RT ENVIRONMENTAL & CONSTRUCTION PROFESSIONAL

Market Update

2024

Market Update

Contents

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Introduction

RT Specialty's Environmental and Construction Professional (RT ECP) team has dedicated the past 18 years to helping agents, brokers and their clients identify effective risk management solutions available within today's complex commercial insurance marketplace.

Our 2024 Market Update represents RT ECP's view of the environmental, environmental casualty, and construction-related professional liability insurance trends confronting this specialty niche. It contains the collective knowledge of our RT ECP brokers, who were surveyed along with the representatives of many of the nation's leading carriers to provide what we believe is an insightful look into the "state-of the-marketplace" and the conditions we feel are likely to impact this highly specialized field. Our goal throughout this annual recap is to provide information we hope will help the marketplace by reviewing strategies designed to overcome industry challenges and strategically protect against the risks that can potentially impair a business' bottom line.

Overall, RT ECP anticipates a continued increase in claims activity during 2024 across all of our coverage platforms due to the sustained increase in social inflation combined with an increasingly savvy plaintiff's bar. As a result, we expect continued updated language and restrictions in terms and conditions for environmental coverage in the standard market policy forms. We also expect continued erosion of limit capacity related to project specific professional liability. As a result, we continue to closely monitor the marketplace and the potential availability of new coverage forms; changes to policy terms, conditions, and exclusions; and the increased scrutiny placed on specific claims areas by carriers.

As an example, here are some of the insights and trends highlighted within the 2024 Market Update:

Contractor's Pollution Liability (CPL)

Capacity in the CPL market remained strong in 2023 with several new carriers entering the space and some providing limits up to $50 million per claim / aggregate. Rates remained competitive in 2023 compared to recent 5- and 10-year trends. In 2024 we expect expanded capacity and appetite with new entrants to the market and continued stabilization of rates for insureds with flat exposures and clean loss reports.

Pollution Legal Liability (PLL)

Transaction volume dropped noticeably in the first half of 2023, with a 40% decline in the number of deals and a 65% decline in aggregate sales volume compared to the same period in 2022, signifying investor caution. We expect demand for transactional PLL to remain soft during the first half of 2024 due to continued inflation. In addition, we expect a continued increase in underwriting scrutiny for industrial, hospitality, habitational, healthcare, energy sector, and development / redevelopment risks, as well as markets with certain exposures / classes of business.

General Liability / Pollution Legal Liability (GL / PLL)

GL / PLL saw significant rate increases over the past two years that have started to stabilize depending on the market, or whether or not excess was quoted as well. Despite the continued wave of catastrophic events (i.e., wildfires, pandemic, etc.), GL / PLL carriers have been successful and most grew significantly as a result of underwriting discipline. In 2024, we expect the impacts of emerging contaminants and the push back by markets' on site coverages to continue. We expect continued rate increases in Excess due to increased rates for automobile and the continued uptick in claims for GL / PLL.

General Liability / Contractor's Pollution Liability / Professional Liability (GL / CPL / PL)

GL / CPL / PL has seen double digit rate increases over the past few years for environmental contractors with heavier fleets especially on excess liability policies. Pricing adequacy has improved and with that comes stability. We expect more flexibility among carriers in 2024 with regards to professional exposures and more robust coverage via enhancement endorsements for larger environmental contractors and foresee rate increases of 5% or less for better performing contractors on the GL /CPL / PL coverages.

Architects and Engineer's Professional Liability (A&E PL)

Carriers continue to focus on meeting the professional liability needs of professional service firms and appetite for risk is beginning to shift, with many carriers seeking to limit capacity and / or seek additional rate. In 2024, RT ECP expects engineers, architects and other professional services can anticipate rate pressure with regards to residential, infrastructure and / or geotechnical exposures.

Contractor's Professional Liability (CPrL)

There are about 35+ carriers in the CPrL marketplace with common capacity up to $10 million / $10 million. We expect a strong construction market in 2024 due, in part, to the expectation of falling interest rates by mid-year. In 2024, expect to see heightened carrier scrutiny with respect to design and project type with project-specific appetite remaining tight for condominium projects.

Owner's Protective Professional Indemnity (OPPI)

Pricing variations between OPPI markets can be significant with some being more conservative and others more aggressive. We expect this product to remain a key component for owners / developers considering risk transfer alternatives.

