

## PLAYING THE INSURANCE GAME

Although perhaps 20 years ago many design professionals were unable to find adequate professional liability insurance coverage, those days have largely passed and, subject to a varying amount of deductible, design professionals are able to obtain such insurance. However, a design professional who enjoys the status of an insured under a professional liability insurance policy must nonetheless be conscious of the policy terms. One of the most important terms requires the design professional insured to give timely notice to the insurance carrier of a claim or potential claim. A failure to give such timely notice can subject the design professional to a refusal by the insured to defend and indemnify under the policy.

Sometimes a design professional who engages in litigation to collect an unpaid account from a client fails to recognize that when faced with a lawsuit, the client may suddenly claim that the design professional was negligent in performing design services or failed to complete the design in accordance with the design contract terms. It is not unusual for some litigation to be pending for months before a counterclaim is asserted. Defendants have an unrestricted right to file a counterclaim for the first time within six months within commencement of the action, and even later, with the court's permission. If, for example, the client has refused to pay the design professional because of some dissatisfaction with the design work, suing the owner for unpaid fees is an invitation to be sued for professional negligence.

Even where the design professional does not expect any expression of dissatisfaction by the owner who has not paid for the professional services long ago rendered, the commencement of a lawsuit to collect the fees may trigger a claim for professional negligence. The question arises as to whether the design professional should recognize that a claim for the collection of unpaid professional fees may trigger a counterclaim for professional negligence. If so, the design professional should have given its professional liability insurance carrier notice of that possibility so that the insurer can conduct the necessary investigation while facts are current and easily followed. Months or years later the evidence may have disappeared. Since a breach of contract action may be brought at any time within six years from the date of the breach, some unpaid accounts never become the subject of litigation until many years after the completion of the design work.

It will be helpful to share some of the legal principles that relate to the giving of notice of a potential claim or claim. When an insured's notice to an insurer is untimely, the court decides whether the insurer was prejudiced by the insured's breach of duty to give timely notice of a claim. The courts will recognize a rebuttable presumption of prejudice which shifts the burden of proof to the design professional to prove that the insurer was not prejudiced by the untimely notice. Whether the court will shift that burden of proof depends upon the amount of the delay in giving timely notice and the terms of the insurance policy itself. Many policies require that notice be given within a specific period of time.

While generally the question of whether an insurer has been prejudiced as a result of receiving late notice is an issue over which the insured and insurer will argue, if a specific provision setting a time limit for the notice of a potential claim or claim is exceeded, the court may very well enter summary judgment in favor of the insurer on the theory that prejudice has occurred as a matter of law under that contract provision. Obviously, it is helpful if the design professional insured can find some evidence that its professional liability insurance carrier had notice, such as information provided under a renewal questionnaire. If no such evidence exists, and suddenly the design professional awakens to the fact that a pending collection action now involves a claim of professional negligence, tendering the case to its professional liability insurance carrier may not be free of controversy. The insurance carrier may claim prejudice as a result of not receiving timely notice and may commence a lawsuit to intervene in the pending collection action and then move for a stay to contest its duty to defend and its duty to provide indemnity. Ultimately, the design professional may not only lose the fee case, it may find itself without a defense or insurance indemnity provided by its insurance company.

A design professional should err on the side of caution and provide notice of any potential claim even when in doubt. Many professional liability insurance carriers include coverage for investigating a potential claim. Under such coverage, the professional liability insurance carrier will retain a lawyer for the design professional to investigate the claim before it is formally asserted, at no cost to the insured other than what

may be required under the deductible. Whether or not such pre-claim investigative service is included in the policy, it is essential for the design professional to give "timely" notice to the insurance carrier, and that definitely means within the time required under the insurance policy, and should be much sooner, if at all possible.

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