

A vintage surveying instrument, possibly a theodolite or level, is shown in a high-angle, close-up shot. The instrument is dark and metallic, with a prominent circular lens or viewing area. It is resting on a textured, light-colored surface that appears to be a map or a piece of paper with a grid pattern. The lighting is dramatic, with strong highlights and deep shadows, creating a sense of depth and focus on the instrument's details.

Guide to the
Schinnerer and CNA
Risk Mitigation Credit
for
Surveyors

This publication

has been prepared as a guide to the Risk Mitigation Credit described under Item E of Section V, Limits of Liability/Deductible in the 10/05 Edition of the CNA *Professional Liability and Pollution Incident Liability Insurance Policy*. The intended audience for this guide includes land surveyors as well as their insurance brokers and legal advisors.

This information is for illustrative purposes only and is not a contract. It is intended to provide a general overview of the policy described. Nothing contained herein should be construed as an acknowledgment by Schinnerer that a given situation may be covered under a particular policy.

Introduction

Schinnerer and CNA's new Risk Mitigation Credit (RMC) is a unique feature of the program of professional liability insurance commended since 1962 by the American Congress on Surveying and Mapping (ACSM). It offers eligible policyholders the option of receiving a deductible credit of up to \$25,000 if they implement certain “best practices” in the engagement and performance of professional services. The RMC is designed to reduce the frequency and severity of claims, make claims more defensible, and provide a mechanism to reward policyholders for their risk mitigation efforts.

The risk mitigation credit is most applicable to **risk-intensive** projects and services—those associated with **project design and construction**.

The information presented in this guide is for those firms in the Schinnerer and CNA Surveyor's Program. It is not applicable to surveyors providing services as part of a design firm insured in the Schinnerer and CNA Architects and Engineers Program.

Eligibility to participate in the RMC is limited to firms whose annual gross billings do not exceed \$25 million. In addition, certain other restrictions apply to firms with annual gross billings between \$5 million and \$25 million. Finally, while otherwise eligible to participate, some firms will not be able to take advantage of the RMC because the nature of their projects or services may not afford them an opportunity to implement the minimum number of the best practices required. The RMC is most applicable to risk-intensive projects and services—those associated with project design and construction.

Background

The RMC was developed as part of a broad interdisciplinary review and update of the 7/99 edition of the CNA Professional Liability and Pollution Incident Liability Insurance Policy. From the inception of the Schinnerer and CNA Program in 1957, the primary goal has been to provide professional liability insurance that meets the ever-changing needs of professionals. Toward this end, the basic CNA policy has had 11 revisions since 1957. In addition, numerous policy endorsements have been developed to tailor the basic policy to specific circumstances, requirements, and underwriting considerations.

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Generally, credits in insurance programs are designed to encourage or reward desired policyholder practices. Once the overall objective of the credit is fulfilled, the credit may be dropped and replaced by a new credit to encourage other practices or outcomes. For example, the 7/99 edition of CNA's basic policy form included a mediation credit of up to \$25,000 for eligible policyholders. While not appropriate for the resolution of all claims, mediation had proven itself to be generally more cost-effective in resolving claims than either arbitration or litigation. Industry inertia and resistance to the unfamiliar, however, was hindering the use of mediation in circumstances where it would have been appropriate and beneficial. The mediation credit was designed to help overcome this industry inertia and resistance. By 2005, it had served its purpose—approximately 75 percent of all claims within the Schinnerer and CNA program were being resolved by mediation. As a consequence, the

mediation credit was dropped in the 10/05 policy form and replaced by the new RMC.

As noted above, the risk mitigation credit encourages the use of a set of best practices, long recommended throughout the design and construction industry. Receipt of the RMC is predicated on the policyholder's documented satisfaction of a baseline criterion—the timely execution of a written professional services agreement—plus any three of five best practices criteria. The policy language establishing these criteria, their rationale, and appropriate documentation demonstrating compliance are described in detail on the following pages.

The risk mitigation credit encourages the use of a set of **best practices**, long recommended throughout the design and construction industry.

“Baseline” Criterion: Written Agreement

Policy Language

We will reduce **your** Deductible obligation for a **claim** by 50%, up to \$25,000, if, within 60 days of the date of our request, **you** provide us with a copy of the written agreement that was executed by **you** and **your** client prior to **your** performance of the agreed-to **professional services** giving rise to the **claim** and **you** demonstrate, to our reasonable satisfaction, the existence of any three (3) of the following five (5) conditions:

Rationale

A written agreement is a fundamental risk management tool. Through a written agreement, the parties can state their goals and expectations they have of each other and of third parties. They can allocate rights and responsibilities, risks and rewards. Written agreements can also help parties deal with future changes. Even though it may not be possible to determine exactly what those changes might be, it is usually possible to establish a process and some procedures for dealing with change. Also, contracts can help prevent disputes and can establish a framework for the fair resolution of those that do occur.

