Claims: Avoiding Disasters

Risk Management Advice from Walker Professional Insurance

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  -Design Professionals
  -Municipal: Cities & Towns
  -Non-Profit Organizations
  -CPA’s & Lawyers
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A/E ProNet Members

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Agenda

• Claims are on the Rise: Professional Liability Claim Drivers
• Incorrect Design and Preserving Insurance Coverage
• Scope of Services Problems and Claims Case Study activity
• Claims Mitigation, response, and preparedness
Design Errors surpassed Scope of Services issues as the #1 cause of claims and disputes which has not historically been the case.

<table>
<thead>
<tr>
<th>Cause</th>
<th>Primary</th>
<th>Secondary</th>
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<tbody>
<tr>
<td>Design was incorrect</td>
<td>36</td>
<td>11</td>
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<tr>
<td>Workmanship deficiencies</td>
<td>31</td>
<td>14</td>
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<td>Design was incomplete</td>
<td>31</td>
<td>12</td>
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<td>Physical conditions were unforeseen</td>
<td>29</td>
<td>11</td>
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<tr>
<td>Change in scope</td>
<td>27</td>
<td>12</td>
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<td>Poor management of sub-contractor/supplier and/or their interfaces</td>
<td>25</td>
<td>12</td>
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<td>Design information was issued late</td>
<td>28</td>
<td>7</td>
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<td>Claims were spurious, over-inflated, opportunistic and/or unsubstantiated</td>
<td>21</td>
<td>13</td>
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<td>Access to site/workface was restricted and/or late</td>
<td>22</td>
<td>10</td>
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<tr>
<td>Contract management and/or administration failure</td>
<td>17</td>
<td>14</td>
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<td>Weather conditions were exceptionally adverse</td>
<td>19</td>
<td>12</td>
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<tr>
<td>Installation failure</td>
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CRUX Insight report 2020 by HKA
DESIGN ERRORS: Why are there more mistakes today than before?

“Design problems are more likely to occur as a result of increasingly tight timescales...” ~HKA

In my experience:
- Labor shortages (contractor and design pro)
- Supply Chain delays
- Too busy to do project close out
- Internal Quality Control procedures are pushed to the side
- Firms taking on projects outside of their expertise
- Less collaboration between design and construction team
When a claim occurs preserve your insurance coverage

- DO NOT admit Fault
- Report the claim timely
Policy language is very explicit that if you admit fault, the insurance company is not responsible for defense or indemnity obligations.

Not every mistake is an act of professional negligence.

The standard is not to be perfect but rather to meet the standard of care.

In order to be legally liable for professional negligence, it must be proven: a duty was owed (meet standard of care), there was a breach of that duty, and the breach was the proximate cause of damages.

PRETIVE YOUR COVERAGE: DO NOT admit Fault
Professional Negligence

- An architect designs a building with 1,000 doors
- The architect only includes 990 doors on the door schedule
- Clearly an error or omission—the client did not hire the architect to include 990 doors
- The question is whether the architect breached his/her duty to meet the standard of care?
- If you asked 15 architects, they would likely tell you that it is not uncommon to miss a few doors on the door schedule, and thus 10 is not unusual. Missing 250 might be, but not 10 doors
- Further, has the client suffered any damages?
PRESERVE YOUR COVERAGE: DO NOT admit Fault

• What would you say instead or What would you instruct your team to say?
  • Be empathetic
  • Walk away
  • Call Leadership/Management
  • Call your insurance agent to report the claim/potential claim
Signs you might need to report a potential or actual claim:

• Error has been discovered & reference has been made regarding making a claim as some point
• Project is significantly behind schedule and/or over budget
• Significantly more change orders than anticipated
• You are not being paid or having trouble collecting owed fees
• Your relationship/Communication with your client has changed/strained
• You or your team are excluded from meetings or have reduced roles
• A third-party consultant is retained by your client to review plans/services
• There is a collapse or significant event during construction
• You just have an unsettling feeling.

* Berkley Design Pro.*
PRESERVE YOUR COVERAGE: Timely Reporting

• Once you become aware of a claim or potential claim, it is necessary to report that claim during the current policy period.

CLAIMS

Claim means a demand against you for money or services, or the filing of a suit or the initiation of an arbitration proceeding naming you, seeking damages for an alleged error, omission or negligent act.

25. In the last five years, have any claims been made against your firm? □ Yes □ No

26. Does the firm or any of the principals, partners, officers, directors or employees have any knowledge of any act, error, omission, unresolved job dispute, accident, or any other circumstance which might reasonably be expected to give rise to a claim? □ Yes □ No

If yes, please attach claim/circumstance details (Project, Total amount paid, Status of claim, etc)
PRESERVE YOUR COVERAGE: Timely Reporting

- OWNER: 501c3 organized exclusively for this project
- PROJECT: Indoor/Outdoor urban tennis facility for the underprivileged
- BOARD: Made up of the Washington DC Elite including big wig attorneys
- CONTRACT: Written proposal without clearly defined scope of services
OTHER DRIVERS OF CLAIMS: SCOPE ISSUES
Activity: In your groups, read your claim example, discuss and be ready to answer the following questions:

1. What were the risk factors associated with the claim?
2. What could have been done to reduce or alleviate those risk factors?

