

Are You Really Covered by Your Insurance?

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Engineers and other entities in the construction industry must understand their policies, the extent of the coverage provided, the effects of various exclusions in the policies and the duties arising under the policies and applicable contracts (in terms of defending or indemnifying another contractor or subcontractor) in order to adequately protect themselves when a catastrophic event occurs during construction.

Engineers and other players in the construction industry typically secure commercial general liability (CGL) insurance policies, assuming that these policies cover all of their work-related risk. Some recognize that professional liability (PL) policies may also be required, as they often are. However, these CGL and PL policies may not always apply or “cover” all risk scenarios that an engineer may face in a construction project. In fact, there are a variety of instances where CGL and PL policies may not provide the protection contemplated by the typical engineer/buyer. Let’s discuss a few.

Consider a scenario where there is a catastrophic structural failure during construction, which damages a structure and seriously injures multiple construction workers. Not surprisingly, a lawsuit is filed for property damages and bodily injury against the owner, general contractor, structural engineer and multiple design and construction subcontractors. Assume that the structural engineer has CGL and PL policies (\$5 and \$5), totaling \$10 million in coverage. Further assume that the project is covered by \$20 million in insurance coverage under an owner controlled insurance policy (OCIP) or a contractor controlled insurance policy. And that the engineer has on site responsibilities and is covered under this policy.

An assumption that our hypothetical engineer has total available coverage of \$30 million (\$10 million from his combined CGL and PL policies and \$20 million from the owner’s policy) would seem reasonable. But therein lies the rub!

Many CGL and PL policies have exclusions. Frequently, CGL and/or PL policies do not apply – that is, they have an exclusion that specifically states that the policy does not provide coverage when the insured (here, the engineer) is working on a project covered by a separate owner controlled policy. This increasingly common exclusion does not mean that the owner’s policy provides a defense and pays indemnity until exhausted, then

triggering the separate CGL/PL policies. Instead, it means that regardless of what happens under the owner’s policy, the CGL/PL policies never kick in to action. It’s as if they don’t exist. Not a pleasant scenario, when or if the monies available under the OCIP are spent and the case is

not fully resolved. Imagine the reality of ASSUMING that one has \$30 million in insurance when, in fact, one has \$20 million... which is shared among the several sued entities covered by the owner’s policy.

“Consider a scenario where there is a catastrophic structural failure during construction...”

Another issue for the engineer may arise even if the CGL/PL policy does not contain an owner’s policy exclusion and does provide coverage for the accident. In that event, certain other relatively standard provisions in the policy may work against the unsuspecting engineer. For example, although the policy will generally provide the engineer with a defense to the lawsuit, it may be structured in a way that defense costs incurred will erode the available policy limits – sometimes referred to as a “wasting” policy. So, the CGL policy might provide \$5 million in coverage, but the lawsuit drags on for several years and the insurance company pays \$3 million to the engineer’s lawyers to defend the case. That would leave the engineer with only \$2 million in coverage to settle the case or pay a judgment, leaving the engineer completely exposed for any excess. Not good, especially if the engineer didn’t understand this risk from the start.

Our hypothetical engineer might also be surprised to learn that even though he has both PL and CGL coverage, it doesn’t mean that both will apply. Often a CGL policy will not provide coverage for claims against the engineer for its performance of “professional services” and the PL policy will only apply to those professional services. So, while the engineer began with two policies, he may only get coverage under one in a given case.

For a reality check, consider the example of *Kvaerner Metals vs. Commercial Union*, where the Supreme Court of Pennsylvania recently held that a CGL policy is not triggered (for

costs of defense or indemnity) when an insured is faced with a claim for damage to a structure due to faulty workmanship. Therefore, an assumption (in Pennsylvania and other states) that a CGL policy will provide defense and indemnity to an engineer faced with such a property damage claim can be a serious miscalculation if no other insurance is available to address it. That is, an engineer sued for negligently designing a structure leading to its collapse would be left holding the bag, with no insurance money to provide a defense or settle such a claim. Lack of insurance funds for settlement is bad enough, but the lack of insurance funds to pay the legal defense can be additionally problematic.

Injured workers are another big variable, since workers compensation insurance and laws will be involved. If some of the injured parties are employees of the sued businesses, worker’s compensation law will prevent them from pursuing any claims against their employer. Rather, they will pursue the engineer and other non-employer parties even if the “real” fault lies with their unreachable employer. This further complicates the engineer’s coverage position and increases the risk exposure exponentially.

The “message” is that different fact and insurance scenarios can drastically shape the duties and dollars owed to an engineer by its insurance carrier. Don’t assume. Ask questions of your insurance professional in order to ensure that you are as fully covered as possible. All applicable contracts between the various contractors, subcontractors, and other entities involved in the project should be reviewed and their defense and indemnity provisions evaluated to determine the entity or entities responsible for the defense and indemnification of claims.

As President Reagan often said... “Trust but verify”. ■

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