Compliance Documentation

Appropriate compliance documentation consists of:

- a written agreement executed prior to the performance of the agreed-to services giving rise to the claim.

Contracts can help prevent disputes and can establish a framework for the fair resolution of those that do occur.

The risk mitigation credit will not apply to any claim resulting from services rendered prior to the execution of a written agreement.

Discussion

For a variety of reasons, professionals sometimes decide to provide services prior to execution of a formal written agreement. In those cases, firms should keep a record of the arrangements they have made with the client. This can take the form of a commitment letter, sometimes referred to as a letter of intent. It is also advisable to include a time limit for the authorization contained in the commitment letter. That provides an incentive to negotiate and execute the formal agreement promptly. As indicated by the policy language on the previous page, the RMC will not apply to any claim resulting from services rendered prior to the execution of a written agreement.

Practice Criterion 1: Payment Terms/Invoicing

Policy Language

Your written agreement with **your** client specified payment terms, including a schedule of when payments were to be paid to **you**, which **you** consistently followed and enforced, or documented **your** attempt to do so.

Rationale

Unclear or unspecified payment terms and untimely billing and collection of accounts commonly precipitate claims and counterclaims among contracting parties. By requiring clients to make timely payments for services rendered and by taking action to collect accounts when payments are overdue, policyholders may have an opportunity to identify and cure problems or unmet expectations. Left unaddressed, such problems often result in claims.

Compliance Documentation

Appropriate compliance documentation consists of:

- an agreement executed prior to the performance of the agreed-to services giving rise to the claim (per the “baseline” criterion) containing payment terms and a payment schedule;
- dated invoices or a spreadsheet reflecting dated invoices; and
- dated unpaid balance reminders or other documents reflecting the policyholder’s attempt(s) to resolve payment problems, if any.

Unclear or unspecified **payment** terms and untimely billing and collection of accounts commonly precipitate claims and counterclaims among contracting parties.

Discussion

Generally, professional service firms extend credit to their clients from the time services are rendered until the time the service-related fees and expenses are collected. This aspect of any professional practice is fraught with risk. Firms that successfully manage this risk invariably do so by, first, checking the financial capability and payment practices of prospective clients before agreeing to perform services for the client. Second, they insist on written agreements with clear payment terms and conditions, including the right to suspend or terminate services for non-payment. Third, their billings are timely, accurate, and consistent with applicable contract terms. Fourth, they actively communicate with their clients so that there are no surprises to either party. Finally, when clients unreasonably refuse to make timely payments, the firm follows the applicable provisions of the contract.

Generally, professional service firms extend **credit** to their clients from the time services are rendered until the time the service-related fees and expenses are collected.

Practice Criterion 2: Professional Services and Accuracy Standards

Policy Language

You engaged with **your** client to produce a document, such as those currently established by ALTA/ACSM surveys or similar documents, which are incorporated into the written agreement.

Rationale

A defined and contemporaneously documented scope of professional services and accuracy standards encourages the parties to establish expectations for services to be provided. ALTA/ACSM survey standards have been developed to minimize the differences in expectations between the parties regarding what services are to be provided and the acceptable accuracy standards for those services.

Compliance Documentation

Appropriate compliance documentation consists of:

- a professional services agreement incorporating the current ALTA/ACSM survey standards executed prior to the performance of the agreed-to services giving rise to the claim; or
- a professional services agreement incorporating a defined scope of professional services and accuracy standards consistent with current ALTA/ACSM survey standards executed prior to the performance of the agreed-to services giving rise to the claim.

ALTA/ACSM survey standards have been developed to minimize the differences in expectations between the parties.

Managing expectations through proper documentation and improved communication with clients reduces the risk of claims.

Discussion

Managing client expectations is a fundamental risk management tool. Managing expectations through proper documentation and improved communication with clients reduces the risk of claims. Reaching agreement with a client regarding the scope of the professional services to be provided (i.e., the extent of the survey itself) and agreeing to the standards of that survey can help reduce the potential for claims based on unmet expectations. Reviewing ALTA/ACSM survey standards or similar documents with your client can help establish realistic expectations for both parties prior to the start of professional services.

Practice Criterion 3: Interprofessional Agreements/Insurance Certificates

Policy Language

Prior to the performance of the agreed-to **professional services** giving rise to the **claim, you** executed a separate written agreement with and obtained certificates of insurance evidencing both Professional Liability and General Liability from each architect, engineer, landscape architect, land surveyor, contractor, or construction manager **you** engaged or who engaged **you**.

