Talk to Me About A&E: Episode 29 — Managing a PL claim (part II)

ANTHONY CAROLEI: The process of getting a claim from initial report to resolution has taken longer. It has gotten more expensive. And it's something that you have to understand that there's a process.

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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.

DANIEL 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 this is part two of my discussion with Anthony Carolei, director of risk management for Hanover Professional Liability Group. In part one, Anthony and I discussed what a design professional needs to know about their professional liability coverage specific to claims reporting and what firms need to know when it comes to managing a professional liability claim against their firm.

If you haven't listened to part one, I suggest you do so. We will begin now where Anthony and I left off from our discussion.

The cost of discovery really has risen dramatically, hasn't it? And sometimes we certainly have had situations where insureds are frustrated where the firm feels that defense counsel when it has been assigned now to counsel that it seems that spending can get out of control and the money is going against their deductible and even into their limits. And how do you manage this?

And some of it is just an education process to manage those expectations of the insured, that they understand this. But it is something that you need to keep an eye on, isn't it?

ANTHONY CAROLEI: Oh yeah, certainly. We can't stress enough that that's some of the times why it's so important to utilize the panel firms. Because frankly, the panel firms have heard from the claim representatives from claims management of cost controls, cost management, litigation management, and effective litigation.

DANIEL BUELOW: Or they wouldn't be on your panel, right? They're not going to get more work.
ANTHONY CAROLEI: Exactly, exactly. So we try to manage everything. And when I was in claims, I tried to look at-- every dollar spent was something that was coming out of my wallet. And if I wouldn't want to spend that personally, I wouldn't want to spend it on an insured's behalf.

So you got to take these things personally, and you've got to look at the cost and you've got to manage that. And frankly, there are some firms that are better than others. And the firms that aren't so good at managing their costs don't stick around on panel. So we try to work with the insureds and work with counsel. And frankly, the counsel is the insurance council. We retain them on behalf of the insureds. So they're your lawyers that are representing you.

So they've got to watch their costs. They've got to do what they can to represent you. And again, it's OK to question what they're doing. It's a conversation. So what we want to make sure that during the claims going on if you have concerns. And it's OK to have that conversation.

DANIEL BUELOW: So this process, this entire claim process, can be a very long, slow slog, can it?

ANTHONY CAROLEI: Oh, it certainly can. Listen, especially over the last few years, the process of getting a claim from initial report to resolution has taken longer. It has gotten more expensive. And it's something that you have to understand that there's a process that needs to be carried through. Like I mentioned before, there are certain matters where you've got situations that are clear as far as what went wrong and what the dispute is and what the issues are. And we try to work those out as quickly and efficiently as possible.

But you could have a situation where, yes, liability is clear. But you've got a claimant, the plaintiff, who is just making outrageous demands. And they're also asking for the emotional distress. And things that they're not entitled to and things that aren't reasonable. Or things that they would have had to pay for anyway. What we consider betterment. It makes it difficult to resolve.

So all along the way, depending on the situation, you've got to look to each other. Part of your team, the insured, the claim representative, the defense counsel, to work hand in hand and cooperate in the process. And then expect the cooperation from the other parties involved in the litigation, whether it's the plaintiff or co-defendants, to reach a resolution.

The one hard part about the design claims and reaching resolutions are you're typically dealing with multiple parties. And if you've got the situation where you might be able to resolve this with the owner but yet you've got a claim that's come back against you from the contractor, sometimes you can't resolve that quickly. Sometimes you need to make sure you get a global resolution before you can either pull the trigger on a resolution. And that might make things more complex and take longer.

DANIEL BUELOW: Back in my DPCI days, we had a motto of mediation works. We always recommended our clients to try to negotiate a mediation clause in their agreements whenever possible. Talk to me about this process of mediation. What exactly is it?

ANTHONY CAROLEI: Sure, Dan. It's a alternative dispute resolution tool where you use an independent third party called a mediator. And using that independent third party, you work through what I consider an

assisted negotiation process. The mediator will come in. And they're generally-- and I say generally, because sometimes you get a judge who assigns a mediator to a case. But they're typically selected by the parties.

