

10 Actions NOT to Take When Facing a Claim

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Construction is inherently challenging. The perfect set of plans has yet to be drawn and the error free construction project has never been built. If you are in the building industry, it's not *if* you will have a problem, claim or litigation, it's *when*. How you manage your risk, and specifically how you handle the inevitable claims that will occur, will significantly impact your company' operating results.

First and foremost, risk control strategies should be aimed at lowering the frequency of claims. After all, if you don't have any claims, then the protocols to manage those claims don't matter. Unfortunately, even if you do everything right, you can still get sued. Knowing what to do when a claim happens is important in controlling the severity of that claim. Equally important is knowing what not to do.

Here are some suggestions:

1. **DON'T overreact.**

No matter how you're notified of a claim – whether it's a phone call, an attorney's letter or legal process papers served by a court officer, your job is to remain calm and not overreact. If you feel you may be at fault, you may be inclined to immediately apologize and promise to make it right. If it is totally bogus, you may be upset and suggest the other party do something anatomically impossible. Neither reaction will help your case. It is imperative that you not offer opinions and stay objective.

2. **DON'T make any statements until confering with your insurers and/or attorney.**

Though it seems obvious, making what seems like an innocuous statement (e.g., "I was wondering when I'd hear about this") to the other party becomes part of the record and later could be interpreted as an admission of liability. This could not only hurt your case, it could impair your insurance coverage. Prior to consulting with those in the business of protecting you, the less you say to anyone about the claim, the better.



3. **DON'T wait to contact your broker or insurer.**

The earlier you notify these parties, the sooner they can help you. Call and let them know about the situation and discuss initial steps. Most quality insurance companies will immediately begin investigating the potential liability involved and deciding the best course of action to take (e.g., retaining an expert to evaluate the claim) to defend you. You and

your insurance company share the same interests when it comes to claims against you.

4. DON'T wait to compile project documents.

The claim against you may be related to a project that's years old and the records may have been stored offsite. Getting started right away means you'll be able to quickly pass those records on to those defending your interests.

5. DON'T destroy documents related to the project in question.

As soon as you have any inkling that there's a dispute on a project, even if you don't appear to be involved, you should preserve all documentation. If your firm has a policy of routinely destroying documents after a certain period of time, then you'll also want to circulate a "litigation hold" memo within the firm. The memo should go out to your staff as soon as you learn about the possibility of litigation – don't wait until you've been served with a summons and complaint. If documents are mysteriously destroyed, courts get skeptical.



6. DON'T tell the other side you have no documents.

Many people assume that if no relevant documents exist, the claim can't proceed. The reality

2017 Risk Management Seminar Series



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7:30am Registration

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8:00am - 4:00pm Program

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is that not only can the claim proceed, but by telling the claimant's representative you have no documents, you've just given the opposition a leg up in the case. Their attorneys now realize that, absent your project file, their own proofs will form the basis for much of the case, leaving you to defend yourself with nothing but sketchy recollections.

7. DON'T sign or accept releases from anyone.

In fact, you shouldn't sign any document related to a claim unless advised to do so by your attorney and your insurance company. Otherwise, you could end up releasing the party actually responsible for a problem from any liability, leaving you as the sole defendant. You may also be presented with only an incomplete release, exposing you to liability for additional components of the claim.

8. DON'T agree to make any payments or provide any services.

It might seem to make sense to just write a check or offer to fix a problem. After all, it doesn't appear to be a big deal, and it's probably within your deductible. This can create several problems. First it could be considered a tacit admission of fault and secondly you could be opening up a new statute of limitations period or giving the owner an argument for continued services. Bottom line, do not agree to provide a service or make a payment – even if it falls entirely within your deductible – without the advice and consent of your insurer. By acting on your own, you could jeopardize your insurance coverage.

9. DON'T offer free advice post-project.

It is not uncommon for a client or another stakeholder on a project to ask you for your opinion in response to a problem that has arisen on a

project long after completion. Recognize that the other party may be on a fishing expedition, trying to determine if in fact you should be involved in resolution of the problem. You could also be providing the other party with ammunition that they can use against you later in a claim. This doesn't mean to never to offer assistance, but it does mean that you should be circumspect when someone asks you to help them solve their problem.

10. DON'T use color commentary.

Things are not always as they seem. Avoid pointing fingers or speculating on what happened or what could have been done differently. Also, recognize that communication is an imperfect science. What you say may not be what the other person hears. Stick to the facts.



The importance of proactively managing the claims that your company is going to face cannot be over emphasized. Unlike a First Growth Bordeaux, problem situations rarely get better with age. Make certain that you have a comprehensive claims management protocol and that the appropriate people in your company understand their roles and responsibilities.