



Architects Insuring Architects ...

**The Ontario Architects Professional
Liability Insurance Program**

PRODEMUNITY
INSURANCE COMPANY



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The Ontario Architects Professional Liability Insurance Program

This booklet describes important aspects of the mandatory professional liability insurance program for Ontario Architects provided by Pro-Demnity Insurance Company.

Background

The Ontario Association of Architects (OAA) regulates architects in Ontario. Minimum mandatory insurance requirements applicable to Ontario architects offering services to the public are included in the *Architects Act* and applicable Regulation.

When the Province of Ontario introduced the compulsory insurance requirement for architects in the mid-1980's, insurers active in the market could not provide assurance that all Ontario architects licenced to practice by the OAA would be able to obtain the necessary insurance, or that premiums and available coverage would be consistent for all architects licenced by the OAA. This was unacceptable as it had the insurance industry become the de facto regulator of the profession, usurping the OAA's legislated role.

To overcome the problem, in 1987 the OAA established its own Indemnity Plan to assure that the required professional liability insurance coverage would be available on the same basis to all architects that held a Certificate of Practice. In 2003, the Indemnity Plan was replaced by Pro-Demnity Insurance Company, a wholly owned subsidiary of the Ontario Association of Architects regulated by the Financial Services Commission of Ontario (FSCO).

Architects are employed by Pro-Demnity to manage claims, direct legal counsel and provide risk management assistance and loss prevention advice to Ontario architects.

Unlike market insurers, Pro-Demnity only retains premium revenue sufficient to meet its obligations; any excess revenue in each year that would be profit elsewhere is returned to the practices in the form of a Plan Credit on the following year's premium.

The combination of ownership by the profession, cooperation between the OAA and Pro-Demnity and the engagement of licenced architects in the insurance program has been characterized as "Architects Insuring Architects", a blending of architecture and insurance that serves the interests of the profession, individual architects and the public.



Mandatory Professional Liability Insurance

Ontario Architects Must be Insured with Pro-Demnity

Pro-Demnity Insurance Company is a licenced insurance company providing mandatory professional liability insurance to Ontario architects in accordance with the Ontario *Architects Act* and Regulation thereto. Although owned by the Ontario Association of Architects (OAA), it is an independent entity. As a financial services organization it is regulated by the Financial Services Commission of Ontario (FSCO).

The OAA regulates the profession of architecture in Ontario. One key requirement is that an architect offering professional services to the public must maintain mandatory professional liability insurance with an insurer designated by the OAA.

Pro-Demnity Insurance Company provides the mandatory insurance coverage and limits to holders of a Certificate of Practice issued by the OAA. The impact is that every Ontario architectural practice that the OAA approves as eligible to practice is guaranteed the availability of the mandatory professional liability insurance required as a condition of holding a Certificate of Practice.

Pro-Demnity provides insurance directly to the Ontario architects it insures, rather than through insurance brokers. It is not a broker and cannot offer insurance advice to the public. Pro-Demnity does provide advice to architects and others regarding the mandatory program and the insurance provided to Ontario architects.

Three levels of mandatory limits apply, depending on gross fees received and reported by the practice for the prior year. Commencing January 1, 2016:

Total Gross Fees	Minimum Claim Limit	Project Limit	Aggregate Limit
\$0 - \$499,999	\$250,000	\$500,000	\$1,000,000
\$500,000 - \$999,999	\$500,000	\$1,000,000	\$2,000,000
\$1,000,000 and above	\$1,000,000	\$2,000,000	\$4,000,000

Claim Limit is the maximum amount the Insurer will pay as Damages for each Claim during the Period of Insurance.

Project Limit is the maximum amount the Insurer will pay as Damages for all Claims during the Period of Insurance arising from the performance of professional services with respect to one project, subject always to the Claim Limit of Liability for one Claim.

Aggregate Limit is the maximum amount the Insurer will pay as Damages for all Claims during the Period of Insurance, subject always to the Claim Limit of Liability for one Claim and the Project Limit of Liability for all Claims with respect to one project.

Refer to the Pro-Demnity Policy No.1 and Policy No.4, PART II YOUR INSURANCE, 1. DAMAGES, LIMITS OF LIABILITY for complete policy wording describing Limits of Liability.

In addition to the mandatory coverage and limits, Pro-Demnity provides Ontario architects access to:

- Increased Annual Practice limits with multiple aggregates for both projects and all claims;
- Increased Project Specific and Client Specific limits on an Annual Practice Policy;
- Single Project Insurance;
- Retirement from Practice Program;
- Risk Management services and advice to practices respecting insurance and liability concerns to assist practices reduce exposure to professional liability claims.



