Talk to Me About A&E: Episode 26 — Insuring Single Projects Part I

RYAN BRENNAN: Much like a construction wrap up on the casualty side, the project specific policy will wrap up all of the design professionals on the project policy. So this is basically providing them all the professional liability coverage that they're going to need or called for in that project.

SPEAKER: Welcome to Talk to Me About A&E, a podcast series focused on risk management for architects and engineers. Host Dan Buelow, Managing Director of Willis A&E will engage experts across the A&E spectrum on topics ranging from contract details to the broadest trends impacting design professionals in North America.

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DANIEL BUELOW: Welcome to Talk to Me About A&E. I'm Dan Buelow. And our topic today is on Insuring Single Projects. On occasion, an architect or an engineering firm may take on a project where their prospective client is requiring higher professional liability insurance limits than what the firm currently has in place or wants PL limits dedicated to their specific project.

Given that a design professional's PL insurance professional liability insurance policy is arguably the only asset an owner can look to in the event of a PL related claim, it's certainly reasonable for any owner to question the adequacy of a design firm's PL insurance limits. Just as it's reasonable and prudent for the prime of any project to question the adequacy of the PL limits of their various subconsultants.

Regardless of what a given owner determines is the right amount of professional liability insurance limit and their design team might carry, there are a finite number of options available for a design firm to obtain higher professional liability limits.

When a design professional firm considers how much professional liability limits to purchase to cover their practice, they will and should contemplate a variety of factors, including what they need to meet their contractual requirements and what they will need to protect the financial core of their business. Costs will, of course, also be a factor, and smaller design firms tend to need and purchase lower limits of professional liability coverage than larger firms.

What all A&E firms have in common is their PL practice policy is written on a claims made policy form. And the limits of this insurance will be exposed to cover claims for all their work the firm will do over the next 12 months within that annual policy period, as well as everything that firm has done in their prior acts back to the inception of their business.

Typically the inception of their business in that retroactive period will coincide. Because an A&E firm's PL practice limits can be eroded by any future and past projects, an owner may want to consider if these enforced practice policy limits are adequate to cover their specific project.

Aside from increasing the limits on the firm's PL practice policy which can be difficult, midterm, and costly, there are essentially only two products an A&E firm can secure to raise their professional liability limits. And that is a specific job access also known as SJX A&E project specific, which I'll refer to also as PSPL.
I'm going to provide a brief recap on specific job access or SJX now, and then bring in a very special guest to help me take a deep dive into project specific or PSPL. A specific job access is often referred to, again, as SJX, and is a product that A&E firm can purchase to add additional limits of coverage over and above their enforced PL practice policy for a specific project.

This is often the easiest and most cost-effective way for a firm to increase a firm's practice limits. An SJX is typically purchased from the same carrier and broker that placed the firm's practice PL coverage and is renewed annually and concurrent with the PL practice policy. Cost is typically quoted on a per million basis and will vary based on the scope of the firm's work, their projected design fees for that project, as well as the type of that project.

Cost, again, can vary but will typically see in the range from $5,000 to $10,000 per million. So if you need, for example, a 5,000,000 in specific job access limit, it will cost between $25,000 and $50,000 per year. And we'll see the higher end of that will be if you have to go to access markets for that additional limit.
Some of the other features and issues to consider on an SJX: Coverage needs to be bound prior to the start of construction. While the additional SJX limits purchased are typically only exposed to a single project, all of the underlying practice limits are not, and can be eroded by claims on other projects. An SJX is subject to renewal every year. And there is no guarantee these additional limits will even be available, or at what cost in the future.

And often the owner will agree to reimburse the A&E for these costs of SJX. However, it's important to note again that neither the availability or the future cost of this project can be guaranteed as its subject to renewal every year.

In addition to SJX, a firm can also purchase a specific client access, or SCX, that works in essentially the same manner, it just covers everything you might be doing for a specific client. Also regarding SJX limits, keep in mind it can be costly and very difficult to purchase SJX limits greater than the underlying practice limits.

