

Ask Vic!



Do you have a question regarding an insurance or practice management issue? Email your question to AskVic@Schinnerer.com and look for your answer in a future issue of ACSM's Bulletin. Victor O. Schinnerer & Company, Inc., is the underwriting manager for the CNA professional liability program. Schinnerer and CNA have been the commended program of the American Congress on Surveying and Mapping since 1965.

Q: *With the downturn in the economy, we are cutting costs wherever possible. Why should my firm maintain its professional liability insurance?*

A: There are a few important factors to take into account when considering dropping coverage. First, professional liability insurance is written on a claims-made basis. This means that the coverage in effect when a claim is made will apply, not the coverage that existed when the error leading to the claim took place. If there is no current coverage it is as if the firm never had insurance. This ties into the second point concerning prior acts coverage. Once a firm drops its insurance it loses coverage for all past services. Finally, one must consider any legal limitations on claims such as a statute of repose or a statute of limitations.

Claims-made Basis

“Claims-made” means that the policy must be in effect at the time the claim is made against the surveyor—even though this can be years after completion of services. Claims-made policies are common to professional liability insurance and should not be confused with occurrence policies common to general liability insurance. This distinction is important to understand.

Under a claims-made policy, all coverage ceases when the policy is canceled or not renewed (by the firm or the insurer), even though the surveyor may have been insured when the services were rendered. Under an occurrence policy, a claim filed after policy cancellation or renewal will be covered if the policy was in force when the incident that caused the claim occurred, regardless of whether the insured was covered when the claim was made.

The claims-made basis is used for professional liability insurance coverage because it makes costs to the insurer more predictable. If coverage for professional liability risks were offered on an occurrence basis, the cost of such coverage could be prohibitive. Insurers would have to include contingencies for many more unknowns. This distinction, however, means that firms that purchase insurance as a risk management

tool have to keep the insurance in force on a continual basis to maintain protection. When a firm remains with one carrier, the claims-made nature of the policy is not an issue. If a firm switches carriers, prior-acts coverage is usually available to cover the risks from the earlier period.

Professional liability coverage is also available to continue the protection needed by surveyors who withdraw from active practice. Usually this “tail” coverage is arranged by endorsing the basic policy. Some states require admitted carriers to provide some level of tail coverage at an extra cost to the insured.

Prior Acts

Firms can purchase coverage for professional acts and services that took place before they first became insured or when they were insured by another carrier. The scope and availability of this “prior acts” coverage varies from insurer to insurer. As an example, the Schinnerer and CNA program offers full prior acts coverage (to the day the firm started practice) to eligible firms after they have been in the program for as little as one year. This means that the firm is covered for any claim made against it going back to the day that the firm opened its doors.

Other insurance programs use a retroactive date. For these policies, coverage is provided for claims that arise out of services provided after this retroactive date. By dropping insurance, a firm would lose this coverage. Any new policy written in the future would not have full prior acts coverage or, alternatively, would have a later retroactive date.

Time Limits for Exposure to Claims

In most states, legislatures have enacted statutes of repose preventing the filing of claims involving property damage or personal injury after a set period of time following the completion of an improvement to real property. A statute of repose, therefore, determines the legal time limitations of the right to bring a lawsuit. The suit must be brought within a specified period that normally starts to run from an event specified in the statute—for example, the date of substantial completion of the project. This is distinguished from the statute of limita-

tions, which runs from the time the party bringing the claim knew or reasonably should have known of its injuries or damages.

Statutes of repose are unique in United States law because they are the absolute removal by the state legislature of a party's right to seek redress through the judicial system. Schinnerer and CNA's analysis of claims has shown that 90% of claims alleging negligence and asking for remedial services or compensation by the surveyor happen within four to five years following substantial completion of surveying services.

By contract, the client and surveyor can agree to a specific time limitation or convert an applicable statute of limitations into a statute of repose. Such a contractual provision thus limits the risk of claims against the surveyor from the surveyor's client. Because statutes of limitations usually are much shorter than any statutes of repose, the conversion of the statute of limitations into an absolute prohibition of claims helps protect the surveyor since claims can be barred after only a few years. Be sure to check with your legal counsel before agreeing to such a clause.

Statutes of limitations give aggrieved parties a defined period during which a lawsuit or other claim could be instituted after injury or discovery. Statutes of repose are enacted by states to recognize that in constructed facilities it becomes increasingly difficult as time passes to determine fault for a defect. These statutes give a defined period to bring claims from the completion of services, substantial completion of a project or, in some states, some other final completion date. For instance, a state could limit civil suits (including negligence and breach of contract actions) to ten years after substantial completion. ■

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