And whenever I was working on a situation, I'd want a mediator that is knowledgeable about the industry. Typically an attorney, retired judge. And not necessarily what they would call plaintiff oriented or defense oriented. Just someone who's reasonable. That's not just going to split the baby, so to speak, or not just play a numbers game. And what I mean by playing the numbers game, there's so many frustrating situations where I would come into a mediation and the mediator would-- first thing out of his mouth is, well, you know what it's going to cost you to defend this, so put that on the table.

It's like, wait, wait, wait, wait, wait, wait. You know? Not interested in that. Let's talk about some of the issues. Let's talk about some of the facts. Let's get into it and let's try to figure out how to reach that resolution.

DANIEL BUELOW: And if you do lose in mediation-- and this is why we like mediation, right? It's non-binding versus arbitration, which is binding. And so they're very similar in that respect of alternative dispute resolution. However, if you don't like the result in mediation, you can say, well, we'll see in court. Whereas in arbitration, you're stuck with that decision. And you're going to possibly lose some rights of discovery.

And so we, again, push for mediation. And I don't like where you see mediation and then arbitration and then litigation. I would like to have it mediation. If that fails, we go right to litigation. I think it puts more weight on the mediation process. Because arbitration is just as costly and can be certainly and take as long as litigation, right?

ANTHONY CAROLEI: I get what you're saying. Because there is that old approach where we're going to mediate and then do almost a non-binding arbitration.

DANIEL BUELOW: Well, yeah. Well then, let's do it non-binding. Let's word it like that. And then that's the same as mediation, right?

ANTHONY CAROLEI: Right. Well, I mean, it's a little different. The nuances are that a non-binding arbitration is essentially a non-binding mini trial of the dispute. And it could be helpful because it could let both sides know where their weaknesses are. And they could come out of an arbitration, a non-binding arbitration, and say, oh, we've got to resolve this, because we're going to lose.

DANIEL BUELOW: But in that case, if the arbitrator wants to split the baby and you don't want to, then you can take it to the next step.

ANTHONY CAROLEI: Exactly. Now, when you talked about the binding arbitration-- so the difference between a binding and non-binding and binding arbitration in trial is that the binding arbitration is a

process. It's substitution of actually having your dispute resolved in a courtroom. So you agree in a contract to resolve any dispute through arbitration, a binding arbitration.

And that means that the arbitrators are the judge and jury. And the arbitrators get to rule on motions. They get to decide what if any motions are available. And they get to decide what discovery is going to be allowed. And the rules of civil procedure that are tantamount to the roadmap to getting a lawsuit from filing to trial are out the window.

The other problem with a binding arbitration is that you, Mr. Architect, may have agreed to engineer.

DANIEL BUELOW: Yeah.

ANTHONY CAROLEI: Or engineer.

DANIEL BUELOW: Yeah.

ANTHONY CAROLEI: Agreed to arbitrate any dispute with the owner that hired you. That may not be the same thing for the contractor, and that may not be the same thing for your subconsultants.

DANIEL BUELOW: Right.

ANTHONY CAROLEI: And you've got to make sure that if you're going to agree in arbitration, that everybody is going to agree.

DANIEL BUELOW: You don't want to go to that party alone, right?

ANTHONY CAROLEI: No, you don't. Because you don't want to be necessarily subject to one resolution and get dragged into a state court resolution. Or you don't want to get stuck in a situation where, OK, you hired your subconsultants to provide the structural engineering for building. And you've got an arbitration agreement. And you have an arbitration agreement with the owner.

But your subconsulting agreement with the structural engineer is silent, and you're going to have to track any recovery against that structural engineer in state court. You can't make them come to the arbitration. They can say, I'll wait. You go through the arbitration with the owner. You pay the decision. And then come talk to me. It gets expensive. Because again, like you say, you're paying for the arbitration. And now you're going to pay for the litigation. So it gets expensive, and it gets problematic in that sense.

DANIEL BUELOW: Yeah. And mediations have definitely proven to be successful for all parties. And in fact, many carriers, professional liability carriers, will offer a mediation credit, which they wouldn't do. Carriers typically aren't inclined to give you money, right? Unless they are pretty sure this works.