So, for example, if a firm has only $2 million in practice limits, it will be difficult to get more than $2 million SJX policy for a total of $4 million in PL coverage. Lastly, it's important to note that we've seen a lot of recent changes in the A&E marketplace, and a number of carriers will only offer practice limits up to 510 Might be their maximum limit they'll offer. Five million per claim and 10 million in the aggregate.
This can be an issue if, for example, you are a firm with a 510 practice limit and you are contractually required to have 10 million. If your PL carrier will only offer 510, you will need to find that additional limit in an excess market. And it will often cost you in doing so. So it's a good idea to get out in front of this early and to work with your broker because you can easily price this to understand if it's even commercially viable.

So that's the long and short of it when it comes to SJX. Now let's talk about the other product, which is project specific professional liability, or PSPL. And to help me with this I have with me today a very special guest, Mr Ryan Brennan. Hello, Ryan.

RYAN BRENNAN: Hello. How are you? Thanks for having me, Dan.

DANIEL BUELOW: So Ryan Brennan is Specific Project Professional Indemnity Lead for HDI Global Insurance Company. Since Ryan is the only one I know with this title of specific project lead, it's fair to say this guy should know what he's talking about.

So Ryan has over 35 years of experience in this industry, specializing in architects and engineers' professional liability for both annual business and project specific insurance. He has also handled contracts with professional environmental liability risk. Ryan has spent over 13 years with Lexington insurance and their architects and engineers unit prior to being recruited by HDI Global Insurance Company to start up their R&D division here in the US. And in 2022, using HDI specialty insurance company paper.

HDI Global Specialty SE, is an AM Best A+ rated carrier based out of Hanover, Germany. My team and I have had the pleasure of working with Ryan for many years prior to HDI over at Lexington. And we were lucky to have him with us today because he does really know what he's talking about. So, Ryan, let's take this deep dive into this product of PSPL. How does that sound?

RYAN BRENNAN: Sounds great. Let's keep in mind that like anything, it's not rocket science, but we will try to make it as fun and interesting as possible.

DANIEL BUELOW: All right, well, let's see. So, Ryan, I just gave a drone down a bit here about SJX. Tell us what is project specific insurance?

RYAN BRENNAN: OK. So basically project specific insurance, as its name implies, is written specific for a specific project. And much like a construction wrap up on the casualty side, the project specific policy will wrap up all of the design professionals on the project policy.

So this is basically providing them all the professional liability coverage that they're going to need or called for in that project. It's been around for-- oh, about 20, 25 years. And it's had its ups and downs in the marketplace. But as I said, it's really a fun product. It's a unique product. And it's really a-- it can be a very challenging underwriting, especially the various types of projects that we see on a day-to-day basis.

DANIEL BUELOW: So I want to get into that and some of these other features. Let me go down a list of things that I have noted here. So as you mentioned, it covers the entire design team. Unlike that SJX is only going to cover that firm.

And any and all subconsultants, except for possibly the geotech, are typically added-- right, Ryan, to this policy as additional named insureds. And so, Ryan, what are the thoughts on a geotech when you're underwriting this? Do you want them included or not? And what about other design professionals that might be associated with the owner or even the contractor?

RYAN BRENNAN: Well, we have seen, as respects your question on the geotechs, geotechs will typically have a very strong limitation of liability within their contracts that have been upheld by the courts. So while we do see them included most-- some of the time I should say, most of the time we have seen them carry, not covered under the policy. Which can create some challenges, especially if the geotech report seems to be the main reason for the at fault discrepancy in the design.

So typically I prefer to have the geotech included within the project specific policy only because, again, in the event of an issue arising from the geotech report, it would obviously create larger problems than, say, the limitation of liability within their contract, which is typically to-- held to their design fees for the job.
And it really just brings them into the group. And the whole idea of a project specific policy is that all the members are working as a team. So if you carve one team member out of it, it really doesn't serve the purpose or the owner or the other designers well in my opinion.

DANIEL BUELOW: I know a lot of carriers won't even entertain a project specific unless you're going to have the whole team listed. You're not going to, for example, want to do a standalone project specific for one firm. Is that correct?

