

# ***PROJECT PROFESSIONAL LIABILITY INSURANCE***

Presented by

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As project delivery methods increase in complexity, design responsibilities and the corresponding liabilities have become more pervasive among construction team members. The terms “design-build,” “bridging,” and “project, program, and construction management” all connote evolving professional exposures. Unfortunately, many project participants may not be aware of their professional liability exposure, and those that are may not be adequately insured. Project professional liability insurance allows project owners and construction project leaders to ensure the adequacy of participants’ coverage. Whether written on a “wrap-up” basis or on a first-party excess basis over team members’ individual policies, project professional liability insurance provides dedicated professional liability coverage for all members of the construction team. This session provides an overview of the coverage provided by these policies, a review of markets, including available limits and pricing options, and guidelines for program success.

***Wednesday, November 13, 2002***



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Susan Dunham  
Director, Member Services  
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**David Grigg**  
**Senior Vice President, Design Firms Practice Leader**  
**Marsh, Inc.**

Mr. Grigg is copresenting Workshop M, "Project Professional Liability Insurance." He is senior vice president and Design Firms Practice leader with Marsh USA, Inc., located in New York City. Prior to joining Marsh, he was senior vice president and senior program director of DPIC Companies, the specialist professional liability insurance company. Previously, Mr. Grigg was vice president of DPIC Management Services Corporation, the management consulting arm of DPIC, where he specialized in strategic, business, and marketing planning and management for architect/engineer firms.

Mr. Grigg also has extensive domestic and international experience as vice president of Cadmus Properties, a design-build company located in New Jersey, and as a principal of Australia Design, a New York-based company that provided technical services to Australian and British companies with operations in the United States. Before joining DPIC Management Services Corporation, Mr. Grigg was vice president in charge of marketing and planning for the Sear-Brown Group in Rochester, New York. At Sear-Brown, he was responsible for planning and managing marketing for the company's 12 offices. Previously, he was director of communications for New Jersey-based Louis Berger International.

Mr. Grigg is a graduate of the University of Western Australia. He received his master of science degree in architecture and urban design from Columbia University in 1984.

**Catha Pavloff**  
**Senior Vice President**  
**Marsh**

Ms. Pavloff is copresenting Workshop M, "Project Professional Liability Insurance." She is a client advisor and an Architects/Engineers Practice leader. She is a resource to the Marsh network and its clients on design firm, contractor, construction manager, design/build, and related professional liability placements. She has 24 years' experience in the insurance business, the first 8 as an underwriter and the last 16 with Marsh.

During her career with Marsh, Ms. Pavloff has worked with over 20 different design firm and contractor clients ranging from \$15 million to over \$1 billion in revenues. She is experienced with all aspects of serving these clients including contract review, educational seminars, program design, coverage negotiations, mergers and acquisitions, and claim handling.

In addition, Ms. Pavloff has worked closely with all of the major design firm underwriters in the United States and in London. Most recently, Ms. Pavloff assisted one of the major architect/engineers insurers in drafting policy language for several new products. She has also been active in broking project-specific and owners protective professional policies for projects ranging from \$17 million to over \$2 billion in construction values. Ms. Pavloff recently spearheaded Marsh's World Trade Center Clean Up Project Specific Professional/Contractors Pollution Liability placement efforts. She has authored chapters of IRMI and Wiley-Aspen publications on related topics.

Prior to working in the New York office, Ms. Pavloff spent 11 years as a broker and account manager in Marsh's Philadelphia office. Also while in Philadelphia, Ms. Pavloff was the office training coordinator—designing, coordinating, and facilitating the office training program. Currently, she facilitates several of Marsh's regional training programs.

# ***Notes***

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# PROJECT PROFESSIONAL LIABILITY INSURANCE

**David Grigg  
Marsh, Inc.**

**Catha Pavloff  
Marsh**

## I. Introduction

- A) Instructors' introductions
- B) Workshop objective
- Review two approaches—from the owner's and team members' perspectives
  - Address current market conditions/claim trends
  - Discuss keys to successful program implementation

## II. Project Professional Liability Coverage

- A) Critical program components
- Who is insured/Who purchases
  - Pros/cons of different approaches
  - Term (including retro and ERP)
  - What is covered
  - Addressing the owner's liability
  - Claim mitigation services
  - Key exclusions
    - Insured vs. insured
    - Faulty workmanship
    - Warrantees/guarantees

