If They Build It, Claims May Come

Understanding the claims process for a better outcome

RLI Design Professionals
DPLE 194
September 5, 2018
RLI Design Professionals is a Registered Provider with The American Institute of Architects Continuing Education Systems. Credit earned on completion of this program will be reported to CES Records for AIA members. Certificates of Completion for non-AIA members are available on request.

This program is registered with the AIA/CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product. Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.
Copyright Materials

This presentation is protected by US and International Copyright laws. Reproduction, distribution, display and use of the presentation without written permission of the speakers is prohibited.

© RLI Design Professionals
Disclaimer

Nothing presented herein is a substitute for actual legal advice that can only be provided in the event that an attorney client relationship is formed and agreed to by both the attorney and the client. Furthermore, the presentation may involve hypothetical facts and is no substitute for legal advice based on the actual facts and circumstances of a particular situation.
Today’s Panelists

Garrett Kern
Claim Manager

Charles Spiekerman
Claim Manager

Madelene Sheaffer
Claim Manager
Course Description

Roughly 25 out of every 100 A/E firms experience a professional liability claim each year.

Want to avoid becoming a statistic? Heed the advice of our team of claims examiners!
Participants in this session will:

1. Learn how to manage risk through strategic documentation;
2. Review the impact of contract language on claims;
3. Consider the impact of insurance in claim management; and
4. Identify common areas in which claims are made against design professionals.
When should you reach out to our Claims Team?
Pre-claim(s)

Circumstance

an event or occurrence from which the Insured reasonably expects that a Claim(s) could be made.
When in doubt, report it!

1. Reporting circumstances or pre-claims carries no negative ramifications to premiums.

2. We can provide you assistance to try to prevent a claim from ever arising
Loss Prevention Assistance

RDP Policy Language:

*If the Insured reports a Circumstance during the Policy Period,...until such time a Claim(s) is made, any costs or expenses that Insurer incurs as a result of investigating or monitoring such Circumstance will be paid for by the Insurer.*

*The decision to incur any costs or expenses to monitor or investigate a Circumstance shall be at the sole discretion of the Insurer.*
Claims

a demand received by the Insured for money or services and which alleges a Wrongful Act. Claim(s) includes but is not limited to lawsuits, petitions, arbitrations or other alternative dispute resolution requests filed against the Insured.
Claims must be made and reported during the same policy period!

RDP Policy Language:

This insurance applies to a **Claim** for a **Wrongful Act** to which this insurance applies, only if:

(i) the **Claim** is first made against the Insured during the **Policy Period** and first reported to the Insurer, in writing, during that **Policy Period** or during the sixty (60) days immediately following the effective date of cancellation or nonrenewal, pursuant to Section 9. a. of this Policy;
As a condition precedent to the coverage hereunder:

(i) in the event of a Claim(s), prompt written notice containing particulars sufficient to identify the Insured and all reasonably obtainable information with respect to the time, place and particulars thereof, and the names and addresses of available witnesses, shall be given by or for the Insured to the Insurer;

(ii) if a Claim(s) is made against the Insured, the Insured shall promptly forward to the Insurer every demand, notice, summons, order or other process received by the Insured or the Insured’s representative. This requirement continues throughout the life of the Claim(s).
The Insureds agree not to settle or offer to settle any Claim, incur any Claim Expenses or otherwise assume any obligation or admit any liability with respect to any Claim without the Insurers’ prior written consent, which shall not be unreasonably withheld. The insurer shall not be liable for any settlement, Claim Expenses, assumed obligation or admission to which it has not provided prior written consent.
What is the process for reporting a circumstance or claim?
How to Report a Claim or Circumstance

Email: New.Claim@rlcorp.com
Fax: 866-692-6796
Phone: 800-444-0406
Street Address: 9025 N. Lindbergh Dr., Peoria, IL 61615
Mailing Address: P.O. box 3961
Peoria, IL 61612-3961
Claims/Circumstance Process

1. Report a circumstance or claim.
2. Contact with the Claims Professional to discuss facts.
3. Review circumstance/claim for coverage.
Assessing a Claim

Working with a Claim Manager

- Develop a plan to mitigate or manage the claim.
- Explore appropriate methods to resolve the claim.
- Identify ways to minimize costs.
- Consider quicker resolution.
Details to Capture

- Date, time, name, and location of the project or claim
- Brief description of potential allegations
- Other party(ies) involved
- Name of entity(ies) making the claim
- Insured’s contact person and contact information
More Details

- Amount of legal demands, if known
- Legal documents
- Professional Services Agreement for the project
- Certificates of insurance
- Other pertinent documents and/or correspondence
What should you NOT do in the event of a claim?
A List of Don’ts

