Emerging Trends in Professional Liability Claims

One of the most frequent questions XL Catlin’s Design Professional team gets from risk management-minded design professionals is, “What claims trends are you seeing?” To answer, we spoke with a number of our claims consultants from the U.S. and Canada and have prepared the following overview of what they told us. These trends are consistent with our Risk Drivers research, and further reinforce the need for disciplined and proactive loss prevention and risk management practices.

Technical Errors

Across all regions, disciplines and firm sizes, we’re seeing an increase in claims alleging technical errors. On the surface, this is attributable to a lack of attention to detail, lack of experience or the failure by staff to properly implement QA/QC procedures. However, if we dig a little deeper, we find other factors that help explain this trend.

As the economy continues to recover, many firms are simply unable to find qualified design professionals. During the recession, many design professionals were either forced out of the industry or moved up their retirement dates, leaving a shortage of seasoned talent in the industry. This problem is made worse when firms fail to stay ahead of staffing needs as their business expands. Without planning and foresight, many firms find themselves hiring at the last minute, leaving little or no time to properly train their new employees. Consequently, the mistakes made and the corners cut tend to fall in the QA/QC category.

Design-Build

As the contractor-led design-build delivery model becomes more popular, we’re seeing a corresponding increase in claims. This delivery model presents a unique set of liability exposures, because the traditional lines of communication between the A/E and the owner no longer exist. In a design-build relationship, the A/E is usually a subconsultant to the general contractor. The upshot: design firms often sign contracts that contain onerous and uninsurable clauses, and lose the opportunity to conduct proper contract administration and site observation services. Designers are then unable to determine early on if the construction is in general conformance with the design intent. Consequently, mistakes in the field tend to be more costly, requiring additional design and corrective work that could have been avoided.

The increase in design-build-related claims is also due in part to the ways contractors solve problems. When contractors are in the lead position, they tend to collaborate less. For example, under the traditional design-bid-build approach, a contractor seeks input and cooperation from the design team in order to address an issue in the field requiring additional corrective work. Under the design-build approach, however, it’s easier for a contractor to dictate the terms of a fix to the design team, and to control the narrative about the problem with the client. We’re
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Also seeing claims that result from contractors remedying issues in the field in order to keep the project on schedule, and then billing or back-charging the design team for an amount the contractor attributes to design.

Some contractors are also viewing design teams and their insurance policies as contingency funds or sources of funding to increase the contractors’ profit margins. One tactic they use is to inflate professional liability claims and then offer to settle for a reduced amount if a settlement can be reached early and without having to file a lawsuit. Contractors further enhance their bargaining position through the use of onerous contract terms, such as an elevated standard of care and a prevailing party fee clause, to quash any serious defense efforts by the design professional. Many contractors also know that defense costs can erode a design professional’s insurance limits, and that there is always a cost to defend a claim regardless of how meritless the claim might be.

This is not to say that the design-build delivery model is fraught with disaster. The hallmark of a successful project tends to be an established relationship between the A/E and the contractor, coupled with a high degree of trust and collaboration. Project success is more common when the contractor is willing to advocate for the design professional, collaborate on value engineering solutions, and support the need for the designer to provide construction contract administration and site observation services. The risk profile for design-build projects is greatly improved when the contractor is selected based on qualifications and not necessarily the lowest price.

**Value Engineering**

There’s been an increase in claims stemming from projects in which the design and construction were value engineered to bring the program within a budget that was likely too low in the first place. In particular, public clients with cash flow and funding challenges seek to value engineer projects and cut costs on construction, then file suit to fund upgrades and portions of the project they couldn’t previously afford. Two strategies that can help slow this trend are educating the client about the pitfalls of value engineering, and improving documentation of design changes. Value engineering claims are typically made worse when the design professional readily accepts the contractor’s recommendations or substitutions without properly researching and vetting the options and documenting the resulting decisions.

**Schools and Universities**

Schools and universities have been filing more claims with higher overall damage allegations. Liquidated damage claims, which have traditionally been used by owners to defeat cost overrun claims by contractors, are becoming increasingly more difficult to negotiate. Coupled with typical coverage gaps for a contractor’s general liability insurance policy, e.g., the lack of coverage for economic loss, these claims tend to shift their emphasis to the design professional.

Public school and university projects tend to have even more claim activity because these types of clients typically lack a thorough understanding of the design and construction process, have politically charged decision-making processes, and often select contractors based on the lowest bid rather than quality. These contractors notoriously underbid projects with the intent of making their profit on change orders by alleging insufficient and defective design. These types of claims are further compounded when value engineering is involved.

These issues tend to accompany public projects in general, which are often further complicated by public clients who have unrealistic design and construction expectations and often fail to adequately budget project costs and contingencies. It’s not uncommon to see public clients, including schools and universities, expect absolute perfection in the design deliverables and then try to utilize the design professional’s deductible and insurance to cover project overrun claims by contractors, are becoming increasingly difficult to negotiate. Coupled with typical coverage gaps for a contractor’s general liability insurance policy, e.g., higher overall damage allegations. Liquidated damage claims, which have traditionally been used by owners to defeat cost overrun claims by contractors, are becoming increasingly more difficult to negotiate. Coupled with typical coverage gaps for a contractor’s general liability insurance policy, e.g., the lack of coverage for economic loss, these claims tend to shift their emphasis to the design professional.

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**Contributing Factors**

Here are some additional conditions that have contributed to the claims environment for design professionals throughout the U.S. and Canada:

- Design firms retaining subconsultants are increasingly being called on to pay for their subconsultants’ shortcomings. This trend is due to a variety of factors, including a lack of diligence in confirming professional liability limits for subconsultants, and a willingness to agree to a limitation of liability clause in the subconsultant agreement when no such limit appears in the prime contract. Firms engaged in school and university design should be mindful of the unique requirements in working with these types of clients, and should focus more on project selection. Emphasizing construction contract administration, increased communication and documentation can help mitigate or even prevent claims.

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agreement. These factors increase the exposure for primes due to their contractual liability, putting their deductibles and insurance limits at risk.

Design professionals in this situation could benefit greatly by confirming the available limits of subconsultant insurance policies upfront, requesting specific project excess endorsements if coverage is lacking, and insisting on receipt of updated certificates of insurance confirming the subconsultant’s continuous coverage.

- Staff departures are hampering firms’ ability to defend themselves against claims. When key employees leave, firms lose reliable and available witnesses if there is a claim. And if those employees did not keep adequate project records, firms will find it difficult and expensive to recreate what happened. The issue is further compounded by the fact that baby boomers are retiring industry-wide. The firms that feel the impact of this the most are those that fail to exercise a disciplined approach to sound project management and quality control procedures.

- We’re also seeing an increase in claims for small firms in all regions and disciplines. While the root cause of this appears at first glance to be perplexing, we believe the increase could be due to a corresponding increase in the volume of work, which takes focus away from regimented risk management procedures. The positive growth many small firms are experiencing creates both business opportunities and risk management challenges. Firms often find that lax risk management practices may have worked on smaller projects, but not on more sophisticated or larger projects.

For more information on how to better manage your firm’s risk, contact your broker and XL Catlin’s Design Professional team’s claims professionals and education specialists. In addition, our website (U.S. website, Canada website) contains a host of resources, including our Loss Prevention Library and comprehensive Contract eGuide for Design Professionals.

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Information accurate as of December 2016.

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