



# PROFESSIONAL LIABILITY UPDATE

A LOSS PREVENTION NEWSLETTER FOR THE DESIGN PROFESSION

MSP PL 11/2008 'Getting Paid in a Slow Economy'

November, 2008



## Getting Paid in a Slow Economy

Article courtesy of Professional Liability Agents Network (PLAN)

**W**ith the economy firmly in the doldrums, design firms are not only finding it more difficult to secure new projects, they are finding it challenging to get paid promptly for the work they have started. Some clients who planned their projects when times were good are now finding themselves in a financial pinch.

With real estate prices suppressed, demand for new commercial and residential properties diminished and credit lines vanishing before their eyes, many project owners are facing a cash squeeze. Increasingly, design firms are being paid late — if they are being paid at all.

Making matters worse, designers who try to take legal action to get paid face the real possibility of being hit with a counter lawsuit from their clients. Even in good times, you tread on shaky ground if you threaten to sue your client for unpaid fees.

Clients who are sued for fees are very likely to respond by suing the design firm for negligence, and these counterclaims are not always meritless in the client's eyes. Almost all instruments of service have some degree of error, omission, inconsistency or ambiguity.

While such imperfections may not rise to the level of negligence, a client's lawyer may have little trouble finding a "hired-gun" expert witness who will testify that the design firm performed below the standard of care. They will contend that negligent performance damaged the client — and presented a valid reason for nonpayment.

In many cases, the cost of defending a negligence claim will be greater than the amount of fees you would likely net from a successful claim of nonpayment. This puts your client in a position of great leverage, especially if payment terms are not detailed in your contract. That's why many design firms are willing to settle a dispute by accepting only a fraction of the fees they are owed.

Getting Paid (continued on page 2)

### In This Issue

Getting Paid in a Slow Economy .....	1-4
Decennial Liability .....	5-6
2008 FOCUS Seminars .....	2
AIA Upcoming Events .....	3
SDAF Upcoming Events .....	6
Community Bulletin Board .....	7

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## It Starts with Client Selection

Careful client selection is a cornerstone of risk management. In bad economic times, it becomes paramount. Design firms must avoid the temptation to take on any project offered when business is slow. Instead, check a potential client's history of litigation with other design firms. Examine financial statements. Consider the viability of the project itself. How are similar projects progressing in your locale?

Assuming the client and project check out, your next line of defense is your contract.

## Contractual Rights to be Paid

There are contractual measures you can take to increase the chances of being paid and to help avoid the problem of a countersuit related to client nonpayment.

Add language to your client agreement that spells out payment provisions for services rendered and your rights to remedies in the event you are not paid according to contract terms. The more precisely you define the details of these payment terms and your right to enforce them, the more likely you'll receive prompt payment — and the less likely your client will consider a counterclaim. Work with your legal counsel to draft the following contractual terms.

## Billing and Payment Terms

Your billing and payment terms should address the following issues:

- **Retainer** — Require the client to make an initial payment upon execution of the agreement. Hold the retainer and apply it to the final invoice.
- **Payment Terms** — Specify the timing of your invoices, e.g., weekly, monthly or upon completion of project phases. Specify the period of time for payment (e.g., upon delivery, net 30) and when payment is considered past due. It is always advisable to specify that payment for services rendered shall be due regardless of any subsequent suspension or termination of the agreement by either party.
- **Interest** — Establish interest due on late payments and how that interest rate is accrued. Also set how future payments are applied — e.g., first to accrued interest and then to the unpaid principal.
- **Collections** — Address how any collection costs will be recovered. Contractual clauses often specify that the client agrees to pay for all collection costs incurred, including legal fees, collection agency

## 2008 Risk Management Seminar Series

Cavignac & Associates FOCUS Room  
Bank of America Plaza  
450 B Street, 18th Floor, San Diego, CA

- Sexual Harassment Prevention Training  
Satisfies requirements under AB 1825  
Friday, December 5, 2008 — 9:00 AM - 11:00 PM

All training sessions available to our clients  
Reserve early / seating is limited! \*

For more information about upcoming seminars:

- Visit our Web site at [www.cavignac.com](http://www.cavignac.com)
- Contact Darcee Nichols at [dnichols@cavignac.com](mailto:dnichols@cavignac.com) or 619-744-0596

\* **NOTE:** Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.

fees, court costs, reasonable consultant staff costs and other expenses.

