

December 31, 2016

Revisions to *Non-Drained Exterior Wall Exclusion*

Revisions to *Non-Drained Exterior Wall Exclusion* clarify that:

- An architect's design that may have complied with the water ingress coverage requirements in a Pro-Demnity policy but was NOT constructed in compliance with the insurability requirements will NOT be covered for water ingress;
- For the purposes of determining water ingress coverage, "YOUR design" applies to an "as built" design that was constructed.
- A substitution for an architect's design whether provided by a contractor or supplier or selected or directed by a client, that was accepted or approved by the architect, must incorporate ALL of the requirements of the *Non-Drained Exterior Wall Exclusion* for water ingress coverage to be available to the architect.
- The changes to the *Non-Drained Exterior Wall Exclusion* apply to designs commenced on or after April 1, 2017.
- Above changes to coverage will come into effect at your next renewal.

Explanation

Pro-Demnity is seeing a troubling number of claims where a design prepared by an architect in accordance with the insurability requirements for water ingress is NOT the design that was actually constructed, and the design or assembly that was constructed and gave rise to the claim does NOT comply with the insurability requirements for water ingress.

Although the architect may not have initiated or participated in the change from the design it prepared for the project, the architect may find it has assumed professional responsibility for the substituted design and construction, as if were their own design, through their actions or inactions including:

- failure of the architect to object to the non-compliant substitution;
- failure of the architect to identify that the shop drawings or other submittals were for a non-compliant design, or the architect's acceptance or approval of shop drawings or other submittals for the non-compliant substitution;
- approval or certification for payment of the non-compliant design and construction by the architect;
- failure to advise authorities having jurisdiction of the substitution;

- a declaration to a municipality or other authority that the non-compliant substitution is in "general conformity" with the architect's design as submitted and approved by the municipality or other authority; or
- provision of an unqualified undertaking required for occupancy or transfer of ownership such as a Schedule G for a condominium, that does not identify the architect's reservations about suitability of the substitution.

Impact of the Changes

Refer to Appendix "A" for the complete wording of the *MODIFICATION TO EXCLUSIONS* addressed in this Notice.

The primary purpose of the amendments is to eliminate ambiguity respecting how the Pro-Demnity *Non-Drained Exterior Wall Exclusion* applies to substitutions made to an architect's design, where the substituted design does NOT comply with the insurability requirements for water ingress coverage.

The current wording for the *Non-Drained Exterior Wall Exclusion* refers to "designs commenced by YOU", "YOUR design", "Your design and selection" and "assemblies designed according to rainscreen principles" etc.

The amendments clarify that the criteria for water ingress coverage will be applicable to not only the

architect's *design and selection* but also the architect's *approval or acceptance of an exterior above-grade wall system*. Further, the amendments clarify that it is exterior above grade wall assemblies that are both *designed and constructed according to rainscreen principles* that will be eligible for water ingress coverage.

"YOUR design" (original design) may have complied with the insurability requirements for water ingress coverage; however, if a change or substitution for YOUR design occurs, it will be the constructed or "as built" assembly that will be evaluated against the Pro-Demnity policy criteria to determine whether there is coverage for a water ingress claim.

In summary, an architect's design for an exterior wall system that would otherwise comply with the insurability requirements for water ingress coverage but is NOT constructed as designed may not be covered for water ingress.

What can you expect if a Claim arises on a Substitution?

If a water ingress claim arises on a project where it becomes apparent that a change or substitution for the architect's otherwise compliant design has occurred that may have breached the *Exclusion*, Pro-Demnity may issue a *Reservation of Rights* letter that will facilitate Claims staff continuing to:

- investigate the claim;
- defend all actions in YOUR name;
- carry on negotiations towards a possible settlement; and
- settle the claim.

without prejudicing the Insurer's rights to deny coverage for any damages resulting from failure of the substitution to comply with the insurability requirements for water ingress coverage.

Where it is evident that the change in design and / or substitution has breached the *Exclusion*, Pro-Demnity will issue a formal notification of the withdrawal of coverage from the date of notification. You will be responsible for your own defence, payment of defence costs and where applicable, payment of any damages.

Risk Management Considerations

The provision of a defence to the architect under a *Reservation of Rights* will NOT entitle the architect to indemnity for damages (e.g. Pro-Demnity will not pay damages on behalf of the architect) resulting from a design accepted by the architect that was not in compliance with the water ingress insurability requirements. Accordingly, architects must not overlook a change or substitution or fail to act to protect their interests, or the public interest, where a change or

substitution for their design is proposed, identified or being constructed.

Apart from water ingress insurance coverage, there are other issues that can arise related to a substitution for the architect's design that may give rise to claims against an architect including:

- suitability of the substitution for the purpose intended;
- durability and maintainability;
- compliance with the OBC, or other applicable Building Code;
- undertakings required for occupancy or transfer of ownership such as Schedule G for a condominium;
- compliance with the documents upon which a Building Permit has been issued and any other approvals or undertakings that may be impacted.

Pro-Demnity has prepared a number of risk management suggestions that architects can adopt to reduce the risk of a substitution to their design resulting in claims, including uninsured water ingress claims.

Refer to the Pro-Demnity Bulletin: *Dealing with Substitutions to Your Design* dated December 31, 2016.

