

# Talk to Me About A&E: Episode 18

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SPEAKER: Welcome to Talk to Me About A&E, a podcast series focused on risk management for architects and engineers. Host, Dan Buelow, Managing Director of Willis A&E will engage experts across the A&E spectrum on topics ranging from contract details to the broadest trends impacting design professionals in North America.

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DAN BUELOW: Well, hello and welcome to Talk to Me About A&E. I'm Dan Buelow, Managing Director of Willis A&E, the specialty division for Willis Towers Watson that is exclusively dedicated to providing insurance and risk management solutions to architects and engineers in North America. Our topic today is on emerging risks and claim trends.

And my special guest is Mr. Mark Blankenship. Hello, Mark.

MARK BLANKENSHIP: Hello Dan.

DAN BUELOW: How are you?

MARK BLANKENSHIP: Doing good. Thanks.

DAN BUELOW: So, Mark has been on our show before being interviewed as a senior underwriter for Liberty International. And we were talking to him about professional liability from an underwriter's perspective. And he was one of the leaders over there for the architects and engineers professional liability group for liberty.

Mark has since joined us, our group, and he is now Director of Risk Management for Willis A&E. And we're really lucky to have Mark. In fact, Mark has come back to us. He used to work with us back in the day. And Mark and I met in fact when we were both at DPIC company some 20 plus years ago when I headed up the underwriting and distribution for the Midwest and Mark was a Senior Claims Manager. Mark, why don't you add a little more of your background for us here.

MARK BLANKENSHIP: Well, you're right Dan. I was a Claim Supervisor for DPIC back when we worked together. I worked with you as a broker specializing in architects and engineers professional liability. For the last 12 years, I was Vice President of Underwriting for the Liberty Mutual architects and engineers professional liability program.

DAN BUELOW: So, Mark comes with a great perspective here to join us for this conversation. And for this program, Mark and I are going to discuss the results of a recent Willis A&E professional liability survey that we did with 12 senior claim managers from 12 leading architect and engineering professional liability carriers on emerging risks and claim trends. To get more information on those specific carriers that participated in this survey and to see a very detailed report, you can find that on our website at "[www.wtwAE.com](http://www.wtwAE.com)."

We have a long-standing relationship with a lot of the major, what we would say are tier one professional liability carriers and we are in really a unique position, if you will, to facilitate important discussions and tap into the collective expertise of these carriers, which we're fortunate to do and case in point is this survey. And so, Mark and I will be touching on some select survey questions and offer some thoughts and risk management advice based on the results of the carrier responses here.

So, our first question is, how would you describe the frequency of professional liability claims in the current market? Underwriters are often looking at frequency and severity. Mark, do you want to talk a little bit about that? Put back on your underwriting hat.

MARK BLANKENSHIP: Well, there's two metrics that we look at for evaluating risk. And the first is frequency, how often do firms have claims? And the second would be severity. When those claims happen, how expensive are they?

And almost half the carriers that we surveyed said that they are seeing an increase in frequency of claims being made, and nearly 3/4 said that they were seeing an increase in the severity of those claims. There's a couple of factors that are driving the severity and we're going to get into those in just a few minutes.

DAN BUELOW: Something to think about though, it was 50/50 really on the question of frequency. So, you could say that many are saying, well, it's relatively stable as far as the frequency of claim activity for professional liability claims. But I would argue that it's stable, yes, but it's stable of a fairly high number of claims that firms are seeing.

And in fact, the same survey, these carriers said on average one out of four firms or 25% of firms out there will have a claim in a given year. So, to me, that's a pretty significant number there. And you also have to keep in mind the size of firms. This is a very broad industry report here. And these carriers will represent small, large, and mega firms.

And so, if you think about it, 90% of all design professional firms out there practicing, in the United States anyhow, 90% or 10 professionals or less. And if you consider the ENR 500 of the 500 largest firms, number one on that list is several billion in revenue. And number 500 is 20 some million. So, it's quite a range in there, and it drops off pretty quick there. So, there's a lot of what we would call midsize middle market small firm business even that make up this statistic here. On the question of severity though, I would say that, with you Mark, it's one of the questions we'll get is, what's a severity claim?