Policy No. 1 provides the mandatory coverage and minimum limits for the lowest fee band in the chart above...where the architect's annual gross fees are less than \$500,000. In addition to coverage for Canadian projects, Policy No. 1 provides coverage for damages arising from errors, omissions or negligent acts which occur on projects situated anywhere in the world, provided that for a project outside Canada the claims are made and legal proceedings instituted in Ontario.

Policy No. 4 applies to the higher fee bands in the chart for limits above the minimum of \$250,000 per claim, \$500,000 maximum for one project, \$1,000,000 aggregate. Policy No. 4 provides both higher limits and broader coverage than the minimum, and includes defence of actions that arise outside Canada, subject to specific provisions that apply to claims pursued in the USA.

The USA provisions reduce the aggregate limit to the claim limit and include defence costs in the limits.

These provisions mirror typical provisions available from other insurers respecting USA claims.

Professional Liability Insurance: General Concepts

Obligations of the Insurance Company

A professional insurer has three primary obligations:

- pay Damages when warranted, up to the limits of the policy;
- provide a Defence to the insured when a claim arises; and
- pay Supplementary Payments including Claims Expenses.

A professional liability insurance policy "indemnifies" or pays on behalf of the insured professional, damages that the professional becomes liable to pay as a result of "an error, omission or negligent act in the provision of professional services for others".

Policy provisions will also include the insurer's obligations for the provision of a defence to the insured related to a claim covered by the policy and the payment of claims expenses. The costs associated with provision of a defence and related claims expenses are a major aspect of the insurer's role. However, how defence is provided and funded will vary between insurers, and can have

a major impact on the funds available for payment as damages. For example, where defence costs are included in claim limits, the expenditures for lawyers and experts will reduce the funds eventually available for payment of damages. This will be an issue where the available claim limit is eroded by payment of defence costs leaving insufficient funds to pay the damages.

Who is Insured?

The Named Insured on a professional liability insurance policy will be the name of the Holder of a Certificate of Practice. This may be an individual architect, a partnership or a corporation.

Individual architects who are current or former employees, partners, directors, officers or shareholders of an insured practice and individuals or personal corporations retained under a personal services agreement will be covered under the firm's policy for actions taken within the scope of their duties for the Named Insured.

Also included as insured are heirs, executors, administrators and legal representatives of each insured in the event of death or bankruptcy. Refer to the definition of "Insureds" in a Pro-Demnity policy for the complete wording that applies.

Coverage vs Limits

Although often used interchangeably, the terms "coverage" and "limits" provided by an insurance policy are not the same.

"Coverage" refers to the circumstances or matters that are covered under the insurance policy, regardless of the "limits". "Limits" refers to the amount of funds the insurer commits to making available in settlement of damages, where the policy provides "coverage".

If the matter falls outside the "coverage" provided by the policy, the "limits" will not apply.

Most of the wording in an insurance policy relates to defining "coverage"...what is covered and, very important, what is not covered.

Exclusions from Coverage

Any professional liability insurance policy will include a lengthy list of Exclusions from coverage. For the most part these are consistent to various insurers; however, there will be differences in both the issues addressed and the wordings. Further, regardless of standard or sample wordings, insurers may add Endorsements to any policy to address specific considerations applying to the insured or a project.

Claims Made Insurance

Every professional liability insurance policy available to Canadian architects or other design professionals (engineers, interior designers, etc.) will be written on a *Claims Made* basis. Unlike most other insurance, it is the policy (coverage and limits) in place at the time a claim is made and reported that will apply, rather than the policy that might have been in place at the time the alleged error or negligent act occurred.

This is different from most insurance which is *Occurrence* based. In an occurrence based regime, it would be the policy in place at the time the error, omission or negligent act occurred that would respond... even if the claim arose after the policy had expired.

Policy Period

The applicable Policy Period for a firm's insurance will be one year, hence the name *Annual Practice Insurance*. At each annual renewal date, a new policy will be purchased by the architectural practice covering the next twelve month Period of Insurance, sometimes referred to as the Policy Period. The commencement and end dates for the current Period of Insurance will be included on the Certificate of Insurance or an Evidence of Insurance issued by Pro-Demnity.

Policy Wordings

It is important to recognize that it is the actual policy wordings that will apply in the event of a claim.

Policy wordings describing the coverage and other important features of the Pro-Demnity policies can be accessed from the Pro-Demnity website:

www.prodemnity.com.

