



Design Professionals Project Professional Liability Coverage



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Project Insurance Manual

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Introduction

Project insurance for design professionals has come of age. Over the past several years, such policies have come to be used more and more by the design professional community. In the past, project insurance was considered to be a cost prohibitive insurance product. It was to be used only for extremely large projects. Rates, however, have come down. Therefore, the product is much more attractive than it has been in the past. For many design professionals, the project policy has become an excellent tool for segregating higher exposure projects from their annual (practice) policies, thereby safeguarding the limits of that policy.

This policy is unique in its structure. As a result, there is a heightened need for all of the parties - owner, the prime design professional, the prime design professional's consultants - to fully understand this unique method of insurance management. The professional services agreements must be modified to recognize the particularities of this unique type of policy. The identity of covered parties, the allocation of premiums and deductibles and the resolution of disputes, are only a few of the issues that must be considered.

The main issues to be addressed here will discuss:

- How does project professional liability insurance differ from your practice professional liability insurance policy ?
- What are the advantages and disadvantages of project insurance ? Are they fully understood by all parties ?
- How are the premiums, including future policy adjustments, and deductibles to be allocated?
- What are the rights and obligations of each member of the design team ?
- How are disputes to be resolved?
- Is this the right project for such a policy?

There is no single resource that we have found that will help all the participants understand the many issues that are presented by the use of the project insurance policy. With the guidance and help of Gunther Carrle of Powell, Trachtman, Logan, Carrle & Bowman, PC we have prepared this handbook for the project team to help them through the process of securing and placing project professional liability insurance. This is intended to be as a reference guide only and it is strongly recommended that advice of legal counsel be secured in drafting any agreements.

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SECTION I -Project Insurance Overview

The traditional practice professional liability insurance policy is written on a claims-made basis. Thus, the policy provides coverage for those claims that are first made during the term of the policy (or any extended reporting period) for services rendered after the retroactive date set forth in the policy. Moreover, such policies are typically subject to an aggregate limit which controls the total coverage available for multiple claims made during the policy year. While such a policy is adequate under most circumstances, many owners (and professionals) are surprised to discover that the insurance protection that is in place at the time the services are rendered may not be available at the time a claim arises. Or, if it is, the coverage provided may have been eroded by other claims. Thus, years after a project is completed the protection may be gone while the exposure remains. This is where project professional liability insurance coverage comes into play.

The main points of difference of project insurance are:

- There is a “dedicated” limit of liability.
- The entire design team is covered under this one policy.
- The premium is defined in advance.
- There is no duplicate premium-the project’s fees are deducted from any premium basis for annual policies still maintained by each firm.
- Deductible and premium obligations may be treated radically different from the traditional approach.

Each of the above issues will be discussed in further detail below.

1. Dedicated Limits.

In essence, the policy provides a limit of liability coverage which is devoted to the specific project for which the policy is written. And, the coverage remains in place for an extended period of time which is roughly related to the period of time during which most claims are made. The policy provides for coverage during two periods of time - the design/construction period and a "discovery" period beginning after substantial completion. Coverage is usually secured sometime during the beginning stages of design. (However, some carriers do not require placement of this until sometime prior to start of construction.) The discovery period is a pre-determined set number of years, to commence at the substantial completion of construction. Most carriers have a maximum discovery period of five years and a total policy period (design/construction and discovery) of ten years.

2. Coverage for the Whole Team.

Of principle concern to prime professionals and to their insurance carriers is the level of insurance coverage for subconsultants. In this regard the project policy adds another advantage for the members of the design team - the entire design team is covered. No subconsultant is uninsured (unless specifically amended to reflect this, and this is strongly discouraged by the carriers, to the extent that if too many disciplines are not to be included they may not offer project coverage) and all are covered under the same policy with the same limits and deductible. Because of the similarity of financial interests, claims between the members of the design team in connection with third-party claims are reduced or eliminated. Accordingly, one defense attorney is retained to defend claims against the policy's "named insureds". The opportunity and basis for distention amount members of the design team is dramatically reduced.

