



# Uninsurability:

What It Is, Why It Matters, and How to Avoid It in Your Contracts

[Speaker's Name, Company, Title]

[Date]

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# Heard This Lately?



I can't agree to this contract clause – it's uninsurable.





# What Does “Uninsurability” Mean?

- A few (wrong, but understandable) ideas:
  - A/E is bluffing
  - A/E has substandard insurance
  - A/E just doesn’t want to stand behind its work
- Today, we’ll explore
  - What “uninsurability” really means
  - Why it matters to project owners
  - Common problem clauses and how to fix them





# What We Mean by “Uninsurable”

- Contract clause is not fully covered under PL
  - Coverage gap not necessarily limited to one insurer
  - Typically the policy language in question is “industry standard” – to the extent such a standard exists
- To extent it is not, A/E firm must fund the loss
- Does NOT mean
  - Policy is “null and void”
  - Destroys all coverage under the policy

# Contractors vs. A/Es

- Insurance: Mostly CGL
- Assets: \$\$\$, equipment
- Insurance: Mostly PL
- Assets: Chairs, used PCs





# But Our Lawyer Wrote this Contract!

- Transactional lawyers draft contracts
  - Want to get “best” terms and shift most risk
- But litigators settle (and sometimes try) cases
  - Know it’s hard to settle when defendant’s uninsured
- Skilled lawyer  $\neq$  insurance expert
  - Especially about A/E professional liability





# Insurance Helps Resolve and Fund Claims

- Most civil cases don't go to trial (only 5% do)
- Lack of coverage creates settlement problems
  - Coverage issues delay and complicate settlement
  - Collecting from an insurance company is simple
  - Collecting from an A/E defendant will be hard
- Uninsurable contract provisions must be deployed – if at all – with this in mind







This will be quick and relatively painless

# **A/E PROFESSIONAL LIABILITY INSURANCE OVERVIEW**





# A/E PL Coverage Is Broad

- Covers damages
  - Bodily injury
  - Property damage
  - Economic loss (wow!)
- To the extent caused by
  - A/E's
  - Negligent
  - Performance of professional services



# A/E PL Coverage Is Not Unlimited

- Subject to deductible or self-insured retention
- Subject to policy limits
  - “Eroding” limits – depleted by \$ spent to defend and settle all claims in same policy year
  - When is a \$1MM policy not worth \$1MM?
- Subject to policy exclusions, such as...
  - Contractual Liability
  - Express Warranties and Guarantees
  - Insured vs. Insured



# A/E PL Policies Are Non-Standard

- No ISO forms – all are different
- Policy language differs from carrier to carrier