Pro-Demnity Program Features

Ontario Architects own Pro-Demnity

Pro-Demnity Insurance Company is owned by the Ontario Association of Architects. The OAA represents the interests of the Ontario architects who are required to be insured by the Company.

The ownership relationship ensures Pro-Demnity has a clear mandate...to provide enhanced professional liability insurance to Ontario architects so that architects and the public interest are protected.

Retirement from Practice Program

A unique feature of the Pro-Demnity program is the *Retirement from Practice Program* that is available to current and former OAA members once they retire or withdraw from practice and are no longer covered under an insurance policy issued to a current holder of a Certificate of Practice.

To qualify, the architect will have maintained *Annual Practice Insurance* with Pro-Demnity for two or more years, surrendered their Certificate of Practice, and be current respecting any financial obligations to Pro-Demnity.

Coverage goes to the individual architect and is provided under Policy No. 2. Limits are \$250,000 per claim, \$500,000 aggregate in the annual Period of Insurance or Policy Period.

At the present time, no premium is charged. In the event damages are paid, the maximum deductible is \$1,000.00 each claim.

Coverage under the Retirement Program is designed to apply for the life of the individual and six years after death for estate resolution purposes. This coverage is a special added benefit to Ontario architects, made possible through a mandatory program.

Important Features of the Pro-Demnity Policies

Pro-Demnity's primary objective is a high quality insurance program tailored to the needs of Ontario architects. There are several noteworthy features of the Pro-Demnity program and policies that may prove to be important considerations impacting availability of funds for damages when a claim arises.

Defence Costs are IN ADDITION to the Claim Limits

A professional liability insurer has the obligation to provide a defence to its insured as well as to provide funds to pay any damages. Defence costs are a very significant cost to an insurer, often exceeding damages actually assessed against an insured. If an architect is named in a lawsuit, it will be necessary to retain a lawyer to defend the architect even if the allegations against the architect prove groundless and no damages result.

Since defence costs can run into hundreds of thousands of dollars...or even millions of dollars on a large claim... the impact of the treatment of defence costs can be an important factor. Few architects would have the financial resources to absorb the costs to defend themselves in a significant claim without the protection provided by professional liability insurance.

Pro-Demnity policies, (for any limits), provide defence costs IN ADDITION to the limits for damages. This means that the costs to defend an architect facing a claim do not erode the funds available for payment of any eventual damages assessed against the architect. The exception is claims instituted in a USA jurisdiction where defence costs will be included in the Claim Limits.

This is in contrast with many higher limits policies available from market insurers where defence costs will be INCLUDED in the claim limits. This has the costs to provide a defence for the insured reducing the funds available for eventual damages.

Where an architect purchases excess insurance from another insurer, there is a limit on the amount of defence costs Pro-Demnity will pay. Architects purchasing excess insurance need to arrange for payment of a share of the damages by the excess insurer. Refer to Pro-Demnity Insurance Company Bulletin dated October 31, 2014: *Re: Amendment to Professional Liability Insurance Policy Wordings*.

Multiple Aggregates

For higher limit policies offered by market insurers it is common to see a claim limit that is also the aggregate limit.

The consequence of this is that one claim may exhaust the firm's insurance for the balance of the Period of Insurance, leaving nothing available to protect the architect for subsequent claims on the project or on other projects.

In contrast, except for claims instituted in a USA jurisdiction, Pro-Demnity annual practice policies, regardless of claim limits, will have as standard:

- a Claim Limit;
- a Project Limit for claims on one project in the Period of Insurance (annually) that is twice the Claim Limit; and
- an Aggregate Limit for all claims that arise against the firm in the Period of Insurance (annually) that is four times the Claim Limit.

The benefits of the *multiple aggregates* on the Pro-Demnity policies are that damages paid on one claim will not eliminate coverage for other claims on the same project, and damages paid for claims on one project, no matter how large, will not eliminate insurance limits for claims that might arise on other projects in the Period of Insurance.

For the Aggregate Limit to be exhausted would require four claims to have generated damages at the full per Claim Limit on at least two projects, or for the full aggregate to be exhausted by an array of claims on multiple projects, all arising in the specific Period of Insurance.

Refer to the chart on page seven.

For claims instituted in a USA jurisdiction, the Aggregate Limit will match the Claim Limit.

Deductibles only apply to Damages paid

Under Pro-Demnity's policies, the insured's deductible will only apply to damages actually paid. This is in contrast to policies provided by some other insurers where the insured's deductible will apply to defence costs or to any damages paid.