3. Predetermined Premium

The premium for a project policy is defined in advance. Because the length of the design and construction phases may vary from original projections, the project policy is subject to an audit which not only may affect the premium but could change when the discovery period commences. However, the policy generally provides a reasonably level of predictability for the premium over an extended period of time.

In many instances the premium is paid by the owner. Generally, however, the policy is paid by all of the members of the design team. Payment for this multi-year policy is usually done at policy inception. For those projects that have a construction period lasting several years, the policy may allow for installments during the construction. However, no project insurance policies will require, or allow, any premium payment to be made after substantial completion of construction; i.e., during the discovery period.

4. Credits on Practice Policy

Typically, the project for which the policy is written is specifically excluded from the firm's practice policy. Consistent with that practice, the fees associated with the project are also excluded from the firm's project fees on which the premium is calculated. Thus, to a certain extent the premium cost of the project policy is partially off-set by a reduction in projected premium for the practice professional liability insurance policy.

5. Deductible Obligations

Since there is only one policy, there is only one deductible. And while this can result in a significant savings for all participants, many look at this area as the most difficult issue to be addressed in the process of arranging for

project coverage. Everyone must clearly know ahead of time how this issue will be dealt with. The variety of methods is unlimited-dependent only on the creativity of the members. This is also where a project policy can fail in its attempt to consolidate costs.

Clearly, a single policy with multiple insureds requires that the management and administration of the policy be carefully considered by the participants. The principle responsibility rests with the prime design professional - referred to as the First Named Insured. This means that the prime design professional is the party that has the obligation to pay the premiums, complete any audit reports, and, at least initially, pay the deductible that may come due in the event of a claim.

SECTION II - Contract Issues

All of the issues discussed in the previous sections of this manual mandate careful drafting of the relevant provisions of the contract. The goal is to provide a clear understanding of each party's rights and obligation up front, so that (hopefully) no subsequent problems arise that are not covered under the project professional liability policy or addressed in the contract.

Unfortunately, none of the standard contract forms promulgated by the professional societies address professional liability insurance in any great detail.

Essentially, they dictate that if the owner wishes the professional to obtain coverage other than for the limits and of the type maintained by the professional, the professional will do so at the owner's expense. Some professionals have taken the initiative and provide a more detail insurance clause which outlines the limits of coverage and the professional's continuing obligations in connection with professional liability insurance.

The project policy, however, demands more. Each of the matters raised above will be discussed below with sample contract clauses to be consider for inclusion in the owner's agreement with the prime professional and in the agreements with the subconsultants. Again please understand that legal counsel should be retained in any contract matter, not only for general business guidance but also for conformance with local/state laws, etc.

A. Owner/Prime Design Professional Contracts

This contract must be amended to reflect the existence of the project professional liability insurance policy, its policy limits (which are per claim and per aggregate - not annual aggregate but aggregate of the policy itself), premium obligations, and, if the owner is participating, the existence of any deductible obligations. This can be done either by amending the actual contract or by a separate letter agreement.

In either case, the document should set forth the following:

- The policy limit is on a per-claim basis and has an aggregate limit for all claims made during the length of the job plus the predetermined extended reporting period.
- The fact that costs of defense will reduce the policy limit.

- The fact that there is a deductible which applies separately to each claim.
- That the limit of coverage applies inclusively to all named insureds.
- An extended reporting period is to be purchased for the period after construction completion (from a minimum of usually 2 years to a maximum of 5 years). Selection of term length needs to be done when initially securing the policy. This may not be changed unless insurance company agrees and an additional premium is paid. It is usually not possible to change the extended reporting near the end of the policy.
- The policy premium is subject to adjustment, and even if the owner has agreed to pay the policy premium, the prime design professional (First Named Insured) is responsible for premium payments. Failure to pay will result in cancellation applicable to all Insureds. If the design team members are paying the policy premium, allocation is to be negotiated among the design team members as agreed to by them.

