

# Talk to Me About A&E: Episode 28 — Managing a PL Claim Part I

ANTHONY CAROLEI: Don't make an assumption that, oh, this isn't going to be covered, or, I don't think I have any liability, so why should I report it? Do yourself a favor. Get it in front of the insurance company. Let them review the situation. Whether it's an actual claim or a potential claim, don't make the interpretation because that's not your business.

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NARRATOR: 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: Hello, and thank you for joining me for another episode of Talk to Me About A&E. I'm Dan Buelow, Managing Director of Willis A&E, and our topic is on what a design firm can expect if and when a professional liability claim is brought against them. This is where the rubber meets the road, so to speak. We put a lot of thought and effort into mitigating a claim with good contract formation, good documentation, and communication practices, and for good reason-- because the ultimate cost of a PL (professional liability) claim against a design firm can be significant and even devastating to the design professional firm.

Any firm that goes through a claim will learn firsthand how painful and costly a PL claim can be. The cost of a claim can be significant and include the out-of-pocket deductible expenses or self-insured expenses for each and every claim against your firm. As the PL market has constricted, underwriters are looking for design firms to retain more risk and have more skin in the game with some carriers pushing for deductibles of and around 0.5% or half of 1% of the firm's gross revenues.

You have the expense of a loss that is potentially over and above your available insurance limits, and you also have the expense that you will be paying at the end of the day-- more insurance premiums as every carrier is going to look at your five-year loss ratio. So these costs can really add up, but these are really your hard costs of a claim. The soft costs, or the intangible cost of a claim can be even greater-- the distraction of your business, having senior staff members tied up in discovery and depositions, as well as your firm's reputation and client relationships.

It's hard to put a price on all that, so the importance of a design firm investing in and nurturing a culture of risk management throughout all levels of their staff cannot be overstated. Firms that do not do this are

simply not as profitable. The objective of this podcast will be to help design professionals gain a better understanding of what to expect if and when a professional liability claim is made against their firm. And to help me with this topic I have with me someone that is well versed on this subject, Mr. Anthony Carolei, Director of Risk Management for Hanover Insurance Companies, Architects and Engineers Division. Hello, Anthony. How are you doing?

ANTHONY CAROLEI: I'm great, Dan. Thank you for having me today.

DAN BUELOW: It's great to have you, Anthony. So Anthony Carolei is the Director of Risk Management for Professional Liability for Hanover Professional Liability Group. Prior to his promotion to risk management, Anthony was the senior claim manager of professional liability where Anthony's team was responsible for architects' and engineers' professional liability claims.

Anthony has specialized in the area of architects and engineers for over 20 years, and Anthony has nearly 30 years of litigation and claim experience as an attorney in New York and California. As a practicing attorney in California and New York, Anthony handled matters for both plaintiffs and defendants involved in various types of litigation. So we're really lucky to have Anthony here, and I've had the pleasure of working with Anthony for many years on a wide range of claims against our design professional clients, and now in his new role as risk manager for Hanover.

Anthony has also been a frequent guest for our Willis A&E webinars and Large Firm Convocation and was a special guest on our recent Willis A&E webinar, Claim Stories Around the Campfire. Also, Hanover has been one of a handful of carrier partners over the many years that we've worked with and has always done a good job backing their promises. So Anthony is in a great position here with a great level of experience to touch on this subject here with us and help us address this.

So Anthony, when you and I were discussing this idea for this program, you suggested this topic of what a design firm should expect and understand when a PL claim is made against them. Why do you feel it is important that we need to discuss this?

ANTHONY CAROLEI: So thanks, Dan. Throughout my career in the insurance industry, one of the first things I hear when speaking to a design professional is, hey, this is the first time I've been through this in my entire career. And whether I was engaging in a conversation with an engineer or an architect, at some point they always express this is my first time over my 25, 30 years of practice that I'm going through this. And whether it's a lawsuit, a demand-- it's all the same.