Disappearing Deductible

Further, Pro-Demnity incorporates a *disappearing deductible* that applies pro rata with damages actually paid up to \$250,000. For instance if damages paid on behalf of the architect were \$50,000 (20% of \$250,000) only 20% of the deductible would apply. Where damages paid are \$250,000 or higher, the full deductible will apply.

Project Specific and Client Specific “Spike-Ups” in Limits

Where a client requires limits on its project that are higher than the Annual Practice limits the architect currently maintains, an available and popular option is a *Project Specific Spike-Up* in limits applicable to a single specific project on the architect’s Annual Practice insurance.

For instance, where an architect carries limits of \$250,000 per claim, \$500,000 maximum for one project, \$1,000,000 aggregate for all claims in the Period of Insurance, and a client requires limits of \$1,000,000 per claim for its project, an option is a *Project Specific Spike-Up* for the project.

In this example, the claim limit for the specific project under the architect’s Annual Practice policy would be increased by a “spike-up” to total the required \$1,000,000 per claim,

LIMITS	Annual Practice	+	Spike-Up	=	Total for the Project
CLAIM LIMIT	\$250,000	+	\$750,000	=	\$1,000,000

For purposes of illustration, project maximums and aggregate limits are ignored. Contact Pro-Demnity for additional information and options.

Claim Limits applicable to all other work under the Annual Practice policy will remain unchanged.

The additional premium for the “spike-up” is calculated with each annual renewal where the higher limits are required to be maintained, and will vary from year to year depending upon fees earned on the project in the previous year. There is no limit on the duration for maintaining the higher limits except for contractual obligations or where a claim has arisen on the project.

In most instances, the increased premium for one project has proven to be less costly than increasing the firm’s Annual Practice limits, or for the purchase of a Single Project policy. The added premium for the higher limits for the project can be identified at each renewal to facilitate allocation of the added insurance costs to the project or where the client is to reimburse the architect for the added costs.

A variant, a *Client Specific Spike-Up* feature can apply to projects where a particular client requires higher limits for its projects than the architect purchases for its practice.

“Full Pollution” Option

Although Endorsement No. 1 to Pro-Demnity’s Increased Limits coverage under Policy No. 4 eliminates an exclusion for asbestos and certain pollution claims, the limits for such claims are restricted to the limits available through Policy No. 1: \$250,000 per claim, \$500,000 maximum for one project, \$1,000,000 aggregate.

Increased limits above \$250,000 per claim, matching those purchased for the annual practice policy, are available under the *Full Pollution* option, subject to completion of a *Pollution Questionnaire* and reinsurer’s approval.

The higher limits are commonly available for little or no additional premium.

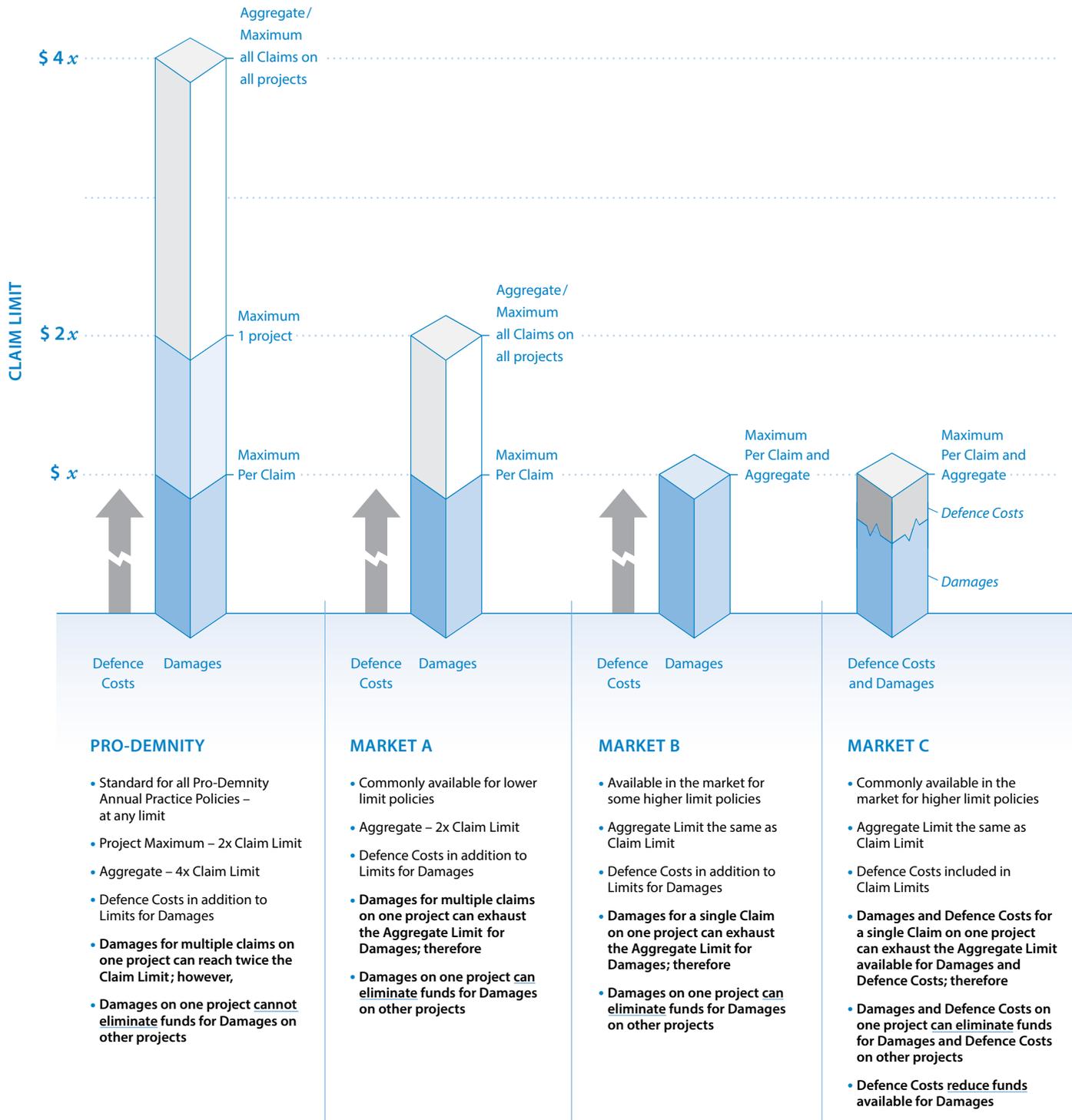
Where an architect retains a pollution or hazardous materials consultant, it is recommended that the *Full Pollution* option be applied for and the *Pollution Questionnaire* completed in order that a premium for the increased pollution limits may be provided to the architect.