## B) Benefits

- For owner
  - Dedicated, comprehensive, non-cancelable catastrophic coverage—for all team members?
  - Policy term up to 10 years past substantial completion
  - Claim mitigation services
  - Joint defense vs. tangled web of cross claims, counter-claims, etc.
  - Fixed rates (but subject to adjustment)
  - Reduced contingencies
  - Minimal administrative burden
- For design/construction teams
  - Claim experience doesn't impact practice policy
  - Owner pays premium
  - Assurance that subconsultants and other team members have dedicated catastrophic professional coverage
  - Coverage for joint ventures/LLC's (e.g., DIB projects) which may not otherwise carry
  - Professional liability coverage

### C) Challenges

- For owner
  - Obtaining credits from team members
  - Deductible allocation
  - Resistance from team members (lack of control)
  - Not first party coverage/ Doesn't cover owner's direct liability for self-performed services
  - Not "catch all" vehicle for all cost overruns/delays
  - Extending coverage to the CM's, PM's, GC and their subs
- For design and construction teams
  - Lose control over scope of coverage
  - Disrupts relationships with broker/carrier
  - Becomes a "claim magnet"
  - Deductible allocation (although if lower than practice deductible, can be a "benefit")
  - Perceived conflict of interest

### D) State of insurance marketplace

- Markets
  - AIG (Lexington)
  - Zurich-American
  - XL Environmental
  - Arch Capital
  - Lloyd's
- Pricing/capacity
- Claim trends—What and why?

- Construction boom—
  - Faster
  - More complex
  - Skilled labor shortage
- Unrealistic expectations
- Liquidated damages/force majeure coverage no longer available
- Constructability vs design
- Design/build
- Construction management, project management, program management
- Defining standards of care

### E) Keys to successful implementation

- Contractual risk allocation
  - Scope
  - Standard of care
  - Warrantees/guarantees
  - Differing site conditions
  - ADR
- Coordination
  - Managing owner's expectations
  - Interfacing with practice policies—credits?
- Upfront communication—critical program components
  - Who is insured
  - Insured vs insured exclusions
  - Choice of counsel
  - Joint defense
  - Circumstance/claim reporting procedures

- Coordinate with other project specific placements
  - Mutual waivers of subrogation
  - Primary vs excess stance
    - GL/excess
    - Builders Risk
    - Pollution Legal Liability
- Define the broker's role
  - Excess and DIC
    - 30% - 50% less costly
    - Flat premium (no adjustment)
    - Minimal administration/communication
    - Resolves problematic contractual provisions
      - L of L's
      - Limit requirements

### III. Owner's Protective Professional Liability (OPPI)

#### A) Critical program components

- Who is insured
- Policy term
- First vs third party coverage
- Excess vs excess/DIC stance
- Claim reporting procedures
- Minimum insurance requirements
  - How much? From whom? When?
  - Carriers' subrogation rights

#### B) Benefits

- For Owner
  - First party/indemnity basis/ with a third party component
  - Covers all team members' services - including
    - environmental consultants
    - geotech firms
    - specialty firms
    - interior firms

#### C) Challenges

- For owner
  - No claim mitigation services
  - No pay on behalf of/defense cost coverage (except for third party claims)
  - Interaction with multiple primary defendants and their carriers/legal counsel may be problematic
- For design and construction teams
  - Must maintain minimum insurance limits or carrier has subrogation rights
  - Loses benefits of project professional coverage

#### D) State of insurance marketplace

- Markets
  - Zurich-American
  - Arch Capital
  - AIG (Lexington)
- Pricing/capacity
- Claims activity—so far/so good!
  - "Green"—too early to tell

#### E) Keys to Successful Implementation

- Managing expectations
  - First party coverage
  - No coverage for owner's direct liability for self-performed services
- Non-disclosure provision
- Claim reporting procedures
- Minimum insurance requirements
- Subrogation rights
- Excess vs DIC

#### IV. Conclusion

Remember "CEC"

**C**ontractual Risk Allocation

**E**xpectations

**C**ommunication

# ***PROJECT PROFESSIONAL LIABILITY INSURANCE***

## **Agenda**

- **Introductions**
- **Workshop Objective**
  - Review two approaches from the owner's and the team members' perspectives
  - Address current market conditions and claim trends
  - Discuss keys to successful program implementation