RYAN BRENNAN: That's correct. We will not cover-- we will not issue a project or entertain a project specific, I should say, unless all the design firms are included in that. And you had mentioned earlier about sometimes the owners or even the contractors will have a separate agreement with separate designers outside of the ones that we're looking at.

And we have at times been requested to include them into the PSPL, which we have agreed to do. And then, of course, that takes some special endorsement wording to make sure that it's included, as well as additional research and studying of the contracts that are involved between the project owner and, say, the engineers that they're hiring or even the contractor and the engineers that they're hiring.

And, of course, what we're seeing now is more and more of these large contracting firms are setting up their own internal engineering firms or engineering divisions, I should say. And so that can be a challenge because they are adamant that they not be covered under the PSPL.

However, they tend to-- for lack of a better term-- cherry pick the nicer pieces of the design, and then hand out the more challenging ones over to the outside design team. Which does create potential issues from an underwriting standpoint.

DANIEL BUELOW: OK. I want to get to some of the underwriting here as you scrutinize and assess these risks. But some of the other features on the policy also, as I mentioned earlier-- as you mentioned, really, is that it is a dedicated limit.

So this is, for an owner you have this limit dedicated to your project. It's not going to be exposed to any other projects. And their practice policies will often sit excess a firm's practice policy. But you need to confirm that because some carriers may have it excluded, we've seen that. But it's often going to be accessed. And that when this coverage expires-- and we'll talk about that a little bit here-- then your practice insurance should repatriate, if you will, when there's no other insurance, right?

RYAN BRENNAN: That's correct. And it's very important to understand from an underwriting standpoint, in the event that the practice policy is sitting excess over the project policies, they should still report those revenues from that project to their practice.

And the underwriter at that time will typically take just a portion of those fees in calculating their annual premium. But it's very important that they understand that when they're reporting the fees, that they break out the fees covered under the project policies from their annual revenues.

DANIEL BUELOW: Right. You're carving that out and just-- it's also very important that you're going to report any claims under your project policy to put them on your notice five-year practice policy as well, right?

RYAN BRENNAN: Absolutely, absolutely. In the event that you don't, you get a potential declination letter or a reservation of rights letter from your practice carrier for late reporting. And that's never a fun thing to receive.

DANIEL BUELOW: Never, never a good thing. So the term of a project specific policy will be the policy period itself, which is going to be the construction period, if you will. And then once construction is substantially completed, there will be an extended reporting period or tail, an ERP or tail. And this ERP insects at substantial completion. And you will have the option of purchasing various lengths of this tail coverage.

The typical project specific policy and ERP together will not be longer than 10 years. So if you have a project that's going to take you two years to build and construct and substantially complete it, your maximum tail would be at eight years. So that's a total of 10.

RYAN BRENNAN: That's correct. Although there are some markets, and it has been done more frequently in the past, where they will offer a longer than a 10-year total policy term. So, for example, you could have a five-year construction period. And the client of the insured or the broker may come back and say, well, the statute of repose and the statute of limitations is 10 years so, therefore, we want a 10-year extended reporting period.

And the industry, to some extent, has been agreeable to that. Although, in all honesty, I'm starting to see some pullback on that from the marketplace. Now, here's a very important piece that the insureds really needs to keep in mind when they're looking at purchasing or requesting a 10-year extended reporting period because that's what the statute of repose is.

We have done-- I have done a study of the amount of claims and when they occur on project policies. We actually did that with my prior company. And we went through policies from 1999 through 2019. We had found that 99% of the claims either occurred during construction or within the first three to five years upon completion of construction.

So when you ask for a 10-year extended reporting period, you're basically paying premium. And the carrier is being asked to keep their premium dollars and the exposure out there for an extended period of time that really is not warranted, given what the actual claims experience has been.

DANIEL BUELOW: Yep. And I would concur with that that's been our experience as well. We're seeing most of those claims. We'll talk a little bit about design build seems to be a little unique. And on the other end of the spectrum would be condos, which is a whole other risk here but where you might see claims come closer to that statute of limitation repose.