This will not assure that the architect will have coverage for all claims involving the specific services that are provided by the specialist. The policy wording will prevail in the event of a Claim.



Differences in Aggregates and Defence Costs can be critical to architects and the public.

The following four examples all offer limits of “\$ x ” per Claim:



NOTE: Examples are simplified to illustrate the impact of Aggregates and Defence Costs on several available Claim Limit structures. These are not exhaustive. Other Claim Limit structures may be available. Arrows do not address possible limits on Defence Costs that may apply.

For that reason, any architect considering retaining a designated substances, hazardous materials, pollution or environmental consultant should insist upon the specialist maintaining professional liability insurance coverage applicable to the subject of the investigation. Further, architects should obtain assurance that the specialist's policy does NOT include exclusions respecting asbestos, PCB's or any of the designated substances, hazardous materials, pollutants or environmental hazardous that will be the subject of the specialist's investigations and recommendations.

Sample wording of the *Asbestos, P.C.B. and Contaminants Inclusion* is available from Pro-Demnity upon request.

Endorsement No. 1: Broader Coverage for Ontario Architects

Endorsement No. 1 applies to all Pro-Demnity policies. It provides additional coverage for Ontario architects for a number of issues where coverage might otherwise not be available, including:

- Inadvertent Breach of Professional Confidentiality;
- Dishonesty of Employees;
- Libel and Slander;
- Inadvertent Infringement of Copyright;
- Loss of Documents.

The Endorsement also provides payment or reimbursement of defence costs incurred by an architect respecting:

- Intentional Acts;
- Prosecutions for Criminal Negligence causing Bodily Harm or Death;
- Contravention of Statutes;
- Parallel Discipline Proceedings where a complaint relates to a Claim on the same issue.

The payment or reimbursement of defence costs has proven very important to architects who have found themselves required to appear before a Commission of Inquiry, Human Rights Commission Hearing or faced charges under Workplace Health and Safety legislation.

As with any policy content, it is important to carefully review the full wording of each of the items included in the Endorsement to understand what is and what is not included in the coverage.

Proactive Policy Provisions

It is common for insurers to exclude specific types of claims that have proven particularly problematic or have generated large, uneconomic losses for the insurer. Historical examples would be claims related to asbestos, mould or water ingress.

Pro-Demnity takes an alternate approach, identifying measures that are to be taken for insurance coverage to apply.

As an illustration, some professional liability insurance policies incorporated a *Water Ingress Exclusion* in the wake of the "Leaky Condo" crisis and losses in British Columbia. This type of limitation on coverage might be included in the policy body or added by an Endorsement. There would be no coverage respecting damages related to water ingress in any circumstances under such policies.