Real Estate Developers (RED) Professional Liability

This coverage continues to grow with eight carriers now offering RED coverage. In 2024, we expect increased demand in the RED marketplace, as more investors and lenders require this coverage to mitigate risk against the onset of greater economic headwinds.

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Contractor’s Pollution Liability (CPL)

OVERVIEW

Contractor’s Pollution Liability (CPL) provides coverage for pollution conditions that occur as a result of covered contracting operations performed by or on behalf of the policyholder. The market readily affords an occurrence-based form to all contractors at all tiers.

The standard CPL form typically contains the following coverages:

- Jobsite / Contracting Operations / Your Work
- Transportation
- Non-owned disposal site (NODS)
- Pollution Legal Liability (PLL) for owned /leased / rented locations that support contracting operations
- Emergency Response to minimize a sudden & accidental pollution condition
- Supplemental defense limits

The construction industry proved to have another strong year in 2023 bolstering the need and desire for CPL. Although the CPL market remained largely competitive, certain contractor disciplines and project types were impacted due to claims, particularly by general contractors utilizing wood frame construction.

As in prior years, capacity in the CPL marketplace gained traction in 2023 with several carriers entering the space. A few carriers continue to provide up to $50 million per claim / aggregate limits, excess limits of liability are generally not a concern and rates continued to stabilize when compared to recent 5- and 10-year trends.

Compromised indoor air quality - typically in the form of mold, fungus, lead, asbestos - continued to be a leading source of claims activity for CPL. However, spills, storm water runoff, and leaks from above & underground tanks were also notable sources of claims in 2023. Wood-frame projects experienced additional levels of underwriting scrutiny, typically equating to higher rates, decrease in limit of liability, higher retentions applied to mold, a restriction to a claims-made trigger, or a combination of the aforementioned. Carriers continued to closely monitor changes to federal and state regulations associated with per- and polyfluoroalkyl substances (commonly known as PFAS) after these compounds were found to have contaminated soil and groundwater at thousands of locations across the United States; as a result, a few carriers began to exclude coverage for these chemicals entirely.

The trend of either consolidating or bolstering the insurance portfolio by attaching Professional Liability coverage to existing CPL remains competitive and a trend across the market. When retaining monoline CPL, markets continue to offer two- and three-year policy term options, equating to notable premium savings.

Approximately 40,000 projects are slated to commence within the next 18 months as a direct result of the 2021 Infrastructure Bill that allocated roughly $1 trillion for construction starts. Many of these projects are substantial with the ENR 400 general contractors creating joint ventures to complete the work. Project-specific programs continue to be a popular alternative solution, especially for those projects that require substantial limit of liability or a prolonged completed operations period. Such programs can be structured to include an owner-controlled insurance program (OCIP) or contractor-controlled insurance program (CCIP) endorsement, which provide expanded coverage to all contractors at all tiers. Such project policy durations can span 15 to 17 years once the project term and completed operation period is included.

2024 OUTLOOK

We expect 2024 to include:

- Stable rates for insureds with flat exposures and clean loss reports.
- Expanded capacity and appetite with additional CPL carriers entering the market.
- Broader insurance specifications that include expanded pollution requirements, increased project limits, and completed operations to meet state statutes.
- Commencement of approximately 40,000 projects associated with the 2021 $1 trillion Infrastructure Bill within the next 12-18 months.
- Continued steady progression from a monoline CPL insurance program to combined CPL / Professional programs as more contractors are contractually required to purchase Professional liability coverage.
- Carriers offering a combined CPL / PLL solution for large infrastructure projects vs. traditional standalone CPL and PLL products with availability to contractors, owners, and other stakeholders with equity interest.
- Heightened underwriting scrutiny around construction-related pollution liability exposure to PFAS - otherwise known as “forever chemicals” - particularly for contractors using associated products or working at jobsites known or expected to contain such chemical exposures.

