

# NEWSLETTER



## Watch for These Seven Claim Trends



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What are today's trends in professional liability claims against architects, engineers and other design firms? We asked a few of our insurance friends specializing in this field and received some interesting answers. Here are seven trends they identified. Claims trends in your discipline and territories may vary, but we think these are largely representative overall.

### Residential Claims

Insurers are reporting an uptick in residential claims throughout the U.S. and Canada. This rise in claims is largely due to an increase in residential construction spurred by a healthy economy and a shortage of affordable housing.

Condos and townhomes (the most common forms of affordable housing) are experiencing more prevalent claims than previously. Claims on generic condos and townhomes are the same construction defect and alleged design defect claims insurers are used to seeing. Insurers report that apartment project claims are also increasing in frequency as well as severity.

Insurers also say that designers who report on their applications that they are doing a low percentage of apartment projects are experiencing a higher percentage of claims. It makes sense that those designers who are moving into the booming residential market with little history there would be at a higher risk of claims than those highly experienced in such work.

Because of better profit margins for developers, high-end residential activity in subdivisions and single-family homes are also on the rise. In these higher-end homes, claims are often related to construction delays (or perceived delays), and cost and budget overruns.

Documentation is the key to avoiding (and mitigating) both affordable housing and high-end residential claims. In both markets, it is extremely important that the design professional be very clear, in a written

contract, about the scope of work for the project, including what services are excluded from that scope. Having a good contract with a tight, well-written scope of services has helped design professionals get out of claims or at least reduce their liability.

Especially on high-end subdivisions and single-family homes, managing owner expectations and promoting clear owner/designer/contractor communication are additional keys to reducing claims. It's important that there is a real "meeting of the mind" as to how much design and construction are likely to cost. It is equally important to document in writing any changes made (by the owner, usually) to design or construction that will increase that total price as the project progresses.

Somewhat unique to residential projects, there is an uptick in claims rooted in a design firm's inability to get paid per contract terms. Insurers are hearing from design professionals looking for help in terminating their roles on projects because of a lack of timely payment by owners. It's a red flag if the owner stops paying someone – whether the design professional or the contractor. Design firms need to keep a very close eye on how, when, and by whom they are getting paid. They should also keep track as to whether other parties to the project are getting paid. Early intervention on payment issues can help avoid a claim later on.

## **HVAC Claims**

An increase in HVAC claims is primarily related to issues regarding excessive moisture, thermal comfort and humidity control. In hot, muggy areas, claims arise when buildings are not sufficiently cooled, and/or are not adequately addressing humidity. In cold northern areas, HVAC claims often allege damages from frozen and burst pipes because insufficient heating units had been installed in the buildings.

The specification of undersized equipment is a major cause of HVAC claims. But claims are also being brought because properly sized systems/units have been improperly maintained. The key to defense here is to document the owner's responsibility to maintain their units. Also, building commissioning should address HVAC issues. Systems should be fully tested before owners and tenants occupy the building.

Mechanical, electrical and plumbing engineers often report they not getting an adequate work scope and appropriate support from the prime designer to provide adequate HVAC systems. Again, communication is the key to avoiding claims related to these issues. The design team needs to ensure there is a meeting of the minds as to how much heating, cooling and humidity control is expected, exactly how big of an area needs to be heated or cooled, and how much capacity a specific HVAC unit has. The design team also needs to be aligned with the needs/expectations of the user/stakeholder/owner.

Energy models are only useful if they accurately represent how the HVAC system and space will be used. Clear and comprehensive documentation is the key to defend HVAC claims. Unfortunately, these issues are not always well documented and designers find a betterment or other defensive argument more difficult to pursue.

## **Other Technical Claims**

Technical claims in general are experiencing an increase, not just HVAC issues. For example:

- Insufficient engineering calculations, which have been plaguing structural engineers more than in the past.
- Failure to update designs to meet current codes.
- Failure to disclose subsurface test results to bidders on a property.
- Specifying non-ADA-compliant doors and windows causing life-safety issues.

Insurers surmise that many of these claims are rooted in basic mistakes made by designers because they are too busy and not attentive to quality assurance/quality control measures. QA/QC is imperative when specifying and installing technical systems and equipment and commissioning should be a part of the protocol for today's high-tech and ADA-compliant buildings.

