

**Engineering Law &
Ethics Seminar**

HalfMoon Education, Inc.

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Presented By

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1. Learn Basics of Professional Liability Insurance (**PLI**) and Commercial General Liability (**CGL**) Policies.
2. Understand Differences between these Two Types of Policies.
3. Discuss Coverage Issues Related to Common Risks.



Basic Policy Structure:

1. Declarations
2. Insuring Agreements
3. Definitions
4. Exclusions
5. Conditions
6. Endorsements



Policy Exclusions: How do They Operate?

- The Insuring Agreement grants the insured broad coverage, which is then narrowed by the policy's Exclusions that operate to restrict and shape the coverage otherwise afforded by the Insuring Agreement. *Lamar Homes, Inc. v. Mid-continent Casualty Co.*, 242 S.W.3d 1, 10 (Tex. 2007).
- Exceptions to exclusions then further shape the scope of coverage by bringing back in some of the coverage removed by the exclusion.

About

Professional Liability Coverage



Designed to cover liability of insured to third parties arising from “**negligent act, error or omission**” in insured’s performance of professional services, subject to numerous conditions and exclusions.

- Commonly referred to as **“E&O” insurance**.
- Typically a **“claims-made” policy form** – requires claim to be reported within policy period.
- Coverage only up to limits of liability for each claim and annual aggregate.
- Policy limits are eroded by defense costs.

Typical Insuring Agreement:

A. COVERAGES: (CLAIMS-MADE AND REPORTED)

- The Insurer will pay on behalf of the Insured all sums in excess of the deductible shown in Item 4 of the Declarations that the Insured shall become legally obligated to pay as **Damages** resulting from any **Claim** first made against the Insured and reported in writing to the Insurer during the Policy Period for any **Breach of Professional Duty** by the Insured or any other person for whose action the Insured is legally responsible, but only if such **Breach of Professional Duty** occurs on or after the Retroactive Date shown in item 8 of the Declarations and before the end of the Policy Period and solely in the performance of **Professional Services**.

Common Definitions:

- **Breach of Professional Duty** – negligence, defined as the failure to meet the professional standard of care legally required or reasonably expected under the circumstances in the performance or non-performance of Professional Services rendered to others by the Insured which results in Damages for which the Insured is legally liable.
- **Claim** – any written demand received by an Insured seeking Damages and alleging liability or responsibility on the part of the Insured or persons for whose conduct the Insured is legally liable.

Common Definitions:

- **Damages** – any amount which an Insured is legally obligated to pay for any Claim to which this insurance applies and shall include: judgments and settlements, interest on judgments, and punitive, exemplary or multiple Damages . . .
- **Professional Services** – those services that the Insured is legally qualified to perform for others in their capacity as an architect, engineer, landscape architect, land surveyor, Agency Construction Manager, or as specifically defined by endorsement to this policy. Professional Services shall not include facilities operations and maintenance operations or activities.

Common Exclusions – No Coverage for:

- Any criminal, dishonest, fraudulent or malicious conduct;
- Any Claim made by or on behalf of any Insured against any other Insured, i.e., cross-liability exclusion;
- Any cost to replace or repair any faulty workmanship if work is performed by Insured;

Key Exclusions – No Coverage for:

- Express or implied warranty or guarantee; provided, that this exclusion shall not apply to any guarantee that the Insured's Professional Services comply with the generally accepted professional standard applicable to the Insured's Professional Services;
- Actual or alleged liability assumed by the Insured under any written or oral contract or agreement; provided, that this exclusion shall not apply to the extent the Insured would have been legally liable in the absence of such contract or agreement.

About

CGL Insurance



Designed to cover liability of insured to third parties for bodily injury or property damage arising from an Occurrence, subject to numerous conditions and exclusions.

- Coverage for professional liability excluded.
- **“Occurrence” policy** – allows coverage even if claim not reported during policy period so long as “Occurrence” took place during policy period.
- Defense costs do not erode policy limits.
- Coverage forms are standardized.

Typical Insuring Agreement:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "**bodily injury**" or "**property damage**" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "**occurrence**" and settle any claim or "suit" that may result.
(Part 1 of Para 1a. from ISO Coverage Form CG 00 01 12 07)

Common Exclusions – No Coverage for:

- Expected or intended bodily injury or property damage.
- Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.
- **“Bodily injury”** to an **“employee”** of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business.
- **“Bodily injury”** or **“property damage”** arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of **“pollutants”**.

