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Contractual Risk and Insurance for Professional Services Firms

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**From the Oregon State Bar CLE seminar *Issue Spotting for
Construction Lawyers*, presented on October 21, 2022**

Chapter 3

Presentation Slides: Contractual Risk and Insurance for Professional Services Firms

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ACEC
Business Insurance Trust
Engineered for Peace of Mind

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**CONTRACTUAL RISK
AND INSURANCE
FOR PROFESSIONAL
SERVICES FIRMS**

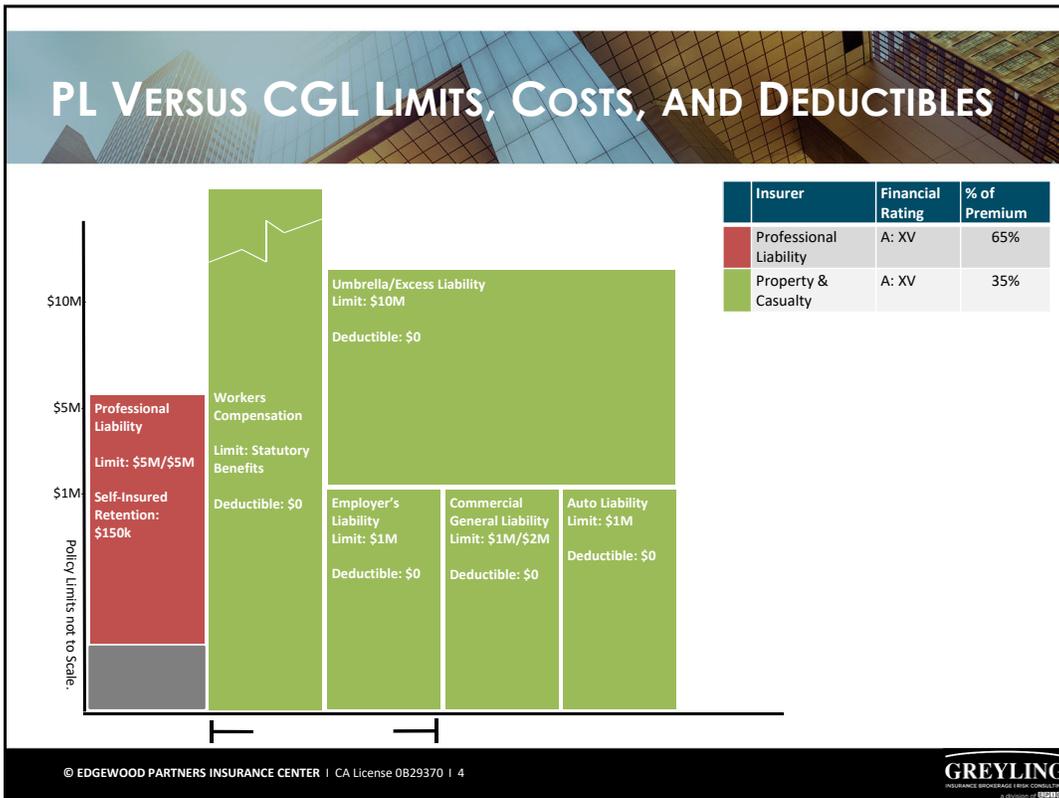
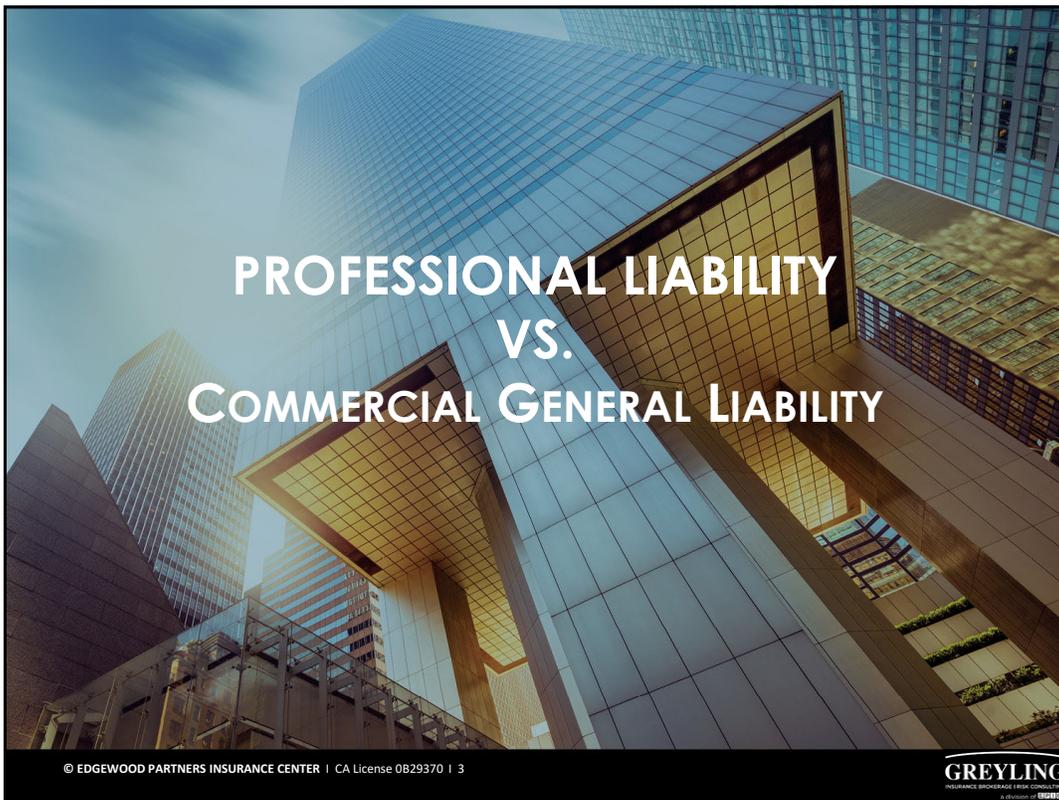
**KENT COLLIER, J.D.,
CRIS, LEED AP BD+C
OCTOBER 21, 2022**