So the knowledge of the claims process becomes commonplace to claims professionals, and we take a lot of it for granted. But for the first-time reporter, this claims process is a mystery. It's shrouded in the unknown. So I think it's a good chance to pull back the curtain and explain a little bit for the design professional and give them a little bit of a comfort level as far as what to expect when they do report a claim, or a potential claim for that matter.

DAN BUELOW: I agree. A claim can be a very daunting emotional process for any design professional that goes through this, especially if you've never done this before or gone through this process of a professional liability claim. And I've always found that design professionals take a great deal of pride in the work that they do, and they really want to do the very best for the client. So when a claim against them arises, it can be traumatic and an emotional experience, and costly, as I've outlined.

ANTHONY CAROLEI: I mean, I've always found that the design professionals are some of the best professionals to work with because they do take it personally and they do put their heart and soul into their work. And the same effort is given in relationship to working with their insurance company and working with their counsel to assist in the process.

DAN BUELOW: Excellent point. So before we jump in, Anthony-- into this discussion of what to expect when you report a claim, what is there, would you say you think about might be helpful at this point in the discussion for a design professional on this topic?

ANTHONY CAROLEI: Get familiar with your policies. Read the entire policy from start to finish. It may sound redundant, but how many of my insureds would say to me, oh, that's in my policy? I didn't know that. Take a read through it. There's a lot there that's helpful. And what I've always felt was that a well-informed insured can have an easier path through navigating through a situation. Your insurance policy is a contract. Get familiar with it.

DAN BUELOW: Well, and that's a very good point. And I try to stress that as well-- is that your insurance policy is a contract and there are certain responsibilities and obligations for both parties, and so you need to understand what those are. And let's look at this. I pulled up some provisions from your Hanover policy, which is a very good policy, very broad, and is one of those that we would say is a tier one carrier-- a professional liability policy here.

And right at the very beginning it states here, "this is your architects and engineers professional liability insurance policy." And it begins with, "this is a claims made and reported policy subject to the terms, conditions, exclusions, and limitations of this policy. Coverage is limited to liability for only those claims that are first made against you and reported to us in writing after the retroactive date and during the policy period or any optional extended reporting period if exercised by you." So professional liability coverage is very broad coverage. It essentially covers you for everything you do as a design professional and breach of contract within that standard of care. Right, Anthony?

ANTHONY CAROLEI: That is correct.

DAN BUELOW: And so as-- a PL also very broad as to who it covers. So for example, the Hanover policy defines the insured as the named insured. So you're going to always want to look at your policy and see if there's any named insurers listed and any additional named insureds, making sure you've got all your predecessor firms listed on that policy.

And it's also going to go on to cover any past or present partner, officer, director, shareholders, or employees of the named insured while acting within the scope of his or her duties for any entity listed as an additional named insured. So that's very important for anybody that knows that they're going to have coverage if they go off and retire or go to another firm, for example. And then it also provides some coverage for leased or retired personnel, as well as some other things in there you want to look at-- some of the details. It gets into your spouse, domestic partner, even heirs.

So again, it's important to know what's in there. And you might even want to amend some of these policies if necessary. So we'll get into that, but let's first talk a bit about this process of confirming and triggering coverage. Anthony, your professional liability claims-made policy-- how is a claim defined, and what is the difference between a claim and a potential claim?

ANTHONY CAROLEI: So typically when we look at it, the claim is going to be that written demand from a claimant or their representative for damages that arise from a wrongful act that relates to your professional services. And then when we look at a potential claim, you're looking at in a typical sense any event or incident that may create an awareness of a possibility that a claim could be made against you.

A demand could be contained in a lawsuit. It could be an email, a text, a letter. But the key thing to keep in mind is someone making a demand against you for money for damages for services. It's got to relate to a wrongful act, and it's got to relate to your professional services. So those key things get into the professional liability arena as far as claims and potential claims.