A sample contract clause addressing these points is as follows:

1. *[The Architect shall procure and make commercially reasonable efforts to maintain] or [The Owner shall arrange at Owner's sole expense for the purchase and maintenance of] a project professional liability insurance policy ("Project Insurance") for the protection from claims arising out of the performance of professional services caused by a negligent error, omission or act for which any insured, as hereinafter defined, is legally liable; such Project Insurance will provide for coverage in such amounts, with such deductible provisions and for such period of time as set forth below, and certificates indicating that such insurance is in effect will be delivered to Owner. The Project Insurance shall, subject to the prior approval of the insurance carrier, name the Architect and each of its consultants as identified on Schedule "A" attached to this agreement as Insureds under the Project Insurance. Consultants retained by Architect after the preparation of Schedule "A" shall, also subject to the prior approval of the insurance carrier, be named as Insureds under the Project Policy.*

The Project Insurance shall have limits of \$_____ per claim and \$_____ in the aggregate for all claims made during the duration of the Project Insurance relating to the Project. It is understood by the Owner and the Architect that the limits set forth above include all costs of defense relating to any claim made against the Project Insurance.

The Project Insurance shall remain in force for the period of [design and] construction (estimated to be ___ years, ___ months) but not beyond ___ and shall include a discovery period of ___ years, ___ months to commence upon substantial completion of the project.

The Project Policy shall have a deductible of \$_____ for each claim made against the Project Policy. The deductible shall be the obligation of the (Owner/Insured.)

OR

The Project Policy shall have a deductible of \$_____ for each claim made against the Project Policy. The deductible shall be paid by the Insured(s) responsible for the design of the system or element of the project on which the Claim is based or for the service upon which the Claim is based. It is agreed, however, that under no circumstances shall any insured be liable for the payment of any deductible in excess of the deductible under its then current practice professional liability insurance. Any remaining deductible shall be paid by the Owner.

The Owner's failure to make in a timely fashion any premium payment or deductible payment required by this Agreement shall constitute a material breach of this Agreement and shall entitle the Architect, upon seven days written notice, to suspend, or at Architect's option, terminate this Agreement. Such suspension or termination shall not relieve the Owner from its obligation to make the payment required by this Agreement. Moreover, neither the Architect nor any other Insured shall be liable to Owner for any damages arising in connection with such suspension. In the event of suspension, the Architect shall resume performance within seven days after the Owner has cured its default. The Architect shall be entitled to be compensated for reasonable costs associated with the suspension.

It is critical to recall that notwithstanding the requirements of the contract for professional services, the insurance contract requires the First Named Insured to be responsible for the premium payment and for the payment of any deductible obligation.

B. Design Team Contracts

Each member of the design team must be aware of the unique aspects of this type of insurance coverage. There are both advantages and disadvantages. The prime advantage is that for a very cost effective premium, all parties are included under one policy. This may, however, also cause some deviations from normal expectations. Deviations which require the parties to discuss their mutual understanding of the relationship prior to entering into the agreement and the insurance contract.

Traditional practice dictates that if a claim or problem arises out of a particular discipline, the costs associated therewith would be the prime responsibility of that consultant. The intent of project insurance, however, is that in all incidences all of the members of the design team will share in the responsibility for satisfying a claim - not only for the deductible but, because of the single limit for the policy, for the settlement of the damage portion of the claim.

Moreover, because insurance premiums are frequently related to fees, many design professionals may believe that, in those cases where the premium is to be paid by the design team, the premium should be allocated in accordance with fees. However, the nature of the discipline frequently plays a substantial role in dictating premiums. Thus, not all of the parties will agree as to what might be the "logical" basis for allocating premiums. Resolution of that issue in advance of the placement of coverage is clearly preferable to a dispute on the subject during the project.