## **School Claims**

Insurers report that claims involving schools are on the increase countrywide, particularly in regard to colleges and universities. Lately, the rise has been most prevalent in Texas, Colorado and Kansas. Insurers report that there is not a particular claim type or event, but rather a wide variety of issues.

One of the drivers of these claims is the targeting of schools by aggressive law firms, a trend that started in Texas and is expanding to other states. These law firms determine which schools have recently had construction done, hunt for possible defects in design or construction and then try to convince the school districts to pursue claims on a wide scale.

Fortunately, Texas recently passed HB 1734 a bill signed into law by the governor and put into effect September 1, 2019. This law requires schools to use any funds received from litigation to actually repair the schools. Hopefully, other states and provinces will follow suit if they haven't already.

The best risk management tactic for school claims is drafting a clear scope of work that shows exactly what the designer was hired to do, and identify services outside of that scope. This clear scope should be part of a well-written contract that affords balanced risk allocation and ensures that any changes in the scope are client-approved and well documented.

## **Soils/Storm Water Issues**

Soil and storm water claims are on the rise in many regions. The increase in such claims is based on a combination of a proliferation of construction overall and more precipitation in many parts of the country. In the Mountain states, insurers report a rise of claims related to settlement of soils and/or movement due to expansive soils. In the Southern and some Western desert/arid states, insurers are seeing more claims related to storm water/runoff issues.

Soils and storm water claims are proving to be difficult to mitigate, say insurers. Reports prepared by geotechnical engineers and other design firms predicting the future behavior of soils are often based on very limited testing and investigation (as demanded by cost-conscious owners in the scopes of work). Structural engineers will then offer foundation options based upon inadequate reports. The owner typically selects the least costly option for the foundation. The soils then often behave outside the ranges predicted in the report and damages and claims follow.

Design firms benefit by making sure their design is based upon adequate soils reports from the actual project site and not a site adjacent to or similar to the actual project. All designers need to be better at

insisting on more comprehensive scopes of service, communicating and documenting the risk of limited scopes for subsurface investigation. If a specific type of foundation is called for in the soils report, there should not be a deviation from that specification unless the owner understands and accepts the risks.

The lead designer's contract with the owner should have a provision stating that they can rely on the information provided to them by the owner. (Usually the owner retains the soils engineer.)

For storm water/runoff issues, the best advice is to consider the increased frequency and intensity of rain and snow storms. One hundred year storms are happening every few years, rather than every 100 years. Any design professional involved in civil engineering, grading, or any other design function that might be affected by significant rain or storm water should consider these climate change issues.

## **New Project Deliver Methods**

For decades, design firms worked largely within the framework of the design-bid-build project delivery method. Lately, though, largely the result of advances in automation, design firms are being asked to work within a variety of deliver methods. Design-build. Integrated Project Delivery (IPD). Value Engineering. Building Information Modeling (BIM). The list goes on and on.

It's not surprising that working with unfamiliar project deliver methods can lead to misunderstandings, mistakes and claims. The key to combat these claims is training and experience for all designers on staff. Hiring outside expertise is a shortcut to internal growth but can pay dividends. Make sure you are adequately trained and staffed before taking on unfamiliar methodologies.

## **Bad Contracts**

This is a bit of a catch-all category wherein design firms who agree to bad contracts find themselves more and more the target of claims from their clients. Particular contract issues that have been leading to increased claims include:

- Lack of clarity of the designer's scope of services, which leads to unrealistic client expectations.
- Broad indemnification clauses, which lead to designers taking on uninsured liabilities that rightfully belong to the owner or contractor.
- Agreeing to binding dispute resolution methods other than nonbinding mediation.
- Including protective contract language such as limitation of liability and mediation clauses in the client contract, but not including the same language in contracts with subconsultants.

The resolution to these problems, of course, is to include fair and clearly written language in all of your contracts. Begin with standard language provided by your industry associations and your insurance carrier and then customize it to fit the particulars of the project. If you can't get your client to negotiate a fair and comprehensive contract, then maybe it's time to walk away from the project.

## **Thanks Folks!**

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## Can We Be of Assistance?

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*



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