DAN BUELOW: We always recommend for our clients that we want to tender any demand for money or service. And so we don't care if you think that this claim is not going to be material, if it's going to be resolved under your deductible, if you think you're going to be able to commercially resolve it with your client, you want to trigger coverage in order to preserve coverage and what you bought and paid for.

So I think this is very important. Back to this language-- and I'm looking again at the Hanover policy. It states, "the duties in the event of a claim or potential claim, if you receive a claim, you and any other involved insureds must see to it that we the carrier receive written notice of the claim with full details, including the date received, as soon as practicable but no later than 90 days after such claim is first made."

So you have some wording in there, Anthony, that some of these carriers will look at this wording pretty closely depending on who the insured is, because you go into again asking what you're going to need. And we're going to get into that as far as the papers-- what you necessarily need in order to manage this claim.

But the way this is written that you have-- we have, for example, for some of our larger clients with multiple offices-- we would want to endorse this language to revise it to narrow the scope of the knowledge to the risk manager and general counsel for example, versus any other involved insured. And I

know that's really up to the broker and the underwriter and you as the claim manager or handler when you were in that role. You're going to rely on that policy, won't you?

ANTHONY CAROLEI: Right. And you've got to go off the black and white of the policy. That's always the key. And to go back to what you had mentioned before, get it in the hands of the insurance company. Let them make the evaluation as far as coverage. Let them confirm it. Don't make an assumption that, oh, this isn't going to be covered. Or, I don't think I have any liability, so why should I report it?

Do yourself a favor. Get it in front of the insurance company. Let them review the situation. Whether it's an actual claim or a potential claim, don't make the interpretation because that's not your business. That's not what you do. Your business is providing great designs. The insurance company is-- they're in the business of, and the claims departments in the business of evaluating whether there's coverage and confirming that.

DAN BUELOW: Right. And if you fail to report it, you might very well void coverage. To that point, we've had a situation, for example, where an insured of ours was very confident that this was going to be resolved commercially between them and their client, so they never reported the claim. And so the policy went, and three years later-- so that policy-- again, it's claims-made. You got to be making these claims within that policy period.

Well three years later, they learned that their client had sold their business and the new owners of that business-- or in this case, this project took a different view on the matter and brought a claim based on something that arguably should have been reported because there was a clear paper trail. There was a clear demand. And in that situation, they very well were in a position to have coverage voided. So again, I can't stress that enough, as I know you agree with.

OK, so coverage has been properly triggered and acknowledged. What is now generally the first step, Anthony, that a design professional should anticipate?

ANTHONY CAROLEI: So once everything's been reported, the next step will be that your insurance claim representative will be in contact with you. They'll reach out to you, and at that point they'll start the investigation. So it's a good step for the insured to make sure that they've organized themselves, they've gathered their documents that surround the situation. And the documents could include any of their contracts with the owner, developer, with their subconsultants. Any emails, text messages, design drawings, filed, unfiled, permitted, not permitted. In essence, gather up your entire work product. Your entire job file.

DAN BUELOW: I'm looking at the Hanover policy again, and it states clearly that, "we the carrier, Hanover, have the right to investigate and the exclusive right to defend any claim made under this policy. Even if the allegations are groundless, false, or fraudulent, until there is a final adjudication against you, we are not obligated to defend any criminal investigation, criminal proceeding, or prosecution against you. If a claim is not covered under this policy, we will have no duty to defend."

So we often will hear that the duty to defend is broader than the duty to indemnify. Can you explain that?

ANTHONY CAROLEI: Sure. So the idea that duty to defend is greater than the duty to indemnify-- indemnification is a payment under the policy. So usually the idea that an insurance company will have a greater duty to defend may not necessarily tie to their duty to indemnify. So again, it all comes back in line where-- and for professional liability policies or general liability policies you do have that ramification built in.

So again, courts will interpret the idea that an insurance carrier will have a greater duty to defend their insureds.

DAN BUELOW: Which is good.

