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QUARTERLY RISK MANAGEMENT UPDATE

Claims Retrospective: Keeping Your Professional Liability Insurance Carrier Close When Claims Surface During Ongoing Projects

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When claims surface during an ongoing project, engineers are often under pressure to act quickly in order to prevent further damages. However, acting too hastily may jeopardize their insurance coverage. It's imperative for the engineer to report claims to their professional liability insurance carrier immediately.

Most professional liability insurance policies, including the ones underwritten by the ASCE program, contain clauses prohibiting an insured from admitting liability, settling any claim, or incurring any claim expenses, without the insurer's written consent. These clauses also state the insured must take reasonable action to prevent or mitigate any claim which might be covered under the professional liability insurance policy. Thus, when engineers face claims during an ongoing project, they are often uncertain how to proceed. They do not wish to jeopardize their coverage, but also want to mitigate consequential damages that may occur if they fail to act promptly.

> "In most circumstances, the engineer can collect information and continue providing services without admitting liability."

The engineer should report claims made during an ongoing project to their professional liability insurance carrier immediately, and provide any important upcoming deadlines on the project. The engineer should not wait for instructions from their carrier before collecting information or providing other services on the project. In most circumstances, the engineer can collect information and continue providing services without admitting liability. While the engineer shouldn't admit liability or agree to any settlement, they should remain in contact with the parties involved to offer what assistance they can.

In the rare instance that the engineer needs to make recommendations that would amount to an admission of liability, they should always notify their professional liability insurance carrier prior to doing so to help avoid further damages. In addition, the engineer should not agree to any settlement, as their professional liability insurance carrier may not be bound by any settlement made without their consent. Most parties in construction projects should be aware that design professionals cannot agree to a settlement without their insurers' consent.

In these situations, most insurance carriers will want to work with their insured to resolve the matter as quickly and efficiently as possible. The carriers will likely be responsive and assist the insured with any investigation that might be necessary, as working together can lead to significant savings for both parties, and may also prevent the carrier from paying consequential damages. Some carriers have special benefits set up for their insureds for these exact situations. ASCE, for example, has a Risk Management Hotline (855.955.2723) which allows insureds to immediately contact knowledgeable attorneys during business hours. This benefit provides insureds with up to two free hours per policy period of legal advice and support.

The carrier will require a release from the claimant, which should protect the insured from future claims. Many professional liability insurance policies, including the ones underwritten by the ASCE, include incentives for the early resolution of claims in the form of a deductible reduction.

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Illinois Court Stifles Homebuyers' Latest Attempt to Expand Design Professionals' Liability

By Sarah A. Johnson, Esq.

General contractors and developers rarely have insurance covering construction defect claims, and they regularly become insolvent and/or judgment proof after a project is completed. Because of this, homebuyers often attempt to expand the duties of design professionals beyond those imposed by common law or agreed to in a contract. Illinois homebuyers recently attempted to expand the duties and attendant liability of design professionals by arguing the doctrine of implied warranty of habitability applies to design professionals.

This doctrine is based on the premise that a homebuyer has the right to receive what was bargained for and what the builder-seller agree to construct: a dwelling reasonably fit for its intended use as a residence. Thus, the courts have found that builders and developers impliedly warrant the dwellings they sell will be reasonably fit as residences.

In *Board of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, LLC*, the Appellate Court of Illinois held that the doctrine of implied warranty of habitability does not apply to design professionals.[1] The case involved a claim for breach of the implied warranty of habitability by a condominium association against the architect that designed the condominium complex in relation to water and air filtration into the buildings and units.[2] The court recognized the public policy reasons for adopting the implied warranty of habitability doctrine, namely that: (1) the modern home buyer is dependent upon the competency and honesty of the builder rather than the buyer's own ability to discern latent defects; (2) the buyer is potentially making the largest single investment of his or her life; and (3) fairness dictates that the repair costs of defective construction be borne by the builder-seller who created the latent defects.[3]

> "While builders usually warrant the habitability of their construction work, engineers and architects do not warrant the accuracy of their plans and specifications."

However, the court also found that, while builders usually warrant the habitability of their construction work, engineers and architects do not warrant the accuracy of their plans and specifications.[4] The court likened architects and engineers to other professionals who deal in "inexact sciences and are continually asked to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement."[5] Therefore, the court found that the law does not require perfect results, but rather "the exercise of skill and judgment reasonably expected from similarly situated professionals."[6]

[1] *Bd. of Managers pf Park Point at Wheeling Condo. Ass'n v. Park Point at Wheeling, LLC*, 2015 IL App (1st) 123452, 31.

[2] *Id.* at 3-4.

[3] *Id.* at 8.

[4] *Id.* at 15.

[5] *Id.* at 20 (quoting *City of Mounds View v. Walijarvi*, 263 N.W.2d 420, 424 (Minn. 1978)).

[6] *Id.* at 20 (quoting *Mounds View*, 263 N.W.2d at 424).

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The court highlighted two principles from the relevant case law: (1) the implied warranty of habitability is traditionally applied to those who engage in construction; and (2) design professionals, such as architects, do not construct structures, but instead perform design services pursuant to contracts which set out their obligations.[7] The court declined to extend the doctrine of implied warranty of habitability past those involved in actual construction, such as builders and developers, to design professionals, such as architects and engineers.[8]

ASCE Tip:

Adequate limits of liability are key in protecting you and your business. Pay attention to both the per claim limit, as this is the amount available for each claim, and the annual aggregate, which is the amount available for the year. In addition, look for coverage for legal and court costs, and also for an option to purchase an additional limit that applies to defense costs only. Defense is the largest expense when it comes to claims that can quickly erode limits of liability available for a settlement. This additional limit will help to preserve your available limits for damage awards.

[7] *Id.* at ¶ 22.

[8] *Id.* at ¶ 31.

With *Board of Managers of Park Point*, Illinois solidifies itself among the majority of jurisdictions refusing to expand the doctrines of such equitable warranties to design professionals.[9] While this trend is certainly positive for engineers, it heightens the importance of the engineer's written contracts, as those documents will continue to dictate the nature of any warranties provided by the engineer.

[9] *See, e.g., Kemper Architects, P.C. v. McFall, Konkel & Kimball Consulting Engineers, Inc.*, 843 P.2d 1178, 1186 (Wyo. 1992) (finding that engineers and other design professionals do not warrant their services or that the tangible evidence of services will be merchantable or fit for its intended use); *Bd. of Trustees of Union College v. Kennerly Slomanson & Smith*, 400 A.2d 850, 852-54 (N.J. Super Ct. Law Div. 1979) (refusing to apply the implied warranty theory to the performance of architectural and engineering services); *Mound View*, 263 N.W.2d at 424 (finding that applying a theory of implied warranty to architectural services would amount to strict liability and declining to impose same); *but, see North Peak Constr., LLC v. Architecture Plus, Ltd.*, 254 P.3d 404, 408 (Ariz. Ct. App. 2011) (recognizing the validity of a claim for breach of implied warranty against an architect).

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