## **Project Professional Liability (PPL): Critical Program Components**

- **Who is insured/who purchases**
  - Pros/cons of different approaches
- **Term (including retro and ERP)**
- **What is covered**
- **Addressing the owner's liability**
- **Claim mitigation services**
- **Key exclusions**
  - Insured vs. insured
  - Faulty workmanship
  - Warrantees/guarantees

### **PPL: Benefits for Owner**

- Dedicated, comprehensive, non-cancelable catastrophic coverage - for all team members?
- Policy term up to 10 years past substantial completion
- Claim mitigation services
- Joint defense vs. tangled web of cross claims, counterclaims, etc.
- Fixed rates (but subject to adjustment)
- Reduced contingencies
- Minimal administrative burden

### **PPL: Benefits for Design/ Construction Teams**

- Claim experience doesn't impact practice policy
- Owner pays premium
- Assurance that subconsultants and other team members have dedicated catastrophic professional coverage
- Coverage for joint ventures and LLC's (e.g., DIB projects) that may not carry professional liability coverage

### **PPL: Challenges for Owner**

- Obtaining credits from team members
- Deductible allocation
- Resistance from team members (lack of control)
- No first-party coverage. Doesn't cover owner's direct liability for self-performed services
- Not a "catch-all" vehicle for all cost overruns or delays
- Extending coverage to the CM's, PM's, GC and their subs

### **PPL: Challenges for Design and Construction Teams**

- Loss of control over scope of coverage
- Disrupts relationships with broker and carrier
- Becomes a "claim magnet"
- Deductible allocation (although if lower than practice deductible, can be a benefit)
- Perceived conflict of interest

## **PPL: State of the Insurance Marketplace**

- **Markets**
  - AIG (Lexington)
  - Zurich-American
  - XL Environmental
  - Arch Capital
  - Lloyd's
- **Pricing/Capacity**

## **PPL Claim Trends - What and Why?**

- **Construction boom**
  - Faster
  - More complex
  - Skilled labor shortage
- **Unrealistic expectations**
- **Liquidated damages and force majeure coverage no longer available**
- **Construction vs. design**
- **Design/build**
- **Construction management, project management, program management**
  - Defining standards of care

## **PPL: Keys to Successful Implementation**

- **Contractual Risk Allocation**
  - Scope
  - Standard of care
  - Warrantees/guarantees
  - Differing site conditions
  - ADR

## **PPL: Keys to Successful Implementation**

- **Coordination**
  - Managing owner's expectations
  - Interfacing with practice policies - credits?
- **Up-front Communication—Critical Program Components**
  - Who is insured
  - Insured vs. insured exclusions
  - Choice of counsel
  - Joint defense
  - Circumstance/claim reporting procedures

## **PPL: Keys to Successful Implementation**

- **Coordinate with Other Project Specific Placements**
  - Mutual waivers of subrogation
  - Primary vs. excess stance
    - GL/excess
    - Builders Risk
    - Pollution Legal Liability
- **Define the Broker's Role**

## **Owner's Protective Professional Liability (OPPI): Critical Program Components**

- **Who is insured**
- **Policy term**
- **First vs. third-party coverage**
- **Excess vs. excess/DIC stance**
- **Claim reporting procedures**
- **Minimum insurance requirements**
  - How much? From whom? When?
  - Carriers' subrogation rights

## **OPPI: Benefits for Owner**

- **First party/indemnity basis/with a third party component**
  - Covers all team members' services - including:
    - Environmental consultants
    - Geotech firms
    - Specialty firms
    - Interior firms
- **Excess and DIC**
- **30%-50% less costly**
- **Flat premium (no adjustment)**
- **Minimal administration/communication**
- **Resolves problematic contractual provisions**
  - L of L's
  - Limit requirements

### **OPPI: Benefits for Design and Construction Teams**

- Doesn't disrupt current programs, relationships
- Owner doesn't expect credits
- Resolves problematic contractual provisions
  - L of L's
  - Limit requirements

### **OPPI: Challenges for Owner**

- No claim mitigation services
  - No pay on behalf of/defense cost coverage (except for third party claims)
  - Interaction with multiple primary defendants and their carriers/legal counsel may be problematic

### **OPPI: Challenges for Design and Construction Teams**

- Must maintain minimum insurance limits or carrier has subrogation rights
- Loses benefits of project professional coverage