MARK BLANKENSHIP: Well, the average claim usually clocks in around \$75,000. So, severity claims we would consider, it could be \$250,000 or more. It's certainly a six-figure number. And with regard to the increase in frequency and severity that we're now perceiving, this is what's driving the carriers seeking rate increases today. They are perceiving that they need to increase their rates to cover the increasing cost of claims so that they can remain stable and stay in business.

DAN BUELOW: Yeah, that's a great point. As an underwriter, you would consider loss ratios. You would consider maybe a five-year loss ratio, where you're adding up how much premium you earned over that period of time and how much claims were paid out, right?

MARK BLANKENSHIP: Yes. As between frequency and severity, severity is the more important question because the rating tools used by underwriters factor in that loss ratio, basically the premium paid in compared to the claims dollars incurred. And that's the single most important factor in developing a rate. Frequency is more of a judgment factor. Severity hits the loss ratio and drives pricing.

DAN BUELOW: In this same survey, it was interesting, we asked on average how long it takes to resolve a professional liability claim. And the average across the board really was two to three years. And so that's a long period of time. And you have to keep that in mind when you're thinking about this, it really makes this a long tail exposure. Whereas, I say, auto insurance is a short tail exposure. This is insurance jargon. Professional liability is a long tail exposure, meaning that whatever you and your folks are working on today in your design practice, by the time it is constructed and you get dragged into mediation, arbitration, and/or litigation, it can be months, if not years. In this case two to three years. So that's a long time.

And so, if you recognize that fact, you must recognize the importance to be able to tell your story in the future, to be able to, at the end of the day, have good documentation, have good information available. And we'll talk a little bit on that.

But I want to read a comment that one of our carriers provided specific to this. And this carrier's comment on the survey is that "We've seen a steady and fairly extreme uptick in severity, primarily in our large firms segment." And their defined large firms is over \$30 million in revenue, "Arising from bodily injury related losses. The single driving cause we have isolated is social inflation. And now we have supply chain interruptions, a looming recession, and economic inflation to contend with as well. For context, claims that five years ago may have been presented to us for \$250,000 are now demanding a million or more for the loss. \$1 million claims in 2014 for example, are now coming out of the starting blocks at around \$3 million or more." So, this is a carrier that's definitely feeling this. And as Mark alluded to is, this will impact rates.

Mark, he mentioned social inflation in all this. This is kind of been a buzzword we're hearing a lot about. What do you mean by that?

MARK BLANKENSHIP: Well, what that means is that juries are giving out ever increasing awards in their verdicts. And one of the driving factors that this goes back to is a book that was published in 2009 by a plaintiff's attorney on reptile theory. And what this attorney tapped into

was the emotional response of a juror. And reptile theory espouses that you can get a bigger award if you instill fear in the juror.

And so, you want to paint the defendant as dangerous. And then you are tapping into the very base emotions of the juror. And if you can scare that and make them think that this defendant is a threat to them, all the better to drive a high award. And this tactic has been used fairly successfully and we're seeing it in terms of average increasing awards.

DAN BUELOW: We're definitely seeing a significant increase in median settlements and some of these are coming out. And it doesn't help the fact that there is something out there also that is called litigation financing. And this is something that is in my opinion very disturbing, where a third party unrelated to the lawsuit, provides capital to the plaintiff involved in litigation in return for a portion of any financial recovery from the lawsuit.

These are particularly bodily injury cases. And litigation financing has increased significantly, where now more than a third of US law firms are using litigation financing. So, if you think you've been seeing a lot of billboards with attorney's faces on them, you're right. And this is something where now there's a mutual fund out there, believe it or not, where folks can invest in and essentially share the spoils of this reward.

And I think that's a problem. And I don't know what the answer is other than the fact that there's no meaningful tort reform, I think, on the horizon from what I can tell here given that trend.

So, let's shift gears here a little bit. So, it's actually related to this. We have seen a rash of bodily injury claims involving civil engineering firms and involving traffic accidents. And the Civil is arguably not negligent in many of these cases that we've seen, and clients that have been involved in these. But you have a very sympathetic plaintiff. The state often has sovereign immunity. And right or wrong, the engineer is often dragged into these matters, these suits.

