

Design Professional Liability Episode 1

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast, Design Professional Liability Episode 1. We would like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

Before we begin, let's meet our speakers. I'd like to turn it over to Andrew to get us started.

Andrew Treloar: Hi, Tyla. Thank you for the introduction. Today we'll be speaking about Design Professional Liability. This is the first in a three-part podcast series. I'm here with Alison Weinstein. She's going to be today's host. So, I'm going to kick it over to her briefly for an introduction and we'll go ahead and get started.

Alison Weinstein: Thanks, Andy. I'm Alison Weinstein. I am Claim Counsel at Travelers, handling Design Professional claims. I'm based out of Hartford, Connecticut. And as we heard, we have Andy Treloar with us today. He's going to be our subject matter expert here today. And he is also Claim Counsel at Travelers, handling Design Professional claims. [00:01:00] And he is based out of Colorado.

Before we begin, I do want to remind everyone that this material is for general informational purposes only and it is not legal advice. It is not designed to be comprehensive, and it may not apply to your particular facts and circumstances. Please consult as needed with your own attorney or other professional advisor.

Alright, so let's get into it. Today's topic is an introduction to Design Professional Liability claims. We really wanted to introduce you listeners to the world of Design Professional Liability claims. This is a bit of a niche area, and it can be a specialty realm. These often can be very highly technical and complex claims but given how prevalent construction is in our everyday world, we see these claims come up everywhere, all the time.

Design professionals are really involved in so many different facets of the external world that we use every day. And so, we really see these claims

[00:02:00] across the board arising in so many different ways. They can be really varied and interesting, and we're really excited to talk about them today.

So first, Andy, let's jump in just so our listeners are clear. What is a design Professional?

Andrew Treloar: Sure Alison. Thanks for the question. And I think your intro was really good. And I think the point about the impact to the external world I think is really important and I think it'll probably go through a lot of our discussion today.

But to your question, what is a design professional? These are the licensed professionals who handle the design side of construction projects. They're the architects, they're the engineers, the surveyors, the designers. They're the ones doing the design. They are responsible for coming up with the ideas for what is ultimately going to be constructed by the construction team, whether it's a building, bridge, road, whatever the case is, they're the ones creating it.

Alison Weinstein: I think that's a great point. And it's important to remember [00:03:00] these are the people who have licenses and who have gone through years of education and are creating these designs. And it's really as you said, it can be a civil engineer, an architect, a land surveyor. There's really a lot of different types that fall within that world of design professionals.

Andrew Treloar: Certainly.

Alison Weinstein: So now what constitutes a Design Professional claim?

Andrew Treloar: So when we think about claims, it's generally a demand for money or to do something based on an allegation that that design professional was negligent and what that boils down to is that there's an allegation or an indication that the design professional did something wrong in their professional capacity and whoever's making the claim wants them to fix it or they want money to fix it.

So, an example might be an error or an omission in the design. So, the designer maybe forgot to include [00:04:00] something. Maybe the calculation was wrong and there's a problem with loads in a wall, if they're an engineer. They may have undersized, oversized something, maybe made a mistake in a survey. So, the building being constructed is in the wrong place. Those would all be things that need to be fixed, and it's going to cost somebody money to do that.

So, the person bringing the claim is going to allege that this caused them damages and it needs to be remedied. So that's a general overview, I don't know, we'll call it the basics of what a Design Professional claim is.

Alison Weinstein: And now, who typically brings these claims against design professionals?

Andrew Treloar: This--Alison that's a really good question because it can be any number of different people or entities. It can be project owners. Now, an owner can be let's say a developer. An owner can be an individual person.

It can be an LLC, a company. So, owners are able to bring claims. Contractors can bring claims. Other design professionals, believe it or not, can bring claims. So, like an architect who [00:05:00] maybe contracts with another engineer to do a portion of the project. They can bring a claim against that engineer if there's an indication that they did something wrong in their scope. It can be individuals, third parties. It can be government entities. Really, the list goes on and it comes down to somebody to whom the design professional had a duty or an obligation. And depending on the jurisdiction and how the claim is arising claims might only be able to be asserted by the entity or the person that retained the design professional.

You know, that person with whom they've got a contract. It might be limited to that. But in some other jurisdictions in some other places, depending on the claim maybe it's a bodily injury claim or property damage claim to a third party. It may not be limited to just that client. It may not be limited to that person who the design professional has a contract with.

It could be the general public, somebody who was injured. Depending on the facts and circumstances, it can be a host of different people, but conceptually it comes down to did that design [00:06:00] professional have some sort of duty or obligation to the person who's ultimately bringing the claim, Alison.

Alison Weinstein: Yeah. Thanks, Andy. And I think that's a really important point. I think a lot of times we just think that it's, whoever hired the design professional would be the one to have the claim against them. But we really see these claims come from all over from people involved on the project, people not involved on the project, general public.