## Use a Satisfaction-with-Services Clause

If possible, incorporate a satisfaction-with-services clause in your contract. Such a clause can help you in the event a client fails to pay a subsequent invoice and later claims dissatisfaction with your entire range of services.

Essentially, the clause states that your client's payment of an invoice shall be taken to mean that they are satisfied with your services to date and that they are not aware of any deficiencies in your services unless otherwise noted.

## Withholding Fees for Disputes

Refuse to allow your client to include contract language that permits the withholding of all fees for disputed invoices. If the client insists on a clause regarding disputed fees, make sure it reserves your right to collect fees on all undisputed portions of the invoice.

Set a time limit (e.g., within 10 business days of receiving your invoice) for notification of any objection or dispute regarding the invoice. Require that the client identify in writing the specific cause of the disagreement and the amount in dispute. Also require

that the portion of the invoice not in dispute be paid according to your payment terms.

Your contract should specify that any disputes over an invoiced amount will be settled according to the dispute resolution provision of your contract. Require that interest be paid on any disputed invoice amounts that are subsequently settled in your favor.

### Suspension of Services

One of the most effective contract provisions for getting paid on time requires the client to pay any undisputed due portion of the bill within a specified period or otherwise face a curtailment of your services. But first, check with your attorney to determine whether such language is enforceable within your state.

If you can use a suspension-of-services clause, have it specify that if your client fails to make payments when due under your contract terms, you have the right to suspend your services upon reasonable notice to your client (e.g., when payment is 60 days late.) The clause should also state that you will not be liable to the client for any costs or damages that may result from your suspension of services due to nonpayment. Agree to resume your services upon payment in full of your late invoices. The clause should state that upon resumption of services the time schedule and compensation will be equitably adjusted to reflect any delays or additional costs caused by the suspension of services.

### Termination of Services

When all else fails in your efforts to collect fees due, you should have the right to lower the final hammer – the termination of your contract. A termination-of-services clause should state that the client's failure to make payments to you for services rendered in accordance with the payment terms of the contract constitutes a material breach of your agreement and this material breach is cause for termination of the entire agreement.

### Withholding Transfer of Documents

Where appropriate, consider making payment in full for services rendered a condition of transferring the ownership of your design documents to the project owner. This condition often serves as effective leverage to ensure you receive your final payment. Similarly, you might make payment of all due invoices to date a condition for you submitting documents for permit approvals and other activities during the course of construction.



## Upcoming Events

December, 2008

### Lunchtime Learning CES Program

❖ **Save the Date!**

Topic to be announced

WHERE Cavnignac & Associates  
450 B Street, Suite 1800  
WHEN Wednesday, December 3, 2008  
Noon to 1:30 p.m.  
LUNCH Included  
CONTE D To be announced  
COST \*AIA Members—Free / \*Non-Members—\$10  
\**\$5 charge for NOT registering online*

### Young Architects Commission (YAC) Meeting

YAC hosts a variety of educational and social events for students and emerging professionals, including Praxis, ARE Seminars, and Barstool. All are welcome.

WHERE Offices of Architects Delawie Wilkes  
Rodrigues Barker  
2265 India Street, San Diego, CA 92101  
WHEN 1st Tuesday of each month — 6:00 pm to 7:00 pm

[archi]CHAT proudly presents

### AIA San Diego Annual Holiday Party

Unleash your inner child and get in the spirit of the season! Three fantastic features (and maybe a surprise musical guest!)