And so, a carrier that responded to the survey also made the following comment. And I've got just a couple of comments here, but I think they're worth sharing here. And this one is, "We have identified firm profiles and services that we feel are most exposed to severity claims. Most are large civil firms with CM or site observation services working on large infrastructure projects. Many of which are design build delivery and no longer covered under project specific policies. This isn't the extent of where we are seeing severity claims but, these are the risks where we are

finding we can't really get our arms around the exposure even with firms who are well risk managed and have good loss histories."

So, Mark, while this is a difficult exposure to manage, and I would certainly agree with that in some cases, you know, what's your lesson learned? It's difficult to come up with that. There are certain things firms really do need to be thinking about, aren't they? Especially when it comes to CA and job site safety. Would you agree and what are some thoughts on that?

MARK BLANKENSHIP: Clearly, I would agree. This increasing trend for injured plaintiffs to sue design professionals on the project is one of the major drivers of the increasing severity trend that we are seeing. Now, the job site safety exposure is traditionally managed by the contractor. And part of managing that exposure involves insuring that exposure.

So, what we want to do is hit this job site safety exposure head on and hard. And we need to begin by inserting a requirement in the agreement in the design professional's contract that the contractor is solely responsible for job site safety. This should be noncontroversial. This to me is a deal breaker. If the owner is not willing to include that, then this is a walk away for me.

But assuming we get that, we want to execute the project and live within the terms of that contract and not assume responsibility for means and methods by virtue of our conduct on the job site. The classic example would be telling the contractor how to do his job. It can sneak up on you.

Sometimes a contractor will run into a problem and ask the design professional to show him how to fix it. To design a fix. It could be getting involved in the design of temporary structures that would be involved in a means or methods. So, we want to live within our contract and not assume responsibility for means or methods. And that's going to be the topic of a program unto itself.

But we want to train our staff regarding our construction administration responsibilities and avoid documenting safety concerns. And now we want to back all of this up with additional insured status because this exposure is truly beyond our control. And accidents will continue to happen, and they are highly unpredictable.

So, what we want to do is be named as an additional insured on the contractor's general liability policy. We need to require that in our agreement with the owner so that the owner will make it a term in the general conditions of the contract of construction. There are two very important things to include with that requirement, that the additional insured status provided will be on a primary and not contributory basis. Meaning the contractor's insurance comes first and does not seek contribution from the design professional's insurance. And the second thing is, we need to specify what limits are available to the additional insured. I would recommend the full limits available to the contractor. But if we don't say how much insurance is available to the additional insured, the carrier can take the position that there is no coverage for the additional insured because you did not specify how much.

DAN BUELOW: Great advice. And I find that some of our clients are design professional clients that are actually quite good at this and whereas others, I think, could do a better job. And then you have the problem where there's some public entities that for whatever reason in their contracts won't allow it. But it really does make a lot of sense. And in fact, it's very important. And when you're negotiating this on a traditional design bid build, it's going to be using an A201 or similar vehicle where you're working in contracting with the owner.

And what you're essentially asking if you want exactly what the owner is getting. The owner, believe us, is getting named as an additional insured on that contractor's deal policy. And ideally the prime will endeavor to get that as well, not only for themselves but all the sub consultants on that because that's where the insurance belongs. With that party that can manage that risk. And most general liability policies for contractors will contain a provision there, additional insured by contract, that if you succeed in getting this in your contract, you're going to get the insurance. Often at little or no additional cost to that contractor to have them cover what rightfully belongs is that exposure. Because usually it's a job site injury or something that's an at risk, exposure that is not the design professional. So that's great advice Mark.

And I think also on this topic of managing these exposures that are severity and specific to bodily injury is just good documentation practices. For example, we had a conversation in our last podcast with Frank Musica on emails. And the scenario was where there was an auto accident, somebody calls the engineering firm that was involved in the auto accident and complains about signage.

And the engineer had a conversation with the contractor but then hangs up the phone and there was nothing memorialized. That would have been a good opportunity for them to establish something in an email to memorialize that it was in fact the sole responsibility of the contractor. And unfortunately, subsequent to that conversation, that was never documented there was a terrible accident that arose to a bodily injury claim.

