PROFESSIONAL LIABILITY UPDATE

A Loss Prevention Newsletter for the Design Profession

MSP PL 05/02: "Two Deterrents to Frivolous Lawsuits" May, 2002

Two Deterrents to Frivolous Lawsuits

Have you heard about the environmental consultant who landed the dream job designing a prominent wastewater facility? It was an award winner, drawing praise from city dignitaries and local design groups alike. Problem was, the client didn't pay as scheduled. And when the environmental firm sued for payment of fees, the client counter-sued, making general allegations about design flaws, delays and added costs. After months of legal hassles, the consultant finally settled the case out of court, and barely escaped with his company intact.

Or have you heard the one about the drunk driver? He careened down the road past several well-marked detour signs and crashed. When he finally sobered up, the fellow sued the engineering firm that designed the road, along with the road's general contractor, subcontractors and several others. Five years later, fed up with the legal wrangling, all of the defendants settled with the plaintiff for $35,000. But just getting to that settlement cost a 15-person engineering firm more than $200,000 in legal fees.

Then there is the one about the architect who designed the local hamburger joint for an old high school friend, barely charging enough money for the project to pay for his staffers' time. Six years after project completion, a local youth crashed into an outdoor railing while riding his skateboard. The architect was sued and spent more than a year defending himself. He was later relieved of all liability, but ended up spending ten times the amount of fees he earned on the project getting himself cleared of ridiculous charges.

And let's not forget the one about the environmental firm that was sued when a construction worker was injured while pouring concrete for the installation of a foundation for an underground tank. It was painfully clear that the firm had no responsibility for jobsite safety, but that didn't prevent an unscrupulous

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Cavignac & Associates

INSURANCE BROKERS

License No. OA99520

1230 Columbia Street, Suite 850

San Diego, CA 92101-3547

Phone: 619-234-6848 ✧ **Facsimile:** 619-234-8601

Web Site: http://www.cavignac.com

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lawyer from filing a claim against everyone and anyone involved in the project. The result was months of legal headaches and mountains of legal fees.

Are these kinds of suits unusual? Just how serious the frivolous (or non-meritorious, as trial lawyers prefer to call them) lawsuit problem is depends on whom you ask – and how you ask the question.

According to a 1996 survey reported in *California Lawyer* magazine, only *5%* of surveyed attorneys admitted to filing a frivolous suit. Yet in the same survey, 64.9% of the attorneys said they had defended a client against one! And more than half of the lawyers felt that frivolous and unfounded suits were ruining the economy.

The truth is, there are frivolous claims against environmental and design firms all the time. These are usually "shotgun" lawsuits, cases in which a plaintiff's attorney sues anyone and everyone who had anything to do with a project in hopes that some have either assets or insurance money they can get their fingers on. These defendants are named without any shred of evidence regarding how or even if they contributed to the problem. Often shotgun suits are filed with the purpose of finding parties who can be intimidated into paying something just to get out of the lawsuit. It is, in effect, a form of legalized blackmail.

Thankfully, these unscrupulous lawyers and clients don't always get away with such blackmail. In egregious cases, attorneys can be sued for malicious prosecution. While there might be a certain satisfaction in seeing the plaintiff's attorney suffer for their misdeeds, these malicious prosecution cases are difficult to prove, and the entire process can cost the original defendant years of frustration and stress.

Unfortunately, there is no complete protection against frivolous lawsuits. There are, however, some protective measures available.

Certificate of Merit

A growing number of jurisdictions (including California) have enacted a form of legislation called Certificate of Merit laws. These laws oblige a potential plaintiff to demonstrate that a case against a design professional has legal merit.

Unfortunately, the law in California is rather weak. All it requires is that plaintiffs' counsel check with a licensed professional who has reason to believe that the defendant made a mistake. It does not require the licensed professional to be disclosed, nor does the licensed professional have to indicate what the problem is.

Because the law in California is so vacuous, it is suggested that you insert a contractual Certificate of Merit. Sample wording is shown below:

Certificate of Merit

The Client shall make no claim for professional negligence, either directly or by way of a cross complaint against the Consultant, unless the Client has first provided the Consultant with a written certification executed by an independent consultant currently practicing in the same discipline as the Consultant and licensed in the State of _____. This certification shall: (a) contain the name and license number of the certifier; (b) specify the acts or omissions that the certifier contends are not in conformance with the standard of care for a consultant performing professional services under similar circumstances; and (c) state in detail the basis for the certifier's opinion that such acts or omissions do not conform to the standard of care.

This certificate shall be provided to the Consultant not less than thirty (30)

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calendar days prior to the presentation of any claim or the institution of any arbitration or judicial proceeding. This Certificate of Merit clause will take precedence over any existing state law in force at the time of the claim or demand for arbitration.