WHERE The New Children's Museum of San Diego  
200 West Island Avenue  
San Diego, CA 92101  
WHEN Tuesday, December 9, 2008 / 6 pm — 9 pm  
COST FREE for AIA Members!  
Non-members: \$20 in advance / \$25 at the door

FOR MORE INFORMATION AND A FULL CALENDAR OF UPCOMING EVENTS, VISIT:

<http://www.aiasandiego.org>

Work with your attorney to develop payment terms and language best suited to your firm's unique needs. Check out the advice offered by your professional societies as well. Once you have language in place, seek to apply it consistently among all of your clients.

## Be Wary of a Resistant Client

Be wary of any potential client who balks at signing any language that protects you from nonpayment. Occasionally, however, clients may have legitimate problems with specific obligations of your payment terms. For example, a client's billing and accounting procedures may require it to extend the length of invoice payment beyond 30 days. A client who wants to pay in 60 or 90 days should expect to pay a premium for that luxury.

If the client balks at accepting a termination-for-nonpayment clause, as opposed to objecting to its specific terms, be aware that the client may be contemplating slow or no payment and does not want you to have the ability to suspend or stop services. In such cases, you have to ask yourself, "Do I really want to deal with this client?"

By using appropriate contract language with real teeth and by following a consistent, well-designed billing and collection system, you can minimize the risks of write-offs and slow pay accounts as well as threats of retaliatory liability claims.

## Pay-When-Paid Clause

When it comes to payment terms, subconsultants have the right to be treated by the prime as the prime wants to be treated by the client. The prime expects to be paid promptly for work done for his or her client; so does the subconsultant.

In some instances, however, a prime consultant may feel the need to insist on a pay-when-paid provision in its agreement with subconsultants. In such cases, the subconsultant should consider accepting such an agreement as long as the contract language provides adequate protection. For example, the pay-when-paid clause should have an outer limit by which time payment must be made, whether the prime has been paid or not.

Consider these elements when drafting a pay-when-paid clause:

- The schedule of submitted invoices to the prime consultant – e.g., monthly, quarterly, by project phase.
- An approval process of the invoice and method for resolving disputes.
- The method and timing of the subconsultant's invoices being submitted to the client.
- The payment schedule once the prime is paid by the client – e.g., the subconsultant is paid within



ten days of the prime receiving payment from the client.

- The time limit within which the subconsultant is paid for services regardless of whether the client pays the prime – e.g., within 90 days of services rendered.
- Any interest due the subconsultant for payment beyond the contractual terms.

If a prime consultant and subconsultant enter into a joint venture sharing the risks and rewards of working with a client, then each may share the risk of nonpayment. However, in a typical consultant-subconsultant relationship, the subconsultant has the right to expect to be paid within a reasonable time, whether the prime gets paid or not.

## Surviving Hard Times

A counterclaim filed over fee disputes is one of the fastest growing areas of litigation among design firms. The chances of nonpayment and subsequent litigation only increase during bad economic times when clients face illiquidity and must pick and choose who gets paid on time and who doesn't.

Adding protective language to your client agreements not only helps reduce the chances of such counterclaims, it enables you to judge your clients attitude regarding contract provisions that give you the ability to enforce the agreed-to fee and payment schedule for your services. ❀

**Disclaimer:** This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.

# Decennial Liability:

## A Potential Problem for International Design Firms!

By Colleen Palmer, A&E Risk Manager, Beazley Insurance Company  
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In the United States, liability for architects and engineers arises out of a failure to perform in accordance with generally accepted standards of professional skill and care. Even in the case of a catastrophic failure, liability will only attach to the design professional if the firm can be shown to have breached applicable standards of care, i.e. to have acted negligently. However, the requirement to prove the design professional was negligent does not apply in all countries. Decennial liability is a prime example.

### What Is Decennial Liability?

Decennial liability, or *responsabilité décennale*, is a form of strict construction liability arising from the French Civil Code under which no proof of negligence is required. It has been adopted worldwide by numerous civil codes, including jurisdictions in the Middle East such as the United Arab Emirates, Saudi Arabia, Kuwait, Iraq, Egypt, Jordan, and Qatar. The specific wording of the applicable codes varies, but all of these countries mandate strict liability for building defects.