Rationale

Interprofessional agreements are too often oral, not written. Putting pen to paper encourages the parties to address and memorialize the complete terms of their agreement. It also helps the parties avoid uncoordinated contracts and mismatched expectations. Insurance certificates help demonstrate and confirm financial responsibility and compliance with applicable contract terms.

Putting pen to paper encourages the parties to address and memorialize the complete terms of their agreement.

Compliance Documentation

Appropriate compliance documentation consists of:

- interprofessional agreements executed prior to the performance of the agreed-to services giving rise to the claim; and
- certificate(s) of insurance evidencing professional liability (PL) and general liability (GL) coverages (or a spreadsheet reflecting all such certificate information) obtained prior to the performance of the agreed-to services giving rise to the claim.

Discussion

Interprofessional or subcontract agreements should describe in detail the duties and responsibilities of the prime professional and consultant. Virtually all design and construction projects involve multiple contracts—design and construction, prime, and sub—so they should be tailored to avoid conflict and ambiguity. Industry standard documents generally require the consultant to provide services to the prime professional in the same manner and to the same extent as the prime professional is bound by the prime agreement to provide such services to the client.

From a professional liability risk management perspective, in addition to a written agreement, it is important to obtain certificates of insurance evidencing both PL and GL coverage. But why, from a professional liability risk management perspective, should we concern ourselves with GL coverage? When PL or GL coverage is unavailable or inadequate, plaintiffs' attorneys typically assert legal theories that they hope will comport with the coverage available under the other policy. And, because the carriers' defense obligations are broader than their indemnity obligations, a considerable sum of money can be spent before the issues are sorted out. On the PL side, this is particularly problematic for policyholders because the defense of a claim may not only trigger deductible obligations, but the cost of defense is within the limits of the policy. As a consequence, inadequate or nonexistent GL coverage can erode the limits available under the PL policy.

Inadequate or nonexistent GL coverage can erode the limits available under the PL policy.

Practice Criterion 4: Pre-Project Planning

Policy Language

You engaged with **your** client to produce a structured, contemporaneously documented, pre-project planning process that produced a project definition document or package that substantially addressed the following project parameters (only “a” through “c” are required to satisfy this condition for study-and-report-only contracts):

- a. project objectives (e.g., business, economic, aesthetic, other);
- b. project constraints (e.g., budget, schedule, regulatory, other);
- c. basis for the survey/investigation (e.g., site data/requirements, utilities data/requirements, facility programming/requirements, other);
- d. project communication requirements and procedures (e.g., contracts, forms of communication, other); and
- e. project monitoring and control procedures (e.g., quality, cost, schedule, other).

Research by the Construction Industry Institute...has clearly demonstrated the **benefits** of pre-project planning.

Rationale

Research by the Construction Industry Institute (www.Construction-Institute.org) and others has clearly demonstrated the benefits of pre-project planning. These include better definitions of risks, increased predictability of cost and schedule, better achievement of business goals, improved operational performance, and fewer changes and disputes.

Compliance Documentation

Appropriate compliance documentation consists of:

- project definition document(s) addressing the applicable parameters (“a” through “c” or “a” through “e”);
- agreements annotated to address the applicable project definition parameters; or
- reports prepared as deliverables addressing the applicable project definition parameters.

Discussion

Industry standard documents have long attempted to address the need to define the project and its environment by including provisions in professional services agreements that require the client to provide “full information” (i.e., schedule, budget, existing survey, geotechnical report, or other necessary information) before proceeding. In addition, under industry standard documents, the professional providing services should respond to the initial information provided and advise the client of apparent conflicts or the need for additional information or consultant services. Practice criterion 4 supports the fulfillment of these requirements.

Industry standard documents have long attempted to address the need to **define** the project.

Practice Criterion 5: Quality Assurance/ Quality Control

Policy Language

Prior to delivery to **your** client of the instruments or deliverables of **your professional services**, a documented quality assurance/quality control process was completed, internally or externally, by a qualified professional to assess the likelihood that such instruments or deliverables would satisfy **your** client's objectives and would be in conformance with good professional practice.

Rationale

Development and implementation of quality assurance/quality control (QA/QC) procedures can help minimize the likelihood of a claim. Completion of QA/QC procedures by a qualified professional can help identify potential areas where the firm has not met professional standards, program requirements, or other agreed-to obligations.

Compliance Documentation

Appropriate compliance documentation consists of:

- documents reflecting quality assurance/quality control procedures, such as meeting minutes, memoranda, reports, completed checklists, and notations on design documents; or
- for external reviews, an agreement or engagement letter for a quality assurance/quality control review and documents evidencing the completion of any such external quality assurance/quality control review.