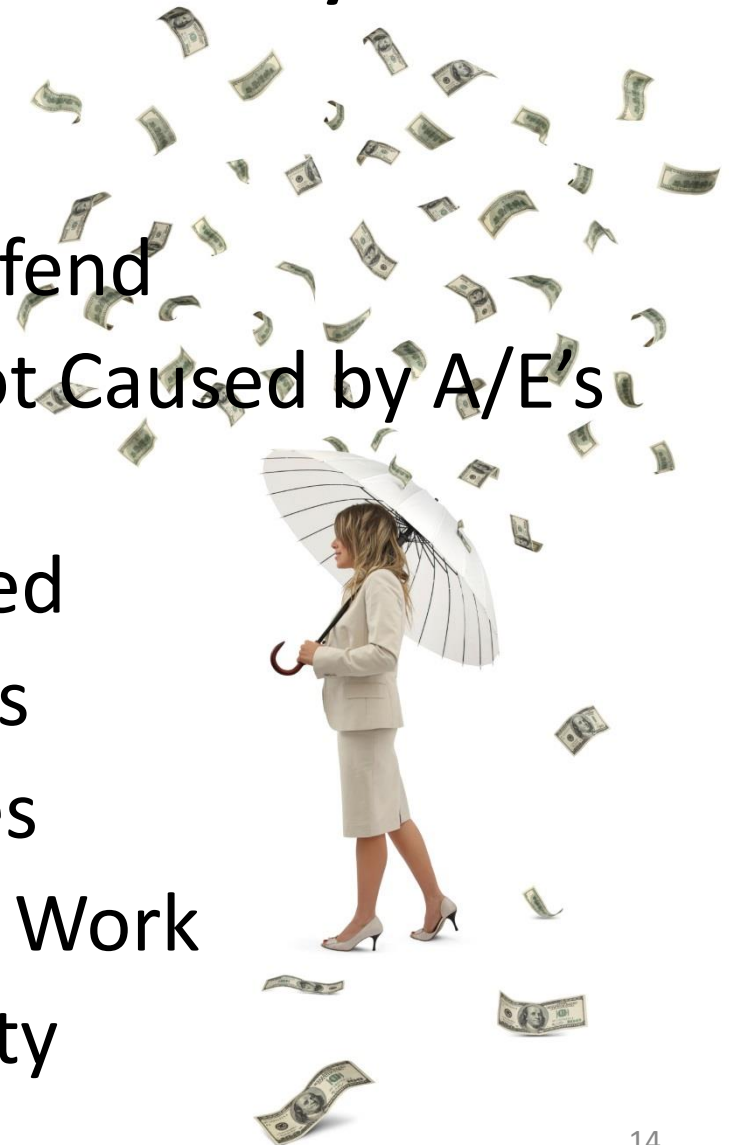


Why some clauses are “uninsurable” and what that means for you

# **COMMON “INSURABILITY” PROBLEMS IN CONTRACTS**

# Common Contract Insurability Issues

1. Elevated Standard of Care
2. Indemnity with Duty to Defend
3. Indemnity for Damages Not Caused by A/E's Negligence
4. Owner as Additional Insured
5. Guarantees and Warranties
6. Prevailing Party Fee Clauses
7. Guaranteeing Contractor's Work
8. Responsibility for Site Safety



# #1: Elevated Standard of Care

**“Consultant shall perform its services in accordance with the highest standard of care...”**

- “Highest” exceeds normal legal standard of care
- To the extent this clause obligates the A/E to achieve a standard greater than law would otherwise require, it is “uninsurable”





# What's the “Normal” Standard?

- Normally, A/E's performance is measured by the legal standard of care
  - Doing what a reasonable design professional would do under similar circumstances
  - NOT perfection
- Applies even if contract is silent on this point
- Failure to meet this standard = negligence





# What's the Coverage Problem?

- Policy exclusion bars coverage
- “Contractual Liability” exclusion
  - No coverage for liability assumed by contract
  - UNLESS A/E would be liable in absence of contract
- A/E would have no duty to meet the “highest” standard except for this contract language





# An Insurable Standard of Care

The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality.

From EJCDC E-500, § 6.01A



# Real World Analysis

- *Can't A/Es get policies without this exclusion?*
  - No
- *What if I want "highest" standard of care?*
  - Will contract language change A/E performance?
  - Will coverage problems hamper settlement?
- *I don't have problems getting A/Es to agree*
  - They are not insured for this exposure
  - They are "betting" with their own money





## #2-3: Indemnity Clause Problems

**"A/E shall defend, indemnify and hold harmless Owner, its officers, directors and employees from and against any and all claims, damages, causes of action or allegations in any way arising out of or relating to A/E's work on the project."**

- Problem #2: Duty to defend Owner
- Problem #3: Indemnity for damages not caused by A/E's professional negligence



## #2: Duty to Defend

- Obligates A/E to pay for Owner's defense
  - Obligation arises as soon as a claim is made
  - Even if A/E turns out to have done nothing wrong
- A/E would not normally owe this duty
- Contractual Liability exclusion bars coverage





## #2: Fixing “Duty to Defend” Problem

“A/E shall ~~defend,~~ indemnify and hold harmless (but not defend) Owner, its officers, directors and employees from and against any and all ~~claims,~~ damages, ~~causes of action or~~ ~~allegations in any way~~ arising out of or relating to A/E’s work on the project.”



## #2: Fixing “Duty to Defend” Problem

“A/E shall ~~defend,~~ indemnify and hold harmless (but not defend) Owner, its officers, directors and employees from and against any and all ~~claims,~~ damages, ~~causes of action or~~ allegations in any way arising out of or relating to A/E’s work on the project.”


- Wait - - we still have another problem to fix...

