Preserving Your Right to Insurance Coverage

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No architect, engineer, or other design professional wants to think about liability (error and omissions) insurance coverage for design defects. However, in today's business climate, ensuring that such coverage exists should be one of the professional's top goals. All too often, design professionals are dragged into lengthy and expensive lawsuits brought by owners, notwithstanding the lack of design defects or the lack of a causal relationship between defects and damages, because design professionals are an easy target. In the balance of equities, juries are more likely to find the professional responsible than not. Defending even the smallest claim against a design professional can prove to be very costly, with figures in excess of six figures due to the myriad complex legal issues in the construction process. Accordingly, it is important to take all action possible to preserve and protect insurance coverage.

In Florida, two types of liability insurance policies exist: (1) A claims-made policy, and (2) An occurrence policy. With a claims-made policy, the insured should have coverage for events that occurred prior to the insurance coverage period provided a claim was not prior to the insurance coverage period. Under an occurrence policy, coverage exists for an event that occurred during the coverage period regardless of when a claim was made.

Every insurance policy requires that the insured timely report all claims regardless of whether it is a claims made or an occurrence policy. Failure to timely report claims can cause a denial of insurance coverage. The significant and often debated issue is what types of events constitute a claim that must be reported. There is no hard and fast rule. Insurance policies will typically define the term claim. Definitions vary from the initiation of a lawsuit to an event which may cause the insured to believe a demand may be asserted in the future. In considering whether to report a claim, the size and scope of the claim is insignificant. The design professional should review the insurance policy very closely, and consult his or her insurance agent and a legal professional whenever an event occurs that might result in a claim. The professional should understand that simply knowledge of events that could be the basis of a claim may create a duty to report. To prevent a denial of coverage, it is generally better to err on the side of reporting a claim than to err on the side of not reporting.

As mentioned above, the failure to timely disclose a claim may cause the insurance company to deny coverage. If the denial of coverage is due to a coverage defense, as opposed to a complete lack of coverage, the insurance company, by statute, must notify the insured within 30 days after it learned of, or should have learned of, the coverage defense. Thereafter, within 60 days of receipt of a lawsuit naming the design professional as a defendant, or in no case, later than 30 days before trial, the insurer must also give written notice to the insured refusing to provide coverage. If the insurer fails to comply with these requirements, notwithstanding the failure to timely report a claim, the design professional may be entitled to coverage. Additionally, if the design professional can prove that the insurer was not prejudiced by the delay in reporting a claim, the design professional may have coverage. While the design professional may have a right to coverage in the absence of a timely reported claim, the litigation costs which will be incurred in pursuit of such coverage will often be substantial. Accordingly, as addressed above, it is in the design professional's best interest to over, rather than under report.

Upon occurrence of an event which may be a claim, the design professional should notify its agent in writing immediately. While telephone conferences regarding the claim are certainly warranted, all such conferences should be reduced to writing and transmitted to the insurance agent. To the extent possible, the design professional should encourage the agent to communicate in writing as well to preserve a record in the event of a later dispute over coverage. It is also wise to provide notice of the claim to the insurer directly. A review of the insurance policy is warranted at this stage to determine whether any specific requirements are imposed regarding the form, time, or place of notification. The insured should strictly comply with those requirements.

It is also incumbent upon design professionals, in completing either an initial or renewal application for insurance, to be as accurate and truthful as possible. Insurance applications will always request the disclosure of problematic events. The applications will often require disclosure of items that may not constitute a claim. Read the language in the applications carefully and consult an appropriate professional before deciding to withhold information. The failure to disclose known information on an application may lead to a denial of insurance coverage when a lawsuit is filed concerning matters that were known but not disclosed. One of the trickiest disclosure issues pertains to whether the design

professional must disclose licensing complaints and the design professional's involvement in discovery or other investigative efforts in a lawsuit to which the design professional is not a party.

In the unlikely event the design professional has purchased insurance and the insurance company dissolves, some level of coverage may still exist. Depending on the type of policy obtained, the Florida Insurance Guaranty Association may assume all or a portion of the coverage that would have existed under the insured's policy. Receivership and liquidation proceedings, which are similar to bankruptcies, may also provide a source of indemnity coverage, to the extent an indemnity requirement exists.

While the inclination for most professionals is not to disclose events for fear that insurance premiums will increase, an ounce of prevention can save a great many headaches in the future. When considering whether to report a claim or other similar occurrence, the design professional should consult the insurance agent and a legal professional before making a conclusion. The time and money spent in making such an inquiry could save the design professional hundreds of hours and many thousands of dollars in the event coverage later becomes an issue.

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