And in the case of Hanover, which I think is a pretty good one and compared to some others, but pretty out there. I think there's others that are around this where it states here, if you and we, the carrier, agreed to use mediation to resolve any claim brought against you and if the claim is resolved by mediation, your deductible obligation for that claim will be reduced by 50%. And then they usually put a cap. In the case of Hanover, you cap that at a $25,000.

So that's some real money there in recognition of making that effort. So that's good stuff. So if the matter-- now changing gears here a little bit-- is a suit, what does that process look like? So now we've actually gone to litigation, right?

ANTHONY CAROLEI: Right. So if you're in a situation that is an actual lawsuit-- a summons and complaint is filed against you. You've been named as a defendant in a lawsuit. The overall process is, again, that complaint is filed with the court served on you. And then a response is made on your behalf. 99.9% of the lawsuits that get filed against our insureds were going to hire defense counsel to defend them. In situations where you can't resolve it initially, you're going to assign that defense counsel. You're going to have that defense counsel file a response to the complaint.

Once that response is done, then you walk to the races. You've got to start with discovery. And discovery is both oral and written discovery, where information is exchanged with the parties. And then some non-parties you'll have to get information from. And then if along the way the matter can't be resolved, a lawsuit will resolve one way or the other.

DANIEL BUELOW: Right.

ANTHONY CAROLEI: And if it can't be resolved mutually-- and I don't necessarily tie every resolution to a dollar amount. So there are some resolutions that it's just a walkaway. But a resolution is a walkaway, a payment, a settlement, a dismissal. But if there's not a resolution before the judge assigns you a trial date, the case will resolve with the trial. And that's the ultimate resolution is the verdict and judgment by the court at the end of the day.

DANIEL BUELOW: Yeah, and I think some professionals are surprised at how long this process can take. And when we did our survey, our Willis A&E survey of leading professional liability carriers, including Hanover, and you, Anthony, it came back on average that the average design professional will spend two to three years to resolve a professional liability matter.

And so the wheels of justice can roll pretty slow, as you described and laid out here. So it really is. That's why we call it long tail exposure, right?

ANTHONY CAROLEI: Yeah. Yeah. And I'd have to say of late, the pandemic from 2020 to 2022 shut down the court system. It slowed everything even worse than that. And the courts generally have more important matters to resolve than construction defect matters. And they're more worried about the criminal proceedings than they are about someone's window leaking.

DANIEL BUELOW: Yeah. And that process as you go through, is it mediation, arbitration, and/or litigation. Talk to us a bit about-- this can be very emotional for the design firm, as we touched on earlier. And they take, again, a lot of pride in what they do. And it can be frustrating sometimes when the claim adjuster decides really and determines, look, we're going to settle for this.

Yeah, you didn't do anything wrong. And yeah, we probably could have fought this. But you have to essentially make a business decision, right. And that can be pretty hard, especially if the firm feels that, hey, wait a second, we could possibly fight this. Talk through that a little bit because I know you've experienced that. And then also discuss the concept of a hammer clause.

ANTHONY CAROLEI: Let's start with the idea that design professional policies are a consent to settle policy. And what that means is that at the end of the day, the insured has the ultimate right to make the determination as far as if they're going to consent to settle that policy or not. You typically hear about that in medical malpractice cases where the doctor's not going to consent, because they don't want this to go against their record. And they have that right and they have that consent.

Well, the same thing is true for the design professional. They have to consent to resolve the case. And the team, the claim representative, the design professional, the attorneys, all have to come to a common mindset, so to speak. And they have to figure out, OK, where do we stand liability-wise? Are we going to be able to win a slam dunk motion for summary judgment where you can get the case dismissed because there's no way that a judge or a jury is going to find liability against you?

Or are the damages clear and straightforward? There's situations where, to settle or not to settle? It's a tough decision. But you got to keep in mind, a lot of your policies have eroding limits. Which mean your defense dollars that are spent are going to erode the indemnity limits. So that is to say that if you got $1 million policy and you've spent $500,000 defending the case, you don't have a dollar million left to settle it. You only have $500,000.