In contrast, Pro-Demnity has incorporated a *Non-Drained Exterior Wall Exclusion* and a related *Window Wall Endorsement* that describe the necessary measures for an exterior wall design to be insured for water ingress.

Where such requirements for insurability are included in a Pro-Demnity policy, input from architects and other experts is obtained, and insured architects are advised in advance so they may reflect the requirements in their designs and services.

In several instances, Pro-Demnity policy provisions have filled a gap where adequate standards did not exist or building codes did not adequately address the systems giving rise to the problems and claims.

Vigorous Defence for Ontario Architects

It is a fundamental obligation of a professional liability insurer to provide a defence for an architect faced with a claim, in accordance with the policy provisions. However, the extent of the defence will be determined by the insurer.

Pro-Demnity's approach is to provide a vigorous defence to architects facing claims to avoid the misconception that the architects' insurance program is an assured source of compensation for any problems or additional costs that arise on a project, or that an architect's insurance is an alternate funding source where project budgets and contingencies are inadequate.

Damages are paid on behalf of architects when the facts establish that negligence of the architect contributed to the loss.

Reservation of Rights: Defending a Claim where an Exclusion Applies

It is common for a claim against an architect to include one or more allegations that are not covered by the policy or are specifically excluded from coverage. In other situations, an architect may not have complied with the terms and conditions of its policy in reporting a claim or accepted responsibility for damages without the insurer's consent, threatening its insurance coverage for the claim.

In such circumstances, insurers have the right to deny coverage for the claim, leaving the architect without a defence by the insurer or funding for any damages that might be awarded. If the claim were denied, the architect would have to retain a lawyer at its own cost to defend the claim or to contest the insurer's decision to deny coverage.

Ownership by architects and the clarity of its mission means that Pro-Demnity has rarely denied coverage. Instead, where circumstances are unclear whether coverage applies to a specific claim or allegation, a *Reservation of Rights* letter will be issued, which allows Pro-Demnity to continue investigating and defending the claim on behalf of the architect, while not prejudicing the insurer's rights.

Note: Any comments related to how other insurers may address claims handling, policy interpretation, etc., are general observations, not specific to any particular insurer. We are not in a position to advise on any other individual insurer's policies, approach to claims handling, etc.

Pro-Demnity Policy Wordings

Available Policies and Wordings

The Pro-Demnity policies, including standard Endorsements applicable to all policies, are available on the Pro-Demnity website: www.prodemnity.com. Click on "Professional Liability Insurance".

Policy No. 1: *applies where the minimum Annual Practice claim limits (\$250,000) are purchased.*

Policy No. 2: *applies to the Retirement from Practice Program*

Policy No. 3: *is a Single Project policy for the minimum limits of \$250,000 each claim and \$500,000 aggregate*

Policy No. 4: *applies where any level of Increased Limits above \$250,000 are purchased.*

Standard Endorsements

There are five standard Endorsements that apply to Pro-Demnity policies:

- Endorsement No. 1: Broadens Coverage;
- Endorsement No. 2: Modifies Non-Drained Exterior Wall Exclusion;
- Window Wall Endorsement;
- Infrastructure Ontario Endorsement;
- Warranty Endorsement.

The standard Endorsements above are available on the Pro-Demnity website: www.prodemnity.com.

If there are questions respecting any specific provision, Pro-Demnity staff are available to comment.



Client Considerations

The mandatory professional liability insurance program exists so that the public interest, which includes the interests of clients, may be protected. The mandatory program ensures that professional liability insurance will be available to pay damages resulting from an error, omission or negligence of an Ontario architect in the provision of its services to a client.

Often clients or their insurance advisors are unfamiliar with professional liability insurance, are unaware of the mandatory program applicable to Ontario architects and request features for the architect's professional liability insurance that are unavailable or inappropriate.

The following section addresses a number of issues that commonly arise related to client requests.

Professional Liability Policies and the Client

The *Architects Act* requires that ALL Ontario architects offering services to the public maintain professional liability insurance, so that the public interest is protected. The Ontario Association of Architects oversees and administers the *Architects Act*, assuring that the mandatory insurance is maintained by every Ontario architect offering professional services to the public.

A client is not directly insured by the architect's professional liability insurance policy.

The architect's professional liability insurance is available to pay damages to a client or other party should it be established that the architect was negligent and the damages claimed resulted from the negligence. However, the architect is entitled to a defence of the claim and such determinations respecting the architect's negligence and the amount of damages suffered are subject to due process in accordance with applicable law and procedures.