Both of these above points can be addressed in a variety of ways. This can either be accomplished by creating a multi-party agreement in which all of the design team members participate or as a part of the professional service agreement entered into with each team member. Regardless of the mechanism, the critical factor is that the parties meet to discuss and agree on how these issues are to be resolved.

Ideally, the agreement should address at least the following issues:

- The policy limit is on a per claim basis and has an aggregate limit for all claims made during the length of the job plus the predetermined extended reporting period.
- The fact that costs of defense will reduce the policy limit.
- The fact that there is a deductible which applies separately to each claim.
- That the limit of coverage applies inclusively to all named insureds.

- An extended reporting period is to be purchased for the period after construction completion (from a minimum of usually 2 years to a maximum of 5 years). Selection of term length needs to be done when initially securing the policy. This may not be changed unless insurance company agrees and an additional premium is paid. It is usually not possible to change the extended reporting near the end of the policy.
- The policy premium is subject to adjustment, and even if the owner has agreed to pay the policy premium, the prime design professional (First Named Insured) is responsible for premium payments. Failure to pay will result in cancellation applicable to all Insureds.
- Allocation of premiums if the team members are paying for the policy. This should address the deposit premium and any audits (additional or return). Allocation is to be negotiated among the design team members, if applicable. Sample allocations are enclosed for reference.
- The First Named Insured is responsible for premium payments. Failure to pay will result in cancellation applicable to all Insureds.
- Insureds will not have to sue each other to prove cause of loss. The policy will defend everyone jointly.
- The First Named Insured is responsible for payment of deductibles. Division of any claim deductibles is the responsibility of the design team. (Most of the time this is divided in a manner similar to the premium allocation.)

Although an allocation of premiums can be based on the exposure associated with a particular discipline, such an allocation is subject to dispute. Typically the insurance company will not determine how much of the policy premium or deductible is due to which exposure. Therefore, the parties must agree on their own as to how to allocate these costs.

Experience has shown that if the parties wish to allocate premiums based on fees, it is appropriate to modify the relative percentages by a "risk factor" related to the discipline. This "weighted fee allocation" is an extremely simplified attempt to mirror the process of premium determination undertaken by many insurance carriers. A sample worksheet that has been used to modify the ratio based on fee allocations to reflect relative exposures of risk of each of the disciplines

involved is included in the exhibits. This worksheet can be used for premium and for deductible allocations. Please bear in mind that this worksheet is a sample only. It is not a substitute for active discussion between the parties as to what they believe is proper. Ultimately, it is the responsibility of the design team to come up with the method of allocation of any premiums and the deductibles that all can accept.

Based on the foregoing, the following is a suggested project insurance clause with several alternatives. It must be a part of each prime design professional/consultant agreement:

1. *The Architect and the Consultant have agreed that the Architect shall arrange for the purchase of a project form of errors and omissions insurance policy ("Project Insurance Policy") to provide professional liability coverage to the Architect and each of his consultants for this project (hereinafter the Architect and each consultant for which coverage is provided under the Project Insurance Policy shall be referred to as "Named Insureds.") The Consultant acknowledges that it reviewed and approved the terms and conditions of, the limits of coverage of, the deductible of and the carrier for, the Project Insurance. The Project Insurance shall have limits of \$ _____ per claim and \$ _____ in the aggregate for all claims made during the duration of the Project Insurance relating to the Project. It is understood by the Architect and the Consultants that the limits set forth above include all costs of defense relating to any claim made against the Project Insurance. The Project Insurance shall remain in force for the period of [design and] construction (estimated to be _____ years, _____ months) but not beyond _____ and shall include a discovery period of _____ years, months to commence upon substantial completion of the project. Any extension of the Project Policy shall require the consent of a majority of the Named Insureds including the Architect.*

1.1 Responsibility for Premium Payments

Alternate 1 *The Named Insureds agree that the premium for the Project Insurance shall be allocated as follows:*

[specify sums to be paid if known]