As its name suggests, decennial liability lasts for ten years. In France, Article 1792 of the Civil Code provides that a builder is liable towards the building owner or purchaser for damages, even resulting from a defect of the ground which imperils the strength of the building or which, affecting it in one of its constituent parts or one of its elements of equipment, renders the building unsuitable for its purposes. The ten year duration runs from the approval of the works by the building owner (Art. 2270). By definition, “*builder of the work*” includes any architects, contractor, technician, or other person bound to the building owner by a contract of hire of work (Art. 1792-1).

The parties cannot contract around decennial liability: contract provisions attempting to exclude or limit decennial obligations are deemed void and unenforceable (Art. 1792-5). A builder can only escape liability by providing that the damages were caused by

an extraneous event, likely to be a *force majeure* event or major natural disaster (Art. 1792).

In the United Arab Emirates (UAE), decennial liability is codified by Articles 880-883 of Federal Law No. 5: 1985 (The Civil Code). The UAE federation comprises seven emirates, including Abu Dhabi and Dubai, where architects are increasingly being engaged to provide design services for multi-billion dollar projects.

In the UAE, if the subject matter of the contract is the construction of buildings or other fixed installations, the plans for which are made by an architect to be carried out by the contractor, the Civil Code imposes strict joint decennial liability on the architect and contractor to the client from the date of delivery of the work.

During the ten year liability period (or longer period if specified by contract), the architect and contractor must compensate the client for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect that threatens the stability or safety of the building. This decennial liability applies unless the contracting parties intend that such installations should remain in place for less than ten years (Article 880[1]).

Significantly, the obligation to compensate the client exists even if the defect or collapse arises out of a defect in the land itself, or if the client consented to the construction of the defective building or installations (Article 880[2]). On most U.S. construction projects, the owner hires the geotechnical engineer directly and maintains responsibility for unforeseen or differing site conditions. Thus, the design professional does not have responsibility for ground and subsurface conditions.

Under decennial liability in numerous countries, including France and the UAE, a design professional’s responsibility dramatically increases because it

Decennial Liability (continued on page 6)

Decennial Liability (continued from page 5)

effectively assumes the risk for “defective” or “faulty” ground conditions.

The Civil Code requires the client to bring a claim for compensation within three years of the collapse of the building or the discovery of the defect (Article 883). However, the “*discovery of the defect*” may be a subjective determination akin to the discovery rule in the U.S., making the time frame in which the client must bring a claim ambiguous.

If the architect’s scope is restricted to preparing plans and excludes supervision of the execution, the architect will only be liable for defects in the plans (Article 881). This exception applies if the design is correct and the defect is due to construction, but architects are cautioned that supervision may be broadly interpreted to include such tasks as approving a contractor’s shop drawings.

As with the French Civil Code, parties cannot contract around UAE decennial liability, and Articles 880-883 apply to all design and construction contracts in the UAE. Since there is no requirement for the parties to mention decennial liability obligations in the contract, design professionals should research the jurisdictions in which they practice to understand their potential liability.

## Summary

Decennial liability raises significant questions regarding professional liability insurance coverage. In some countries, including France and Egypt, specific decennial insurance is mandatory. Decennial liability goes well beyond the scope of traditional professional liability insurance, and negligence-based professional liability coverage is unlikely to suffice.

Construction markets are booming in many parts of the world that have adopted decennial liability. Design professionals that venture into these markets without carefully sounding out their liabilities can incur an expensive surprise for up to ten years after their work is completed. ✨

*The Beazley Group has been underwriting architects and engineers insurance to cover the domestic and international liabilities of U. S. firms for more than 20 years.*

*This article was prepared and edited by Beazley Group, and is published with the understanding that neither it nor the editors or authors are responsible for inaccurate information. The information set forth in this article should not be construed nor relied upon as legal advice, and is not intended as a substitute for consultation with legal counsel.*

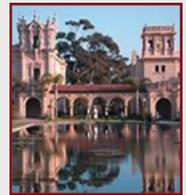
# What’s Going On? at the San Diego Architectural Foundation



## Architectural Tours

### Saturdays in Balboa Park

<b>Tour Guide</b>	Jeff Parshalle, AIA
<b>When</b>	December 6, 2008
<b>Time</b>	10:00 am — Noon
<b>Cost</b>	SDAF Members — \$10 Non-Member Adults — \$15 Student / Military — \$8
<b>Meet</b>	In front of the Museum of Man 1350 El Prado — 9:45 am
<b>Limit</b>	Tour is limited to 15 people!