Client as an Additional Insured

Some clients seek to be added as a Named Insured on an architect's professional liability policy.

The architect's professional liability insurance provides coverage respecting damages arising from errors, omissions or negligent acts "*in the provision of professional services to others*". A client is not providing the professional services that are the subject of the insurance. Instead, a client is the "*others*" who receive the services.

A client is also the entity most likely to pursue damages covered by the architect's professional liability policy and would therefore have a conflict if it were one of those insured.

Accordingly, it is not appropriate to add a client as an insured under an architect's professional liability insurance policy.

This is different from other types of insurance such as *Comprehensive General Liability* (CGL) where it may be appropriate and possible to have a client added as an insured on an architect's CGL policy. An architect should consult its insurance broker if such a request arises.

Renewal of Architect's Insurance

Renewal of existing annual practice limits is automatic at each renewal date unless the architect fails to complete a renewal application, acts to change its limits or surrenders its Certificate of Practice prior to the renewal date. Failure to complete the required renewal application needed to assess renewal premium will trigger a notice of pending cancellation of the architect's Certificate of Practice and Licence.

Cancellation of the Architect's Insurance

A client may seek assurance that an architect will maintain its professional liability insurance.

The *Architects Act* and Regulation require every architect offering professional services to the public to maintain mandatory professional liability insurance with Pro-Demnity Insurance Company, and the OAA enforces the requirement by interlocking the architect's Certificate of Practice and Licence with the architect's insurance.



Neither the architect nor Pro-Demnity can cancel the architect's insurance except for the architect's failure to pay any premium, deductible, taxes or levy when due. In such an event, the OAA will be notified and will cancel the architect's Licence and withdraw the architect's Certificate of Practice, meaning the architect can no longer provide architectural services to any clients.

The Evidence of Insurance provided by Pro-Demnity Insurance Company includes advice that the policy is non-cancellable by the insurer except for the specific failures noted.

At no point may the architect's professional liability insurance drop below the mandatory limits prescribed by the *Architects Act* and Regulation.

When an architect retires from practice and is no longer covered by a current annual practice policy maintained by a Holder of a Certificate of Practice, the Retirement from Practice Program is available subject to the eligibility requirements being met. The Retirement from Practice Program ensures availability of coverage to the retired architect for claims that arise related to his / her professional services prior to retirement.

Notification of Changes or Cancellation by the Insurer

A client may seek to receive prior notification of cancellation or changes in the architect's insurance from the insurer.

Pro-Demnity declines to do this for a number of reasons:

- The insurance is non-cancellable by the insurer except for non-payment of any premium, deductible, taxes or levy;
- The policies and standard endorsements are the same for all architects, and cannot be amended;
- All architects are treated in an equal manner. No favour or arrangement can be given to one architect that is not available to all architects;
- Pro-Demnity has no relationship or obligations to any client, or any other entity than the insured practice, and is unwilling to establish any duty to a client.

Since Pro-Demnity provides Annual Practice insurance, there is no realistic expectation that Pro-Demnity would be able to identify and notify all of an architect's clients (past and present) even if it was possible to accommodate clients in this way.

An architect who has not paid its premium, deductible, taxes or levy will receive notice of pending cancellation of its insurance from Pro-Demnity and pending cancellation of its Licence and Certificate of Practice from the OAA. The timelines that apply are determined by the OAA through by-law and cannot be impacted by a client, architect or Pro-Demnity.

Architect can Notify a Client about Changes or Cancellation

Where a client insists on such information, there is no reason why an architect could not agree to inform the client of any notifications received about the looming loss of its insurance and Certificate of Practice. However, there is no action that a client can take to replace the mandatory insurance from another source. Once advised by the architect the client might opt to advance funds to the architect for the purpose of meeting the outstanding financial obligations to Pro-Demnity. However, such arrangements would be strictly between the architect and its client(s).

Ontario architects are provided with advance notification of pending changes to the Pro-Demnity policies that might restrict coverage, and there is no reason why an architect could not agree to pass such notification onto any client who required it.

Changes in the standard policy wordings that restrict coverage will only come into effect after a notice period, at the time of the architect's next annual practice renewal.

Amendments to standard policy wording that broadens coverage will immediately apply to all existing policies.

Changes specific to an individual architect's policy such as changes in annual practice limits, change in deductible, a *Project Specific Spike-Up* in limits or change in name of the practice will come into effect immediately upon issue of the appropriate endorsement.