Risk Factor: an attribute, characteristic or exposure of a situation/event that increases the likelihood of a loss or a claim.
Claim:
• Civil Engineer hired by Municipality to perform several improvements including the replacement of the ladder in a sewage grinder for access to screens which were regularly cleaned.
• Civil worked for the Municipality on an as-needed basis for years but did not have a specific contract for the services performed for this project.
• A Municipal employee descended down the ladder without testing the air quality or wearing a safety harness which was a required part of the process. He got down the ladder, felt disoriented and could not make it up the ladder, and ultimately died. Two others rushed to help and were also injured. The Civil Engineer was onsite that day.
• Suit was filed by the estate of the deceased and injured workers. Question of whether Civil had relative control over the worksite. Contract was a MSA but there was no specific task order relative to the services the Civil was providing that day. As such, court determined that it was a question of fact as to the scope and control over project. Settled for 6 figures to get the Civil out of the lawsuit.

Risk Factors:
• MSA was used without clearly defined scope of services and responsibilities

Risk Management Tip:
• When using an MSA, review annually. Task orders should be produced for each service requested, otherwise courts can interpret services as being very broad
• Include a provision that site safety and means and methods of construction are the responsibility of the DP
Claim:
• A Landscape Architect (LA) was hired by an Engineer to provide landscape design services for the medians/embankments for a major highway interchange.
• Project was organized as a Design-Build arrangement between the Contractor and the Engineer.
• The LA’s agreement was a Master Work Agreement that referred to the LA as a “subcontractor” and work that would be performed would be set forth in work authorizations. The contract specified that the LA was bound by the terms and conditions of the prime agreement to the same extent the Engineer was Bound.
• Slope Failures—Contractor contended that Engineer failed to provide slope stabilization details in the plans. Engineer contended the Contractor didn’t property compact the slopes. Contractor withholds fees from the Engineer.
• The Engineer sued for 1M in fees owed. Contractor counterclaimed asserting design defects to all parts of the project. Several parties get brought in including LA with allegations with responsibility for erosion controls. LA contends it was only responsible for specifying plantings. Contract was not clear and difficult for LA to prove it was not responsible for erosion control. Engineer withholds 50K in fees due the LA.
• At mediation, claim settles for 110K and LA waived fees.

Risk Factors:
• Agreeing to be bound by the prime contract
• Unclear Work Authorizations

Risk Management Tip:
• Fee Disputes—pay if paid can lead to disputes. If agree, closely track and follow up for late payments.
• With many entities involved in project, clear scope leaving no ambiguity as to which DP is responsible for which design item.
• Read the Prime agreement to make sure acceptable.
• Use “subconsultant” rather than “subcontractor” to help distinguish different standards applicable to each.
Claim:
• Structural Engineer is hired by owner of an indoor rec park to provide structural design for raising the roof of an existing building. As a cost saving measure, Engineer recommended lowering the floor instead. In addition, the Engineer was to design support structure for play equipment piece that would be installed. No role in determining dimensions or layout of foam pits.
• Engineer’s contract agreed to comply with “all applicable laws, codes and regulations.” Scope of services was not clearly defined.
• A patron did a backflip into the foam pit entering head-first and died.
• Estate files suit against owner and Engineer.
• No codes for foam pit designs. Expert contended negligence by not considering published guidelines that pits should be 6-8 ft deep and the floor was 4ft below pit.
• Defense argued Engineer was not responsible for dimensions of foam pit but scope was vague.
• Settled at mediation for 1M with owner and 200K with Engineer.

Risk Factors:
• Vague scope and no exclusions of scope not provided.
• Compliance with “all laws, codes, regulations.”

Risk Management Tip:
• Include clearly defined Scope of services including “examples” of what is NOT to be included.
• Compliance with laws should be tied to standard of care and in this situation limited to the services the Engineer Provided.
• If not familiar with foam pits, extra research may be needed to meet the standard of care.
MITIGATION, RESPONSE, AND PREPAREDNESS

- Claim/Project Review Committee (Lessons Learned-Good and Bad)
- Clearly Defined Scope
- Contract Review Process
- Claims/Crisis Response Process
Is your team prepared to respond to a Claim or a Crisis?
Do Not's:

- Don’t Admit Fault
- Don’t talk to the Media
- Don’t destroy any documents
- Don’t engage with Social Media
- Don’t text or email (it is discoverable)
- Don’t make payments or settlement offers
- Don’t sign any releases
- Don’t say, “Don’t worry about it, my insurance company will take care of it” or “That is what I have insurance for!”
Do’s:

- Call your Leadership
- Call your Insurance Agent
- Gather related documents
- Identify 3\textsuperscript{rd} Parties involved
- Identify other staff involved on the project
- Take pictures (if applicable)
Questions? Comments?