

Professional Liability Insurance for the Engineer

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Many engineers understand the need for maintaining professional liability insurance coverage. In any given year, approximately one out of every four engineering firms can expect a claim asserted against them. But what risks does professional liability insurance address? What happens once a claim arises? What happens after the insurance carrier assumes the defense of the engineer? Given the growing frequency of claims, especially in today's economic climate, carrying adequate amounts of and understanding professional liability insurance should be an important consideration for all engineers.

Professional liability insurance protects engineers against negligent acts, errors, or omissions in the furnishing of professional engineering services. Professional liability insurance is sometimes known as errors or omissions or "E & O" insurance. Professional liability policies typically exclude intentional acts of misconduct, such as fraud, conduct warranting punitive damages, and unfair or deceptive trade practices. Most engineers also obtain commercial general liability "CGL" policies which provide coverage for acts arising out the engineer's premises or from the nonprofessional negligent acts of the engineer's practice. CGL policies generally exclude coverage for professional design services. Therefore, engineers should obtain professional liability insurance to cover them on any claims arising out of their provision of professional engineering services.

For coverage to arise under the professional liability policy, the wrong asserted must arise out of the engineer's negligent performance of professional engineering. Claims may be brought against an engineer by the party the engineer contracted with, such as the owner. Parties with whom the engineer did not contract with may also be able to assert a claim against the engineer. For example, if the engineer contracts with the owner of a construction project, the general contractor may have standing to allege negligence against the engineer.

In negligence actions, engineers in North Carolina are held to the "customary and accepted standard of care." The standard of care for an engineer is defined as the "failure to exercise the proper degree of care required by a prudent engineer under similar circumstances." There are four requirements that must be met for negligence to be established: (1) legal duty of the engineer to act or not act; (2) breach of this duty; (3) the breach must be the proximate (legal) cause of the injury; and (4) actual damages.

Professional liability insurance policies are generally obtained by the engineer on an annual basis. What happens when the claim is brought against the engineer years after the act or omission occurred? Professional liability policies used to be offered in a form known as "occurrence policies," which means the policy in effect at the time of the act or omission provides coverage. Currently, most, if not all, professional liability policies are offered in a form known as "claims-made policies," which mean the policy in effect at the time the claim is brought against the engineer provides coverage.

The professional liability policy provides coverage for damages against the engineer in amounts generally ranging from \$500,000 and up into the millions of dollars. The policy generally limits the amount of coverage per claim and also for the policy period. Thus, there may be a limit of \$1 million per claim, and a limit of \$2 million per policy period. Under such a policy, if one claim results in a judgment against the engineer of \$1.5 million, then the policy would only cover \$1 million.

The engineer should determine the amount of coverage it needs based on the type of work performed, the size of the engineering firm, etc. Any judgment against the engineer in an amount greater than the coverage provided under the professional liability policy would be the responsibility of the engineer. The engineer's defense costs are also covered by the professional liability policy. These include the engineer's attorney's fees, expert witness costs, and any other litigation costs, are also covered by the professional liability policy. The professional liability policy is subject to what is known as "declining balance limits." That means if the policy provides \$1 million in coverage, the defense costs offset this amount until the \$1 million policy limits are exhausted. Thus, if the engineer's defense costs reach \$1 million, there will be no coverage for any damages found against the engineer, meaning the engineer would be responsible for the damages.

Once a claim is made against an engineer, the engineer must promptly report the claim to the professional liability carrier, or risk a denial of the claim. Once the claim is reported to the carrier, the carrier will perform an investigation to determine there is coverage. The carrier will then approve or deny the claim. Sometimes, the carrier may cover the defense of the claim under what is known as a "reservation of rights." This means that the carrier covers the engineer's defense costs, but reserves the right to contest coverage for liability of some or all of the claims asserted against the engineer. When an insurance carrier denies coverage, the engineer may need to hire another attorney to persuade the carrier that the coverage exists. This attorney is known as the engineer's "coverage counsel."

Once coverage is provided by the carrier, the carrier will generally pick the attorney that will represent the engineer. These attorneys are known as "insurance defense counsel." The engineer, however, will typically have a deductible to pay before the policy begins paying the defense costs. The higher the deductible, the more leeway the engineer may have to participate in the selection of the attorney. There are insurance defense counsel who focus most of their practice on representing design professionals and typically have established relationships with the professional liability carriers. But there are also attorneys who represent engineers as a more occasional part of their practice. Although the carrier is paying the attorney's fees, the attorney's client is the engineer. Practically speaking, however, the representation of the client and obtaining payment from the insurance carrier can cause conflicts between the insured, the engineer, and the insurance carrier.

Once the attorney is hired by the insurance carrier, the process unfolds just like any civil lawsuit does. The attorney may retain one or more professional experts, typically a professional engineer. The insurance carrier typically assigns a claims

adjuster to handle each claim and this person is the contact for the attorney. The attorney will eventually offer a forecast to the claims adjuster as to the carrier's potential exposure on the claim. The claims adjuster must approve any offer of settlement to the plaintiff, if any is to be made. The engineer must provide its consent to settle any claim under the policy. The engineer may not want to consent to settlement if there is a concern that the premiums will increase at the next renewal period. The engineer may also not believe it was negligent. The engineer needs to be careful in such situations, because if the engineer is later found to be liable in an amount greater than what the carrier wished to settle the dispute for, the carrier may have a cause of action against the engineer, if there was an unreasonable refusal to settle by the engineer.

Conversely, sometimes the engineer would prefer to settle, but the insurance carrier does not. If the engineer is later found to be liable in an amount greater than the policy limits, the engineer is personally on the hook for the difference. The engineer in this scenario may have a cause of action against the insurance carrier, if there was an unreasonable refusal to settle by the carrier. In this situation, the engineer may need to hire a separate attorney in order to persuade the carrier to settle.

The engineer may assume that paying its policy premiums should take care of him/her if a claim is ever asserted against the engineer. However, the engineer should be prepared to actively seek to protect his/her rights even after the carrier assumes the engineer's defense under the policy.

Bio

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