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Lawsuits happen. Not only is that a fact of business, but a fact of life. Someone has a loss, usually financial, and believes that someone else is responsible. The affected party calls a lawyer and everyone else calls their insurance companies—if they have one—to find out whether they're covered.

### What is professional liability?

Engineers have insurance to deal with claims involving professional liability. To assure the public that compensation for losses due to a professional engineering service is available when necessary, the *Professional Engineers Act* stipulates that except where specific exemptions apply, Certificate of Authorization (C of A) holders must be covered by a professional liability insurance policy.

This insurance (also called “errors and omissions insurance”) provides coverage of a person or organization for injury or loss arising from negligence or negligent misrepresentation that is alleged to have occurred in providing professional services. Professional negligence in engineering can be defined as an engineer failing to meet the standards imposed by the engineer's duty of care owed to a client. This duty of care arises because a profession is a special form of occupation to which the following criteria apply:

- The work is skilled or specialized and generally mental or intellectual rather than manual.
- Those engaged in the work are expected to be committed to higher standards for the benefit of their clients and of society as a whole.
- Those practising in the profession are licensed by a self-governing organization that regulates admissions and sets standards for the profession.

These criteria are understood to separate the members of a profession from others in the community by allowing them to provide services that others cannot. It

## Primary vs secondary liability insurance: What's the difference?

*The Professional Engineers Act* requires mandatory professional liability insurance for Certificate of Authorizations holders. This article explains how such insurance fits in with PEO's regulatory role, what this means for businesses and individual engineers, and what insurance options are available.

also means that the public has an expectation that professionals have taken personal responsibility for providing a certain minimum level of skill and service, a responsibility that doesn't extend to non-professionals.

Like other professions, an engineer does not need to achieve perfection. “Provided that a professional has exercised reasonable judgment, competence and diligence in doing the work, the fact that the work proves unsatisfactory in some way will not necessarily render the professional subject to civil liability.”<sup>1</sup> In other words, just because a client is unhappy about the outcome does not mean that a claim is justified. However, the public does expect that an engineer's work, unlike that of other professionals, always results in a positive outcome. Although engineers rarely provide incompetent services, a client may still suffer a loss from an engineer's services that exceeded the minimum standards of the profession.

Consequently, it is not always true that an insurance claim is due to incompetence or misconduct on the part of the engineer. Sometimes, it is a matter of a disagreement between the parties about what the client wanted and what the engineer has provided. When an engineer's best work, given his or her impression of the client's need, does not meet the client's expectations, the client may

feel cheated. The money was spent, for either engineering services or work based on the output of those services, and the result is something less than what the client believes it should be. Sometimes, these claims are frivolous, but once a lawsuit is filed the engineer has to defend against it, even if only to have it thrown out. This process costs money, which will be paid for by professional liability insurance, since it covers not only judgment costs, but also claims defence costs.

Professional liability insurance is suitable only for a business that is providing engineering services to a client. A business providing products is responsible for the overall quality of the product, including the quality of any engineering done by its employees in designing or producing the product. If a product fails, the people affected usually don't care whether the failure was due to incompetent engineering, poor quality control, or bad materials: The manufacturer is responsible regardless.

The difficulty arises where a firm provides engineering services in conjunction with a product. For example, some industrial equipment manufacturers now provide the pre-start health and safety reviews needed by clients purchasing new machinery or processes. This review is clearly an engineering service that is separate from the design and manufacture of the equipment.

## Who needs professional liability insurance?

Section 47(3) of Regulation 941 under the *Professional Engineers Act* requires C of A holders, unless they are exempt because of the uninsurable nature of their work, to have professional liability insurance (or an equivalent that covers professional engineering services) or notify each client in writing of their uninsured status before entering into a service agreement. C of A holders should note, however, that a lawsuit could still be brought against the firm, since disclosure of uninsured status is not a limitation of liability.

Members of Professional Engineers of Ontario (PEO) often complain that paying for insurance is a business decision and that the *Professional Engineers Act* should be silent on what is essentially a matter of self-interest. The consensus arising out of court decisions, however, is that the object of liability insurance is to provide public protection. This follows from the fact that

The *Professional Engineers Act* imposes the insurance requirement on the C of A holder (a business), rather than on individual engineers because, unlike other professionals, engineers generally provide engineering services through a business entity. If an employee in the course of his or her employment committed negligence, the employer is vicariously liable. It is therefore always the business that attracts the claim and needs insurance. This form of insurance is known as primary professional liability insurance because it is the policy that responds first to any claim.