## **OPPI: State of Insurance Marketplace**

- **Markets**
  - Zurich-American
  - Arch Capital
  - AIG (Lexington)
- **Pricing/capacity**
- **Claims activity - so far, so good!**
  - “Green” - too early to tell

## **OPPI: Keys to Successful Implementation**

- **Managing expectations**
  - First- party coverage
  - No coverage for owner’s direct liability for self-performed services
- **Non-disclosure provision**
- **Claim reporting procedures**
- **Minimum insurance requirements**
- **Subrogation rights**
- **Excess vs. DIC**

**Conclusion: Remember CEC**

Contractual Risk Allocation

Expectations

Communication

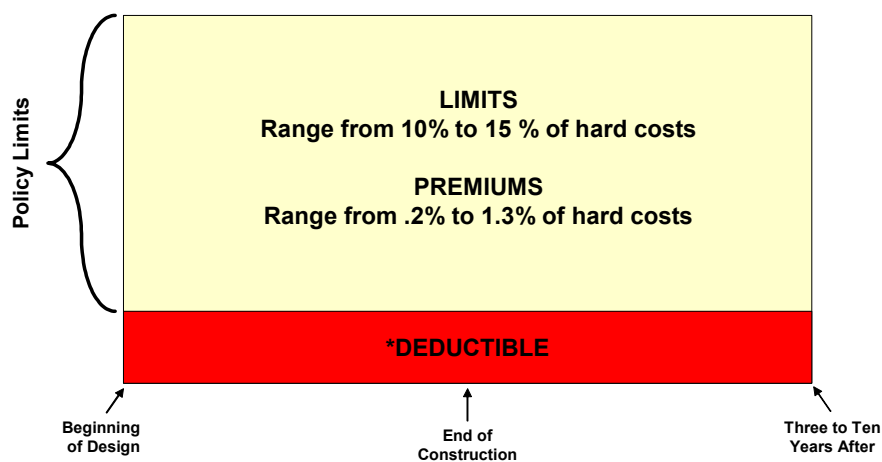
**Professional Exposures and Representative Claims**

Responsible Party	Professional Exposure	Representative Claims
A&E or Design/Build Subconsultant	Design Error	Defective design, including cost overruns, delays property damage and, bodily injury.
Owners Rep./CM	Schedule Approval, Budget Review, Site Supervision, Site Selection	<ul style="list-style-type: none"> <li>• Inadequate scheduling, coordination or planning,</li> <li>• Negligent and/or untimely review and/or approval of contractor submittals,</li> <li>• Negligent, arbitrary, unreasonable and/or untimely acts or omissions in the administration of the construction contract, including review/rejection of submittals, applications of r payment, change order proposals, claims, requests for substitutions, value engineering proposals, etc</li> </ul>
General Contractor	Means & Methods, Health & Safety – Supervision	Negligent direction or supervision of construction activities and/or construction means, methods, procedures, techniques or sequence.
Subcontractor, i.e., (Foundation, Electrical, Mechanical, HVAC)	Design Delegation Responsibility	Defective design, cost overruns, delays, property damage, and bodily injury.
Subconsultants	Design Errors	Defective design and associated damages as above
Engineers	Geotechnical Soil Testing	Negligent or inaccurate description of sub- surface or site conditions, or the conditions under which the work will be performed.
Owners	Continent/Various Liability	All of the above