So, there's a lot there to talk about. And we do, in fact, have a podcast and a series of webinars on this topic of CAs. So, it's that important. And I would say that you can't overemphasize, can you Mark, as far as the importance of educating your staff. Anybody that's going out on the site, needs to understand the standard of care of the design professional and what their role is and what it's not, and what to do in certain situations.

As you mentioned, even though in your contract you hopefully have that you're not responsible for job site safety means or methods, if you have an employee of your staff going out there and it takes control of that site, stops the work or does whatever, you can essentially amend that agreement by your actions out on the site. We've talked about that in the past as well.

Number five question here is around project types, Mark. And we ask these carriers, list the top project types that experience the most professional liability claim severity. And there's quite a list here of residential, apartment, condos, road, highways, infrastructure, hospitals, schools, arenas, offices, and others and so forth. And other includes oil and gas. And as again, put your underwriting hat here on Mark and talked to us a little bit about what's the issue here with these specific project types.

MARK BLANKENSHIP: Well, residential traditionally has led the field in terms of both frequency and severity too. The expectations in residential construction are very high. And residential owners have certain legal protections that are not available to commercial owners. For instance, there's the implied warranty of habitability.

With regard to condominiums, a lot of decisions get made to do things on the cheap, especially with regard to mechanical systems. And when they don't work out, it's an expensive fix to go back in and rehabilitate a constructed building. What I found as an underwriter is there's frequently a correlation, a very strong correlation between project size and claim severity. Larger projects are understandably more complex. And \$5 million change orders on a billion-dollar project, it might be less than 1% of construction values but it's still a lot of money. And so,



we see more lawsuits and significant lawsuits filed on larger projects generally. But I want to say that you can address these exposures by offering a higher level of service.

So right now, apartments are trending badly. They're approaching condos in terms of their claims experience. As an underwriter, I came across a firm that's been doing \$30 million in apartment projects for 10 years with no claims. Now, this is a truly remarkable result. And I asked for an interview with the principals to see how they were doing it. And they had organized their firm into studios.

So, they had groups of people that had a long history of working together. They brought in independent consultants to do a peer review of accessibility issues and waterproofing issues. They work with a very experienced attorney, who looked at all of their contracts. They had people who were dedicated to construction administration phase and who were expert at it. In addition, they required owners to hire their own construction inspector to verify that the work was being done in conformance with the plans. In addition, they offloaded certain consultants including and especially the geotechnical consultant. And they were willing to say no. And they had a documented history of saying no to bad deals. And this was working well for them. They were doing great and growing and profitable.

DAN BUELOW: I think we're seeing more apartments because we saw a real increase in apartment and rental versus condo and ownership, in that whereas condos always have had that third party exposure, there'll always be a challenge on that. On the emerging risk frontier too, front and center is designed build.

That we've seen a real increase in client activity around that, particularly infrastructure design build versus vertical design build. We've had a lot of conversation on that. Again, we did a separate podcast. We did two of them just on this whole design build risk. So, we don't have to hit it too hard, other than, a lot of these underwriters are looking at this and in fact, some have exited the market to offer capacity for this.

For example, a couple of major players left the project specific marketplace. And as a result, some of this risk that may have been covered in the past by a project specific policy is now being picked up under the practice policies of some of these carriers. Hopefully, the market's going to do something about this and respond, and there's this whole drive for a progressive approach to design build which some underwriters are in fact requiring that to even offer quotes now. And so

that's another issue that we're seeing specific to design build. And I know there's a lot of issues specific to design build that make it, I don't know, Mark, you want to add any more thoughts or common specific to that, but that keeps coming up as a real trend in this case. In fact, some carriers won't write firms that engage in design build. But everyone that has, has said there's an upward trend in design build claims.

MARK BLANKENSHIP: So, to summarize the results that we saw in that survey, residential and condos were leading the charge. Schools were in there. For a long time, schools have been the leading source of claims on a frequency basis due to a number of factors. One is inexperienced boards. Second is low bid contractors. And the third is unlevel playing field, I would call it. Champagne taste, beer budgets and just unsophisticated owners.