AGENDA

- Overview of Professional Liability compared with Commercial General Liability
 - Coverage triggers and components
 - Limits
 - Deductibles/retentions
 - Premium
 - Market Trends
- Insurance Coverage for Liability Assumed in a Contract
- Analysis of a Typical Indemnity Clause
- Duty to Defend and Insurance Coverage
- Additional Insured Provisions

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OVERVIEW OF PL VERSUS CGL

	Commercial General Liability	Professional Liability
But Do Not Call It:	"Comprehensive"	"Errors & Omission"
Damages Covered:	Bodily Injury & Property Damage	Any damages the firm is legally obligated to pay if caused by negligent professional services
Also Covered:	Personal & Advertising Injury	Pollution Liability and possibly Cyber/Technology coverage
But Does Not Cover:	Economic/Consequential Loss (except "Loss of Use" and damages "because of" BI/PD)	Damages covered by other insurance policies, and some exclude A/E's employee BI
What Actions Trigger Coverage?	An OCCURRENCE arising from covered operations (i.e., non-professional services)	NEGLIGENT Professional Services – judged by comparison with the common law standard of care

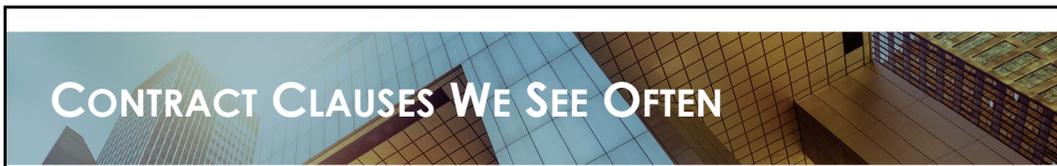
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CONTRACTUAL LIABILITY

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CONTRACT CLAUSES WE SEE OFTEN

- Commercial General Liability Insurance requirements including “contractual liability insurance” or “specifically insuring the indemnification provisions set forth herein” or “covering broad form contractual liability”
- Professional Liability insurance requirements including “limited contractual liability coverage” or “insuring contractual liability assumed in this agreement”
- Standard of care provisions with a higher or best standard of care that differs from the applicable common law standard of professional care
- Warranties or guarantees broader than the applicable common law standard of professional care – such as design “fit for intended purpose” or “complying with owner’s requirements” or “meeting a set budget”
- Liquidated damages for delay and time is of the essence
- **These are all problems for design professionals with respect to insurance coverage**

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COMMON PROFESSIONAL LIABILITY CONTRACTUAL LIABILITY EXCLUSIONS

B. Contractual Liability arising out of:

1. the **Insured's** actual or alleged liability under any oral or written contract or agreement, including but not limited to express warranties or guarantees; or
2. any actual or alleged liability of others that the **Insured** assumes under any oral or written contract or agreement.