2024 MARKET UPDATE

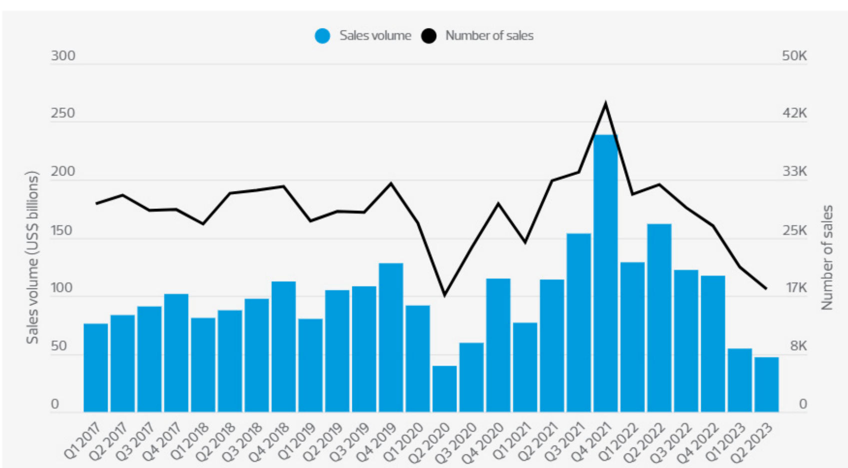
Pollution Legal Liability

OVERVIEW

Pollution Legal Liability (PLL) continues to function as one of the primary risk management / insurance tools designed to facilitate contaminated property transactions and buoy the balance sheets of large real estate assets. Typical PLL coverage benefits apply to virtually every industry that owns, leases, acquires or divests real estate. This claims-made coverage, in our experience, consistently manages the on- and off-site clean-up / remediation expenses; third-party bodily injury, property damage; and defense expenses associated with industries including Commercial / Habitational Real Estate; Manufacturing; Healthcare; and Education to name a few.

According to RSMUS, the real estate market continues in a holding pattern, unsure where pricing will land. Transaction volume dropped noticeably in the first half of 2023, with a 40% decline in the number of deals and a 65% decline in aggregate sales volume compared to the same period in 2022, signifying investor caution. Trends in the asset sectors also indicate that investors are diversifying their capital deployment across various sectors and geographies to further mitigate market risk. Although multifamily properties shined early in the post-pandemic period, they have significantly tapered in demand, as shown by a 74% decline in aggregate sales volume in the first quarter of 2023 compared to the same period in 2022—the largest decline in any real estate sector. Secondary markets, the Sun Belt, and lower-class assets have also begun to follow traditional underwriting trends. Cap rates across the board are rising as 10-year bond yields stay elevated, which will continue to put significant pressure on the recovery of transaction volume in the short term.[1]

Real estate transaction volume



Coverage terms have likely been impacted in recent years by the types of risk and a combination of high-profile mold exposures, rising legionella claims, natural disasters, contaminated site development claims and the growing focus on emerging contaminants such as PFAS. PFAS exclusions have been used with more frequency in the second half of 2023 by a larger percentage of the marketplace, with several markets adding total PFAS exclusions on all renewals and new business. However, other markets continued to exclude PFAS only for certain classes of business including airports, municipalities, legacy manufacturing sites, etc.

2024 OUTLOOK

RT ECP expects the demand for transactional and operational PLL to remain soft during at least the first half of 2024 due to continued inflationary pressures for Insureds relying on third-party capital for asset acquisition. In contrast, we also expect development projects to continue to be strong as the construction industry continues to have a strong project forecast for the upcoming year. Although we anticipate increased frequency of various pollution losses to continue to plague the marketplace, we expect competition to remain robust due to the advent of new markets. We continue to monitor the approach to PFAS in the marketplace. We expect policy terms to remain consistent throughout 2024 with a maximum term of 10 years. We also anticipate prospective / ongoing coverage to remain in the one- to three-year range with the occasional five-year term. A continued increase in underwriting scrutiny for industrial, hospitality, habitational, healthcare, energy sector, and development / redevelopment risks, as well as markets with certain exposures / classes of business is expected.

In our experience, coverage enhancements such as contingent business interruption, defense outside the limits, and first-party diminution of value continue to be readily available for inert real estate portfolios. Several markets can also provide clean-up coverage for known pollution conditions for lenders requiring PLL. Indemnity triggers are also sometimes used to address the known pollution conditions identified in contaminated property transfers. Affirmative coverage for PFAS is also available for certain risks, albeit on a sublimit basis. Policy terms up to ten years continue to be available for transactions.