Because businesses assume the risk for the services they provide, engineers normally rely on the protection of their employers' policy. It is possible, however, for an engineer to be sued directly. An employer who has been sued may countersue an employee engineer, for example, in cases where an engineer is working for an uninsured business. Similarly, former employees of an insolvent business may

cost below \$10 for each person, the plan required complete participation by all engineers licensed in any jurisdiction taking part. To do this, each participating CCPE constituent member had to make insurance a mandatory part of licensure and include the cost of insurance in each licensee's annual fee. The program was implemented in 2002, at which time most of the provincial associations/ordres, except PEO, joined. Since then, PEO Council has been reviewing its earlier decision not to participate, but has not yet determined how to proceed, since the CCPE or any other plan would require mandatory participation of all PEO licensees to keep premiums affordable. Until secondary liability insurance becomes available to PEO members, if it does, professional engineers believing they may need personal professional liability coverage will have to obtain primary liability insurance and should discuss their needs with an insurance policy provider.

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the courts' interest in all cases of negligence is to ensure that the parties whose welfare has been negatively affected by the actions of a professional are protected. The law is quite clear on this point: “The fundamental purpose of tort law is to compensate victims of tort. Punishment of negligent wrongdoers is not a purpose of tort law.”<sup>2</sup>

Insurance, when it covers the cost of such settlements, is not intended to compensate the engineer for incurred penalties. Rather, the courts intend to ensure that the wronged party is able to secure relief from economic damages and is therefore offered protection from changes in lifestyle, lost future opportunities and other unwanted consequences of those damages. Settlements made in tort cases should be considered as a means of protecting the welfare of wronged parties, which is consistent with PEO's regulatory mandate.

be sued directly because the company can no longer provide compensation to the plaintiff. Or friendly advice provided by an engineer outside of the engineer's normal employment may be incorrectly understood, leading to unfortunate consequences for an acquaintance.

In all these cases, primary insurance would not cover the claim against the engineer. To protect themselves and provide compensation, where appropriate, professional engineers in these cases would need personal insurance coverage. The insurance industry has met this requirement with secondary liability insurance, a relatively new product.

A secondary liability insurance policy is purchased individually through a group plan. The Canadian Council of Professional Engineers (CCPE) put out a tender for such a plan in 2001 and selected a program proposed by DPIC Insurance. To keep the annual insurance

## Types of coverage

Insurance policies provide two different kinds of coverage. Coverage under an occurrence policy is based on when a loss happened; that is, you are covered if the policy is in force on the date of the alleged acts of negligence, no matter when a claim against you is reported to the insurance company. If a claim were made against you today for work done last year, it would be the policy in effect last year (assuming there was one) that would deal with the claim.