However, this exclusion shall not apply to the **Insured's** liability that exists in the absence of such contract or agreement.

E. **Assumption of Contractual Liability of Others** arising out of or resulting from the liability of others assumed by the **Insured** under any contract or agreement either oral or written, including any hold harmless or indemnity agreements, except:

1. with respect to Insuring Agreement C for liability assumed under contract; or
2. to the extent the **Insured** would have been liable in the absence of such contract or agreement.

C. liability assumed under any **Contract**. This exclusion does not apply to:

1. any liability that you would have in the absence of that **Contract**, or
2. your contractually assumed obligation to reimburse any person or entity for their reasonable costs of defense pursuant to an indemnity or hold harmless provision in your **Contract** for **Professional Services**, as long as such obligation is limited in the **Contract** to the portion of such costs equal to the percentage of your liability as ultimately determined after adjudication in a court of competent jurisdiction to be caused by your **Wrongful Act** or **Pollution Incident** using principles of comparative fault. This exception to exclusion C shall not apply to any obligation to provide a defense prior to the ultimate determination of fault.

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ISO CG 00 01 COMMERCIAL GENERAL LIABILITY CONTRACTUAL LIABILITY EXCLUSION

B. EXCLUSIONS

1. Applicable To Business Liability Coverage
This insurance does not apply to:

b. Contractual Liability

(1) "Bodily injury" or "property damage"; or
 (2) "Personal and advertising injury"
 for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

This exclusion does not apply to liability for damages because of:

(a) "Bodily injury", "property damage" or "personal and advertising injury" that the insured would have in the absence of the contract or agreement; or
 (b) "Bodily injury" or "property damage" assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purpose of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage" provided:

12. "Insured contract" means:

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused, in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. includes that part of any contract or agreement that indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing.

However, Paragraph f. does not include that part of any contract or agreement:

(1) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, designs or drawings and specifications; or
 (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(2) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (1) above and supervisory, inspection, architectural or engineering activities.

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WHAT DOES THIS ALL MEAN?

- Professional Liability = Contractual Liability EXCLUSION
 - Exception only for liability that would exist absent contract – i.e., professional negligence for failure to comply with common law standard of care
 - Don't agree to contract requirements for PL to have contractual liability cover
- Commercial General Liability = Contractual Liability EXCLUSION
 - Bigger exception for liability assumed in an “insured contract”
 - But “insured contract” does not include part of contract where an A/E agrees to indemnify for professional services, or an agreement to indemnify another for their professional services
 - Watch out for contract requirements on CGL including language like: “including all liability assumed under this contract” or “broad form contractual liability” or “covering all operations and liability for this contract”
 - Clarify: (pursuant to standard ISO policy form CG 00 01 language)

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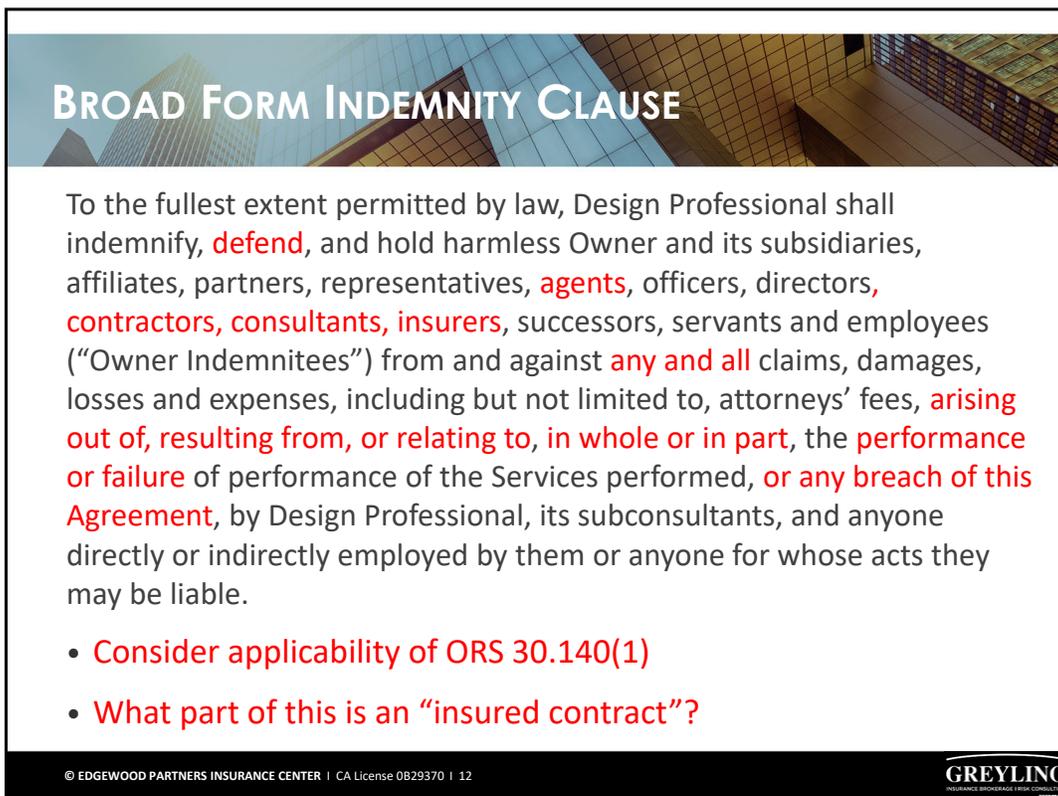




