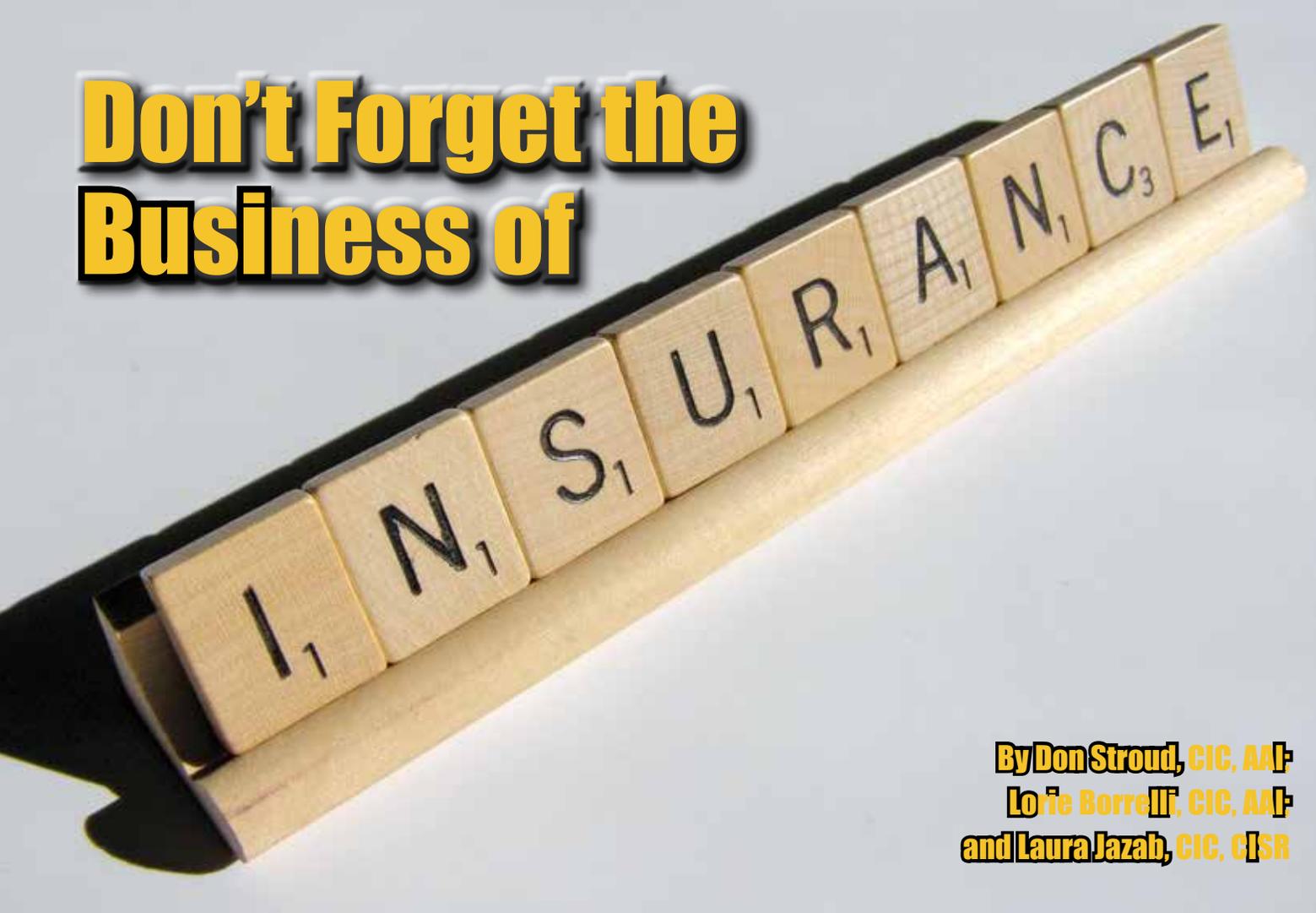


Don't Forget the Business of



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Graphic by Chris Potter, www.stockmonkeys.com.

You have worked hard to get the degrees and certifications that help you stand out as a respected building envelope professional or roof consultant. Your hard work and dedication are allowing you to steadily increase your annual billings. You are regularly getting referrals and adding new clients. Insurance is one of those business necessities that no one bothers to understand until there is a claim and, quite frankly, that is the worst time to begin to determine how your insurance will respond. When your name and credentials are no longer applicable, and you are referred to simply as “defendant,” you want your insurance program to do what you thought you were paying for: protect your assets. There are many pitfalls in the realm of business insurance, but today we will focus on professional liability (errors and omissions, or E&O), general liability, and the interactions between the two.

