

BUILDING BLOCKS

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CONTRACTUAL DEFENSE PROTECTION – A NEW SOLUTION FOR THE OLD “DUTY TO DEFEND” PROBLEM

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Imagine this scenario – you are retained by an owner to design a new office building. In front of the office building are stairs and a corresponding ADA-compliant ramp to the front door. Shortly after the building is opened to the public, a visitor slips and falls on the ramp and suffers bodily injuries and sues the owner.

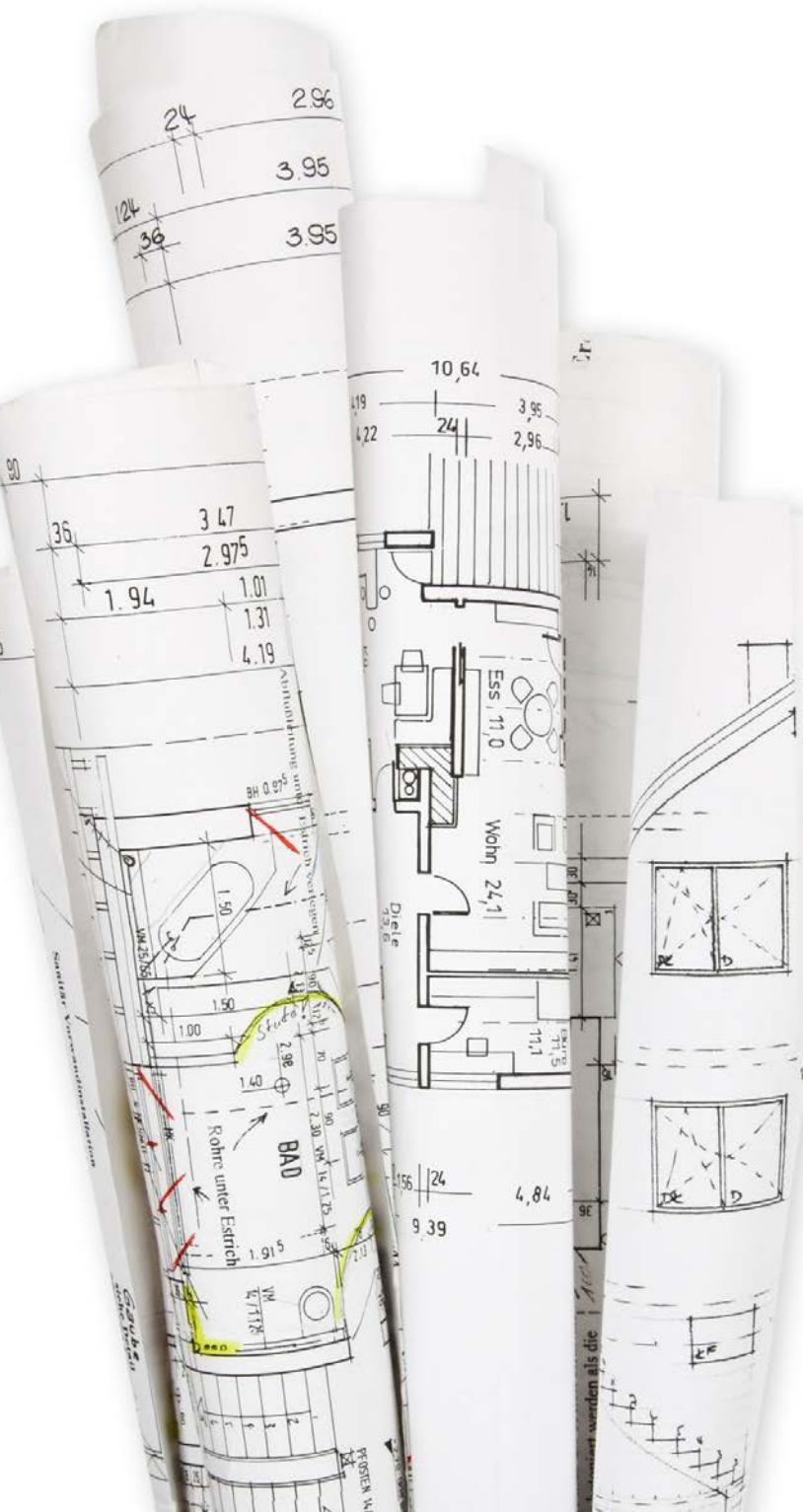
A slip-and-fall like this should be covered by insurance, right? Yes, it should be, as the insurance industry handles slip-and-falls on a daily basis. But because it may be unclear whether the fall was due to improper maintenance of the ramp by the building owner or due to the architect's negligent design of the ramp, it is likewise unclear whether the claim should be handled by the Owner's commercial general liability policy or by the A&E's professional liability policy, or both.

DUTY TO DEFEND PROVISIONS

In the meantime, somebody has to respond to this slip-and-fall claim. Fortunately for the Owner, it required the inclusion of a “duty to defend and indemnify” clause in your contract. The purpose of this clause is to protect the Owner against any claims brought by third parties that arise out of your negligence in the design of the building. This clause places the burden on you to pay the cost of the Owner's attorney fees in defending itself against the third party's claims.

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During the negotiation of the contract with the Owner, you asked your insurance broker how such a provision would be handled by your professional liability carrier. You were reminded that while you are covered for a reasonable indemnity obligation arising from your negligence, your coverage will not include your obligation to defend your client.

How can this be? Insurance companies handle slip-and-falls all of the time. Why are they not able to cover this exposure?