INDEMNIFICATION AND THE DUTY TO DEFEND

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BROAD FORM INDEMNITY CLAUSE

To the fullest extent permitted by law, Design Professional shall indemnify, **defend**, and hold harmless Owner and its subsidiaries, affiliates, partners, representatives, **agents**, officers, directors, **contractors, consultants, insurers**, successors, servants and employees (“Owner Indemnitees”) from and against **any and all** claims, damages, losses and expenses, including but not limited to, attorneys’ fees, **arising out of, resulting from, or relating to, in whole or in part**, the **performance or failure** of performance of the Services performed, **or any breach of this Agreement**, by Design Professional, its subconsultants, and anyone directly or indirectly employed by them or anyone for whose acts they may be liable.

- **Consider applicability of ORS 30.140(1)**
- **What part of this is an “insured contract”?**

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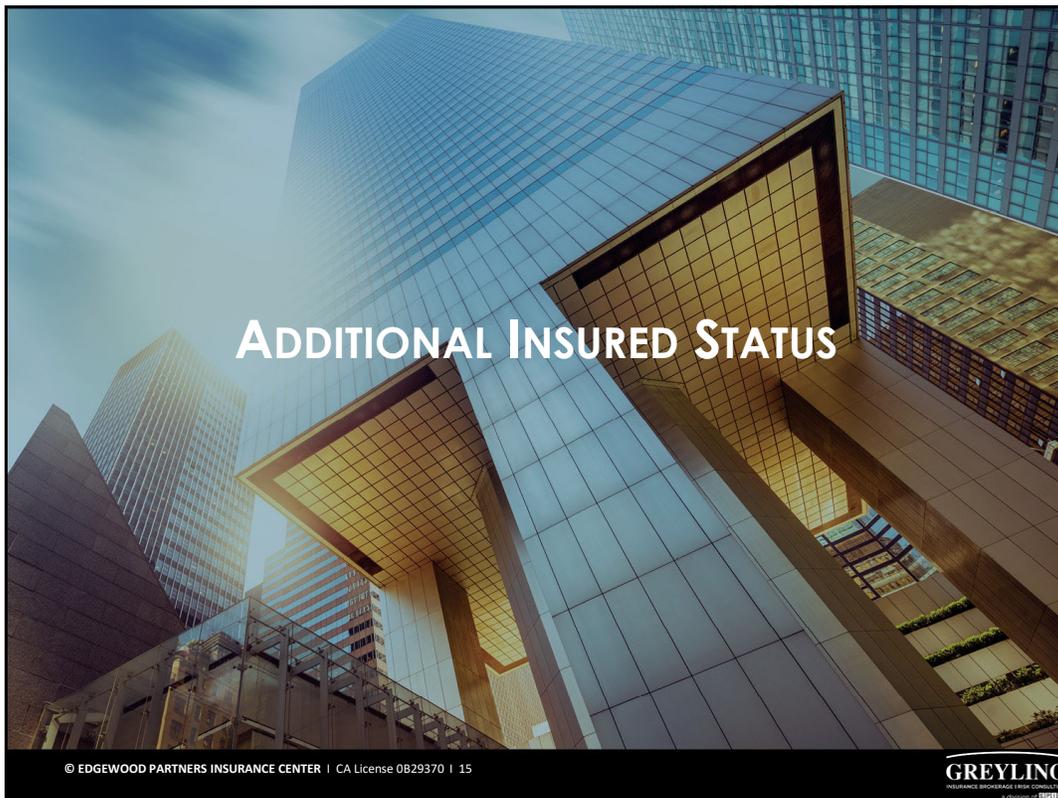
DUTY TO DEFEND