*These may jeopardize your defense or compromise your coverage unless permitted in advance by RLI.*

1. Communicating with other parties
2. Agree to attend a meeting or conference to resolve the situation
3. Refuse delivery of any legal documents
4. Sign a joint defense or similar agreement
More Don’ts

*These may jeopardize your defense or compromise your coverage unless permitted in advance by RLI.*

5. Blend project records with claim-related correspondence
6. Destroy evidence
7. Admit responsibility or liability
8. Sign or accept any releases related to the issue
What Key Pieces of Documentation Might Be Used to Defend a Claim?
Claim Documents

1. Contract documents
2. Documentation of key decisions
3. Construction related correspondence
Contract Documents

- Scope of services
- Fee(s)

- Signature(s) by required party(ies)

- Terms & Conditions
  a) Dispute resolution
  b) Limitation of Liability
  c) Insurance requirements
Written Contracts – A BIG Deal

Why do Written Contracts matter?

1. Your services = Your responsibility
2. Limit your liability
3. Attribute liability to actual at-fault parties

What favorable terms mean for your defense.

1. Risk Transfer
2. Earlier resolution
3. Cheaper resolution
Client Contracts

What are we looking for?

- Clearly defined scope of services
- Limitation of liability
- Waiver of consequential damages
- Indemnity/AI from contractors
Limitation of Liability

...[A]ny and all injuries, claims, losses, expenses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project, Engineer’s or its Consultants services or this Agreement...shall not exceed the total amount of $ ___ or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee.

EJCDC Document E500-2014, Exhibit I
To the fullest extent permitted by law, CONTRACTOR shall indemnify and hold harmless ARCHITECT, ARCHITECT’s subconsultants and the officers, directors, partners, employees and agents of any of them from and against any and all claims, costs, losses and damages (including but not limited to all fees and charges of architects, engineers, attorneys and other professionals in all court or arbitration or other dispute resolution costs), caused solely by the negligent acts or omissions of CONTRACTOR or CONTRACTOR’s subcontractors and the officers, directors, partners, employees, agents of any of them, with respect to this agreement or the project.

Sample contract language
Indemnification by Subcontractor

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorney’s fees, arising out of or resulting from performance of the Subcontractor’s Work under this Subcontract . . .

AIA A401-2017 § 4.7.1
Additional Insured Obligation

To the fullest extent permitted by law, the Subcontractor shall cause its commercial general liability coverage to include: (1) the Contractor, the Owner, the Architect, and the Architect’s consultants as additional insured for claims caused in whole or in part by the Subcontractor’s negligent acts or omissions . . .

AIA A401-2017 § 12.1.6
Waiver of Consequential Damages

The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or related to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination of this Agreement...

AIA B101-2017 § 8.1.3
Sub Contracts

What are we looking for?

- Clearly defined scope of services
- Indemnity in insured’s favor
- No broader limitations than those included in the client’s contract
Documentation of Key Decisions

- Project Team
- Project Delivery Method
- Documents by Phase of Service
- Cost Changes
- Coordination of Consultants
- Specifications
- Code Reviews
- Schedule Changes
Construction Related Documents

- RFIs
- Submittals
- Substitutions

- Change Orders
- Emails/Photos
- Site Visit Reports

- Applications for Payment
- Certificates of Completion and Occupancy
How long should I hold on to my records?
Guides for Record Retention

Consider the following and act consistently...

- Applicable Statutes of Repose and/or Statutes of Limitations
- Contractual obligations
- Practice-related considerations
- Advice from Attorney
- Advice from Accountant
- E-Discovery considerations
Record Retention

Design Professional shall keep such records and other documentation relating to the Services for a period of three years after their completion, or for such longer period as may be required by the Law.

Sample Contract Language
What are the most common types of claims?
Two Types of Claims We See

1. Design Errors or Omissions

2. Construction Phase Services
Reasons Claims Arise

- Differing site conditions;
- Defects;
- Defaults and terminations

- Delays, disruptions;
- Change order disputes;
- Liquidated damages
Construction employee’s use of blow torch caused tank explosion resulting in injuries and a death. Suit was filed against design firm that had contracted to provide construction phase services alleging negligence in the performance of their duties.
Evaluations of the Work

The Architect shall visit the site at intervals appropriate to the stage of construction...to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed ...in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work...

AIA B101-2017 § 3.6.2.1
Sometimes the best defense is a good offense

Sun Tzu, The Art of War
Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
Continuing Education Systems Program

Garret Kern, Claims Manager
Garrett.Kern@rlicorp.com

Charles Spiekerman, Claim Manager
Charles.Spiekerman@rlicorp.com

Madeleine Sheaffer, Claim Manager
Madeleine.Sheaffer@rlicorp.com