



Legal Edge

Design Liability: Are Component Manufacturers Adequately Protected by Insurance?

by Kent J. Pagel

Find out whether your CGL policy covers your company's component design activities.

In this article I will tackle the topic of how well component manufacturers are protected with liability insurance for a number of the activities they may undertake, particularly in the area of design. To begin, it is important to understand some of the everyday risks/hazards that exist for component manufacturers, and the insurance coverage that is likely in place to cover such risks/hazards. Take a moment to review Figure 1 on the facing page, which lists six risks typically faced by a manufacturer and the corresponding coverage that should be in place to protect it. In WTCA's ORisk program, particularly in the Insurance 101 track, I discuss in greater detail the types of insurance policies commonly carried by manufacturers and the risks they cover.

Now let's get a bit more specific. Your company may be performing one or all of the activities listed in Figure 2 that relate to component design and engineering.

If your company engages in any of these types of activities, do you know whether you are protected by insurance? My analysis with respect to this question begins with a general overview of the CGL policy which is referred to in Figure 1. All component manufacturers should carry some type of CGL policy, although the exact nature and limits will vary by manufacturer.

Keeping it simple, a CGL policy provides limited protection for the activities listed in Figure 2 SO LONG as the loss results in "bodily injury" and/or "property damage." While the terms bodily injury and property damage are defined in the CGL policy itself, I've provided several case examples in Figure 3 to illustrate their application to component manufacturers.

It is important to remember that only claims of bodily injury and property damage are covered under the CGL policy. Economic damages such as acceleration costs, delay damages, costs for repairing any defective trusses, etc. are not covered as they may be covered under a professional liability policy.

You should not however assume that all claims of bodily injury and/or property damage are automatically covered under the CGL policy for the activities described in Figure 2. Whether or not coverage exists depends in large part on whether the CGL policy contains the following exclusionary endorsement, frequently called the "professional services endorsement." The formal name is the Engineers, Architects, or Surveyors Professional Liability endorsement. The Insurance Services Office form number of this endorsement is CGT 22 43. When this endorsement is attached to a CGL policy, it is the intent of the insurer to preclude coverage for bodily injury and property damage:

...arising out of the rendering of or failure to render professional services by the named insured or a design professional employed by the named insured or performing work on the named insured's behalf in a professional capacity...

The endorsement specifically states that the following professional services are excluded by this endorsement:

The preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; and supervisory, inspection or engineering services...

Risk or Hazard	Insurance Coverage
Medical care and loss of income due to death or injury to worker working in the course and scope of his/her employment	Workers' Compensation
Lawsuit brought by injured employee or dependent	Most workers' compensation acts eliminate the employee's right to sue his or her employer within the scope of that state's workers compensation statute.
Lawsuit brought by a person for damages arising out of bodily injury, death or damage to property of others	Commercial General Liability Insurance (known as "CGL" insurance)
Lawsuit brought by builder customer arising out of a lawsuit by a third party where insured signed an indemnity provision	CGL Insurance includes coverage for certain liabilities assumed under contract.
Bodily injury to a business visitor to manufacturing facility	CGL Insurance
Lawsuit brought by injured person where damages asserted exceed the limits of the insured's CGL policy	Excess Insurance covers claims in excess of the limits of the CGL policy up to the limits of the Excess Liability Insurance policy.
Lawsuit to recover damages for bodily injury or damages to property of others arising out of the use of an automobile owned by an insured	Commercial Automobile Liability Insurance

Figure 1

Design of trusses and components
Design of truss to truss connections
Design of truss to beam or wall connections
Design of truss repairs
Temporary or permanent bracing designs that go beyond depicting the location of web compression bracing
Constructability, value engineering or material optimization reviews
Inspection of suitability of installation/bracing

Figure 2

It is important to understand some of the everyday risks/hazards that exist for component manufacturers, and the insurance coverage that is likely in place to cover such risks/hazards.

I would first suggest that the standard means of truss design, the first activity listed in Figure 2, would most likely cover claims of bodily injury or property damage if this endorsement is NOT attached to the manufacturer's CGL policy. The same goes for the design of truss to truss connections and truss to beam/wall connections, and the design of truss repairs. As to the other activities it is questionable whether CGL coverage exists at all, as these activities go beyond the traditional scope of work of truss manufacturers and they also essentially constitute a service and do not relate to the sale of a product.

If the professional services endorsement is attached to a manufacturer's CGL policy, there is a serious question of whether bodily injury or property damage claims arising out any of the activities listed in Figure 2 are covered. Most likely

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CASE EXAMPLE 1:

A manufacturer delivers an order of roof trusses. During erection, as a bundle of roof trusses is lifted to the top plate, due to a manufacturing defect in some or all of the trusses, they come apart and cause injuries to a passerby and damage to erected walls and jobsite equipment. Since the injuries were unintended on the part of the manufacturer, they are covered under its CGL policy. All the property that is damaged is covered as this falls within the definition of property damage in the CGL policy. However, there is no coverage for damage to or replacement of the roof trusses as this is not considered property damage due to exclusions contained in the CGL policy.