- The verb “defend” in the prior clause means provide and pay for attorneys and other defense costs for the indemnitee (other party)
 - Contrary to “American Rule” that a party to litigation bears its own fees
 - Creates contractual liability that would not exist absent the contract
 - Agreement to defend does fall within “insured contract” definition and is consistent with additional insured coverage under CGL, when available
- Immediate duty to defend is not covered by professional liability insurance*
- Agreement to reimburse attorneys’ fees, as damages, in proportion to negligence is likely covered by professional liability insurance
- Defense claims are rare, but potentially very significant
- Subconsultants could end up with multiple layers of uninsured defense exposure

* Limited, untested market (one insurer) covering small firms

ALTERNATIVE INDEMNITY LANGUAGE ON DEFENSE

- ~~defend~~
- (but not defend)
 - Required in California due to CH2MHill case
- defend (to the extent of Design Professional’s commercial general liability insurance coverage)
- defend (except for claims alleging professional negligence)
- Bifurcated indemnity provisions
 - Be careful of breadth to make sure one does not swallow the other
- Reimbursement to indemnitor of defense costs in proportion to adjudicated negligence
 - Many in California now trying this under § 2782.8

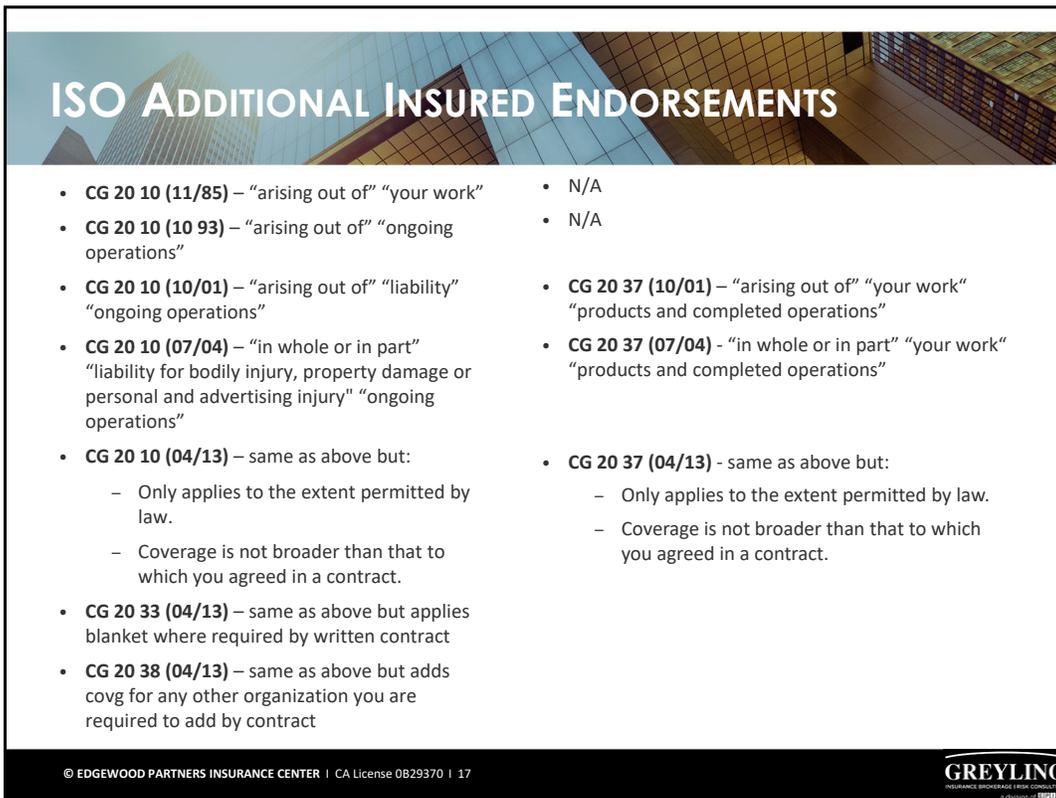


ADDITIONAL INSURED STATUS

- Allows another person or entity direct access to a CGL policy
 - Not available for Professional Liability
 - Creates insurer duty to defend another party
- Should only be given to identifiable parties
 - Subsidiaries, related entities, officers, directors, employees
 - Not agents, consultants, invitees, representatives, other contractors
- Granted by endorsement typically
- Blanket vs. scheduled