[1] https://rsmus.com/insights/industries/real-estate/uncertainty-leads-to-shift-in-investment-strategies.html

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General Liability / Pollution Legal Liability (GL / PLL)

OVERVIEW

The combined PLL (claims-made) and General Liability (occurrence) policy forms remain a well-suited solution for facility-based risks with environmental exposures for insureds' products, sites or processes.

The form blends ISO-similar General Liability language along with PLL and may include other environmental coverages including contractor's pollution, products pollution, transportation pollution, and non-owned disposal / location coverage all in a single non-auditable form (from most markets). Originally intended to provide focused coverage to chemical manufacturers, distributors, waste management facilities, and any other manufacturers of "environmental" products, the marketplace has expanded its parameters on classes considered as new entrants to the marketplace to push the product appetite toward higher hazard General Liability classes. The marketplace continues to avoid accounts with potential for mass tort actions and will not support potable water products and services and construction-related products. In light of the social climate, carriers are revisiting renewable industries such as geothermal, solar (commercial only), bio-fuels and potentially carbon sequestration.

At the same time, the disposition of on-site coverages within the GL / PLL product, for the most part, has followed the path of monoline PLL. The tightening of coverages is exacerbated by the growing emergence of contaminants, most notable of which is PFAS, which are ubiquitous as either a product component, process, or in fire protection for facilities. Relative to PFAS, as 2023 progressed, several markets started introducing full PFAS exclusions. The ability to carveback PFAS coverage for bodily injury or property damage depending on the class of business, was subject to significant additional underwriting. In addition, without environmental due diligence, securing PLL coverage without a retroactive date or even gradual new conditions coverage continued to be a challenge. We anticipate that the approach to robust site coverage will not change in 2024.

GL / PLL followed the traditional casualty market over the past two years and saw significant rate increases that have now started to stabilize. Concerns continue over rising litigation of claims, costly effects of natural disasters, start-up companies, and social inflation, which has not abated in its impact on the economy. Auto coverage and its impact overall via nuclear verdicts has not diminished and the continued driver shortage remains as a noteworthy element to aiding insureds in controlling losses. We are seeing insureds, who have taken significant rate increases over the last three years, invest in driver fleet safety to support profitable accounts with moderate increases. However, the marketplace continues to attempt to insulate themselves from auto, and, as a result, the trend continues as many carriers continue to deploy lower limits. Global positions on environmental, social, and governance (ESG) continued to evolve in 2023 and guide environmental appetites. Follow-form excess coverages have also seen accelerated upward rate pressures due to the reasons cited above.

2024 OUTLOOK

In 2024, RT ECP anticipates the impacts of emerging contaminants and the general push back by markets on site coverages to continue. For profitable accounts, we expect rates to range from flat to 5% to 10% increases depending if excess is provided or not. We also anticipate higher rate increases for accounts with elevated loss ratios. We expect higher rate increases on Automobile and Excess coverages to continue in 2024. Insureds, feeling the pain of continued property rate increases as well as automobile and excess, are expecting a robust marketing effort even if they have been with the same carrier for years. In addition, insureds continue to explore alternative options including Captives or possibly splitting up their combined environmental program. However, this approach may result in insureds leaving themselves more exposed to catastrophe and leaving significant swaths of their environmental exposures (i.e., products and waste disposal) uninsured.

Despite the continued and unrelenting wave of catastrophic events such as wildfires, ESG and more, carriers who write GL / PLL had successful years, and most grew significantly as a result of underwriting discipline. We have seen carriers who typically would not offer excess, look for opportunities to support excess towers for GL / PLL once they are outside of the working layers for auto. So, the marketplace has grown in that sense. Capacity remains strong. However, the marketplace is careful in how it deploys and seeks to save capacity for long term insureds who have maintained coverage through good times and bad.

2024 MARKET UPDATE

General Liability Contractor's Pollution Liability Professional Liability (GL / CPL / PL)

OVERVIEW

The combined Environmental Casualty Program (GL / CPL / PL) typically provides General Liability (GL), Contractors Pollution Liability (CPL), and Professional Liability (PL) to specific market segments consisting of environmental contractors e.g., asbestos / lead / mold abatement, waste transporters, environmental consultants, oil / gas / renewable energy contractors, and / or some combination thereof. These policies are typically written for an annual term and continue to be offered, depending on the carrier, on a flat and non-auditable basis. Only a handful of environmental casualty markets offer complementary coverage such as Workers' Compensation and/or Automobile Liability.