### Historic Gaslamp Quarter

#### “Urban Blight to Urban Light”

<b>When</b>	December 13, 2008
<b>Time</b>	10:00 am — Noon
<b>Cost</b>	SDAF Members — \$10 Non-Member Adults — \$15 Student / Military — \$8
<b>Meet</b>	Arts Tix kiosk in Downtown San Diego <b>3rd</b> Avenue and Broadway on Broadway Circle (in front of Citibank / across from NBC’s street side studio) — 9:45 am
<b>Limit:</b>	Tour is limited to 15 people! Sign up in advance for all tours at:



<http://www.sdarchitecture.org/tours/registration.htm>

## 2009 Community Vision Award

The San Diego Architectural Foundation and County of San Diego have launched a **Community Vision Award** program recognizing outstanding urban infill projects.

The **Community Vision Award** promotes the implementation of Smart Growth as well as collaborative, sustainable and green building practices in revitalizing urban areas of San Diego County. It encourages the construction of projects that will serve as examples for future urbanization throughout the region. The **Community Vision Award** awards a minimum \$25,000 beautification grant to the community in which the recognized project is located.

For a project to be considered for the 2009 award, nominations must be received *no later than March 31, 2009*. For more information, visit:

[www.sdarchitecture.org](http://www.sdarchitecture.org)





# Community Bulletin Board

*"Neighbors helping neighbors in San Diego"*

## 4th Annual DIAMOND *in the Rough* GALA



SAVE THE DATE!

January 31, 2009



### 4th Annual Diamond in the Rough Gala

The Century Club's Buick Invitational **Diamond in the Rough Gala** is scheduled for January 31, 2009. Our featured entertainer is comedian / impressionist Frank Caliendo.

**Monarch School** will be the sole beneficiary, so please join us at the Manchester Grand Hyatt to celebrate this premiere event.

Let us know how many seats or tables you'd like to reserve. The earlier the reservation, the closer to the stage you will be!

We also need sponsorships and auction items!

Please contact **Paula Kelly** at **619-685-8242 x227** for more information, or click on the butterfly below to visit our Web site.



We look forward to seeing you at the Gala!



## Don't Miss Out!

### 39th Annual Resolution Run

Resolve to be fit for 2009! Start your year with fitness by participating in the Downtown YMCA's Resolution Run.

<b>WHAT</b>	5k Run or 1 Mile Fun Walk
<b>WHEN</b>	Saturday, January 3, 2009
<b>WHERE</b>	Balboa Park Meet at 6th & Laurel
<b>COST</b>	FREE!
<b>QUESTIONS?</b>	Call <b>Alicia Gettys</b> at <b>619-232-7451</b> or e-mail <b>agettys@ymca.org</b>

### Need a Great Holiday Gift?



Can't think of a gift for the person on your list who has everything?

Want to avoid the holiday shopping crowds?

Looking for a unique gift for staff or clients?

Why not make a donation to **Senior Community Centers** in honor of a friend, loved one, or client. Your gift will not only bring a smile to the face of the recipient but will help provide low-income seniors in our community with a hot meal, supportive services and a safe place to call home.

#### You can complete your holiday shopping in 3 easy steps:

- Make your donation [online](#), mail it in or give us a call
- Specify the name and address of the person who should be advised of your gift and include a personal message, if desired
- A card acknowledging your gift (amount will not be disclosed) will be mailed just in time for the holidays or we can mail you the card to sign and send on your own\*

Visit our website at [www.servingseiors.org](http://www.servingseiors.org) or call (619) 235-6572 and start "shopping"!

\* A special holiday card (pictured above) will be sent for donations of \$25 or more.