People walking down the street who claim they got injured by something on the project. It can really run the gamut. And that's what makes these claims so

varied and so interesting. Can you talk to us a little bit about what some common types of Design Professional claims might look like?

Andrew Treloar: Yeah, you use the words varied and interesting, and I think that's a perfect kind of segue to this topic. Again, types of claims are--they're, they're really different. Because of how design professionals impact, really the built environment, every building, everything out there has a design professional involved with it.

Almost everything constructed, it's going to [00:07:00] have an engineer, it's going to have an architect, it's going to have a surveyor. The types of claims are just as varied. You've got claims for costs to repair or remediate and property damage. So, say, for example, wall cladding falls off of a building because the design didn't have some adhesive component designed into it.

And that cladding not only needs to be fixed and remedied, but it fell, and it damaged somebody's car, or it possibly hurt somebody. So, you've got property damage, injury, cost to fix. You've got delays too--delays are really sneaky and can be really expensive. Those are based on the idea that the design, what was created by that licensed professional engineer or architect. Either the design or the administration, the oversight of the implementation of that design as it's being constructed, caused delays. So, it's costing time, it's costing money. Somebody's going to want their pound of flesh. And then, I had mentioned briefly earlier, bodily injury or damages.

It seems strange that that would come about, but we see them, sometimes more and more [00:08:00] frequently where you're having the designer, the involvement of that design professional contributing to an injury or a fatality, either during the pendency of the construction project or afterwards, something happens and there's an allegation that the design professional was negligent and somehow, some way that design contributed to someone's injury.

Alison Weinstein: Yeah, I think that's a great overview. And I think it's important to remember, it's not just about fixing the design. I think a lot of times when we think, a designer left something out, or made a mistake in the design, they just need to go back and fix the design, revise the design.

There are so many more damages that kind of emanate from that. You've got to fix the construction, maybe somebody got hurt, you've got the delay component. And we see the damages on these cases sometimes really get quite large and really go into areas that you maybe would have never even foreseen.

So, how do claimants prove their cases against design professionals? What do they need to show that the design professional was negligent?

Andrew Treloar: [00:09:00] Claims, as we just talked about, they're really varied. There's a lot to wrangle here. And to do that, there really need to be experts.

And it's a two-part process. First, the claimant's got to show that the design professional breached what's called the standard of care. And I'll get into that in just a quick second. And then second, they have to show that breach, that violation, caused them damages. And as I said, this is done through experts.

This is a very fact intensive and specialized process that contains information and expertise that the general public typically doesn't have. So, experts are thrown into the mix from the get go, and they have to be. Those experts are going to set forth what the standard of care is for an ordinary engineer, surveyor, or architect.

Essentially saying, look, this is what typical architects and engineers do. This is what they do in this area on these types of projects. This design professional at issue, was not acting in conformance with that. They breached the standard of care. They violated it. They were negligent and that breach caused damages to the person [00:10:00] bringing the claim.

That's how a claim is established and set up. So, it's that two-part process showing that breach and then showing that damages came from that breach.

Alison Weinstein: I'm curious a little bit about what these claims look like to defend. We talked a little bit about how the damages can really be far reaching.

And what does it look like to defend these cases? Are these expensive cases to deal with in litigation? Are they easy to resolve?

Andrew Treloar: I wish they were all easy to resolve. Some potentially can be, but I think in the big picture they are generally pretty--they're pretty intensive, because like we talked about, you need experts to be able to establish these very technical details about what a design professional is supposed to do, how they violated the standard of care.

Claimants are spending a lot of money to prove up their case, and they want to get value out of the cost of them, prosecuting their case against design professionals or anybody else.

Generally, the cost of prosecution is high. The cost of defense is high because on [00:11:00] this side of things, on the design professional defense side of things. You've got to get your own experts. You have to get your own rebuttal experts to say there was no standard of care violation. You've got to get your own experts to talk about damages depending on what they are. Experts to talk about delays. Really, it can be quite expensive to hire all of these experts, get all of the project information put together, analyzed, reviewed, and distilled down to a nice concise argument that a jury of non-experts is going to understand and believe.

So that process takes a lot of time, and it takes a lot of expense.

Alison Weinstein: Okay. So, we've talked about what a claim looks like and what a potential lawsuit might look like. Is there any way to avoid these types of claims? Is there anything our brokers listening can do to help design professionals avoid a full-blown claim?

Andrew Treloar: Absolutely. And that's--that is a huge takeaway, I think, from today's conversation, Alison, is that many professional liability insurers offer what's called pre claim [00:12:00] assistance, which allows design professionals to report an incident or a matter or circumstance to their broker after speaking with them or their carrier before it becomes a claim.

