capacity with another Certificate of Practice.

To be eligible for the Retirement from Practice Program, the individual must be a current or past member of the OAA, the practice from which he or she is retiring must have maintained insurance with Pro-Demnity or the Indemnity Plan for two or more years and be in "good standing" with Pro-Demnity at the time of the individual's enrolment in the retirement program (e.g. has met all its financial obligations to Pro-Demnity while insured).

## **"NO CLAIMS" DECLARATIONS: CHECK BEFORE YOU SIGN!**

Any insurance application will include the requirement that the insured sign a "No Claims" declaration as a condition of the insurance being provided. Often the wording includes a reference to the applicant having made enquiries as a prerequisite to signing the declaration.

If you are a sole practitioner without employees, the issue of enquiries should be moot. However, for any practice with more than one individual, it is imperative that the practice have a process in place that ensures that potential claims and circumstances that might give rise to a claim are identified and brought forward so that the responsible principal signing the "No Claims" declaration is fully informed before committing the firm.

The principal signing the insurance application and a "No Claims" declaration should only do so

AFTER making appropriate enquiries within the practice to ascertain that the declaration is accurate at the time of signing.

If the application includes other practices, be sure that they have also diligently enquired as to existing claims and known circumstances that might give rise to a claim before signing.

As noted, an inaccurate “No Claims” declaration can lead to serious consequences including denial of coverage.

## **MANDATORY PROGRAM ENSURES CONTINUITY OF AVAILABLE INSURANCE TO ONTARIO ARCHITECTS:**

A major benefit of the mandatory program provided by Pro-Demnity for Ontario architects is that practices (unless exempted) are assured continuing availability of insurance in accordance with the mandatory requirements in the Architects Act and Regulation as long as the firm maintains its Certificate of Practice, files its renewal applications and pays the premium, taxes, any deductible or other levy when due. Ontario firms holding a Certificate of Practice are able to maintain continuous claims made insurance year after year, for at least the mandatory limits, ensuring that claims arising for work carried out in prior years, if properly reported, can be covered by a current policy.

Upon retirement, the mandatory program includes a “Retirement from Practice” policy that affords claims made coverage for retired members of the OAA. This coverage continues for six years after the death of the retired member for estate resolution purposes. There is currently no premium for this coverage and the deductible is \$1000.00 per claim.

Retirement from Practice insurance is only available to current and former OAA members through the mandatory insurance program provided by Pro-Demnity Insurance Company.

Acquiring increased limits through Pro-Demnity rather than through an excess insurer means that policy language and coverage is consistent and you need deal with only one insurer respecting applications, renewals and claims resolution.

Pro-Demnity Insurance Company is available to assist you respecting the coverage implications of the insurance provided by Pro-Demnity.

## **IMPORTANT:**

The content herein is provided as general information to architects insured by Pro-Demnity Insurance Company. In the case of any actual or perceived discrepancy between the content of

this bulletin and the content of a Pro-Demnity Insurance Policy, the provisions of the insurance policy will prevail.

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