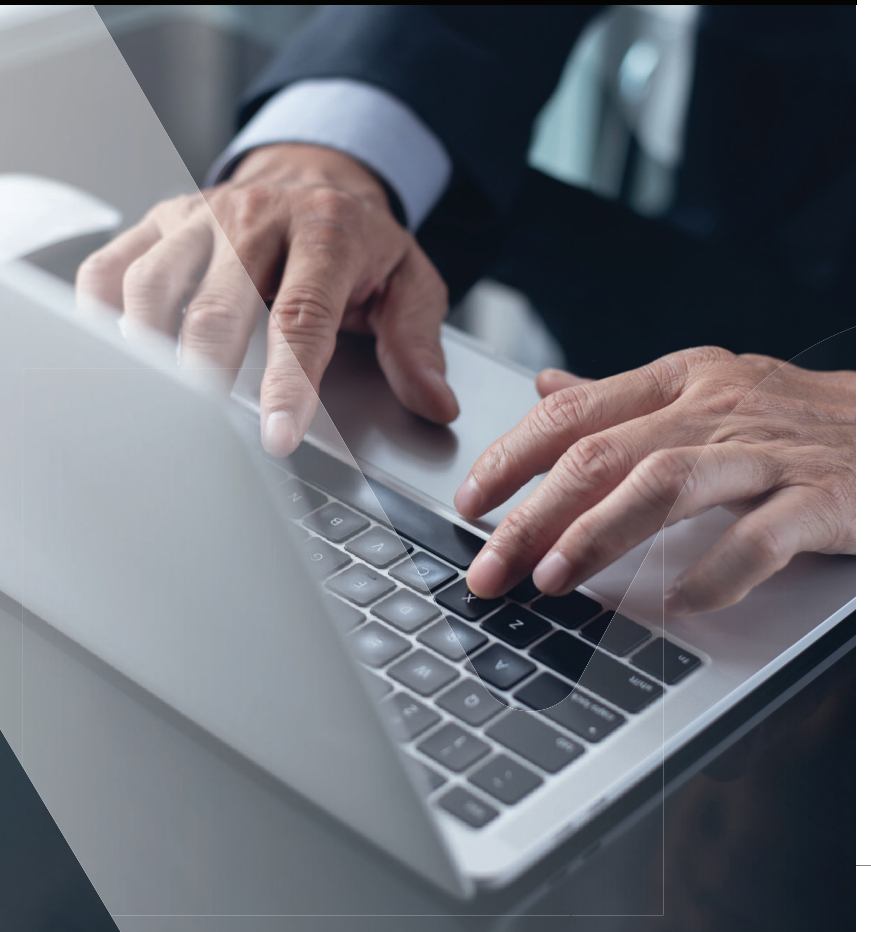
2020 POLICY CHANGES
VICTOR AND CNA PROFESSIONAL LIABILITY PROGRAM



VICTOR

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OVERVIEW

2020 policy changes

For more than 60 years, the Victor and CNA professional liability program has maintained a solid and stable base policy while introducing innovative expansions of coverage. As the design and construction industry has evolved, so has our policy.

Significant changes to the 2020 version of the policy include:

- expansion of the term insured;
- enhanced rectification applicability;
- availability of aggregated defense outside the limits;
- update to the faulty workmanship exclusion;
- carve-back to the transportation exclusion;
- inclusion of most favorable jurisdiction;
- expansion of the subrogation waiver; and
- liberalization of current policy coverages.

At its base, the professional liability policy provides coverage for current and former employees of your firm who in the scope of their duties perform professional services for the firm. Recent expansions of coverage, for examples, include allowing you to hire a retired partner as a consultant for a specific client or project, or providing coverage for any leased personnel. These expansions enable you to staff your practice and projects with the personnel best suited for the job.





We have expanded the definition of the term insured in a significant way, highlighting our commitment to serving the needs of the changing A&E marketplace. A simple change like expanding the term "insured" gives you:

- more effective responses to project proposals that require additional staffing;
- maximum flexibility in acquiring the best talent; and
- assistance with management of colleague costs and benefits.

In addition, this new expansion of coverage can help you with:

- transformational projects, such as when you have an expansive project that requires specific or functional areas of needed specialization;
- overburdened deadlines, such as when you bring on workers to handle the rush of a particularly difficult project; and
- special connections, such as when you hire individuals due to their relationships or connections with a specific project or owner.