With regard to infrastructure, the design build is playing into that to a significant extent. We just see cost overruns. And I wouldn't expect a firm to be able to give a guaranteed maximum price at 15% design development, but many owners do and it's just not worked out well.

Arenas show up on the list. But that's consistent with my comment about larger projects being more complex than as you might expect, having more significant claims. Then a few other categories, oil and gas. One of our carriers told us that the largest claims, their \$10 million claims were mostly oil and gas type facilities.

And when there's a problem and there's a shutdown, the consequential damages there can be enormous. The economic loss aspect. So that's something we can deal with in contract by getting a mutual waiver of consequential damages. And there are other risk management techniques available as well.

DAN BUELOW: When I look at this list, again, that we just ran through of all the different project types, it can't help but think of all the different types of people that our design professional clients work with, with very varying levels of experience and sophistication. And the challenge that brings the design professional when it comes to managing expectations. Again, that's where a lot of these claims are coming from, if not the vast majority of these expectations not being managed, not being established and so forth.

And if you consider one end of that spectrum, you're going to have that residential, unsophisticated consumer. And on the other end of the spectrum, you may have an owner's rep

representing a condo developer or a developer with a three-page indemnity agreement. And in the middle there, you've got that school board, that every time you show up, there's 12 people that all know more than you do with the tight referendum.

So, it's a challenge, I think, from a risk management standpoint. And I think it's important that firms think about these go/no go considerations by project type. Because I think as you touched down here, Mark, there's very specific and unique risks associated with these different project types. So, you may have a different set of go/no go considerations for design build, for example. We're not going to take responsibility for quantities or whatever that might be. You're going to want a condo writer or a certain responsibility or something to do addressing maintenance or so forth with condos and so on.

So, let's shift gears a little bit here as we look at this because the next question I want to talk to you about that we had was along the lines of emerging risks. Which was a very broad question that we asked these 12 carriers. And we asked, what would you say are the top emerging risks facing design professionals?

And there was quite a list. And you really got to check out the report that's available on our website to take a look at because there's quite a list that we had in there. But a few that I will hit on is beginning with staffing. Staffing came up.

Staffing is a real issue. There's currently more work than there is engineers right now. You've got problems that we had with finding mid-level talent. Now you are having young, even finding enough young graduates to do the work on the engineering side is a real challenge in other disciplines. And I think that's always going to be a challenge, not only for your firm but the sub-consultants that you work with and the owners that you work with and the contractors. You're not getting that A-team. So staffing is definitely an issue.

And the second on this list concerning a lot of these carriers is around climate change. We're going to have a separate program just on this topic of climate change and we've had some webinars on it, but there's a lot to think about when it comes to climate change. But one of the things I think is so important from a risk management standpoint is around this concept of informed consent. Talk to us about that, Mark.

MARK BLANKENSHIP: Well, the insurance industry is a firm believer in climate change. Carriers are very concerned about this, and I think design professionals should be too. And here's the reason. Current codes are based on what I consider to be a faulty assumption, which is that weather conditions will remain static. Historically, for the last 10,000 years they have been pretty stable, but things are changing now.

And the question is, what is the standard of care and how is that going to adapt to the new reality of increased frequency and severity of storms? So, what I would recommend is that we exceed mere compliance with codes or at least offer that as an alternative to our client. And we want to encourage the client to give more value to a resilient and adaptive design by asking them to look at the cost of it over the life cycle of the building as opposed to a one or two or even five-year window return on investment.

And in that way, they could perhaps place more value on an adaptive and resilient design. And if we make that offering and we document that they declined that offering of a higher level of service, of a better more resilient building, then if it is damaged in a flood or a windstorm or a wildfire, then we have a defense. It's, we offered it to you, and we explained the risks to you and you decided to accept that risk in exchange for saving money.

The situation I'd like to avoid is assuming risk so that somebody else can save money. It reminds me of that scene from Shrek. You know, where the King sends the knights off to slay the dragon and rescue the damsel in distress. And he says, some of you may die but that's a risk that I'm willing to take.