So that consent to settle, that business decision isn't taken lightly by anybody and shouldn't be. It's evaluation. And the loss history is something that I always considered when I was handling claims.
DANIEL BUELOW: Yeah.

ANTHONY CAROLEI: It's like, how is that going to impact my insured when they go to renew their policy? I'd always take that, keep that in mind. And something that I always wanted to try to work with for them to understand. And they also have to understand that they might want their day in court. They might want to be vindicated for this. But the time, like you mentioned earlier, that they're going to have to spend in depositions and litigation in the courtroom is time that they don't have to be working and designing and doing the work that they want to do rather than defending it.

So that all comes into play. That all is a harsh reality. And the other thing to keep in mind is that we see how this works out on a day-to-day basis. The claims representatives and the litigators that are assigned

to work with you see this all the time, and they know how the process works. And this could be your first lawsuit, could be your second, third. But certainly not your 100th or your 1,000th that you've seen.

And you have to rely upon your claims representative, your counsel to be in your corner. You got to trust them to-- insurance companies don't want to throw money at cases just to make it go away. That's not what they're there for. But they may see that judge and jury are going to have a hard time understanding the case. They're going to have a hard time swallowing that you didn't do anything wrong. Or that you did do anything wrong and what the costs are.

So the conversation as far as resolution of a litigation is one that has to be had. And it's something that should be discussed all along. It's an open and honest and reasonable conversation that evolves as the litigation evolves.

DANIEL BUELOW: We talked on a claim is the demand for money service and we touched a bit also on pre-claim. But you can trigger coverage-- there may not be a demand against you for money or service. But you could be invited to a deposition, or somebody wants to subpoena your records. Your client, for example. Hey, we're not naming you a suit. We just want to subpoena your records. Those are two great examples of where we want our insureds to trigger their policy in order to get some counsel and some support, often at no charge or a reduced charge. As long as it's in that area of not a claim. In order to get legal counsel and assistance in responding to that subpoena or attending that deposition, right?

ANTHONY CAROLEI: Oh yeah, that's 100% true. The idea that if you're stuck in a situation where your client comes to you and says, well listen, I just want your documents, it's going to help me in my case against the contractor. Oh yeah, and just come to this deposition. You're going in without that assistance of counsel, where you could have the other side's counsel try to come up with theories against you and create exposure.

You could say something at a deposition that you didn't mean to say or that—

DANIEL BUELOW: You weren't prepared.

ANTHONY CAROLEI: You weren't prepared, yeah. So take advantage of that reclaim type of situation and get the assistance.

DANIEL BUELOW: It's a significant coverage benefit of these professional liability policies. And also, we've seen a scenario where we've done a case study of the collapse of the Chicago post office where the Chicago post office collapsed, people were hurt and even killed. And rather than wait for that inevitable lawsuit, our insured worked with us. And I was with DPIC at the time where they were able to trigger coverage, get counsel to work with them, and get a forensic engineer out on the site before the site was contaminated, which at the end of the day was a huge benefit.

And so again, anytime there's a claim or a potential claim, we ask our clients to bring those to us so that we can talk through them because we cannot overstate the importance of properly reporting and triggering coverage. In fact, I referenced already our Willis A&E Biannual Survey of A&E Professional Liability Carriers. And one of the questions we surveyed, we asked the question, why might you deny a professional liability claim?

And the number one answer that all of 12 carriers that we surveyed responded was, failure to timely report. So that's your hard red line, if you will, is not reporting that claim. And so as we say in Chicago, report early and report often, right? And for firms with excess layers, and we're seeing more firms have excess layers because some carriers have dropped their limits down to $5 million. And if you need 10, you're going to need an excess layer. We want to report every claim and every pre-claim to all layers. So anything we report to that primary carrier, report those to all your excess layers. Absolutely need to do that. Because again, it's claims made coverage you want to preserve. All the coverage you bought and paid for. And keep in mind, if you happen to be under a project specific policy and you have a project specific policy which are named insured under our recommendation also is to report any claim under that policy. To your practice policy as well to preserve coverage, certainly if you expect that practice policy to be there for excess.