At Victor and CNA, we strive to be active partners in helping to grow your professional practice, and the design and construction industry as a whole. Our mission is to consistently create superior products and to provide outstanding service and exceptional value to each and every policyholder. Our goal is to be recognized as an elite specialty insurance provider and distributor and grow through valued service, innovation, and expertise.

Download the new policy

Download a copy of the new 2020 policy.

EXPANSION OF THE TERM INSURED

Insured means, "any person who is or becomes a leased or contracted personnel under the direct control and supervision of the Named Insured or newly acquired subsidiary during the policy period, but only while acting within the scope of their duties for the Named Insured or newly acquired subsidiary."

Introduction

The professional liability policy provides coverage for current and former employees of your firm who in the scope of their duties perform professional services for the firm. The policy also provides coverage for the firm entity as well as the current and former owners who have responsibility for the firm. We have now expanded the definition of the term "insured" in a significant way, highlighting our commitment to serving the needs of the changing A&E marketplace.

What is the change?

The CNA professional liability policy now provides coverage for contracted personnel under the direct control and supervision of the insured firm for the scope of duties the contracted personnel complete on behalf of the firm. The contracted personnel have to be engaged in their individual capacity; be aware that the coverage expands to those personnel whose income is reported on a 1099 form for federal income tax purposes. The policy only provides coverage for the contracted personnel if they do not have professional liability coverage of their own. If they already have professional liability coverage, your CNA policy will provide excess coverage if the contracted personnel policy limits are exhausted.





Why did we change it?

In the past, you employed on-site staff as full-time employees undertook design projects. Developments in digital technology increasingly allow you to expand the use of individually contracted labor on a project-by-project basis. This gives you the flexibility to use the best resources for each project and does not necessarily bind you to using employees for project execution. One of the major impediments to this evolving need was that either contracted personnel had to procure their own insurance policies or you had to work with your broker and underwriter to have the contracted personnel added as a named insured. We made this change to serve your needs to use contracted personnel on a project basis and reduce the administrative time and cost of onboarding contracted personnel for your projects.

How does it benefit my practice?

This change offers peace of mind. You can engage subconsultants knowing that your professional liability policy provides coverage for contracted personnel. From a risk management perspective, it still makes sense to engage competent, experienced personnel. If, however, the subconsultants do not have professional liability coverage of their own, you can still select them knowing that the CNA policy includes contracted individuals in the definition of insured.

ENHANCED RECTIFICATION APPLICABILITY

“Rectification expense means reasonable and necessary fees, costs and expenses incurred by the Named Insured for rectification of a design defect caused by professional services in any part of the construction works or engineering works for any project upon which the Insured is responsible for design. Rectification expense does not include: overhead, mark-up, profit or any fee, charge, cost or expense incurred by any Insured for materials supplied or services performed by any Insured.”

Introduction

Rectification coverage enables you to take the lead on design-build projects while supporting early resolution of design problems on all projects by limiting the risk that a design error will lead to a major financial loss. The coverage extends to any design defect caused by professional services on any construction project. With the new policy, you do not have to be responsible for construction. Whether you are performing design services for a project client directly or a design-build entity as a subcontractor, the policy expedites the early resolution of a design problem.

What is the change?

The new policy expands rectification coverage by setting up a system for the early involvement of a CNA claims specialist when you discovers a design deficiency while providing design services. Some of the features of the rectification coverage are the following:

- provides mitigation of loss payments for design defects that could result in a claim;
- covers reasonable and necessary fees, costs, and expenses incurred by you because of a design defect caused by professional services in any part of the construction or engineering works for any project upon which you are responsible for design;
- covers design services, but not actual or alleged negligence in the review of shop drawings, issuance of change orders, observation of construction, or review of pay applications because those allegations would be subject to normal negligence coverage of the policy; and
- is subject to the deductible obligation and excludes overhead, mark-up, profit or any fee, and charges, costs or expenses incurred by you for materials supplied or services performed.

Why did we change it?

When a problem happens during construction using traditional design-bid-build, there is often a claim from the project owner against the design team. In some cases, the construction entity that discovers the problem brings a contractual claim for delays and extras against the project owner, who then involves the design firm in the claim's resolution. About 33% of claims against design firms occur before a project is substantially complete. If technical design errors are identified early, they are usually resolved quickly and often at a minimal cost of time and money.

The rational solution is one that enables you to take the lead on a design-build project and minimize the risk to your firm, the project owner, and the public: a mitigation of loss coverage called rectification.

How does it benefit my practice?

The expanded rectification provision equips you with another tool to increase your control over your professional liability exposure in providing design services on all projects, including those where you take the leadership position on a design-build project. You can cite the expanded coverage when educating clients on your ability to provide a timely and responsive project.