The marketplace has seen several new entrants for smaller or program type business via MGA / MGUs with a focus on technology efficiencies for specific classes to expand and gain market share. Additionally, even outside of programs, many markets offer "off the shelf" programs for the smaller, traditional remediation and environmental type contractors.

Some casualty markets are looking for ways to capitalize on the newer and evolving technologies and broadening their appetite classes (i.e., solar contractors who perform commercial work only).

Environmental contractors remain a target for private equity acquisitions for both large and small contractors who are dealing with the same issues as the traditional construction markets (i.e., suffering a shortage of labor and skilled drivers and are looking to partner to grow). The workload in this part of the construction market remains strong as there are often environmental contractors hired to deal with the devastation of wildfires, emergency response incidents, hurricane cleanup, and asbestos / lead / mold abatement, etc. Most environmental contractors have experienced continued revenue growth and are often struggling to keep up with projects.

The past few years saw, in many cases, double digit rate increases for environmental contractors with heavier fleets especially on excess liability policies, resulting from nuclear verdicts and the limited driver pool, as the underlying auto line struggled with losses. Pricing adequacy has improved because of the increase, and with pricing adequacy comes stability. However, a few of these environmental markets continue to charge for every single transaction on the policy (i.e., adding named insureds, notice of cancellations, etc.) and are less willing to make changes or broaden coverage. The marketplace is also reluctant to deploy limits greater than $5 million for this class as many of the markets with an A- rating typically have only this much capacity available.

We have seen markets continue to re-underwrite New York based risks especially in the five boroughs with several carriers exiting the marketplace entirely due to the severity of action-over claims. In addition, we have noticed many carriers adopting a conservative underwriting approach with several mature markets looking to refine their appetites to protect loss ratios. We expect the typical coverage forms to remain conservative with many carriers carefully deploying limits and rewriting policy language. Very limited distribution with action over only being deployed on the primary and not extended to the excess in many cases. This is worth noting on this very tough to place class of business domiciled or doing work in New York especially in the Boroughs where Upstate risk is looked upon as more favorable.

2024 OUTLOOK

In 2024, we anticipate carriers to be more flexible concerning professional exposures and more robust coverage via enhancement endorsements when it comes to larger environmental contractors (i.e., excess of $100 million). We also expect carriers to continue to protect their loss ratios by limiting higher limits and tolerance for the frequency of claims or large losses. The excess liability market is still strong with carriers willing to put up towers, but multiple carriers now need to be involved to get to higher limits as primary carriers are pulling back deploying capacity over $10 million in most situations. We expect carriers to continue to scrutinize auto, while narrowly underwriting and focusing on the insured's potential for large losses and the professional liability of construction products, which includes long-tail, completed-operation exposures and for PFAS exclusions to be deployed with more frequency. We expect small increases of around 5% or less to continue for better performing contractors and continued rate push (>10 percent) on poor performers. Residential continues to be a tougher class of business to write but not anything like New York.

FIRE / WATER RESTORATION

GL / CPL / PL generally provides GL and Excess Liability for fire / water restoration contractors. Distribution of GL / CPL / PL for this class of business continues to shrink. Among this select handful of carriers only a few can offer complementary coverage such as Workers' Compensation and Automobile Liability. Bailees Customer's Coverage is also available as a supplementary coverage part attached to the environmental casualty program from markets who target fire / water restoration. This is worth noting as these customers tend to take the customer's property into their possession when remediating water, fire, or mold losses.

Direct repair networks or third-party administrators fill fire / water restoration contractors' pipelines by assigning jobs to these contractors across the country. These networks work for numerous insurance companies promising their clients that every contractor has minimum insurance, certifications, and other items.

RT ECP has noticed a relaxed approach with carriers more willing to deploy professional liability without limitations or designated operations and anticipate this continuing in 2024. The markets are becoming more mature and want to compete with the limited carriers writing in the fire / water restoration space.