CASE EXAMPLE 2:

A homeowner sues a floor truss manufacturer for sagging floors. To restore the floors, furniture is moved out of the house, sheet-rock and some flooring is removed, and the trusses are beefed up to restore the floors to level. All the property that is damaged and the repair costs are covered as falling within the definition of property damage, but there is no coverage for the money spent to actually repair the floor trusses themselves.

Figure 3

Peace of mind underfoot



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this would be the position at least initially taken by the insurance carrier in response to a claim. Please note that most CGL policies will include this endorsement if not negotiated by the insured early on and deleted from the policy prior to its inception. Further component manufacturers should not rely on their software provider's insurance coverage to apply to them in these areas.

I recommend that all component manufacturers review their CGL policies to see if this exclusionary professional services endorsement exists. If so, efforts should be undertaken to have this endorsement deleted from the CGL policy.

The next question that you should ask is whether the activities listed in Figure 2 present any meaningful level of risk to component manufacturers. I would submit that many do, especially those activities which involve bracing design, value engineering and inspection services. Figure 4 contains the list of activities set out in Figure 2 with my assigned risk rating. The rating is certainly subjective, but is based on the more than 20 years of experience I have representing component manufacturers.

As you review this list, keep in mind that regardless of whether the professional services endorsement exists in your policy, it is a good idea to seek counsel about the particular design work being done in light of insurance coverage that may NOT exist. This is especially important as the level of risk for a particular service rises.

Is professional liability insurance an option? Professional liability insurance can be obtained by component manufacturers, although this is not coverage that is commonly purchased. Further, such insurance is not limited to claims of "bodily injury" or "property damage" as is CGL insurance

Activity	Level of Risk
Design of trusses and components	Risk ↑
Design of truss to truss connections	Risk ↑
Design of truss to beam or wall connections	Risk ↑↑
Truss repairs	Risk ↑↑
Temporary or permanent bracing designs that go beyond depicting the location of web compression bracing	Risk ↑↑↑
Constructability, value engineering or material optimization reviews	Risk ↑↑↑
Inspection of suitability of installation/bracing	Risk ↑↑↑↑↑
Combination of several of the above	Risk ↑↑↑↑↑↑↑

Figure 4

and will cover economic damages such as acceleration costs, delay damages, and costs for repairing any defective trusses. However, manufacturers need to carefully evaluate the coverage that professional liability insurance provides and the applicable restrictions.

Also referred to as errors or omissions insurance, professional liability insurance is a policy designed to provide coverage in the event a client/third party alleges they suffered a financial loss as a result of an error or omissions committed by the insured in the delivery of "professional services." But what is

COMMON FEATURES OF PROFESSIONAL LIABILITY INSURANCE:

- Most often the insured is engaged in the delivery of professional services.
- Policies are usually issued in increments of \$1 million in coverage
- Self insured retentions exist—from \$2,500 to \$100,000
- Virtually all policies are issued on a claims made basis—as such, for claim to be covered, it must be first made against the insured and reported during the policy period.

Figure 5

meant by "professional services?" Here is one definition taken from a policy I recently reviewed:

...services performed by the insured for others in the practice as an architect, engineer, land surveyor, landscape architect, construction manager, scientist or technical consultant.

The language that makes up the definition of "professional services" suggests there is no coverage unless the claim that is asserted relates to services performed as opposed to products being sold. A manufacturer would need to carefully explore this language with its insurance broker before making the decision to purchase such insurance. This is especially the case since this same policy contained the following exclusion from coverage:

Insurance does not apply to [a claim] for or arising out of any breach of warranty, guarantee, or service level agreement, or for or arising out of any delay of delivery, failure to deliver, or non-acceptance of products or services.

"...Considering our litigious society with more and larger judgments being awarded, increased cost and time of reconstruction, and more restrictive language in insurance policies, it pays, more than ever to compare your insurance coverage and limits with [an educated broker who is familiar with the truss industry]."

—Richard Langton, Bowermaster & Associates, a WTCA Expert Insurance Partner

Figure 5 sets out the common features of a professional liability policy.

In conclusion, I'll refer to some comments from Richard Langton of Bowermaster & Associates, a WTCA Expert Insurance Partner. He said, "Everyone wants to get the best deal on their insurance; however, often insurance is purchased because it is the lowest price or because of a relationship with the agent [or broker]. Don't get me wrong—these are both good reasons, but only if you have the coverage you need at the time of a claim. Considering our litigious society with more and larger judgments being awarded, increased cost and time of reconstruction, and more restrictive language in insurance policies, it pays, more than ever to compare your insurance coverage and limits with [an educated broker who is familiar with the truss industry]." SBC

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