A commercial general liability (CGL) policy is a basic need for the proper operation

of any type of business—from an ice cream stand to a building envelope consultancy. The CGL provides liability coverage for bodily injury and property damage (BI and PD) to the body or property of a third party that may arise due to one’s operations or activities. Keep in mind that the CGL coverage trigger is negligence on one’s part that causes bodily injury or property damage, and without one of those two (injury or damage), the CGL does not respond to an incident.

Let’s say you (or an employee) are at a job site and have erected a ladder against the side of a structure, and during the course of your operations, the ladder falls and hits a vehicle nearby, breaking the windshield and denting the hood. We now have a property damage event triggering coverage under the CGL, and your policy should respond to repair the windshield and hood. Now, what if the ladder hits a child walking by and causes serious injury? We now have a bodily injury situation, and your policy should respond by paying for your defense and the attorney’s demand for dam-

ages. In most states, the child’s representatives would have until three years after the child reaches the age of majority to actually file a suit; so, depending on the child’s age, this could drag on for almost 20 years.

We have now established that the CGL will cover bodily injury and property damage resulting from your “operations,” and it is important to know that it will also provide this coverage for “completed operations.” This means you have that same BI and PD coverage should your work fail (excluding professional liability) after the job is complete. As you see, the CGL policy is very broad in coverage but, as with everything, there are exclusions included in the language. The exclusion in the CGL with the greatest single impact on building envelope and roofing professionals is the “professional liability exclusion.” It excludes coverage for any loss that is the result of “your professional services,” and the most often cited definition of a professional service comes from the leading case of *Harad v. Aetna Casualty & Surety Co.* as follows:

Something more than an act flowing from mere employment or vocation... [t]he act or service must be such as exacts the use or application of special learning or attainments of some kind. The term “professional”... means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A “professional” act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. In determining whether a particular act is of a professional nature or a “professional service,” we must look not to the title or character of the party performing the act, but to the act itself.

As you can see, this ruling is very broad as to what is deemed to be a professional service. This one exclusion in the CGL creates the need for an entirely separate insurance policy: the professional liability policy.

There are a variety of different professional liability policies and policy forms available. Whereas the CGL policy has very standard language that is written by the Insurance Services Office (ISO) and approved by the commissioners of insurance in almost every state in the U.S., the professional liability forms are manuscript policies. This means that every company that provides professional liability products writes its own coverage forms and, therefore, every form is different.

There are true architects’ and engineers’ (A&E) professional liability forms, and there are miscellaneous professional liability (MPL) forms. Within each of these two types, many differences may be found. This is where the understanding of what you purchase is of paramount importance: Does your form contain an exclusion for bodily injury and property damage, construction management, or independent contractors? How is “professional services” defined? What is your retroactive date? Do you have a hammer clause? Does your policy exclude mold or fungi?

You will find that most true A&E forms include coverage for bodily injury and property damage, while most MPL forms exclude such damages. You will further find that

most MPL forms exclude construction management and mold as well as subcontracted work (and specifically work subbed to architects or engineers). These coverages are extremely important to building envelope professionals.

To better illustrate these issues, let’s say that you have done work on a project and suggested a particular material to be used on the roof. You observed the project as it progressed and reported back to the owner’s representative. The project is finished and you have been paid. Then one day you get a call that the roof has failed (potentially due to your advice, counsel, or professional opinion). A section of the roof collapsed and injured a person who was parked in his car next to the building. This is clearly professional liability as it was due to your advice. First, the bodily injury and property damage trigger is met for the commercial general liability; but the professional liability exclusion kicks in, and there is no coverage under the CGL. We now move to the E&O policy. If you have the typical MPL policy, the BI and PD exclusion will provide no coverage for the injured person or the damaged car. This leaves you to pay the claim out of your business and personal assets (most states allow a legal attack on personal assets for professional claims). The typical A&E form would provide coverage (person and car) for this scenario, including cost to repair or rebuild the roof.

Let’s change the situation slightly and say that you did not do any design work, but you subcontracted certain design aspects of the job to another consultant or engineer. The same roof failure occurs, but this time you are sued for the design work and the ensuing damages to the building. So again, we turn to the professional form. Most MPL policies have exclusions for subcontracted work, regardless of what type of subcontractor is used; so again, you could be left paying the defense and claim from your own pocket.