In addition, the OAA is developing a Practice Tip related to dealing with substitutions.

Risk Management and Coverage Advice

Please contact Pro-Demnity Insurance Company's Risk Management service if you have any questions respecting a substitution on a project. Contact information is available on the Pro-Demnity website.

Any coverage decision, including a determination respecting coverage for water ingress, will only be taken at the time a claim arises, based on the allegations in the claim and the then known circumstances. Such a decision must be provided in writing. The policy wording in place at the time a claim arises will govern.

Pro-Demnity Bulletins and Notices

Copies of *Dealing with Substitutions to Your Design* and other Pro-Demnity Bulletins and Notices can be located on the OAA website through a link on the Pro-Demnity website **www.prodemnity.com**.

OAA member log-in is required to access the Pro-Demnity Insurance Company Bulletins and Notices on the OAA website.

Appendix A

Changes to the wording are highlighted in blue and underlined.

Non-Drained Exterior Wall Exclusion

ENDORSEMENT NO. 3 TO PRO-DEMNITY POLICIES NO. 1, 2, 3 and 4

MODIFICATION TO EXCLUSIONS

Notwithstanding PART III Exclusion 1 s) of Policies No. 1, 2 and 3 or PART III Exclusion 1 r) of Policy No. 4, the following will apply to designs commenced, selected, approved or accepted by YOU on or after April 1, 2017.

THE INSURER will not cover YOU, pay DAMAGES, provide YOU with a defence or make supplementary payments for CLAIMS arising out of:

Any CLAIM made against YOU, directly or indirectly arising out of or related to ingress of precipitation, resulting from, or in connection with YOUR design, selection, approval or acceptance of an exterior above-grade wall system.

This exclusion shall not apply to:

- i) Exterior above-grade walls or wall assemblies designed and constructed according to rainscreen principles that include both Primary and Secondary Planes of Protection (water barriers), provision for drying of the assembly, and an air space no less than 10mm deep behind the cladding with positive drainage to the exterior to protect the interior of the building from precipitation that penetrates the Primary Plane of Protection,
- ii) Windows designed and constructed according to rainscreen principles, inserted into a wall where they are fully supported at the perimeter, where all the components are specified and used in conformity with the structural and installation parameters of the relevant Canadian Standards Association (CSA) and Canadian Government Specifications Board (CGSB) documents, or other standards referenced in the applicable building code,
- iii) Solid masonry or concrete walls where drying of the masonry or concrete is not adversely affected by any other exterior building material,
- iv) Precast Concrete walls designed and constructed as drained systems utilizing two stage drained joints,
- v) Glass and metal Curtain Wall systems that incorporate both Primary and Secondary Planes of Protection (water barriers) with provision for positive drainage to the exterior in a rainscreen design,
- vi) Window Wall systems used on projects classified under Part 9 of the Ontario Building Code that incorporate both Primary and Secondary Planes of Protection (water barriers) and ventilated air spaces with provision for positive drainage to the exterior in a rainscreen design,
- vii) Window Wall systems used on projects other than those classified under Part 9 of the Ontario Building Code that comply with the conditions as provided by the Window Wall Endorsement dated July 28, 2009 to this insurance,
- viii) Pre-Engineered buildings or siding systems incorporating both Primary and Secondary Planes of Protection (water barriers) and provision for drainage to the exterior in a rainscreen design.

(continued overleaf)

Appendix A (continued)

For the purposes of this exclusion:

- a) “Windows” or “Curtain Wall systems” shall not include “Window Wall systems”;
- b) “Pre-Engineered buildings or siding systems” shall not include Exterior Insulation and Finish Systems (EIFS), Insulated Concrete Form (ICF) systems or “Window Wall systems”;
- c) “Solid masonry or concrete walls” shall not include Insulated Concrete Form (ICF) systems; and
- d) Regardless of the building code classification of the project, “Primary and Secondary Planes of Protection” shall have the meaning given to “First and Second Planes of Protection” respectively by the Ontario Building Code 2006, 9.27.2.3 (1)(a), (1)(b) and (1)(c).

If THE INSURER alleges that by reason of this exclusion any actual or alleged losses, liabilities, damages, injuries and supplementary payments are not covered, the burden of proving the contrary shall be upon the NAMED INSURED.

July 28, 2009

Updated April 1, 2012:

Policies Nos. 1, 2 and 3 dated April 1, 2012 refer to Exclusion 1r) instead of the previous 1s)

Policy No. 4 dated April 1, 2012 refers to Exclusion 1q) instead of the previous 1r)

[Updated April 1, 2017](#)

NOTE:

The Non-Drained Exterior Wall Exclusions in Pro-Demnity Insurance Policies No. 1, 2, 3 and 4 for a design commenced by YOU on and after July 1, 2002, and the Non-Drained Exterior Wall Exclusion in Endorsement No. 2 (*Updated April 1, 2012*) under Pro-Demnity Insurance Policies No. 1, 2, 3 and 4 for a design commenced by YOU on and after January 1, 2010, which were in effect immediately prior to this modification of Endorsement No. 2 under Pro-Demnity Policies No. 1, 2, 3 and 4, continue to remain in full force and effect.