And to your point, not a lot of markets want to offer more than a total of 10. And I think some of that's tied to maybe what they have for reinsurance restrictions or what have you. But it's good to know that it's worth at least trying to negotiate, right?

RYAN BRENNAN: Absolutely.

DANIEL BUELOW: So another big, big feature, a key feature-- and I think probably arguably one of the most important features of this product-- is the joint defense provision. And so a project specific policy offers a joint defense provision.

That's why you want all these folks-- the design team together so they are working together. And instead of everybody scurrying off to their respective insurance companies/attorneys, you're going to have a single point to manage that claim. And you should be able to do so more efficiently and avoid even mitigate the likelihood of delays. Would you agree with that?

RYAN BRENNAN: Absolutely. We found that when you have the joint defense rather than-- because the other thing that could happen without a joint defense is that each of the players within the PSPL are bringing their own legal team to the table. That's going to erode the policy limits because defense costs are included within the overall policy limit. And then you're going to have five people trying to argue the same point against each other, which really doesn't benefit anybody.

So by having the joint defense and having a united front, it makes for a much stronger presentation against your opponent as it were, as a united front to help you to get it resolved much, hopefully, quicker and much more cost effectively than if you were doing it upon yourself.

DANIEL BUELOW: Right. I mean, in some of these large projects you might have a dozen disciplines on a given project. So that's a key point and a coverage benefit, I would say. Another point here is a project specific policy is in the name of the design team. With the first named insured typically being the prime, or it might-- if there's a JV you might name them in there.

But this coverage is not for the owner. It's third-party coverage where the owner certainly benefits again. But the first named insured is listed on there and has certain responsibilities, don't they? Including paying of any premiums, including added premium, as well as any SIRs, as well as reporting of claims and communicating with the other additional named insureds on that policy.

RYAN BRENNAN: That's correct. And what we have done or what you will see as part of a lot of the projects nowadays, they will have a program manager. And that program manager will work with the first named insured and keeping the other additional named insurers in the loop of what's going on as far as in the event of a claim or a notice of a potential claim. And bringing all of the appropriate parties to the table that need to be there.

But you're absolutely right, the first named insured will be the one that we will be looking for payment of the retention, payment of the premiums, and payment of any additional premiums that are incurred during the policy term.

DANIEL BUELOW: That's a great point on the program manager. We've certainly seen in our larger of our project policies that we bound, having a program manager-- I know like David Hatem who's been one of our guests on our podcast has, I think, provided an invaluable service and support of this.

Because a lot of these project policies will have an MVE, a material variation endorsement, where there's going to be certain responsibilities, certain baseline obligations, if you will, for that first named insured. And so this is not a product you just want to bind it, pay the premium, and then wake up 10 years from now and hopefully everything's fine, right?

RYAN BRENNAN: That's correct. Actually the creation of the MVE was driven mainly because what was happening was the original project policies were done just that, they were written, and they were just put in a drawer and forgotten about. And it's my understanding that one of the first MVEs, David Hatem had actually crafted as part of the Big Dig project.

DANIEL BUELOW: And, in fact, we'll talk a little bit about this, the history of project insurance. But there was a time when we've seen the market flee, like we saw recently constrict. 15 or so years ago we saw that again where everybody left.

And to Lexington AIG's credit, they did stay in the market, and you were there in creating this MVE which is basically was saying, look it, we'll do a project policy, but these large projects scope will invariably creep. It's not fair for you to be sitting there with a project that is a materially different risk than you underwrote five or so years ago, right?

RYAN BRENNAN: Correct. And what the MVE allows us to do is we would have basically meetings, project update meetings every six months. And as items such as that arise, it allows us to then generate or create an additional premium charge based upon that creep. So it makes it a pay as you go rather than waiting for five years plus the end of the ERP to go back to you and say, OK, by the way, your project changed this way, and we're now going to be looking for x amount of dollars.

And it's going to make it very difficult for us to collect that premium five or 10 years after the fact. So by setting it up almost as a pay as you go, it's much easier because the owner is also involved, obviously, because they're going to ultimately be the one paying the bill for this.