Development and implementation of...QA/QC procedures can help minimize the likelihood of a claim.

Discussion

Quality assurance procedures are established for a firm to monitor adherence to the firm's standards for quality. Quality control is the system itself that a firm has established for achieving and maintaining an established level of quality for professional services. Establishing and following QA/QC procedures can increase the likelihood that the services and deliverables provided are in accordance with sound firm and professional practices and will meet client expectations. It is important that firms plan for quality from the start of professional services, including appropriate staff assignments, establishment of communication and documentation procedures, appropriate use of technology, and adequate time allowed for review before the client's receipt of deliverables.

Quality assurance procedures are established for a firm to monitor **adherence** to the firm's standards for quality.

Administration of the Risk Mitigation Credit

If there is a claim against a policyholder, the policyholder has an obligation to notify CNA or Victor O. Schinnerer & Company promptly and in accordance with the provisions described under Policy Item E of Section VI, titled, “Your Duties if there is a Claim.”

Following a policyholder’s written notice of a claim, CNA will confirm that a claim file has been opened and will ask whether the policyholder intends to apply for the RMC. If the policyholder advises CNA that it intends to do so, CNA will request that the policyholder complete the “Surveyor’s Application for Risk Mitigation Credit” and submit the application and the following documentation to CNA within 60 days:

If there is a claim against a policyholder, the policyholder has an **obligation** to notify CNA or Victor O. Schinnerer & Company promptly.

- a copy of the written agreement that was executed by the policyholder and client prior to the performance of the agreed-to professional services giving rise to the claim; and
- documentation demonstrating, to CNA’s reasonable satisfaction, that the policyholder had implemented three of the five best practices criteria described under Policy Item E of Section V, titled, “Limits of Liability/Deductibles.”

The descriptions of “appropriate compliance documentation” are meant to assist policyholders in implementing best practices and in demonstrating their compliance with the RMC criteria. From an evaluation standpoint, the substantive content of the documentation, rather than its specific form, will determine

compliance. However, the documentation should be well organized and clearly keyed to each applicable RMC criterion.

How to Obtain Additional Information

To download other resources concerning Schinnerer and CNA's new risk mitigation credit, go to www.PlanetRiskManagement.com/rmcsurv.html. For more information about the Schinnerer and CNA professional liability insurance program in general, call 301/961-9800 or visit our website at www.PlanetAEC.com.

Compliance Document Checklist

The following checklist includes the submittals in each category. Once the “Baseline” Criterion of a written agreement is met, three of the five Performance Criteria need to be included in the application for the RMC. The application is available from the CNA claims offices or from www.PlanetRiskManagement.com/rmcsurv.html.

“Baseline” Criterion (Written Agreement)

Documentation Submitted:

- A written agreement executed prior to the performance of the agreed-to services giving rise to the claim.

Practice Criterion 1 (Payment Terms/Invoicing)

Documentation Submitted:

- An agreement executed prior to the performance of the agreed-to services giving rise to the claim (per the “baseline” criterion) containing payment terms and a payment schedule;
- Dated invoices or a spreadsheet reflecting dated invoices; **and**
- Dated unpaid balance reminders or other documents reflecting the policyholder’s attempt(s) to resolve payment problems, if any.

Practice Criterion 2 (Professional Services and Accuracy Standards)

Documentation Submitted:

- A professional services agreement incorporating the current ALTA/ACSM survey standards executed prior to the performance of the agreed-to services giving rise to the claim; **or**
- A professional services agreement incorporating a defined scope of professional services and accuracy standards consistent with current ALTA/ACSM survey standards executed prior to the performance of the agreed-to services giving rise to the claim.

Practice Criterion 3 (Interprofessional Agreements/Insurance Certificates)

Documentation Submitted:

- Interprofessional agreements executed prior to the performance of the agreed-to services giving rise to the claim; **and**
- Certificate(s) of insurance evidencing professional liability (PL) and general liability (GL) coverages (or a spreadsheet reflecting all such certificate information) obtained prior to the performance of the agreed-to services giving rise to the claim.

Practice Criterion 4 (Pre-Project Planning)

Documentation Submitted:

- Project definition document(s) addressing the applicable parameters (“a” through “c” or “a” through “e”);
- Agreements annotated to address the applicable project definition parameters; **or**
- Reports prepared as deliverables addressing the applicable project definition parameters.

Practice Criterion 5 (Quality Assurance/

Quality Control)

Documentation Submitted:

- Documents reflecting quality assurance/ quality control procedures, such as meeting minutes, memoranda, reports, completed checklists, and notations on design documents; **or**
- For external reviews, an agreement or engagement letter for a quality assurance/ quality control review and documents evidencing the completion of any such external quality assurance/quality control review.



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