Alternate 2 *The Named Insureds agree that the premium for the Project Insurance shall be allocated based on a weighted fee ratio as is shown below. (See attached exhibit.)*

Alternate 3 *The Named Insureds agree that the premium for the Project Insurance shall be allocated in the same ratio as the Basic Compensation of the Named Insureds for the Project.*

Alternate 4 *The Named Insureds agree that the premium for the Project Insurance shall be allocated equally based on the number of Named Insureds under Project Policy.*

Any additional premiums charged by the insurance carrier including those for any increases in coverage limits, changes in the duration of the policy or an extension of the reporting period for claim shall be paid by the Named Insureds in the same ratio as the original premium for the Project Insurance.

Notwithstanding any requirement that one of the Named Insureds (who shall be referred to as the "First Named Insured") is to be responsible to the insurance carrier for the payment of the entire premium, each Named Insured shall promptly remit to the First Named Insured its share of the premium as determined above. In any event, each such Named Insured shall remit its share of the premium payment so that it is received by the First Named Insured no later than seven (7) calendar days prior to the date the premium payment is due to the insurance carrier or its agent.

1.2 Responsibility For Deductible Payments

In the event that a Claim is made against one or more Named Insureds and such claim is covered by the Project Insurance, the Named Insureds agree as follows. A representative of each Named Insured shall meet with counsel retained to defend the Named Insureds for the purpose of obtaining an estimate of the anticipated attorneys' fees and other costs of defense (other than internal costs of assisting in the defense of the Claim, which costs shall be borne solely by the Named Insured incurring them) ("Defense Costs") to be incurred during the first six months of the defense of the Claim. Each Named Insured shall within ten (10) days thereafter remit to the First Named Insured its share of the deductible to be expended during the first six months of the defense of the claim based on the estimate obtained from counsel for the Named Insureds. All such funds shall be deposited in a joint account of the Named Insureds for the purpose of satisfying the deductible obligations under the Project Insurance Policy. Every four months thereafter or whenever the amount in the joint account falls below 10% of the amount originally deposited, the Named Insureds agree to replenish the joint account to a level sufficient to satisfy deductible obligations for the following six months.

1.2.1 Allocation of Deductible Amounts

The Named Insureds agree that for each Claim made against the Project Insurance Policy, the deductible shall be paid

Alternate 1 - *equally by all of the Named Insureds on a per capita basis.*

Alternate 2 - *by all of the Named Insureds in the same ratio as Basic Compensation.*

Alternate 2a - *by all of the Named Insureds in the same ratio as the allocation of premiums for the Project Insurance Policy.*

Alternate 3 - *by the Named Insured(s) responsible for the design of the system or element of the project on which the Claim is based or on the service upon which the Claim is based. In the event of a dispute, all of the Named Insureds shall contribute on a per capita basis until the proper allocation can be determined in accordance with the Dispute Resolution provisions of this Agreement.*

Alternate 4 - *by the Named Insured(s) whose negligence or breach of contract caused the damage for which recovery is sought in the Claim. Such negligence or breach of contract shall be determined in accordance with the Dispute Resolution provisions of this Agreement. Until such time as such determinations can be made, the Named Insureds agree that the deductible shall be paid [equally by all of the Named Insureds on a per capita basis] or [by all of the Named Insureds in the same ratio as Basic Compensation] or [by the named Insured(s) responsible for the design of the system or element of the project on which the Claim is based or on the service upon which the Claim is based].*

1.3 Failure To Make Payments When Due

In the event that a Named Insured fails to make a required premium payment or fails to deposit its share of the deductible, that Named Insured's share shall be contributed by the other Named Insureds in proportion to their existing obligation to contribute to the premium payment or the deductible obligation, respectively. The First Named Insured may thereafter withhold from any sums which are due or which become due to the Named Insured that was delinquent an amount equal to that Named Insured's share of the premium payment or deductible payment plus interest at the rate of one percent (1%) per month or part thereof calculated from the time that the premium payment was

made or the deductible funds deposited in the joint account. The First Named Insured shall distribute the amounts withheld to each Named Insured on in proportion to their contributions until each Named Insured is reimbursed for having advanced premium payments or deductible deposits.