And this allows the insurance carrier and broker and the design professional, ideally working together on this front end, to be able to assist that design professional before it becomes a full-blown claim. Sometimes the claim can be mitigated, its severity can be lessened, or it can be avoided altogether depending on the circumstances and the level of involvement on that front end.

There's not a lot of downside, Alison, to this kind of pre claimed concept. It's generally recommended that brokers and design professionals connect on these types of matters as they're arising because, certain carriers can handle things differently, but issues with policy limits or deductibles, loss runs, things being counted against you.

Generally, these types of concepts don't really apply to a pre claim because carriers and brokers want those reported so they [00:13:00] can, head it off at the pass before it becomes a nasty claim. Sometimes even the insurer will even pay for defense counsel to help in the process. So that's a really good benefit.

And again, strongly encourage these conversations to happen early and often between brokers and design professionals.

Alison Weinstein: And what kinds of things can you report as a pre claim? What should brokers be thinking about or keeping an eye out for with their design professional insureds?

Andrew Treloar: That's a good question because sometimes things can slip through the cracks, Alison. Which isn't great, but examples of things to report; accidents on a project, structure collapses, possibly, even the design professional wakes up in the middle of the night and realizes, cold sweat, that they made a mistake, nobody else has realized. What do they do?

Or a relationship with the client is starting to go south. On its face, those might just seem like relationship type of things, or nobody knows about it. So, it's not a big deal, but it's those, it's really those types of scenarios that can blow up later if they're not on the forefront of that design professional's mind, trying to [00:14:00] get ahead of it early.

Those are really good things to talk to brokers about to make a determination. Is this something we want to get a pre claim process going for? And then also subpoenas. These can be really tricky too, because they can seem somewhat benign sometimes.

And a design professional may say, I did nothing wrong. I'm friendly with these folks. They're just looking for information from me. Many times, that is the case, but sometimes, that may be a fishing expedition, right? They may be looking for information to add you to a lawsuit, to add a design professional to a lawsuit, or their client or whatever the case is.

So, it's really good as subpoenas come in, as innocent as it might seem, having design professionals talk to their brokers, and having brokers be aware of these things, and have that open line of communication is huge because getting involved to help with the subpoena, no big deal.

But if that's overlooked and it turns into a lawsuit later, then, someone's going to be kicking themselves.

Alison Weinstein: Yeah, I think that the pre claim assistance is really a great, service [00:15:00] and a great, opportunity for brokers and design professionals to get ahead of things.

And it is really important for brokers to keep that open dialogue, open communication and to also educate their insurers about this, offering and, make sure that they know, come to us if they, if you think there might be an issue.

Andrew Treloar: There's huge value in that huge value.

Alison Weinstein: Yeah. So, what are the initial steps a broker should take if they think they, you know, they think their design professional insured has a claim or a pre claim?

Andrew Treloar: Sure. And practically speaking, this is like where the rubber meets the road. What do you do? What's a broker supposed to do here? Some of the most helpful things a broker is able to do is gather the basic information about the issue.

Who are the parties in the project? Who's the owner? Who's the contractor? Who are the design professionals? How do they all interrelate? Are there, a clean chain of contracts? What's out there? What's the nature of the issue? Was this an injury issue? Is it just a simple fix? Is there key correspondence? Is there demand out there?

Are we waiting for something to come? When did this [00:16:00] occur? When was that project substantially complete? Really dig into the history of this project and paint a nice, concise picture so that when that's ultimately reported as a professional liability carrier, that information is in hand, that carrier is doing a quick scan, calling the design professional, following up on details and not having to rehash information, because it's all been gathered cleanly and concisely on the front end.

That's really a good process to try to get into the habit of. But generally speaking, with that in mind, this concept that brokers and design professionals have open lines of communication throughout the year, not just during policy renewal, "hey, this is the one time I'm going to talk to you," but having that resource available for a design professional as a broker, is immensely valuable because that encourages questions. It encourages conversation.

And I've seen matters myself that maybe a design professional wasn't even aware that this could become an issue, and they're having [00:17:00] an offhand conversation with their broker and the broker goes, "hey, wait. What did you just say? What did you say happened on this project? And oh yeah, blah, blah, blah, blah."

And then it turns out that's actually something that needs to be reported on a pre claim basis possibly. And it didn't even register with the design professional. So, the more heads, the better, the more conversations, the better I think is a really good takeaway, Alison.

Alison Weinstein: Andy, thank you so much for this discussion.

I think you raised so many great points and really helped shine a light on this really interesting area. Thank you PLUS today for having us here. And thank you to all our listeners. I hope everyone has a great day.

Andrew Treloar: Thank you, Alison.

PLUS Staff: Thank you to our speakers for sharing their insights with PLUS and thank you to our listeners for listening to this PLUS podcast.

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