Key Exclusions – Contractual Liability:

- Assumption of liability in a contract **unless**:
 - **the liability is for damages the Insured would have in the absence of the contract; or**
 - **The liability is assumed under an “insured contract”.**
- Texas Supreme Court recently ruled on application of the first exception above to the Contractual Liability Exclusion in the *Ewing v. Amerisure* case.
- Court determined that Exception 1 allows coverage for insured’s duty to perform in good and workmanlike manner, even if this duty is stated in a contract, because contract does not expand insured’s common law duty.

What is an “Insured Contract”:

- That part of a contract under which the Insured assumes tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

What is **not** an “Insured Contract”:

- Commonly known as “**Professional Services Exclusion**”
- No coverage under contract in which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured’s rendering or failure to render professional services, including:
 - Supervisory, inspection, architectural or engineering activities;
 - Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - Giving directions or instructions, or failing to give them, if that is the primary cause of the damage.

Additional Insured (AI) Endorsements:

- Allow additional parties to be Insureds on the CGL Policy.
- Provide coverage to these additional parties for their liability for bodily injury or property damage caused in whole or in part by the insured's acts or omissions.
- Generally, these endorsements provide coverage for Insured's indemnity obligations to AI.
- House Bill 2093, enacted by Texas Legislature in 2012, now limits the scope of coverage allowed by AI endorsements.

Typical Additional Insured (AI) Endorsements:

- **ISO CG 2010** – provides coverage to AIs for liability arising from ongoing operations of Insured.
- **ISO CG 2037** – provides coverage to AIs for liability arising from completed operations of Insured.
- These endorsements are commonly contractually required by Owners.

PLI Policies:

1. **“Claims-Made”** Policies
2. Limits Eroded by Defense Costs
3. Cross Liability Exclusion
4. Additional Insureds are Typically Not Allowed

CGL Policies:

1. **“Occurrence”** Policies
2. Defense Costs Outside Policy Limits
3. Separation of Insureds Clause
4. Additional Insureds are Allowed