1.4 Joint Defense and Cooperation

The Named Insureds agree that in the event a Claim is made against one or more Named Insureds for which coverage is provided under the Project Insurance Policy, all of the Named Insureds agree to cooperate with and assist each other in good faith in the mutual defense of the Claim whether or not they are named individually as Named Insured to the Claim. The Named Insureds agree not to join as a party to the Claim any other Named Insured that was not originally joined to the Claim and further agree not to file cross claims against any Named Insured that is a party to the Claim. In the event claims exist between Named Insureds for which there is no coverage under the Project Insurance Policy, the parties agree to execute documents necessary to preserve such claims for resolution at a later date after the resolution of the Claim. The Named Insureds consent to the joint representation of all of the Named Insureds by a single attorney and waive any conflict that may exist in connection with such joint representation. Each Named Insured agrees to provide reasonable assistance to the defense effort at no additional compensation including but not limited to consultation, access to its records and access to its employees.

(This clause is only necessary if you want to allocate liability for deductible based on fault or responsibility for the services which are the subject of the Claim)

1.5 Dispute Resolution

The Named Insureds agree that upon the final resolution of the Claim either by way of judgment (at the expiration of all appeals) or settlement ("Final Resolution") all deductible payments made shall be allocated between the Named Insureds in accordance with the following procedure, with each Named Insured receiving credits for any payments already made.

Within thirty (30) days of the Final Resolution of the Claim, the Named Insureds shall meet to discuss the allocation of Deductible Payments. The determination of this allocation shall hereafter be deemed to be the Dispute. In the event an amicable resolution of the Dispute is not achieved within thirty (30) days after such initial meeting, the Named Insureds agree to submit the Dispute to good faith, non-binding mediation.

The mediator shall be selected by agreement of the Named Insureds. In the absence of an agreement, the [insurer or other agreed upon entity] shall designate a mediator to resolve the Dispute. The Named Insureds shall participate in the mediation with or without counsel, at their option. In the event, however, that any Named Insured wishes to be represented by counsel during the Dispute, the costs and fees incurred as a result of such representation shall not become part of the Dispute and shall be borne solely by the Named Insured hiring the attorney. The attorney retained to represent the Named Insureds in the defense of the Claim shall not participate as counsel on behalf of any Named Insured. Such attorney, shall, however, make available to the Named Insureds, any and all documents and information in its possession relating to the defense of the Claim. The Named Insureds consent to such disclosure.

In the event that a full and complete resolution of the Dispute is not achieved within forty-five (45) days after submission to a mediator, the Named Insureds agree to submit the Dispute to binding arbitration in accordance with the Construction Industry Rules of the American Arbitration Association, then in effect.

In making an award in connection with the Dispute, the arbitrator shall be guided by the Named Insureds' desire to have all Defense Costs and Damage Payments allocated between them in ratio to the amount of each Named Insureds' causal fault either based on the negligence or breach of contract of the Named Insured. In making this determination, the arbitrator shall not rely upon nor consider either any allocation of liability as determined by the trier of fact in the Claim nor any allocation of settlement payments as set forth in any settlement agreement in the Claim.

In the event that it was determined or agreed in the Claim that no Named Insured was liable for any of the damages sustained, the arbitrator shall nonetheless attempt to make an allocation of deductible payments in accordance with the relative degree to which a Named Insureds' conduct was a cause of the Claim arising. If the arbitrator is unable to allocate deductible payments based on the relative culpability of the Named Insureds, then all such deductible payments shall be allocated between the Named Insureds in the same manner as utilized during the litigation.