The benefits of the contractual Certificate of Merit are: (1) it requires the name of the licensed professional to be disclosed, (2) it requires the licensed professional to specify the acts or omissions that he/she thinks were committed or omitted, and (3) state that those acts or omissions fell below the standard of care.

A Certificate of Merit requirement, such as the one above, accomplishes two things. First, it might discourage someone from suing without justification. Second, if the claimant does obtain such a certificate, that tells you that there is at least one member of your profession who believes the case against you is worthwhile, and may be prepared to testify to that end in court.

You will note that the last sentence pertains to California. This sentence is appropriate because the requirements of the contractual Certificate of Merit are broader than the California State law.

Bear in mind that any contractual Certificate of Merit clause you negotiate in your contract only applies between you and your client. The weaker, standard California Certificate of Merit law would apply to anyone else.

The contractual Certificate of Merit is extremely important. Your clients will be hard-pressed to refuse this type of clause, especially in the formative stages of a contract. It is challenging for clients to argue against putting a provision into a contract that would require them to do something that they ought to do in the first place.

Attorneys' Fee Clause

If your client sues you, claiming negligence, your defense costs could be astronomical. You might spend several years and tens of thousands – even hundreds of thousands – of dollars just to prove you weren't at fault. Insurance helps, of course, but you still bear the cost of your deductible.

If your contractual agreements with your clients and subconsultants are silent on the issue of who pays attorneys' fees in a dispute, each party is generally responsible for its own legal fees regardless of who prevails. Even worse is a client-written clause that gives only your client the right to recoup attorneys' fees.

One solution to this problem is an Attorneys' Fee clause that states that the losing party in a lawsuit is responsible for paying both parties' legal expenses. Such clauses can discourage a party with a weak case from filing a lawsuit since, if they lose, they will be saddled with all of the legal expenses incurred in defeating their case. The following paragraph provides a sample Attorneys' Fees clause to review with your legal counsel.

Attorneys' Fees

In the event of any litigation arising from or related to this Agreement or the services provided under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred, including staff time, court costs, attorneys' fees and all other related expenses in such litigation.

Some contend that an Attorneys' Fees clause like the one above is lacking because this provision is triggered only if one party actually prevails. In other words, if your client sues you, the suit would have to go through the whole legal process and then a court of competent jurisdiction would have to decide the case in your favor before you could recoup your legal fees. Because many cases settle as the result of mediation or other non-adjudicative processes or resolution by arbitration, you might want to consider adding a provision to the above clause, such as:

In the event of a non-adjudicative settlement of litigation between the parties or a resolution of dispute by arbitration, the term "prevailing party" shall be determined by that same process.

Note that Attorneys' Fees clauses are double-edged swords. If you have such a clause and a court finds you responsible for negligence as charged, you would have to pay the other party's legal expenses in addition to the damages you caused

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(although such legal fees should be a compensable damage under your professional liability insurance).

Still, we generally recommend Attorneys' Fee clauses because having such a provision can strengthen your bargaining position when negotiating a claim settlement in a frivolous lawsuit situation. However, talk to your attorney and your insurance company about whether you should have such a contract clause.

A Never-Ending Problem

Frivolous lawsuits will never go away, as long as there are plaintiffs and attorneys who think they can intimidate someone into paying money. However, by making use of deterrents such as Certificate of Merit and Attorneys' Fees clauses in your contracts, you can lessen the chances of your firm being the target of such a lawsuit. Seek professional guidance in drafting such clauses to meet your needs within your jurisdiction.✳

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.*

The Fourth Commandment:

Make Certain That Your Subconsultants Must Live by the Same Rules That You Do

Excerpted from "Ten Commandments of Loss Prevention" by Gunther O. Carrle, Esq.

Your agreement with your subconsultants should be discussed contemporaneously with the prime agreement and its terms should be consistent. Be particularly aware of clauses:

- Waivers of Liens
- Ownership of Documents
- Mandatory Arbitration
- Obligations to give certifications
- Duties and Responsibilities for site visits✳

Small Firms — Large Claims

Did you know?

You could be involved in a claim even if you don't make any mistakes in design services:

Non-technical factors play a role in **70%** of claims. These factors include:

- Communication
- Client selection
- Negotiation and contract issues
- Project team capabilities
- Quality control and quality assurance

A recent study shows some of the leading factors that contribute to your risk exposure:

- Lack of written services agreements
- Residential projects involving homeowners associations
- Issues involving lack of insurance or not enough insurance
- Undertaking projects without the necessary expertise

Written contracts are important because:

- You and your client reach a **mutual understanding**
- You have the opportunity to establish **your own rules**
- You can **size up your client**, and vice versa
- You can **identify** and **allocate** the **risks**✳