About

Important Coverage Issues



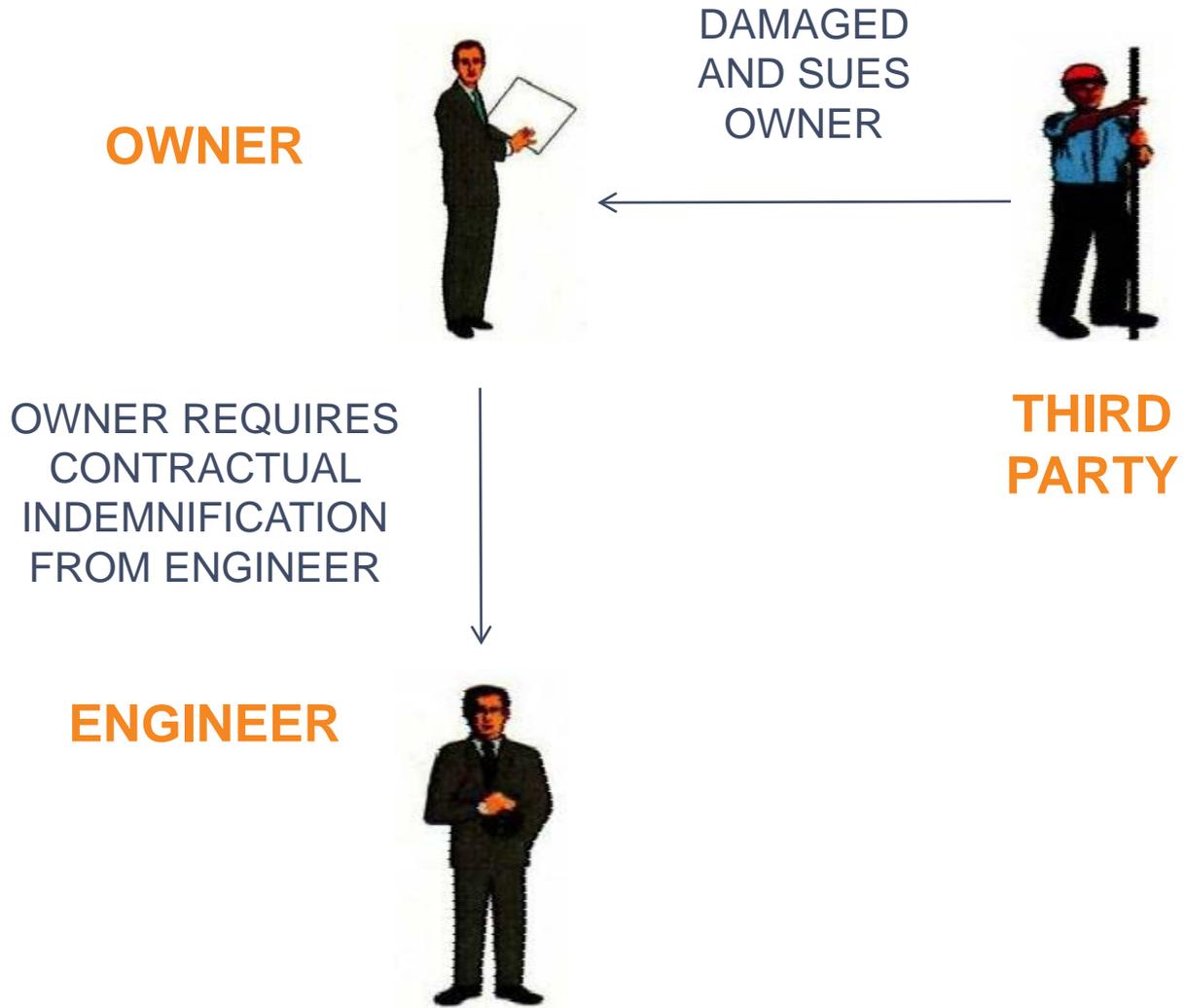


- **Indemnity Clauses**
- **Assignments/Consents**
- **Vicarious Liability for Subconsultants**

- **Indemnity: What Is It?**
 - An “indemnity” is simply an agreement to assume another’s liability to a third party.

- **Who are Third Parties Who Might Assert Claims of Liability?**

Typical Indemnity Arrangement



- **Type I, Broad Form** – one party (indemnitor) indemnifies the other party (indemnatee) for its negligence, even indemnatee's sole negligence.
- **Type II, Comparative or Intermediate** – one party (indemnitor) indemnifies the other party (indemnatee), even if the loss was due in part to the negligence of the indemnatee.
- **Type III, Limited** – one party (indemnitor) indemnifies the other party (indemnatee) only if loss was caused by the negligence of indemnitor.

To the fullest extent permitted by law, Engineer shall indemnify, defend, save and hold the Owner and its respective partners, officers, employees and anyone else acting for or on behalf of the Owner (hereinafter collectively called “Indemnitees”) harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with the performance of Engineer’s Services hereunder, whether or not such liability, damage, loss, claim, demand or action was caused solely by the negligence or fault of an Indemnitee.



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To the fullest extent permitted by law, the Engineer shall defend, indemnify and hold harmless the Owner, the Owner's officers, directors, members, consultants, agents and employees (the Indemnitees) from all claims for bodily injury and property damage, including reasonable attorney's fees, costs and expenses, that may arise in connection with this Agreement, but only to the extent caused by the negligent acts or omissions of the Engineer.

Under PLI Policies:

- The trigger for coverage must involve a negligent act by the Insured – no coverage for assumption of another party's liability, e.g., broad form indemnity and intermediate form to the extent of the other party's negligence.

Under CGL Policies:

- It depends on the type of Additional Insured Endorsement (AIE). If there is no AIE, there would be no coverage for broad or intermediate form indemnity clauses – bottom line, it's complicated – consult a coverage attorney.

- In many instances on private projects financing entity requires Owner to obtain an assignment of the Design Professional services contract to the financing entity.
- In such cases, design professional must be careful not to unravel the many protections contained in the original professional services contract.
- Such **Lender Assignment Agreements / Consents** often contain language creating new contractual relationships and duties which most likely will not be insured due to contractual liability and warranty exclusions contained in PLI policy.

- Is there coverage under a prime engineer's PLI policy for the acts or omissions of its subconsultants, i.e., vicarious liability for wrongful acts of subs?
 - **ANSWER:** Generally, No. Most PLI policies exclude coverage for liability assumed under a written contract except for liability existing absent the contract.
 - In Texas vicarious liability typically only extends to an employer when its employee is acting in the course and scope of his/her employment.
 - Thus, the prime engineer would not be vicariously liable under common law principles, and the exception to the exclusion would not bring coverage back.

- Read and understand the conditions of your policy related to filing claims.
- Understand how your policy defines “claims”.
- If you receive a written demand for damages, then it’s most likely a claim that should be submitted to your carrier.
- **ADMIT NOTHING!** Do not admit or assume any liability, incur any claims expense, enter into any settlement agreement or stipulate to any judgment without the prior written consent of your insurer.
- When in doubt, consult your attorney or insurance advisor.



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