## Four Options For The Owner

Option	Advantages	Disadvantages
Architects'/Engineers' Practice Policies	<ul style="list-style-type: none"> <li>• Cost (But a hard marketplace may change this)</li> </ul>	<ul style="list-style-type: none"> <li>• Limits may be inadequate</li> <li>• Limits may be eroded/exhausted</li> <li>• Coverage may be inadequate (i.e., design/build, construction management, mold and terrorism exclusions)</li> <li>• Annual policies must be tracked every year</li> <li>• Numerous carriers defending claims</li> <li>• Smaller firms may be self insured</li> </ul>
Architects'/Engineers' Dedicated Practice Policy Limits	<ul style="list-style-type: none"> <li>• Limits dedicated to the project</li> <li>• No erosion/exhaustion of limits by claims paid for other projects</li> </ul>	<ul style="list-style-type: none"> <li>• Cost</li> <li>• Coverage may be inadequate (see above)</li> <li>• Numerous carriers defending claims</li> <li>• Smaller firms may self-insure or may be unwilling to purchase dedicated limits</li> </ul>
Owners Controlled Project Specific Professional Liability Policy	<ul style="list-style-type: none"> <li>• Comprehensive primary professional and pollution liability coverage for all design firms, construction managers and contractors working on a project</li> <li>• Simplified selection process for design professionals including M/W and DBE's since adequacy of insurance is assured</li> <li>• Eases the administrative burden – not necessary to monitor renewal certificates</li> <li>• Carriers' first dollar pre-claims assistance</li> <li>• Coordinated/consolidation defense</li> </ul>	<ul style="list-style-type: none"> <li>• Difficult to obtain credits from design firms' insurers</li> <li>• Deductible allocation may be problematic</li> </ul>
Owners Protective Professional Liability Program	<ul style="list-style-type: none"> <li>• Comprehensive excess first party professional and contractors pollution liability coverage</li> <li>• 20 – 50 percent less than project specific approach because of excess/ first party stance</li> <li>• Simplified selection process for design professionals including M/W and DBE's who may not carry sufficient insurance</li> <li>• Can be used for contracts involving limitations of liability/waivers of consequential damages provisions</li> <li>• Can cover a number of projects</li> </ul>	<ul style="list-style-type: none"> <li>• May be difficult to negotiate or litigate owner's claims against multiple defendants</li> <li>• Lack of control over claims mitigation and defense in the primary layers</li> </ul>

### Project-Specific Professional Liability Policy



\* Amounts vary widely, but typical deductibles start at \$250,000  
 Note: Policy applies to all Design Professionals including, but not limited to architects, engineers, construction managers, and consultants from the beginning of design through construction plus three to ten years after.

## **Professional-Specific Professional Liability Coverage Representative Contractual Language**

If the owner notifies the design firm that a project professional liability policy will be purchased, then the design firm agrees to use their best efforts, in cooperation with the owner and owner's insurance representative, to pursue the maximum credit available from the professional liability carrier for a reduction in the premium of the design firm's professional liability insurance policy. If no credit is available from the design firm's current professional liability policy underwriter, then the design firm agrees to pursue the maximum credit available on the next renewal policy, if a renewal occurs during the terms of the project policy (and on any subsequent professional liability policies that renew during the term of the project policy). The design firm agrees that any such credit will fully accrue to the owner. Should no credit accrue to the owner, the owner and design firm agree to negotiate in good faith a credit on behalf of owner for the provision of a project- specific professional liability insurance policy in consideration for a reduction in the design firm's self-insured retention and the risk of uninsured or underinsured consultants.

The design firm agrees to provide the following information when requested by the owner or owner's representative:

- 9.1 The date the professional liability insurance renews
- 9.2 Current policy limits
- 9.3 Current deductible/self-insured retention

## **Professional-Specific Professional Liability Coverage Representative Contractual Language**

9.4 Current underwriter

9.5 Amount (in both dollars and percent) the underwriter will give as a credit if the policy is replaced by a project policy for this project

9.6 Cost of professional insurance as a percent of revenue

9.7 Affirmation that the lead design firm will complete a timely project errors and omissions application.

“If the Owner elects to purchase a project professional liability policy, the firms to be insured will be notified and the Owner shall provide professional liability insurance, naming these firms and their professional subconsultants as named insureds. Such insurance shall be claims made insurance and shall have a limit of not less than \$\_\_\_\_\_ each claim and in the aggregate, including defense costs, for the design firm’s errors, or omissions in performing professional services included in the design work. The limit of liability shall be maintained during the duration of the project (unless it is reduced by the payment of covered claims) and for a period of after final completion the deductible will be no greater than \$\_\_\_\_\_ for each claim. The policy shall contain standard industry terms, conditions and exclusions. The policy shall be retroactive to the date the design firm began the design work.”

## **Professional-Specific Professional Liability Coverage Representative Contractual Language**

If the Owner elects to purchase a project professional liability policy, the design firms to be insured will be notified and the Owner shall determine the method of allocation for payments within the policy deductible.”

Please note that the above wording is a “sample” only and should be reviewed by local legal counsel and your insurance broker or agent to be sure it meets the specific needs of the project and the laws of the local jurisdiction. If the project approach is chosen, the design team’s practice policies should remain in force, but should sit excess of and Difference in Conditions (DIC) to the project placement