AGGREGATED DEFENSE OUTSIDE OF THE LIMITS



Provides a separate claims expense limit for firms up to $1,000,000 in annual billings.

Introduction

All insurance policies have per-claim and aggregate limits that are the absolute maximum the insurance policy will pay out on your behalf. Because professional liability insurance claims can be difficult to resolve through litigation, the costs of defending you are usually included within the policy limits.

What is the change?

The CNA professional liability policy now provides firms with less than $1 million in annual revenue the option of purchasing "defense outside of the limits." Defense outside of the limits means that the costs of defense do not erode the policy limits that are available to settle the claim. With the defense costs borne by CNA, you can protect the limits on your practice policy to meet insurance requirements under your contracts.

Why did we change it?

Typically, defense costs and any indemnity payments made on your behalf for your negligence in providing professional services erode your available policy limits. Defense costs for a specific professional liability claim can quickly erode the available per-claim limit as well as your deductible obligation, unless the per-claim limit increases to accommodate a long defense process.

In addition to your attorney, professional liability claims require an expert to provide a professional opinion about the nature of your services to defend against allegations of your negligence. This is costly, and often puts pressure on your firm to ensure that funds are available to settle the claim within available policy limits before defense costs deplete those funds. For smaller firms, the reserves within the firm may be inadequate to continue the defense if they reach their per-claim limit. There is no "hammer clause" in the CNA policy that forces you to settle a claim. Defense costs can continue rising if you want to keep fighting the claim.

How will it benefit my firm?

If your firm has the availability of defense outside of the limits on your policy, you can educate a client that high limits required by the client are probably unnecessary. Many clients understand that defense costs erode per-claim and aggregate limits so they require much higher levels of coverage. If clients know that underlying funds are available to rectify harm for which your firm is liable, they should reduce their demands for higher limits, thus saving your firm on the costs of maintaining higher limits.



UPDATE TO FAULTY WORKMANSHIP EXCLUSION



The faulty workmanship is clarified as follows: "arising out of any actual or alleged cost to repair or replace faulty workmanship the Insured performs on any construction, erection, fabrication, installation, assembly, manufacture or remediation, including any materials, parts, or equipment furnished in connection therewith. This exclusion does not apply to: drilling, excavation, or other sampling or testing procedures or the supplying of furnishings as part of interior design services, necessary to perform professional services."

Introduction

The CNA professional liability policy provides coverage for liability you have due to negligently performed services. The faulty workmanship exclusion excludes coverage for construction-related activities. If you perform construction, erection, fabrication, installation, assembly, or remediation activities, then any claim that arises from these activities is excluded from coverage. The intent is to clarify that liability due to construction-related activities unrelated to professional services is not covered by the professional liability policy. We recognize, however, that there are certain types of activities that arise in the context of professional services that should not fall under the faulty workmanship exclusion.

What is the change?

You routinely perform certain activities that are necessary to perform your services. If the activity is related to the performance of professional services, then the faulty workmanship exclusion does not apply. For example, an interior design firm often supplies furnishings as part of their interior design services. Similarly, a geotechnical consultant has to drill or sample material to perform their professional services. The CNA policy recognizes that the line between professional services and construction may be blurred by necessity and in those instances, the exclusion should not apply.

In the 2020 policy, we updated the faulty workmanship exclusion to clarify that the exclusion does not apply to the activities that are necessary to perform professional services.

Why did we change it?

We changed this to align the policy language with our practice guidance. Forensic engineers, geotechnical engineers, testing labs, interior designers, and others were often concerned that the faulty workmanship exclusion would somehow impair policy coverage because they were engaged in activities related to their professional services. You can rest assured that the faulty workmanship exclusion does not apply to activities that you have to undertake to perform your professional services.

How does it benefit my practice?

The scope of coverage of the professional liability policy is clearer as it relates to activities necessary to perform your professional services.



CARVE-BACK TO TRANSPORTATION EXCLUSION

This exclusion shall not apply to amounts the insured becomes legally obligated to pay as a result of a wrongful act for which this policy otherwise provides coverage, even if the professional services were performed using or operating an "automobile, aircraft, watercraft or rolling stock."

Introduction

The CNA professional liability insurance policy provides coverage even if you use drones as a tool to perform your professional obligations. Using drones is covered when providing professional services, whether documenting new construction for evaluation by your firm or providing video evidence that supports your inspection of existing facilities.

What is the change?

The new policy form clarifies that coverage only applies if the underlying cause of action was a wrongful act or omission in the performance of professional services and not a wrongful act or omission in the operation of a business that happens to provide professional services.