So, I don't want to see our clients in that position. So, what we want to obtain is the owner's informed consent. We want to show them the options and explain the risks associated with merely complying with current codes. And if the owner elects to do the cheaper thing, save money by the less adaptive and resilient design, then we hopefully have transferred the risk of failure to them under the concept of informed consent.

It's really very much like what you experience when you go to a doctor or hospital for a procedure. They will explain the possible side effects, which can be serious and disgusting and even fatal. And ask you to sign off on it. We don't need to warn them about risk of death, but we do want to get their informed consent.

DAN BUELOW: Good points Mark. Also on this list here is cyber. And we've talked a lot about cyber. We've got a podcast on cyber and other seminars on it. But I think it's worth giving an update because that's what we want to continually do, is update and review what's happening in these trends.

The cyber market is still a very hard market. There's been some stability in that market. We have a separate cyber team within Willis Towers Watson. And the last time they came out with their rate predictions, it was 50 to 100 plus percent. And that's been reduced to a rate, a projected rate increases of 20 to 65 plus percent. So still a big swing. But it does show that there has been some additional capacity in the marketplace.

There's still a great deal of underwriting scrutiny around cyber. And you do need to have very specific controls in place that you need to be thinking about when it comes to cyber, MFA. There's a whole list of things that you really need to get the current updated list well in advance of your renewal as to what your firm is going to be required to have in order to be even offered insurance.

And so that's something to be thinking about. And then the last point I would make, my belief is that it's very important for all firms to have an incident response plan in place so that they know what to do in the event that you have a cyber attack. These often will come at a very inopportune time, usually over a weekend or a holiday. And you need to identify who your stakeholders are within your business. Who are you going to call? What are you going to do if your system is down? And you need to take actions.

MARK BLANKENSHIP: Yeah, cyber is truly an evolving risk. In the beginning, it was getting in and stealing personally identifiable information so that criminals could go take out credit under somebody else's name. But the threat has evolved to extortion. And when they get into your system and they encrypt it, then they will ask for money to unencrypt your data. And there will be a strong pressure to do that.

According to the cyber underwriters that I was working with, almost half of all cyber attacks can be prevented by implementing multi-factor authentication. Most of the other half can be prevented by training people on social engineering tactics that are being used. Not to click on links, to be very suspicious of unsolicited links.

DAN BUELOW: The other half on backing up.

MARK BLANKENSHIP: Right. If you want to be protected from paying that ransom, then you need to have your data backed up. And probably in three places, Dan. One in the cloud. We want one off site. And then we want a local one. That would be a robust procedure that should protect you from a cyber hacking event.

DAN BUELOW: With cyber exposure, you've got a first-party and a third-party exposure. And the third-party is, you did something, contractual relationship with your client. Well, most of these claims that we're seeing are first-party with specific to hacking, where there's a business interruption. It's very difficult, as anybody has ever been through the process of trying to quantify damages with a business interruption for a service firm will know that there's some real challenges to that.

So, the first line of defense is not your insurance policy. It is robust IT practices. And I do think that understanding what these controls are that you're required to have is a great opportunity to understand what the underwriting community has identified as specific controls that you can put in place to mitigate this risk. So, Mark, the other is we had on here, which was interesting, we went back and we talked about COVID.

There was a lot of question of what that was going to look like. I mean, how the damage is, specific to professional liability firms. And I think that what we see here, really the result of the consequences from COVID and the pandemic has been to the economy and the supply chain. And there are certain things that you need to be thinking about. In this case, you touched on when we were talking about is on the area of pre-construction services.

MARK BLANKENSHIP: So, in the beginning when COVID hit, we were wondering what was going to be the impact on design professionals. And originally, we thought it might hit the standard of care by requiring participation of doctors or medical professionals in assisting us in the design to try and prevent the spread of viruses. Fortunately, we have developed vaccines now.

And the impact has shifted away from disease prevention to economic impacts of supply chain interruption. And this is happening right now. Long tail items are taking even longer to order and obtain. And so, firms are adapting by ordering long tail items earlier in the process than we

would have done historically. This suggests the value of pre-construction services and I predict that this will become even more valuable in the very near future as a service both to the client and as a defensive procedure for the design professional.