Client Contracts

Coverage extends to architect's existing liability in law...NOT to additional obligations assumed through a contract

Some clients attempt to expand the obligations and liabilities of an architect through non-standard contract wordings. There are insurance implications that clients may overlook.

Professional liability policies will only cover the professional's liability that already existed in law in the absence of any contract provisions. The impact is that contract provisions that extend the architect's obligations and liability beyond what is already the architect's at law (what a court would award based on established law regardless of contract provisions), if enforced by the client, will NOT be covered by a professional liability insurance policy. That eventuality appears to be in no one's interests.

Limiting Liability in Contracts to available Insurance Coverage

There is little value to the architect or client in maintaining insurance coverage that will not respond to a client's claim, or in liability transferred to an architect in a contract that will not be covered by insurance.

Standard forms of Client-Architect Agreement developed for use in Canada typically include a clause limiting the architect's liability to the client to the professional liability insurance available to the architect. Similar provisions are included in standard forms of Client-Engineer Agreement. These provisions are important protection to avoid claims being instituted by a client that would not be covered by professional liability insurance regardless of limits.

Accordingly, where a client has written an *Indemnity Clause* or other provisions that include non-insurable obligations that do not reflect the architect's existing liability at law, we urge architects to not accept the provision or amend the contract wording to reflect obligations and liability of the architect that will be covered by professional liability insurance.

One possible option is to incorporate a *Notwithstanding Clause* that may be added to modify a client authored indemnity clause, that limits the architect's obligations

and liabilities to the client to those that are covered by its professional liability insurance (i.e. what a court would award without the contract provisions).

“Notwithstanding the foregoing, the obligations and liabilities of the Architect are limited to the professional liability insurance provided by Pro-Demnity Insurance Company and any specific or excess professional liability insurance coverage in force.”

What are Reasonable and Realistic Limits?

Architects Determine the Needs of Their Practice

Architects determine what claim limits they wish to maintain, based on their own assessment of the needs of their practices, including business and personal considerations.

Mandatory minimum limits are established by the *Architects Act* and Regulation. However, many architects opt to maintain higher limits above the mandatory requirements based on their own conclusions about the needs of their practice, the size and complexity of projects being undertaken, the inherent risks and ability to manage them in practice among other considerations.

Client Requirements

Some clients choose to establish their own insurance limit requirements as a condition of retaining an architect. Often these limits are higher than architects interested in the client's project have selected, and there can be concern that the claim limits required by a client appear out of proportion to what is reasonable and realistic considering the fees involved or the size and construction value of the project.

Unfortunately, there is little information available to guide a client or an architect. The issue of what is a “reasonable” limit for any particular project and circumstance will always be open to consideration and discussion. It must also be recognized that some risks that may be covered by a professional liability insurance policy such as claims related to personal injury or economic loss will be unrelated to fees or the size or construction value of a project.

Balancing Act...Insurance Premiums vs. Project Needs

Where project costs including fees are a significant concern, it may appear counter productive for a client to require higher insurance claim limits than the architect already maintains, recognizing that there will be higher premiums to be absorbed by the project budget.

The perceived benefit to a client of requiring a higher claim limit will be to reduce the possibility that insurance proceeds available for damages will be insufficient. As discussed elsewhere, there are other factors that a client should consider that will impact the amounts actually available for damages.

Features of the Ontario architects' insurance program such as:

- Defence costs in addition to limits for Damages;
- Aggregate limit for one project twice the Claim Limit; and
- Aggregate limit for all claims four times the Claim Limit.

mean that one maximum limit claim cannot exhaust the available limits for the project and claims on one project will not impact available limits for other projects. If considered by the client, such features of an architect's insurance might help offset the perceived value and need for higher limits.

Higher claim limits come at a price. Higher premiums must be recovered from the client indirectly through higher fees or directly from the client as a project cost. An offsetting drawback of unrealistically high limits from a client's perspective is that funds spent on insurance premiums will not be available for other expenditures on the project, including those where the client might benefit from the investment over the life span of the project.

Refer to the chart on page seven for an illustration of the value of Pro-Demnity's treatment of defence costs and multiple aggregates.

Additional Information

For additional information about Pro-Demnity Insurance Company and the mandatory professional liability insurance program for Ontario architects, please contact the company or refer to the company website: www.prodemnity.com.

Architects can access "Bulletins and Notifications" on an array of risk management and insurance matters through the website.

Pro-Demnity Insurance Company cannot provide legal advice or insurance advice to the public.

The foregoing is general information about the Pro-Demnity program and must not be relied upon as specific to any project or circumstances.

Readers are reminded that they must consult their own lawyer or insurance advisors respecting the applicability of any of the information provided.



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