2024 MARKET UPDATE

Architects & Engineers Professional Liability (A&E PL)

OVERVIEW

Architects and Engineers Professional Liability (A&E PL) is utilized to insure design professionals against damages resulting from the acts, errors and omissions committed while rendering professional services. This includes the damages resulting from design mistakes and project delays. Both admitted and non-admitted carriers offer coverage for pollution incidents arising from the professional services defined within the base policy form. Some of the industry segments facing A&E PL exposures include architectural design firms, engineers, agency construction managers, interior designers, space planners and surveyors.

Each year, the American Institute of Architects (AIA) releases a report detailing architectural billings for the past 12 months. This data is known as the Architectural Billings Index (ABI), which is a leading economic indicator for construction activity broken down by Regional and Market-Sector Categories. As of October 2023, several trends are emerging:

1. The AIA report categorizes regional activity between the West, South, Midwest, and Northeast. Beginning in August 2023 the Northeast and Western regions of the U.S. experienced a declining ABI, while the Midwest and South did not, suggesting stronger economic headwinds are concentrated in the Western and Northeastern markets.[1]
2. While firms specializing in all market sectors (Commercial / Industrial, Institutional and Residential) reported declines in the ABI, the most prominent declines were seen in the habitational markets, followed by firms specializing in commercial and industrial projects.

2024 OUTLOOK

In 2024, RT ECP expects that engineers, architects and other professional service firms will benefit from a healthy marketplace with a variety of carriers. However, those firms should expect rate pressure wherever residential, infrastructure, structural and / or geotechnical exposures are present. Furthermore, we expect carriers to trim back their capacity, potentially complicating renewals and necessitating multiple carrier participants to achieve the necessary limit deployment.

2023 has seen a continuation of several market trends specific to the A&E PL marketplace:

1. While a robust number of carriers remain focused on meeting the PL needs of professional service firms, appetite for risk is beginning to shift, with many carriers seeking to limit capacity and / or seek additional rate.
2. Claims severity continues to challenge providers of PL, with claims in large part driven by social inflation and catastrophic bodily injury settlements.
3. Substantial demand for project-specific professional programs remains, with relatively few market players able to consider true project-specific programs and affirmatively name all design participants to a single policy.
4. Agents, brokers and insureds are increasingly turning to the E&S market for PL solutions.

1 https://www.aia.org/resource-center/abi-october-2023-business-conditions-continue-soften-architecture-firms

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Contractor’s Professional Liability (CPrL)

OVERVIEW

Contractor’s Professional Liability (CPrL) is designed to provide coverage for damages arising from negligent acts, errors, and omissions in professional services performed by or on behalf of any construction firm. Today’s typical CPrL policy continues to be robust, providing protective indemnity as well as rectification or mitigation coverage - both first party coverage parts.

With economic growth becoming more consistent and accelerating toward the end of 2023, there is a sense of cautious optimism for a strong construction market in 2024. As such, construction contracts will continue to drive the purchase of CPrL, although many small to mid-size firms are also buying as a sensible approach to financing losses associated with professional services. Many have realized that when hiring engineering firms to support their physical work, those engineering firms lack the financial protection needed in the event an error in their services occurs. For example, one of the largest engineering trade associations in the country - American Council of Engineering Companies (ACEC) - recently completed their annual insurance survey of their membership. They found that the percentage of engineering firms in the following disciplines, purchased $2 million or less in professional liability limits: Civil (61%); Geotechnical (79%); and Structural (62%).[2] With inadequate professional liability limits of insurance the hiring construction firm’s vicarious risk is substantially increased.

The CPrL market has remained consistent with respect to the most desired construction-related risks. Commercial general contractors and trade contractors have continued to see flat rates and even decreases when coupled with static operations and an increase in ratable revenue / exposure basis. Higher percentage of design / build project delivery has led to increased rate and higher premiums. Infrastructure project-heavy and heavy civil construction contractors have continued to see increased rate.

The number of CPrL markets is not lacking with 35+ active carriers continuing to write these policies. Capacity of $10 million / $10 million is common for practice policies. When increasing practice limits or seeking project-specific limits, solutions remain but carriers are increasingly inclined to seek specific dynamics of projects, insured’s scope and anticipated length of the projects. Generally, the marketplace has remained the same in the last 12 months in this regard.