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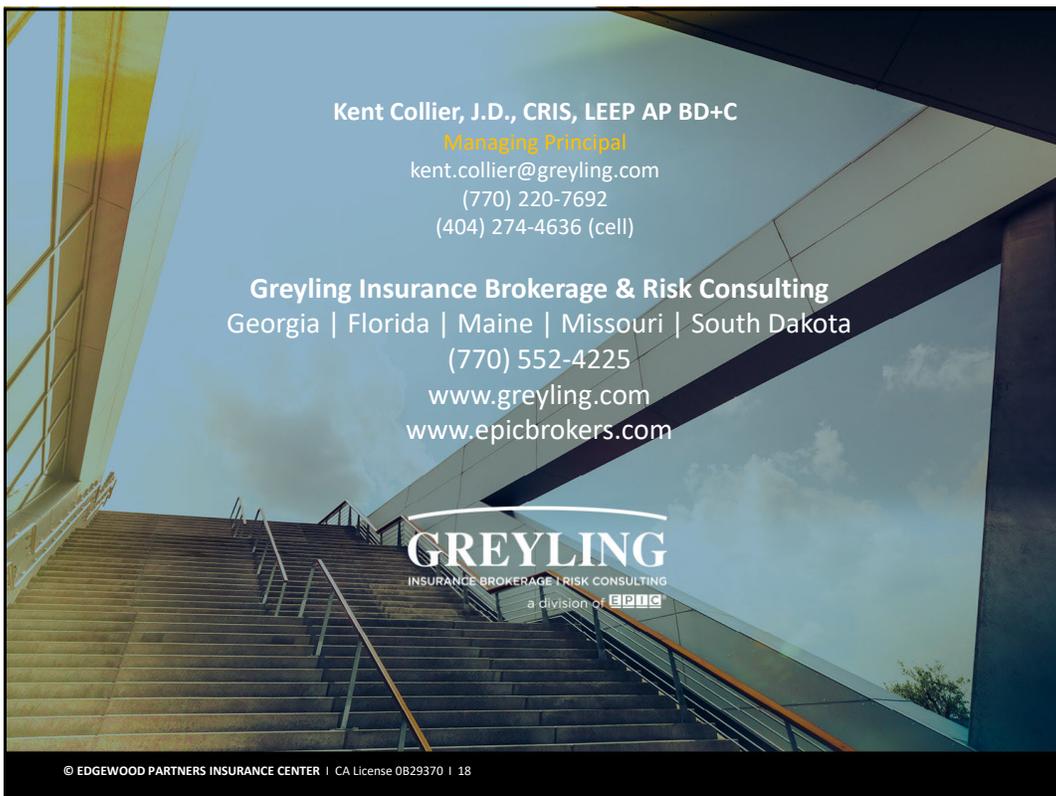
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ISO ADDITIONAL INSURED ENDORSEMENTS

- **CG 20 10 (11/85)** – “arising out of” “your work”
- **CG 20 10 (10 93)** – “arising out of” “ongoing operations”
- **CG 20 10 (10/01)** – “arising out of” “liability” “ongoing operations”
- **CG 20 10 (07/04)** – “in whole or in part” “liability for bodily injury, property damage or personal and advertising injury” “ongoing operations”
- **CG 20 10 (04/13)** – same as above but:
 - Only applies to the extent permitted by law.
 - Coverage is not broader than that to which you agreed in a contract.
- **CG 20 33 (04/13)** – same as above but applies blanket where required by written contract
- **CG 20 38 (04/13)** – same as above but adds covg for any other organization you are required to add by contract
- N/A
- N/A
- **CG 20 37 (10/01)** – “arising out of” “your work” “products and completed operations”
- **CG 20 37 (07/04)** - “in whole or in part” “your work” “products and completed operations”
- **CG 20 37 (04/13)** - same as above but:
 - Only applies to the extent permitted by law.
 - Coverage is not broader than that to which you agreed in a contract.

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