### #3: Indemnity for Damages Not Caused by A/E's Negligence

- Policy covers damages caused by A/E's negligent performance of professional services
- To the extent damages are caused by others, they are not covered
- To the extent damages not caused by A/E's negligence, they are not covered
- Contractual Liability exclusion







### #3: Fixing “Damages Not Caused by A/E’s Negligence” Problem

“A/E shall ~~defend,~~ indemnify and hold harmless (but not defend) Owner, its officers, directors and employees from and against any and all ~~claims,~~ damages, ~~causes of action or~~ allegations in any way arising out of or relating to A/E’s work to the extent caused by A/E’s negligent acts, errors, or omissions in the performance of professional services on the project.”



# More Insurable Indemnity Clause

**"A/E shall indemnify and hold harmless (but not defend) Owner, its officers, directors and employees from and against any and all damages to the extent caused by A/E's negligent acts, errors, or omissions in the performance of professional services on the project."**

## #4: Owner as Additional Insured

**"A/E shall name Owner as an additional insured on all policies..."**





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- Uninsurable with respect to PL
- Owner can't be Additional Insured on PL
  - Owner is not an A/E
  - Not what the insurer bargained for
  - Insured vs. Insured exclusion

# “But the Contractor Does It...!”

- Contractor can make Owner an additional insured on Contractor’s CGL policy
- A/E cannot make Owner an additional insured on A/E’s PL policy



# #5: Guarantees and Warranties

"A/E warrants that the project will comply with all laws, codes and regulations..."





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- PL policies have “Express Guarantees and Warranties” exclusion
- Guarantees and warranties are likely to trigger the Contractual Liability exclusion





# Other “Guarantee” Words

**Ensure, insure, assure, certify...**

- Often trigger PL policy exclusions:
  - Contractual Liability and/or
  - Express Guarantees and Warranties



**CERTIFIED**





# #6: Prevailing Party Fee Clauses

**"...The prevailing party shall be awarded its attorneys' fees and costs..."**



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**"...The prevailing party shall be awarded its attorneys' fees and costs..."**

- Uninsurable
- American Rule
  - Each party pays own lawyer
  - Compare English Rule: Loser pays both
- Contractual Liability exclusion





# #7: Guaranteeing Contractor's Work

"A/E shall inspect the Contractor's Work to ensure that it is in strict accordance with the contract documents..."



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- PL covers damages caused by A/E negligence
- Not damages caused by other parties
- "Inspect" and "ensure"





## #7: Fixing the Problem

"A/E shall ~~inspect~~ observe the Contractor's Work to ~~ensure that~~ endeavor to determine, in general, whether it is in ~~strict~~ accordance with the contract documents..."



# #8: Responsibility for Site Safety

**"A/E shall report all safety hazards to owner..."**



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**"A/E shall report all safety hazards to owner..."**

- Contractor controls site and workers
- Contractor is trained in site safety
- Risk should be assigned to the party best able to control that risk
- On fault line between GL and PL





# More Insurable Clause

“...A/E shall not have control over, charge of, or responsibility for the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall A/E be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents.”



## #9: Everything Else

- Be open to discussion of insurability issues
- Ask to see the policy language
- Get help from your insurance advisor
- A/E's insurance advisor may be helpful also





Not an “insurability” issue, but still relevant to this topic

# **WHAT POLICY LIMITS SHOULD YOU REQUIRE OF YOUR A/E?**

# How Much Is Enough?

- How much limit is enough?
  - Policy limits losses are uncommon
  - Consider the exposure and the A/E discipline
- When you want additional security
  - Project specific limit endorsements
    - Attaches to A/E's practice policy
    - Limits dedicated solely to your project
  - Project specific insurance policy
    - Policy dedicated solely to your project
    - Typically covers entire design team
  - Owner's Protective Professional Indemnity policy
    - Protection against depleted limits
    - Protects Owner ONLY – not design team





# Claims Made and Reported Coverage

- Remember – the policy that matters is the one in force when the claim is made and reported
- NOT necessarily the one in force when the mistake was allegedly made





Why all of this matters

**INSURABILITY IS GOOD  
FOR A/Es AND OWNERS**





# The Benefits of Insurable Contracts

- Get claims resolved and funded ASAP
- Increase financial protection for your project
- Attract well-qualified consultants
  - Take contracts seriously
  - Not signing “bet the farm” contracts



[Speaker's Contact Information]

**QUESTIONS?**