ANTHONY CAROLEI: Yeah, which is good.

DAN BUELOW: I'm just going to say good because you don't know until certain things unfold that, OK, this is covered or not. And in fact, Anthony, you may very well-- and some carriers tend to send these out a little more frequently than others, frankly. But a reservation of rights, right? You may send that out saying, look, we're going to go forward and defend this. However, if it's determined that it's not covered for all these specific reasons-- that there may not be coverage under this policy. In which case, we would cease providing the defense and certainly not indemnify for any damages as a result of these uninsured matters.

But for us as the broker, we have the in-house expertise and the staff to really advocate on behalf of our clients and look closely at these reservation rights with our insureds, and the benefit of working directly with a lot of our good carrier partners like Hanover to really go over and discuss these reservation of rights. So if we don't agree with everything that's in that reservation of rights, we want to have essentially something in writing back to that to try to, again, establish a meeting of the minds if you will, and a position on that.

We've done this over the years with you, Anthony, and so if you want to touch on that process a little bit-- because I will say, you're not in this camp but some carriers-- it seems that every acknowledgment now comes with a reservation of rights, which is frankly quite frustrating. But I'm not seeing that with you.

ANTHONY CAROLEI: The idea of the reservation of rights is really-- it sounds mysterious, but it means what it says. The carrier is reserving their rights to make a further coverage evaluation as information is gained during the claims process. I mean, there's a lot of coverage you get within your policy, but there's also things that aren't covered. And you won't know exactly what's going to impact coverage until you get really through the end of discovery, through the end of-- you could go through trial and not make a determination.

So that idea of what's going to be contained in there-- it's kind of a little belt and suspenders that some carriers—

DAN BUELOW: It is. And it can be a gray area, but I do feel that we don't just want to have you recite the policy to us. We'd rather a good claim adjuster look at this and say, well, there was in this allegation something around taking control of site safety, for example, of which you then would specifically point that out. Well, if you in fact did this it wouldn't be covered, right?

ANTHONY CAROLEI: Yeah, exactly. And that's what we like to try to do. We like to try to have a well-founded coverage position.

DAN BUELOW: Right. So is there anything the design professional should do in preparation for the first contact with the assigned claim representative? So it's been tendered, it's been acknowledged. We would expect that you're going to be getting back to them in a timely manner. What can they expect?

ANTHONY CAROLEI: Well they should at that point typically meet with the project architect, the project engineer. Make sure that when you're calling back your claims representative, you've got the people with some knowledge on there. The principals like to be involved, but they weren't the day-to-day manager. So sometimes the best conversations will be a group conversation between principals, project manager, people working on it in a day-to-day fashion, anybody that has some information.

So gather the team, set up a call, and have a frank discussion with what happened. And really, it comes down to a conversation of, what were you engaged to do? How did the project go? Where did things go awry? Give us your inside scoop, so to speak, as far as why do you think this claim is being presented to you? Because most situations, there's three sides to every story. His, theirs, and then somewhere in between.

So you look at that and you want to be able to armchair quarterback the situation and take a reality-- like, why is this claim coming to us at this point? And do that kind of deep dive heart-to-heart and have that conversation with your claims professionals. So it allows him to start the investigation, to start the evaluation.

DAN BUELOW: Really, the first thing you're going to ask for is their contract, right? So this is back to how important these contracts are, that you have ideally an insurable agreement that's fully executed. But that'll be the first thing you and any defense counsel will be asking for. And you also touched on the text messages or emails and all these other things that you might-- and the documents that you have. And I would suggest everybody refer to our podcast and our on-demand and webinar series Willis A&E programs on documentation and communication. We have a two-part series on the podcast on documentation. But it's that important, isn't it, to be able to tell your story and have good documentation?