Additional notes as to marketplace evolution include:
Rectification claims have been at the forefront of the minds of many carriers. Reporting delays, while improving, continue to haunt the industry. Carriers promptly addressing claims is another dynamic to keep an eye on in 2024.

- Current events drive carrier appetites, with high rise condominiums carrying higher rate or being moved to the fringe of appetites, for example.
- As green building becomes more prominent, some carriers have moved away from solar and others from solar projects involving roofing. New technologies bring hesitation, though contractor experience creates more market opportunity.
- As a litigious society continues to evolve, contractor response or “lessons learned” is increasingly important in carrier evaluation of claim history.

2024 OUTLOOK

As we look toward 2024, adjustments have been made with respect to 2023’s focus on inflation. It remains that some markets seek rate regardless of the nature of an insured’s business model, though we have seen this kept to a minimum due to the continued presence of so many carriers in the marketplace. Notably, worthy of heightened focus is that design/build project delivery will yield scrutiny of project scope, participants, experience and scheduling. Carriers discuss data compilation as they seek to project potential problem areas, though project type and loss history are still main drivers of rate. As heavy civil infrastructure projects become more prominent, increased premium and rate are likely to be seen. Key dynamics to focus on are revised definitions of key terms, such as “professional services.” Higher deductibles / self-insured retentions for certain insuring agreements (think rectification) have become a way that some carriers can get comfortable with certain coverages offered on their less desired project types. Restrictions and exclusions are likely to become more prominent, not less. Project-specific appetite for condominium projects will likely remain tight. Overall, heightened carrier scrutiny with respect to design and project type should be expected.

[2] https://www.acec.org/

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Owner's Protective Professional Indemnity (OPPI)

OVERVIEW

Rates continue to increase for architects & engineers professional liability coverage and design professionals are pushing to limit their liability. These factors contribute to the often difficult, costly and cumbersome task facing project owners and developers when structuring contracts to protect against design and construction professional liability errors or omissions.

More than ever Owner's Protective Professional Indemnity (OPPI) should be considered for projects involving design and construction professional liability exposure. As named insureds under the OPPI policy, project owners / developers can realize multiple benefits compared to alternatives.

For example, when negotiating contract terms, a gap often exists between the professional liability limit requested by the owner / developer and the limit of liability design and construction professionals are willing to provide. The traditional solution of requiring design and construction professionals to evidence increased limits can be costly and difficult to administer through the applicable statute of repose. Shining a light on this issue, according to the ACEC's 2022 Insurance Survey, approximately 61% of engineering firms, up to $50 million in annual revenue, purchase $2 million in professional liability limits or less.[1] These are the firms the architect of record is hiring. Unless the prime architect/engineer is carrying substantial limits, the firms they are hiring may not have the appropriate limits to finance a catastrophic engineering error.

OPPI can be a beneficial coverage by providing a broad layer of excess professional liability coverage over the annual practice policies of contracted design and construction professionals. In addition, OPPI provides a primary defense for claims made directly against the owner. In our experience, no other solution provides a defense to the owner / developer.

A typical policy provides a retroactive date back to the start of design, a policy period that matches the construction schedule and includes an Extended Reporting Period (ERP) aligning with the applicable state statute. From the retroactive date to the end of the ERP is often close to 15 years.

Learn more about professional liability insurance alternatives for owners here.

Over a dozen markets participate on OPPI placements offering varying appetites, underwriting flexibility and coverage terms. As the number of market participants has increased and appetites have expanded, OPPI can provide a solution for a wider variety of project types and sizes. From large infrastructure, manufacturing, healthcare, and industrial to small apartment projects, OPPI may be a fit. Various markets are more willing to entertain projects closer to $20 million in value where in the past minimum project size was closer to $50 million or higher. As design professionals participating on smaller projects often carry lower professional limits, OPPI should be considered to bolster those limits.