So a couple of very important points specific to that. And also, I want to discuss with you, Anthony, winding down here. But the number two reason why an insurance carrier will deny coverage per our survey was settling a matter without the insured's consent. Again, to that point that this is a policy. There's obligations and responsibilities for both sides. And you cannot unilaterally go and settle a matter. And this is the number two reason why. And some of the issues we see here is these clients to set off provisions in their contract. Well, we want you to strike that. But we also, even if you don't have that in your agreement, we don't want that client to come to you and say, hey, I'm going to do you a favor here and I'm not going to pay you your $500,000 or $200,000 we owe you. And in return, we're not going to sue you.

And if you agree to that unilaterally, you may very well be doing that all alone with invoiding coverage. And so you want to try to engage your carrier partner together with your broker ideally to try to work through and talk through that. Right, Anthony? Because I know that you and I have had a situation where I will say to your credit, you really worked with us on that. But those setoffs are a concern.

ANTHONY CAROLEI: Oh, they certainly are, Dan. When an insured goes about resolving something without the input and knowledge of their insurance company, it's tantamount to them basically going out and saying, I don't care that I have a contract with my insurance company. I'm basically going to do what I want to do. And then I'm going to turn around and tender it to my insurance company and ask them to pay it.

DANIEL BUELOW: Yeah.

ANTHONY CAROLEI: Well, and that—

DANIEL BUELOW: Yeah, it's not going to happen.

ANTHONY CAROLEI: It's not. The idea that—

DANIEL BUELOW: So do me a favor client and sue me. I know you don't want to hear that from the carrier side. But it's like from a broker side it's like, look, I want to trigger that coverage to be there. But really what you want to do is engage that carrier, your claim adjuster throughout the process, to make sure, again, that you don't go off and unilaterally and do something and then expect coverage.

ANTHONY CAROLEI: Exactly. Exactly. Just get it out in front of the carrier. They will be a team member to work with you. The goal is to get this resolved. And again, I say resolved. I don't mean just pay it just to make it go away. Resolve it so that it's a fair and reasonable resolution. And that could be, like I said, it could be a complete walkaway. Or it could be you get the client to pay you the fees that they were supposed to pay you originally. Or you might have to accept the fact that your design fell below the standard of care, and you owe them some money.

DANIEL BUELOW: And again, your policy, the Hanover policy, states the following, which is consistent with most every other professional liability policy out there. And it states, no insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, agree to settle, or incur any expense related to a claim without our consent, without the carrier's consent.

And then it goes on in that same policy and it will say, the named insured is responsible for any fees or costs charged by a lawyer defending you or any other expenses incurred without, our, the carrier's written consent. So again, I can't stress that more. So Anthony, good point for us to wind this down. And you want to give us any final thoughts here?

ANTHONY CAROLEI: The idea of resolution for any of these matters is not necessarily going to be a straightforward one. But keep in mind, if you get this matter in front of your insurance company, working with the claims representative, your legal counsel, any experts, it'll help you in the process. So whether it's a potential matter or an actual claim, can't stress enough to report it, get it out there.

And you've got substantial resources at your fingertips. And you can work with your agent, your broker. A risk manager such as myself, the claims department. Illegal counsel that gets assigned. And they'll help you walk through the process and navigate this unknown and find a way to resolution.

DANIEL BUELOW: It was a great discussion. And I want to thank our special guest, Anthony Carolei, risk manager for Hanover. Great talking to you, Anthony.

ANTHONY CAROLEI: Dan, it was great talking to you. Thank you for the opportunity, and thanks for giving me the chance to participate in another one of these programs by Willis.

DANIEL BUELOW: Yeah, really appreciate it. And I want to thank you for listening to another episode of Talk to Me About A&E. For a full listing of our podcasts, webinars, and on demand programs, including an on-demand taping of our recent webinar, Claims Stories Around the Campfire, which Anthony, our special guest, was our presenter, check out our Education Center at www.wtwae.com.

I'm Dan Buelow, and I will talk to you soon.

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