This again goes back to the concept of informed consent. Mr. Owner, systems that integrate with other systems will be difficult to change once we've made a decision and a purchase. And so, we need to think very carefully about what the program is going to be and understand that it's going to slow the project, delay the project and cause additional expense to make changes. So, we want to get approvals.

To make those informed decisions earlier, we think it would be beneficial to meet with the contractor and the owner and the subs to set goals and the budget and do the value engineering and the lifecycle cost analysis early on in the process to establish procurement management procedures and get our bid packages together early. But again, all with the understanding that it's going to be difficult and expensive to make changes once those orders have been placed.

DAN BUELOW: So, here's another question here. What are the leading contractual risk design professionals assume that give rise to a reservation of rights or denial of claim? When it came to the contracts, Mark, again, there was quite a list that they came up with here. But it really, if you boiled it down to it, was indemnification warranties and guarantees.

So, you need to be careful about signing that dotted line, words are important. We've seen firms literally go out of business by signing that dotted line. And while arguably it's nobody's best interest to have an uninsurable agreement, including the owner, it's third-party coverage, it's for their benefit, there's no assets other than this policy, why do you want an uninsurable agreement. But that doesn't stop this from happening. We just keep seeing these agreements seemingly getting worse and worse over time here. And Mark, you see a lot of contracts. We touch on a few of what you might see in this area of emerging issues specific to contracts. Give us a few highlights on this.

MARK BLANKENSHIP: Right. Well, fortunately, professional liability policies provide very broad coverage. Usually all of the services that you're providing will be covered for violations of the standard of care. So, for me, the hierarchy is first, establishing the standard of care. We want to avoid increase in their standard of care or giving any warranties regarding our service. With regard to indemnification, that's my number two.

I would say the duty to defend is probably the leading cause of pain here. Owners' attorneys typically are not as sophisticated as they would like to appear. What I mean is, they fail to understand or appreciate the difference in duties between design professionals and contractors. And they certainly don't understand the difference in insurance. They are used to dealing with contractors whose obligations are related to general negligence and who can add additional insureds to their primary insurance policy, the general liability policy. Additional insureds will get a defense. So, contractors agree to defend their clients from third-party claims. Design professionals only owe a duty to their client at least as far as economic loss goes. Which is the primary type of claim made against design professionals.

And so, we can't add additional insureds to professional liability policies. So, there's no coverage for that defend obligation. If the owner insists on a defend obligation, the best solution is a bifurcated indemnity. For professional liability, we will indemnify the owner, its officers and employees for claims to the extent caused by our negligence. But we will not defend any of them.

For general liability claims or claims covered by general liability insurance, we will indemnify and defend the owner and other designated parties for damages to the extent caused by our negligence. And pursuant to additional insured status. And that will hopefully satisfy the owner and preserve the insurance coverage available to the design professional.

DAN BUELOW: We'll have a separate program. We have a series of four podcasts on contracts. And I think coming back and having a separate one around emerging contract issues, Mark, would be a good idea because additional insured is a separate issue together with copyright infringement, waivers. You're seeing some interesting contracts.

MARK BLANKENSHIP: Yes, yes. Another trend is indemnification for copyright infringement. This is troublesome because copyright infringement is typically an intentional tort. Either a bad act, somebody literally ripped off somebody else's plans, more commonly it's accidental. It's a design professional gets into a dispute with the owner and the owner wants to take those plans and have somebody else finish them or it's an extension to an existing project. It's not malicious. But we do see an increasing tendency to seek indemnity for copyright infringement. And we not normally think of copyright infringement as an error or omission. When I see these clauses, I do



try to revise them to negligent copyright infringement with the goal of bringing that within the scope of professional liability coverage.

DAN BUELOW: All right. So, a couple of last questions or points here for this program, Mark, is that we asked have we asked our carriers, what are the primary reasons you might deny a claim. And the number one reason is failure to report in a timely per the policy. And so, you really need to understand this coverage as claims made coverage.

And while we'll wrestle over words in the contract, and it is so very important, the one thing that keeps us brokers up at night is in the event that our clients don't timely report a claim. In the case of professional liability, our advice, as well as A&E's advice is that you really need to report anything that's a claim. And that would be any demand for money or service even if you think it's under your deductible or if you think you can manage it and it will go away. It's just not going to get better with time. And if you don't report it, you could very well void your coverage. So that's something that we really are sticklers for, we stress and have a lot of conversation around that. So, you want to be careful with that.