You have to be aware of your business risks and cover your exposures through appropriate insurance products or contractual indemnity provisions. Sometimes, many policies are needed to cover differing exposures. When using a drone, you may need special aircraft coverage or an endorsement to your general liability policy for any physical damage, invasion of privacy, and other general liability exposures drone usage could create. This would apply even if you hire an outside drone operator because you still has vicarious liability for the damage the drone can cause. Moreover, professional liability insurance never covers a criminal activity that could result from unpermitted drone operations.





Why did we change it?

Drones are a tool for providing professional services, but drone operations create a different exposure. Professional liability coverage for drone usage is different from the coverage under a general liability policy or endorsement so it's important to recognize and account for any known gaps through separate coverages.

A variety of general liability insurance endorsements addressing drone exposures provide maximum flexibility and allow insurers to decide how to cover drone liability independent of how other aircraft exposures are treated. Endorsements are used to provide coverage for bodily injury, property damage, personal injury (such as invasion of privacy), and advertising injury caused by drone use.

How does it benefit my practice?

Your firm has coverage for using a drone to gather information while providing professional services. Your insurance advisor can examine the non-professional coverage you need for operating a drone. Firms that subcontract for drone operation services should make sure that the subcontractor has appropriate coverage for the physical damages and personal injuries a drone could cause. A drone operator should contractually agree to stand behind its services through an indemnification obligation that protects your firm. In addition, you should check your general liability and management liability coverages so that you has coverage if held responsible for negligence in the selection and management of a drone operator who does not have appropriate coverage.

MOST FAVORABLE JURISDICTION

Most favorable jurisdiction means, "if a claim results in a punitive, exemplary, or multiplied damage award, the Insurer will pay such award, up to the applicable Limit of Liability, to the fullest extent permitted by law. The enforceability of the foregoing shall be governed by such applicable law in the jurisdiction which most favors coverage for punitive, exemplary and multiplied damages; provided that such jurisdiction has a substantial relationship to the Insured or the claim."

Introduction

In many states, insurance coverage is not possible for damages that are not the direct result of a wrongful act. Punitive damages (those assessed by a court or jury) are those damages awarded in addition to actual damages because the defendant acted with recklessness, malice, or deceit. Such damages are meant to penalize the egregious actions of the defendant and act as a deterrent to others. Exemplary damages are simply another name for punitive damages. And multiplied damage awards are authorized by statute for much the same reason; they are double or treble damages, expanding the liability for actual damages.

What is the change?

If punitive and other similar damages are based on your wrongful act in the performance of professional services, the CNA policy will pay them within the normal policy limits and subject to your deductible obligation.

Now, the new policy language expands the insurer's commitment to pay excess damage awards by creating a "most favorable jurisdiction" coverage provision.





Why did we change it?

In an egregious situation, a court may award damages that are in addition to actual damages. In the case of design firms, assessment of these punitive, exemplary, or multiplied damage awards usually happens when the defendant acted with recklessness and violated the professional obligation of protecting public health and safety. The intent of damages is not only to penalize the wrongdoer, but also to make other design professionals aware of their higher duty beyond meeting contractual obligations. Because punitive damages are meant to deter blameworthy conduct, some states often prevent them from being covered by insurance. The argument is that if a party can be insured for its reprehensible conduct, there is no real punishment.

This enhancement increases the possibility of punitive damages coverage in the CNA policy for firms that have projects located in multiple jurisdictions. It also applies to smaller firms that may have projects in one state but, by contract, are subject to the laws of a more favorable jurisdiction.

How does it benefit my practice?

If a claim results in a punitive, exemplary, or multiplied damage award, the CNA policy will pay the award, up to the policy's applicable limit of liability, to the fullest extent permitted by law in the jurisdiction that most favors coverage for punitive, exemplary, and multiplied damages. Of course, the jurisdiction has to have a substantial relationship to your firm or the claim for its rules to apply to the coverage. This means that you need not pay such damages with firm or personal funds.

SUBROGATION WAIVER EXPANDED

The subrogation waiver expansion means, "the Insurer hereby waives subrogation rights against any person or organization to the extent that the Named Insured has, prior to a wrongful act or circumstance, entered into a written agreement to waive such rights."

Introduction

Subrogation is the principle under which an insurance company that has paid a loss under a policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy. For instance, on a project where there is a loss covered by the owner's property insurance, it is common for the property insurer to sue every other party that might have had some responsibility for the cause of loss—and in the process disrupt the orderly progress of the work on the project. This happens unless the property insurer waives its right to take such subrogation action.