Pricing variations between markets can be significant. A few markets are more conservative while others remain aggressive. Submission requirements are more stringent as underwriters want to see applications completed up front along with project schedules, budget, environmental reports and prime contracts. Limitations of liability are becoming more common and must be identified. As an excess policy, OPPI requires sufficient underlying limits called a Minimum Insurance Requirement (MIR). MIR is set based on a combination of the underlying limit evidenced and the limit the underwriter is comfortable with depending on the project details. The MIR can be as low as $1 million for a smaller project to $10 million or more for mega-projects. Limitations of Liability (LOL) can interfere with the availability of the underlying limits and must be identified. In situations where an LOL is lower than the MIR, the use of a self-insured retention (SIR) may be beneficial. More importantly, this provides a solution for both the owner / developer and design professionals. Underwriters are taking a deeper look into submission documents to better understand potential project difficulties. This benefits those projects that appear to be very complicated at first but may be well designed and planned, allowing for more competitive pricing.

2024 OUTLOOK

The OPPI outlook for 2024 is very positive. As professional liability rates for architects & engineers continue to rise, the availability of project specific professional liability coverage is significantly limited, and design and construction professionals push harder to limit liability, OPPI will remain a key component for owners / developers considering risk transfer alternatives.

[2] https://www.acec.org/

2024 MARKET UPDATE

Real Estate Developers (RED) Professional Liability

OVERVIEW

Real Estate Developers (RED) Professional Liability is designed to protect against the covered losses arising from negligent acts, errors and omissions committed during the performance of real estate development professional services. RED policies generally combine the features of professional liability insurance for design professionals, contractors, real estate professionals and owners into a broader solution that can be customized for the real estate industry. This includes those with ownership, firms providing services to third-party investors, or sophisticated real estate developers and owners looking for comprehensive risk management programs. The coverage can be structured on a corporate-wide or project-specific basis.

The popularity of RED Professional Liability continues to grow. Since its introduction in 2009, the RED market has, to our knowledge, expanded again, to eight insurers offering standalone products as well as numerous other construction and miscellaneous professional liability carriers providing coverage on an ad hoc basis through a variety of professional liability product vehicles.

Primary players, in our experience, report an average limit capacity of $5 million with ease of structuring follow-form excess layers offered via other carriers. Many of these carriers are:

- Expanding the first-party coverage features commonly found within the contractor's professional liability arena including protective indemnity and rectification terms and conditions with each carrier having their own slightly different take on the coverages.
- Offering more expansive contractors pollution liability coverage for those developers with in-house construction and general contracting operations.
- Customizing their nuanced professional services to accommodate the individual needs of clients.
- Following the lead of construction professional liability insurers by becoming more selective about the residential projects and project delivery methods they cover.

2024 OUTLOOK

The RED Professional Liability insurance market continues to be in flux, mirroring the overall real estate industry with the interest rate environment playing a role in project selection and insurance placement decisions. We are seeing RED markets pulling back on project-specific placements and being more conservative on project types like residential and renewable energy, with at least one market looking to re-underwrite and reprice their book entirely, causing some minor disruption to insureds. On the other hand, we have seen movement of underwriting talent among new carriers with plans of bringing more capacity looking to be deployed in 2024. We expect increased demand in the RED marketplace, as more and more investors and lenders require this coverage to mitigate risk against the onset of greater economic headwinds.

Going forward, we expect developers to continue to consider the cost / benefit of a more conservative "pay as you go" approach that utilizes project-specific RED and OPPI placements for new projects compared to one that favors a more consistent practice wide placement for development, property management, and leasing. As such, we anticipate that long-term risk managers will continue to invest in more expansive, practice-wide RED programs rather than protecting themselves against risks on a project basis solely with OPPI policies or specific property management E&O coverage forms. We expect this trend to continue well into 2024. Education on key issues (exposures, claims, coverage, program structure, transition from more limited coverage offerings, etc.) will continue to play an important role in the development of this insurance line. With ongoing volatility within the RED insurance market, it may be advisable for attention to be given to the sophistication of the carriers' claims response. We anticipate the need for diligent policy review and coverage assessments to remain important in the coming year given the marked coverage disparities that exist among the various standalone RED and miscellaneous professional liability carriers.

We anticipate claims trends will continue to be severity driven, yet generally favorable across the industry. Given that we have seen historical product performance continually meet the internal expectations of insurers, we expect a number of new RED carriers and MGAs to enter the marketplace as underwriting talent finds willing capital and a growing number of traditional construction professional liability carriers stretch their focus into the RED professional liability marketplace.

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