And you also don't want to, once a claim is reported, Mark, you also don't want to be unilaterally settling a claim. Again, this insurance policy is a contract. There are two sides of that contract. There's the insured. And there's the carrier. And you both have specific responsibilities and obligations.

MARK BLANKENSHIP: Oh, I wholeheartedly agree with this. It's very rare for coverage to be denied. And when it is, it's tragic because it was within the ability of the design firm to report that matter timely, but they failed to do it.

DAN BUELOW: So, when it comes to this question of emerging risks and trends in the A&E industry, I think it's important to touch on what we're seeing in the marketplace. And so, the architects and engineers professional liability marketplace. So, if you take the whole property casualty marketplace, it's gone through a very constricted and hard market recently over the last 18 months, two years.

And through all that, the architects and engineers marketplace has been relatively stable and insulated, in fact. Other than cyber. That's always this outlier. But when it comes to professional

liability, there's always been a fairly abundant amount of capacity. And of all the professional markets, architects and engineers has usually been considered the softest of all the markets.

And so, we've seen a lot of players out there. However, we're starting to see some changes out there. I think firms need to be aware of. And there are a finite number of what I would say are tier one carriers. There's a lot of folks out there that might want to sell you insurance. But you really need to be careful of who you're going to work with as your long-term partner. And so those tier one carriers are those carriers with a history of backing their promises, are strong financially, have good policy forms, as well as good people that are backing those promises. So, you've got good underwriters and good claim representatives and so on.

But in this marketplace, some of the things that we've seen, an increase in some rates. But we've seen some carriers exit the marketplace. And we've seen some carriers reduce their appetite, not wanting to write larger firms, for example, or firms with certain exposures such as bodily injury, design build, residential, which we've talked about. And we are seeing more professional liability carriers reduce their available limits.

So, where they might have offered \$10 million in the past, some of these carriers are only offering up to \$5 million limit. And if you're a larger firm that needs these larger limits to meet your contractual requirements or to protect the financial core of your business, you're going to need more than that. And that's going to mean that you're going to have to go to an excess market. And that's going to come with an additional expense.

And on top of that, we're starting to definitely see some real pressures on some self-insured retentions and/or deductibles. And carriers would like to say that they would like to see 1% of your revenue to be your deductible. Well, we haven't seen 1%. We're seeing it half of 1% or less. But we're definitely seeing some pressure on this marketplace.

I just think it's something that everybody needs to be aware of here. And one carrier that responded to our survey noted the following. So, this last quote of the day here but, "Our large firm segment is running more than two times higher than the loss ratio on the rest of our book. We know we are not the only carrier seeing these claims and I believe the large firm segment will be a tough market for the professional liability markets to manage in the near future." And so that's interesting, where you see at least one carrier here that is definitely suggesting that rates are going to be going up at a certain segment. Mark, on that subject, as an underwriter,

you've worked with a lot of different sized firms in your history. Small firm, mid firm, large firm, mega firm, how would you break it out?

MARK BLANKENSHIP: It's a bit of a subjective question. But I would say anything over \$20 million is certainly a large firm.

DAN BUELOW: The number of 500 on ENR 500 list roughly.

MARK BLANKENSHIP: Right. And this would suggest that there are medium sized firms. And I would say between \$2 or \$3 million. And that \$20 million would be a medium sized firm. My concluding comment, Dan, would be that everything in the world is getting more sophisticated including owners, attorneys, and their litigation tactics. And design professionals, understandably, want to focus on what they know and love, which is designing buildings and infrastructure.

However, we need to respond to these emerging threats by spending a little more time on our risk management practices and becoming equally sophisticated with our threat actors.

DAN BUELOW: Excellent closing points, Mark. And thank you, Mark, for joining us for this podcast.

MARK BLANKENSHIP: Dan, my pleasure as always.

DAN BUELOW: It's great having you. As that concludes another episode of Talk to Me About A&E, thanks for joining us and we will talk to you soon.

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