C. Responsibilities of Prime Design Professional ("First Named Insured")

All team members need to contractually acknowledge the method of insurance for this project and communicate to others; however, the prime design professional has other duties as well. These duties are dictated by the insurance company and involve premiums and deductibles.

- **Premiums.** Whether the owner is paying the bill or not, the policy specifically states that the prime design professional is responsible for paying the policy premium. In a sense the insurance company doesn't care where the architect gets the money, as long as they're paid! It however can also work both ways. If there are any return premiums, such as for final audits (or for DPIC education credits), how these funds are dispersed is the responsibility of the First Named Insured.
- **Deductibles.** Again it is the responsibility of the prime design firm. This will of course only be necessary to be paid after a claim occurs and there are expenses are incurred, but this again should be prearranged to eliminate disputes.
- **Disputes.** While coverage is again written on a claims-made basis and the project "discovery" period serves as the tail for the discovery and filing of claims, some method of eliminating open-ended terms for claims should be considered. An example is a provision for disputes to be filed within a specified number of years after substantial completion - at least for economic damages. This number should of course never be for a time period greater than the length of the discovery period. It should be very clear, though that this time limitation is not intended to restrict any third-party matters, which is against public policy and illegal in many states.

These responsibilities have significant financial consequences. The more that they are settled prior to the commencement of the job, the better. All benefit by having a clear understanding of the risks of working together.

SECTION III Advantages/Disadvantages of Project Insurance

Not every job should be insured by project insurance. Moreover, there are clearly disadvantages to the use of project insurance that must be considered by the parties. These involve:

- Failure to cooperate among team members.
- Limitation in coverage under project insurance.
- Breach of contract /failure to complete work.
- Inadequate insurance limits.

A. Cooperation

The primary purpose for insuring all design professionals under one policy is joint defense of claims. The ability to utilize a single attorney and the cooperative atmosphere that is encouraged by the absence of an adversarial setting inures to the benefit of all by reducing costs and, hopefully, speeding up the resolution process. This can only work, however, if the parties strive to avoid disputes between themselves. To the extent that such disputes would relate to the project insurance policy or the claims covered by the policy, prevention is the key to success. Disagreement during the project or at the start of a claim situation as to premium payment or deductible payment or cooperation in the defense can substantially undermine the greatest benefits of the project insurance policy.

Managed properly by adequate discussion and proper drafting of the agreements, the likelihood that such disputes among team members will arise is substantially reduced. However, if it appears that the parties will find it difficult to cooperate or reach on consensus on these fundamental issues, project coverage may not be viable.

B. Coverage Limitations

While disputes relating to the parties' obligations under the project insurance policy can be addressed in the agreements between the parties, other disputes between the parties are equally destructive and are not as easily addressed. Indeed, a key disadvantage of project insurance is the fact that disputes among team members are not covered. Thus, the parties' economic interests in those matter are at odds and the potential for cooperation is reduced.

The coverage provided by the project insurance policy is generally as broad as that provided by the practice policy. Therefore, the breadth of coverage for third party claims is essentially identical under both the project and practice policies. However, the bar against claims *inter se* members of the design team is a notable difference in coverage between the two types of policies. Thus, while a

claim by the prime consultant that the subconsultant's negligent performance caused it to incur additional expense to correct the errors would be covered by the practice policy, it would probably not by the project insurance policy.

Such a scenario can pose a serious financial problem for the prime professional. When one of the subconsultants fails to correct defective performance, the prime consultant must either on its own or through another consultant correct the work. This cost is not recoverable from the owner. Rather, it would only be recoverable in an action by the prime design professional against the subconsultant. That claim is not covered by the project policy. And, because the project is specifically excluded from the practice policy there is no coverage for that claim under the practice policy.

C. Breach of Contract

Admittedly, a breach of contract claim for the failure to complete (if not due to negligence) would not be covered under a practice policy even in the absence of project insurance. However, a claim arising as the result of defective (negligent) performance would be a covered exposure. The bottom line is this: if a subconsultant negligently performs its work, the cost of correcting that work is not an insured claim if brought by the prime design professional under the project policy.