What is the change?

The current CNA policy form has an automatic waiver of the insurer's subrogation rights against the client of the policy if the professional services agreement requires the waiver. While that takes one negotiation item off the table, many clients want the waiver to be much broader to avoid the possibility of troublesome insurance litigation. Because it would be so unusual for a professional liability insurer to pursue a subrogation claim against a third party after it pays a claim on behalf of the policyholder, the waiver is broader so that other parties do not have to worry about a subrogation claim.





Why did we change it?

In practice, subrogation claims against clients or other stakeholders "up the contract chain" are difficult to pursue and rarely productive. The policy covers harm caused by negligently performed professional services so proving a client's actions caused that act of negligence is difficult. However, there are also subrogation claims against those "down the contract chain"—subconsultants and subcontractors. Usually, they are brought into the claim resolution process whether negotiation or adjudication is used. Once the resolution is final, there is no need for an insurer to use subrogation rights.

How will it benefit my firm?

As you discuss a prospective contract, a demand for a waiver of subrogation rights by the client will not hold up your negotiations and will not require you or your insurance advisor to seek a policy endorsement. You no longer have to explain to a client why the policy would only waive claims against the party who signs the professional services agreement and not the lender, tenant, or other party that might be involved in the ownership, development, or operations of the project.

If you are a prime professional, you might want to analyze whether to limit the liability of subconsultants, or waive their liability for consequential damages. Such limitations reduce your ability to recover from a subconsultant when the subconsultant's negligence or breach of contract creates a loss for your firm. You are vicariously liable for the wrongful acts of your subconsultants so clients often look for recovery from you and your insurer.

With the new waiver, CNA will not pursue subrogation against a subconsultant to recover part of the claim payment made on behalf of you if the contract with the subconsultant requires a waiver of subrogation rights.

LIBERALIZATION OF CURRENT POLICY COVERAGES

Liberalization means, "If, during the policy term, the insurer files with the appropriate regulator, general revisions to the terms and conditions of this Policy that are intended to apply to all Insureds and provide broadened coverage without an additional or increased premium charge, then such broadened coverage will apply immediately to this Policy as of the date the filed revision is effective in the state shown in the mailing address of the Declarations (hereinafter "effective date"). However, this provision will not apply to claims that were first made against the Insured prior to the effective date of such revision."

Introduction

Every insurance policy has a provision, known as a "liberalization" provision, declaring whether enhancements to a new version of the policy will apply to claims made under the current policy. CNA's professional liability coverage is subject to approval in 53 jurisdictions across the US. The process of changing the policy form in every state can take years. Once a jurisdiction approves a new policy form that provides innovative and expanded coverage, the insurer can choose to increase the coverage even before an insured renews coverage under the new policy.





What is the change?

The current CNA policy states that revisions that broaden coverage without additional or increased premium which take place during the policy's term would apply once the policy is renewed. This change hastens application to the benefit of your firm so that once general revisions to the policy are filed with the appropriate state regulator, the broadened coverage immediately applies to your existing policy coverage.

Why did we change it?

When new policy forms are filed with the state and territorial insurance commissions in the US, many allow the new coverage to apply immediately. It makes sense to start treating all claims from any jurisdictions in the same manner—applying the enhanced provisions to all policies in force is a good business practice.

How does it benefit my practice?

The CNA policy has routinely expanded coverage for the same premium. Many of the changes help insured firms expand into new services or take additional risks in their pursuit of enhanced business opportunities. Now that expanded coverage will apply to you immediately, without the often-lengthy wait for some regulators to review and approve the changes, it means that you get more coverage at no additional cost.

About Victor

Victor Insurance Managers LLC is the world's largest managing general underwriter with locations in the US, Canada, UK, Netherlands, Germany, Italy, and Australia. It handles more than $2.5 billion USD in premium on behalf of numerous insurance carriers, through a large network of more than 25,000 active insurance agents and brokers. With deep, specialized underwriting expertise, the company provides a wide range of insurance coverage – from specialty property and casualty and professional liability insurance to group and retiree benefits. Victor is committed to building on 60-plus years of experience to develop products that address risk in new and evolving areas. For more information, visit victorinsurance.com.

Visit us at Victor Risk Advisory to learn more.

This document is for illustrative purposes only and is not a contract. It is intended to provide a general overview of the program described. Please remember only the insurance policy can give actual terms, coverage, amounts, conditions and exclusions. Program availability and coverage are subject to individual underwriting criteria.

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