Now, let’s change the scenario one more time and say you did not provide any advice. You are now acting as a construction manager on a project. Most MPL policies contain exclusions for construction

management, therefore leaving you on your own in this claim scenario.

As you can see from these three examples, there are significant differences in the A&E and MPL forms that can leave you paying for your own defense and claims out of your own pocket.

As you are talking with your insurance professional regarding these particulars, you should also ask if your E&O policy has a “retroactive date” included, and, if so, what is the date? The retroactive date is the date when there will be coverage for an event that occurs after that date, as long as there has been uninterrupted coverage in place. So if your policy has a retroactive date of January 1, 2010, the policy will not cover any occurrence prior to that date regardless of when the claim is presented to you for payment. If you did a project in 2008 and you have the January 1, 2010, retro date, and a claim for design flaws or advice is presented in 2015, you would have no coverage since the triggering work was done in 2008. You should pay very close attention to your retro date, particularly when changing carriers. The new carrier could change the retroactive date to match its policy inception date. Since the carrier is taking coverage away for any prior acts (by moving that retroactive date forward), it can give you a lower premium than you may have been paying previously. When purchasing E&O, you should always ask for a retroactive date that reads “full prior acts” or is the actual date that you started your firm. It is simply not worth a bit of premium savings to eliminate your coverage for prior acts.

Also discuss whether or not your policy includes a “hammer clause.” This particular clause gives the insurance company the right to settle a claim on your behalf or limit their liability should you not con-



Graphic by Gordon Banks.



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sent to their advice to settle. For example, you are accused of providing improper advice or consultation on a project causing financial harm to the owner. The owner's attorney enters suit against you for damages, and your insurance carrier provides your defense. In the course of depositions and discovery, your defense attorney and the plaintiff's attorney come to an understanding that the potential claim can be settled for \$100,000. The insurance company comes to you and tells you it wants to settle the claim for that \$100,000. You are certain that you did nothing wrong and do not want to settle. The insurance company is obligated under most policy forms to continue your defense, but here is the zinger: If there is a "full" hammer clause, you will pay

everything that is spent over that \$100,000 amount. There are varying types of hammer clauses ranging from full (you pay 100% of the overage), soft (you pay a percentage of the overage), or none (you pay nothing over the amount).

You should make certain that you completely understand all of the provisions of your professional liability before you have a claim. Keep in mind that most courts have determined that your insurance agent is not responsible for explaining your coverage to you. You are responsible for reading it and asking questions. Our suggestion is that you do business with insurance professionals who are proactive in discussing coverages and are educated within your specific industry to properly answer your questions.

Professional liability is only one piece in the puzzle of properly protecting your assets. Do you have commercial automobiles owned by the firm, or do you use your personal vehicle for business use? Do you have employees driving your vehicles or theirs? Are you a sole proprietor or corporation?

Workers' compensation is another important coverage. Often required by contract, this important coverage can protect you and your employees.

A good contract with proper risk transfer language is most important. You should have a standard contract for services that has been reviewed by your attorney and your insurance professional. Having a great contract up front does not prevent a lawsuit, but it can go a long way towards mitigating your risk. When signing a contract prepared by a project owner or his representatives, get the same legal and insurance advice. Most owners' contracts can put you in breach of contract before you even walk on the project. Many of these do this by getting you to sign a contract containing insurance requirements that you cannot even purchase or provisions with which it is impossible to comply. Without proper insurance or with a poor contract, you are depending on your savings and your cash flow to pay for claims.

Your understanding of risk should include a solid contract, proper insurance, and a professional insurance advisor. This advisor should be a partner, not a provider, and be prepared to review contracts and point out insurance pitfalls, thereby giving you time to do what you do best. 



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Don Stroud, CIC, AAI, is a native of Wake Forest, NC, and has served his community both personally and professionally for many years. A graduate of Wake Forest University, he joined the Hartsfield & Nash Agency in 1984,

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Lorie Borrelli, CIC, AAI, vice president of sales and operations for the Hartsfield & Nash Agency, has been in the insurance industry since 1974. She specializes in commercial insurance for engineers, consultants, construction, and all other Main

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Laura Jazab, CIC, CISR, is originally from Massachusetts. She moved to North Carolina in 1998 to attend N.C. State University, where she competed on the gymnastics team and received a business degree. With more than 13 years of insurance

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