It is ironic that the prime design professional would actually be better off allowing the defective work go forward uncorrected, thereby forcing a claim by the owner in order for coverage under the project policy. While this result emphasizes the importance of carefully evaluating the applicability of project coverage to the particular undertaking and the need to carefully evaluate subconsultants, it does not undermine the substantial benefits of project insurance in many larger high exposure projects.

D. Inadequate Limits of Insurance

What also needs to be recognized is how policy limits work under project insurance. Standard annual policies renew each year; as such the limits of coverage a firm has is renewed each year. Project insurance limits are per claim and per project term. Unless clearly stated otherwise (and only one or two carriers still even offer annual renewable aggregate limit policies), the aggregate limit shown on the policy declarations page is the total limit the insurance company has at risk for the life of that policy. For this fact alone higher limits of coverage need to be secured for project policies, in addition to the reality that one policy is insuring many different disciplines.

SECTION IV - DPIC Project Insurance Program

Unique to the DPIC Companies "TeamCover" insurance program are several points that further reinforce the concept that all parties including the owner serve to benefit by insuring a project through a project insurance policy. These include mediation credits, limitation of liability credits, educational program credits and most recently partnering.

A. Policy Premium Credits

Each of the below programs are a standard part of the DPIC Companies practice (annual) program. They are also able to reduce the project policy premium:

1. Educational Credits

These are credits for those DPIC practice insurance policyholders who successfully complete the loss prevention educational programs.

2. Limitation of Liability Credit

The project insurance policy premium will be reduced if the agreement between the owner and the design professional contains a limitation of liability clause. (If the owner is paying the policy premium then the premium reduction may be an additional incentive for them to consider the use of this clause.)

3. Mediation Credit

Within the deductible obligation of the DPIC project insurance policy is an offer by DPIC to pay back to the named insureds half the deductible that may be incurred (up to \$12,500) for any claim that is resolved through formal mediation. If the owner were to participate in the savings this might serve as an incentive for mediating claims.

In both the education credits and limitation of liability credit, the credit will be proportionate to the percentage of those DPIC policyholder's fees to the total fees for all team members. Also, one word of caution not publicly stated is that the test/education credit will only be given if the firm has passed the applicable program-they cannot just be enrolled. (In other words, if a firm is enrolled and the required completion date is January first, if a project policy is bound prior to the firm completing that test program, no credit will be given.)

B. Policy Placement Conditions

There are two unique conditions to the DPIC TeamCover insurance program: the preconstruction meeting and a letter of agreement:

1. Preconstruction Meeting

This is a meeting conducted by a local DPIC claims specialist and the broker, for the purposes of acquainting all parties to the DPIC policy, claims filing procedures, etc. Others are welcome as well, including the owner and even construction team members.

2. Letter of Agreement

This an acknowledgment by all of the limits, terms, etc. It is similar to the previous sections but in a condensed format. It also does not address any contractual provisions to owner/prime design professional agreement. See the sample letter in the exhibits section.

C. “Partnered TeamCover”

Just recently DPIC announced that they have offered to assume the costs for the facilitator of partnering a project if it is insured through their project insurance program. This is a clear example of where all will benefit including the owner is this were to be done. This should be considered for all future projects. A sample brochure is enclosed.

SECTION V - Miscellaneous Insurance Issues

A. General Liability

(This section will point out the possible need of changing the general liability insurance, such as for a joint venture, temporary office space, etc.)

B. Workers Compensation

(There may be a need to change workers compensation coverage, for example if out-of-state employees are hired.)

C. Joint Ventures

(Comment on legal liability exposure of joint ventures and how practice policies charge more for this exposure. Accordingly project insurance may be a better vehicle for joint ventures.)

D. Design/Build Projects

(Discuss unique exposures of design build and how again a project policy can isolate this and take the additional exposure out of practice charge.)