ANTHONY CAROLEI: Yeah. No, I mean, the idea that if you don't have the documentation and it's just a he said, she said, it's going to bite you. Because there are so many situations where our insurance said,

well, we're just trying to help out the situation. We were out there in the field; we took a look at the drawings. And the contractor had a question on it, the owner had a question on it, and we explained what was supposed to happen. And I said, OK. Did you follow that up? No. Well, they didn't make that change. But they're going to say, well, he never told me that.

So that documentation is super important. The other super important thing to realize that-- keep in mind, if you do document something it's going to be used against you. So make sure what you're documenting is something that you would be OK if it's read out loud in front of a group, in front of a jury, in front of a judge. So again, stress being professional and making sure that it's something that's clear, concise, to the point, and that documents the conversation.

DAN BUELOW: Is counsel assigned at this juncture? Defense counsel?

ANTHONY CAROLEI: Yeah. No, so defense counsel is assigned depending on the situation. The typical lawyer answer-- it depends. But again, if it's a lawsuit, 99% of the time they're going to be assigned. One instance where it might not be-- if it's a situation of clear liability. Clear damages. Putting my claims hat back on.

But if I was involved in a situation where my insured comes to me hat in hand saying, Anthony, I screwed up. I didn't include this on my design and now my client is looking for me to make the situation right. OK, that may be something where we can reach out to the claimant, reach out to their attorney and say, listen, you filed a suit. Give us an extension. Let's work this out. And we may be able to save some defense costs and work out the situation.

There are other situations where you're not going to be able to do that. So again, depending on the situation, yeah-- early on we will get counsel involved. In addition to counsel, we may feel that there's a need for experts and outside investigators depending on the situation to assist in the investigation and the evaluation.

DAN BUELOW: Many carriers have panel counsel where they've identified certain counsel in certain states that know what they're doing when it comes to defending design professionals for professional liability-related claims, and many of our carriers will also allow choice of counsel, right? And so we always advise if somebody really wants to have and work with choice of counsel-- a specific counsel, that we want to have that agreed upon between the carrier and the insured.

So because as a carrier, you're going to want to make sure that-- not only you're going to look at what they're charging, but you want to make sure they know what they're doing, and based on the specific claim I would assume, as well.

ANTHONY CAROLEI: No, that's correct. And in my days as a claims handler and even in claims management, we would vet all of the choice of counsel requests. And again, it has to be made up front because that has to be something that's agreed upon. And if there is somebody that you have to have as

your counsel, then that needs to be-- before you enter into your insurance agreement, get it out there. Put it out there that that's your request. That's a make or break that we want to have X, Y, and Z.

And then you give the underwriters the opportunity to present that to the claims department. They can discuss it, they can vet the counsel and make sure that the insured just doesn't want their cousin Larry who's hard up for business and does real estate closings to be their professional liability defense attorney. Because one thing that you can rest your bet on is that the claimants' or the plaintiffs' attorneys are going to be experienced in design defect. They're going to know their stuff. You need to make sure that your defense counsel that you hire knows their stuff too.

DAN BUELOW: Well that's great advice, Anthony. I would also recommend that whenever a design firm goes into a new state or province, to identify counsel that specializes in architects and engineers professional liability in that location. There are a finite number of attorneys that really know this area of law and have experience in contract formation and legal defense specific to professional liability for design professionals.

Every state, when it comes to practice acts, laws, and statutes, will vary. The economic loss doctrine, for example, and the anti-indemnity statutes, for example, can and will vary from state to state. We will often help our design firm clients identify attorneys that specialize in this niche in a given state so that they can interview them and get pre-approval from their carrier, which is always recommended.

Well, this is a great place for us to conclude part one of our discussion on managing a PL claim. I want to thank Anthony Carolei, Director of Risk Management for Hanover Professional Liability Group, for sharing his insights and expertise on this important topic. Be sure to check out part two as Anthony and I continue our discussion on what design professionals can expect and need to know when managing a professional liability claim against their firm. Thanks again for joining me for another episode of Talk to Me About A&E. I'm Dan Buelow, and I will talk to you soon.

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