

NEW EXCLUDED SERVICES ENDORSEMENT

Effective January 1, 2022, Construction Phase Architectural Services where the Architect is *also* providing the Delivery of Construction Services, are no longer covered.

What is the Excluded Services Endorsement?

The Excluded Services Endorsement excludes professional liability insurance coverage on Construction Phase Architectural Services when an Architect is ALSO providing Delivery of Construction Services on the same project.

The new endorsement in Pro-Demnity Professional Liability Insurance policies better defines the distinction between Construction Phase Architectural Services as the usual and customary services of an Architect, from the Delivery of Construction Services, which are not usual or customary.

Doesn't Exclusion 1.g. in policies already exclude the performance of services not usual or customary? Why is a separate endorsement needed?

Yes. Exclusion 1.g. in all policies excludes from coverage: *"the performance of services not usual or customary for holders of certificates of practice, or members of THE ASSOCIATION (the OAA)."* The intent of the Excluded Services Endorsement is to strengthen Exclusion 1.g. and provide greater specificity as to the services that are excluded from coverage.

How does this endorsement affect my current professional liability insurance coverage or costs?

Architects adhering to their usual and customary professional services are not adversely affected by the Excluded Services Endorsement as there is no additional cost for this new endorsement. Architectural practices can rest assured that coverage for performing their duties in the provision of Construction Phase Architectural Services (i.e., General Review Services or Contract Administration Services, or both), remains intact.

The Excluded Services Endorsement ensures that the Professional Liability insurance Program reinforces an equitable playing field for all Architectural Practices with respect to covered professional liability risks.

Why is the Excluded Services Endorsement needed?

Some Architects have chosen to expand their business models to include the Delivery of Construction Services under a variety of names – including *Contractor, Project Manager, Construction Manager, Design-Builder, etc.*

The OAA (and likewise, Pro-Demnity) does not have a specific prohibition against an Architect (i.e., a licenced member of the OAA) from participating in the Delivery of the Construction Services using a different business entity to do so; however, those Delivery of Construction Services and activities **are not** regulated by the OAA and, **are not** considered “usual or customary” services of an Architect.

Subsequently, the Delivery of Construction Services falls outside the coverage that the mandatory Professional Liability Insurance Program is intended to provide to Ontario Architects.

What is the impact to professional liability insurance coverage when the Architect wears “two hats?”

Where the Architect takes on two roles with respect to a project – as the Architect responsible for the design, construction documentation, Construction Phase Architectural Services (i.e., General Review, Contract Administration, or both), AND as a participant in the Delivery of Construction Services on the same project - Pro-Demnity’s ability to provide a defence to the Architect for their regulated services, is being prejudiced. It creates a conflict of interest.

Such an arrangement significantly increases the exposure to costs and liability for construction-related claims and damages, than the Architect participating in the mandatory program would otherwise be exposed to.

Further, damages that should be assessed against the party delivering the Construction Services (i.e., a contractor, project manager, construction manager, design-builder, etc.) are being transferred to the Architect.

Can you further explain the conflict of interest as it relates to claims when an Architect wears “two hats?”

Our experience arising from claims where an Architect attempts to wear two hats at the same time through two separate incorporated entities, is that the Architect potentially undermines the strength of their own legal defense as professionals. Conflicts of interest provide an enduring risk regarding future claims, which may come from other parties involved in the project such as contractors, the owners/users of the building, and people who may be affected by the project, such as adjacent landowners and passers-by. Professional liability insurance is [claims-made](#), and so, a claim against the Architect-Developer can occur at any time in the future for work completed in the past.

How can an Architect protect themselves?

The prudent way forward is for the Architect to provide professional services in accordance with the *Architects Act*, avoiding conflicts of interest. If these are unavoidable, the Architect needs to make informed decisions about the type of financial / monetary risks they choose to accept, keeping in mind the professional liability insurance limitations and exclusions.

How does the Excluded Services Endorsement benefit all Architects (i.e., Certificate of Practice holders)?

The mandatory Professional Liability Insurance Program is intended to provide Ontario Architects with valuable protections and coverages specific to their professional services as Architects. The Excluded Services Endorsement bolsters the professionally regulated role of Architects in Ontario, strengthens the integrity of the mandatory program, clarifies the insured risk, protects the mandatory program from inappropriate exposures, and reinforces collective trust.

What are Construction Phase Architectural Services?

The “*usual and customary*” services of an Architect (i.e., holder of a Certificate of Practice) acting in a professional capacity include two types of Construction Phase Architectural Services:

- ▶ *General Review Services* – monitoring and reporting on the progress and quality of the construction of the project, and;
- ▶ *Contract Administration Services* – including Payment Certification, Construction Contract Document Interpretation, consideration of changes to the Contract Price and Project Schedule, preparation of Change Orders, etc.

An Architect may provide one or other or both categories of Construction Phase Architectural Services, in accordance with its contract with the Owner (the Architect’s Client).

When the Architect ONLY provides Construction Phase Architectural Services in accordance with their Professional role, professional liability *remains a covered risk*.

What if I am providing Construction Phase Architectural Services on a project where I have a 25% interest in the entity delivering the Construction Services on the same project?

Claims made by the entity against the Architect are not covered where the Architect's equity, ownership or voting rights in that entity exceed 10%. Claims against the Architect by third parties are covered regardless of the involvement of the other entity in which the Architect has an interest (exceeding 10%), subject to the terms and conditions of the Policy. Third parties would include anyone other than the particular entity in which the Architect has an interest, for example, clients, subsequent owners of the building, tenants, other parties engaged in the construction process and members of the public.

What is the insurance definition of an endorsement?

An endorsement is an amendment to an existing insurance contract or policy. It's also sometimes referred to as a policy rider. Some endorsements broaden coverage and others limit coverage. The Excluded Services Endorsement limits coverage in the specific situation when an Architect is providing *both* Construction Phase Architectural Services and the Delivery of Construction Services.

What do I do if, as a Certificate of Practice holder, my business model includes the Delivery of Construction Services?

If your business model includes the Delivery of Construction Services, please contact your legal and insurance advisors.

When does the Excluded Services Endorsement take effect?

The Excluded Services Endorsement comes into force at 12 am Saturday January 1, 2022. It takes effect upon the next renewal of your professional liability insurance in 2022 and will be automatically included with your renewal documents.