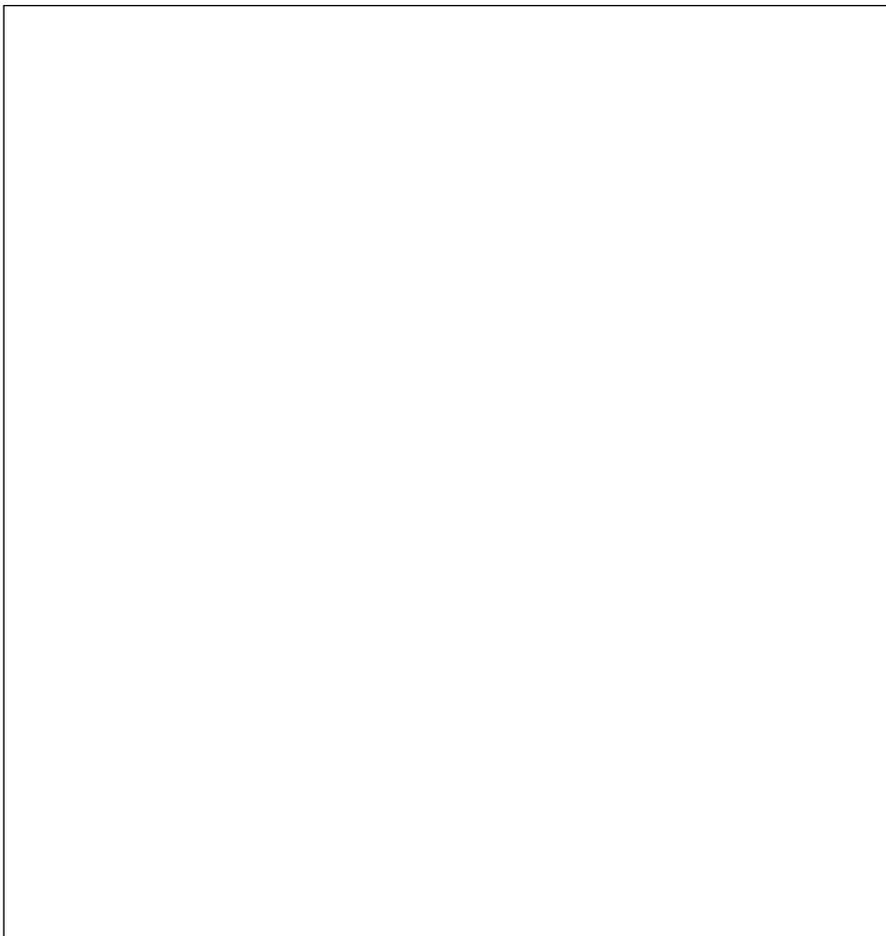
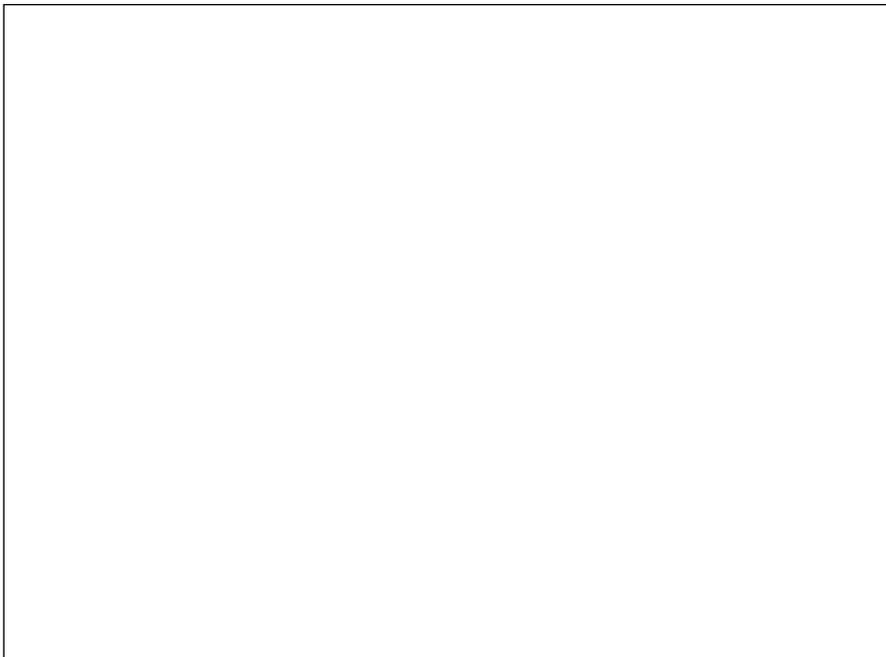
However, most professional liability insurance is written on a claims-made basis. This kind of policy provides coverage for a loss only if the claim is reported during the policy period. A policy bought this year would cover only claims made against you this year, even if the work had been done several years previously (as long as you had no prior knowledge that a claim would be made). If your engineering busi-

ness had operated for a while without insurance you could, of course, become

aware of problems that had occurred before the firm obtained coverage. A claims-made

policy might cover such prior acts, but only if they occurred after a specific retroactive coverage date set out in the policy. Any acts that occurred before that retroactive date would not be covered.

One thing we know about insurance—it's a complex and confusing business. Though there are generalities that apply to all engineers providing services directly to the public, many engineers face employment or business situations that are unique and cannot be easily classified by common types. For this reason, engineers should find out if their employer has insurance, whether it includes coverage for professional services, and whether they need such coverage. Firms employing engineers (even firms not holding a C of A) should check their potential exposure to



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claims for professional liability and determine whether their insurance is sufficient. If you need further information about any of these issues, PEO can provide a list of insurers and brokers handling professional liability insurance. ❖

References

1. John A. Campion and Diana W. Dimmer, *Professional Liability in Canada*. Scarborough: Carswell Thompson Professional Publishing, 1994. pp. 1-5.
2. D.L. Marston, *Law for Professional Engineers*, Third Edition. Toronto: McGraw-Hill Ryerson Limited, 1996, p. 32.

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