DANIEL BUELOW: Right, because these policies will always tend to have an audit provision in them as well. Unlike your practice policy when you hope to incept your ERP, your extended reporting period at substantial completion, you're going to go back and look at that application. And if there's been a material change in the construction value or fees or something else in that project, there could be additional premium due. And to your point, best to manage that on an ongoing basis rather than be surprised and not manage it at all, right?

RYAN BRENNAN: Exactly, exactly. We found a lot of our insureds really appreciated because it also gives us the opportunity to really dig into what created the project creep. And is that project creep going to lead to a potential claim?

DANIEL BUELOW: Right. Yeah. Again, don't just put this on autopilot. We will always try to work with-- even if MVE or not, to have ongoing status meetings and review of this coverage because another issue you may find is that your project isn't going to substantially complete when you projected it to complete years ago.

Because when you complete this application, we always encourage our insureds to be very conservative when it comes to construction value, periods of time, and schedule, and so forth because you don't want that ERP to be incepted prior to substantial completion, right?

RYAN BRENNAN: Exactly. And much as we saw when COVID hit, a lot of these projects got put on hold through nobody's fault, but you know but the COVID lockdown. So a lot of those projects had to be stopped mid-way and then basically started back up again when everybody was allowed to go back to work.

DANIEL BUELOW: So SIRs, your self-insured retentions, can be significant and are on a per claim basis. And the first named insured, again, is responsible for any SIR. So if the insured wants to have another consultant share in those expenses, or even the owner, that really has to be a side agreement because you're going to be looking to that first named insured.

Just ask for the premium. If you want to have that owner-- which often arguably the owner will and should cover the cost because of the benefits to the owner-- it is still the first names insured's responsibility that you're going to have to have an agreement in place about the premium as well as any audit premium as well as the deductible.

RYAN BRENNAN: Correct. And we get that question a lot about, do we have a standard allocation of SIRs available? Do we have any suggestions. And we try to give them some loose suggestions, but, unfortunately, we can't really dictate how they're going to allocate the SIR amongst the consultants.
And we do recommend them having that discussion with the broker. Donovan Hayden with our program manager has offered some suggestions, but it's really got to be decided upon between the first named insured and all the subconsultants. But it is very important to get that determined and decided in the early stages of the PSPL put in place.

DANIEL BUELOW: And last point here is the application is a warranty statement consistent with most applications. So you have to be wary of that. But also take your time. We want to be very careful and use that application as a really an important document as it is because you're going to set your pricing and terms on this.

So, again, be conservative when it comes to schedules and fees and so forth. I'd rather address it up front than down the road. And so we're closely with your broker on that, and then monitor throughout the process. And I would add to that the first named insured's broker.

And, again, it could be a JV where we've worked with some other brokers on this. But they should be the one placing the project policy for their insureds. You don't really want the owner placing this insurance for them because not only do you want a specialist that understands this insurance, but you-- as I mentioned-- need to manage this. And you just can't put it in a drawer and look at it. So you got to have good representation and manage the material variation endorsement baseline obligations, and so on. I think, again, is an important point in all this.

RYAN BRENNAN: And if I could just also throw in there, Dan, it's also very important that if you are covered under a project policy, request a copy of the project policy for yourself. As an additional named insured you have every right to have a copy of the policy. And it is important that you should have a copy, you should read it. Have any questions? Go back and ask the broker-- the appropriate broker or your own broker if they placed it. Any questions that you might have.

We have seen where some subconsultants say, well, we're on a project policy but we have no idea what it is or what it's covering, because they never got a copy of it. So it's very important that your clients do ask and receive a copy of the project policy that's been put in place.

DANIEL BUELOW: That's a great point. And I think it's positive coverage. It's in their best interest to have this coverage, but they're entitled to that, they're named on the policy as additional named insured. And the first named insured, again, is responsibility to communicate with those subs. But anybody on that policy is certainly entitled to a copy of that policy. That's a great point.

All right, well, that concludes part one of our two-part series on insuring single projects. As discussed, we're doing a deep dive on this topic with Ryan Brennan of HDI. So I hope you can join us for part two on insuring single projects. Talk to you soon.

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