NO INSURANCE SOLUTION

There are basically two reasons why this exposure is not covered under the typical A&E professional liability policy. First, the claimant is suing the Owner and not you and the Owner cannot be included as an additional insured under your professional liability policy. Second, your professional liability policy contains a “contractual liability exclusion” which typically states that there will be no coverage for “any liability assumed by any Insured (the A&E) under any contract or agreement unless such liability would have attached to the Insured in the absence of such contract or agreement”.

In addition, if you wanted to look to your commercial general liability policy for coverage, you would be disappointed there as well. Although the standard Commercial General Liability policy provides coverage for an “insured contract” which provides coverage to an insured for “that part of any other contract or agreement pertaining to your business.... under which you assume the tort liability or for another party to pay for “bodily injury” or “property damage” to a third person or organization”, it may also contain an exclusion for Professional Services.

LEGISLATIVE SOLUTIONS

Therefore, during your contract negotiation, you tell the Owner that you cannot agree to a duty to defend the Owner because there is no insurance to provide coverage for that exposure. Many Owners respond simply by saying “if you don’t agree to it, the A&E down the street says that they will, and I will award the business to them”. Faced with the binary option of losing the work to a competitor you decide to assume the uninsured exposure and hope for the best.

You would not be alone as this scenario has been playing out for decades now, and as a result, you and your colleagues have had to swallow this exposure to win business from a certain percentage of Owners that are not willing to forego this duty to defend obligation. In particular, governmental entities have become particularly inflexible regarding these duty to defend provisions. Therefore, any A&Es that regularly negotiate contracts with governmental entities are very aware of the duty to defend exposure that they have been forced to absorb.

SIMPLY DON'T AGREE!

Seeing that no real solutions were available, many A&E trade associations attempted to have state legislatures solve the problem simply by making such duty to defend provisions against public policy and therefore unenforceable. Although there has been limited success in some states such as California and Georgia in this regard, most states have not agreed to declare such duty to defend obligations illegal. Even in those states where some legislative progress has been made, they do not declare that such duty to defend provisions are illegal if the A&E is in fact negligent. They will allow the provisions to work to the extent of the A&E’s negligence. And once again, since that cannot be readily determined in these situations, these new statutes do not alleviate the A&E from having upfront and immediate duty to defend an Owner from a third party claim.



THE CONTRACTUAL DEFENSE PROTECTION POLICY

Founders Specialty, Aspen Insurance and ae ProNet collaborated on developing a new approach. This resulted in creating a new insurance policy that works in conjunction with the typical A&E professional liability policy. Basically, the policy covers the duty to defend obligation that the A&E agreed to in their contract with the Owner. There is no deductible but instead the policy contains a coinsurance clause that splits the costs of defense on an 80%-20% basis whereby the insurer pays 80% of the costs and the insured pays the remaining 20%. The insured’s obligation however is capped on a per claim basis. The coinsurance amount is established by the size of the firm and is approximately 1% of revenues.

It is important to keep in mind that the retroactive date in the CDP policy applies not only to any act or omission that would result in a trigger to the duty to defend provision, but also applies to any contracts entered into prior to such date.

For additional information regarding the contractual defense policy, please contact DesignPro Insurance Group at 614-794-4820 or visit our website at: www.designproins.com DesignPro is your A&E ProNet exclusive broker in Ohio.

About the Author

Stephen S. van Wert is the President of Founders Specialty, a Managing General Agent based in Tampa, FL that specializes in the development of innovative insurance solutions for professionals. Stephen graduated with honors from Duke Law, and has held executive positions with Brown & Brown and Willis, before starting Founders Specialty in 2016.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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Mark your calendars for Eric's upcoming Continuing Education Programs:

Webinars:

Cleveland Engineering Society

November 28, 2018 – 11:30 a.m. to 12:30 p.m. 1 Credit Hour
Topic: Ethics in the Practice of Engineering, Part II

Conference Seminars:

Downtown Cincinnati – Hilton Netherland Plaza

35 West Fifth Street

Cincinnati, OH 45202

October 4, 2018 – 1:45 p.m. to 3:15 p.m. 1.5 Credit Hours

Topic: The Ethics & Law of Taking Property by Eminent Domain

AIA Ohio Toledo Convention

Renaissance Toledo Downtown Hotel

444 North Summit Street

Toledo, OH 43604

October 5, 2018 – 8:00 a.m. to 9:00 a.m. 1 Credit Hour

Topic: Small A/E Firm Practice & Risk Management, for the Small Firm
HSW Pending

October 5, 2018 – 10:45 a.m. to 12:15 p.m. 1½ Credit Hours

Topic: The Good, Bad, & Ugly in Construction Administration-Shop
Drawings, RFI's & Change Orders in the Various Project Delivery Methods
HSW Approved

Engineers Foundation of Ohio – Ohio Society of Professional Engineers

Bridgewater Banquet & Conference Center

10561 Sawmill Parkway

Powell, OH 43065

November 1, 2018 – 4:00 p.m. to 5:00 p.m. 1 Credit Hour

Topic: Ethics in the Practice of Engineering

THE FINISHED PROJECT

PICTURES AND STORIES OF OUR CUSTOMER'S PROJECTS

Do you have a completed project that proved to be challenging, exciting, unique, or has a special story behind it? If so, now is your time to share your story!

If you would like your project highlighted in our newsletter, please submit a brief summary and several photos to:

brad.designproins@wichert.com

FUN FACT:

The aurora borealis is more likely to occur in the fall.

Turn your eyes North to the aurora borealis. Also known as the Northern Lights, these geomagnetic storms occur when charged solar particles squeeze through our atmosphere's defenses and collide with gaseous particles in Earth's sky. Thanks to longer, clearer nights, this free light show occurs twice as often during fall and winter months.



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