

DEMYSTIFYING THE CLAIMS PROCESS



MASTER PLANNING FOR DESIGN PROFESSIONALS

MDSPE ANNUAL CONFERENCE
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Rogues' Gallery



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Agenda

- What is a Claim?
 - The Day-to-Day Issues – Is it a Claim?
 - Have You Received “Notice of a Claim”?
- Who Needs to Know About the Claim?
 - Carrier
 - Consultant(s)
 - Attorney
- Reporting the Claim
 - Notice of Claim to Your Insurance Carrier
- It’s a Claim. Now What?
- What Does the Insurance Policy say about:
 - Defined Terms
 - Insurer and Insured Duties and Responsibilities
- Working Towards an Acceptable Resolution
- Takeaways
- Questions?

What is a Claim?

Insurance Policy Definition:

“Claim means a demand for money or services, naming the Insured and alleging a wrongful act or pollution incident.”

- Will it cost more money?
- Is there a demand for services?
- Has a wrongful act or omission by you been raised?
- Is there the potential that it extend the project schedule?
- Was someone injured?
- Have you received a “Notice of Claim”?
- Did anyone raise the prospect of making a claim?
- Has a tolling agreement been requested?
 - [Note: Some Insurers define tolling agreement requests as a “claim”]

Notice of a Claim – Coverage Trigger

Insurance Policy Definition:

I. COVERAGE

A. INSURING AGREEMENTS

1. Professional Liability

The Insurer will pay all amounts in excess of the deductible up to the limit of liability that the **Insured** becomes legally obligated to pay because of a **claim** as a result of a **wrongful act** in the performance of **professional services**, provided that:

- a. on the **knowledge date**, none of the **Insured's** directors, officers, principals, partners, or insurance managers knew of any **wrongful act** that could reasonably be expected to become the basis of such **claim**; and
- b. such **claim** is first made against the **Insured** during the **policy year** and reported to the Insurer in accordance with section **VI, CONDITIONS**, paragraph **B.**, The **Insured's** Duties if There is a **Claim**. Except as set forth in the section **VI, CONDITIONS**, paragraph **C.**, The **Insured's** Rights and Duties In the Event of a **Circumstance**, a **claim** is considered first made on the earlier of the **Insured's** receipt of the **claim** or the Insurer's receipt of notice of the **claim**.

Insurance Policy - Defined Terms

- **Wrongful Act** means an act, error or omission that causes liability in the performance of **professional services** for others by the **Insured** or by any person or entity, including joint ventures, for which the **Insured** is liable.
- **Professional services** mean those services that the **Insured**, or any person or entity, including joint ventures, for whom the **Insured** is liable, performs for others on behalf of a **Named Insured** in the **Insured's** practice as an architect, engineer, interior designer, land surveyor, LEED® green building program consultant, landscape architect, construction manager, scientist, or technical consultant.
- **Circumstance (i.e., "potential claims")** means an event reported to the Insurer during the policy term from which the Insured reasonably expects that a claim could be made.

Insurance Policy - Defined Terms

- **Design defect** means a **wrongful act**, but does not include any actual or alleged negligence in the review of shop drawings and submittals, issuance of change orders, observation of construction or review of any contractors' requests for payment.
- **Design defect circumstance** means a **circumstance** arising out of a **design defect** for which the **Insured** has requested reimbursement of a **rectification expense** from the Insurer.

Policy Definitions - Continued

Insured means the **Named Insured**, a newly acquired subsidiary and:

1. any person who is or becomes a partner, officer, director, member, stockholder or employee of the **Named Insured** or newly acquired subsidiary during the **policy term**, but only while acting within the scope of their duties for the **Named Insured** or newly acquired subsidiary;
2. any person who is or becomes a leased or contracted personnel under the direct control and supervision of the **Named Insured** or newly acquired subsidiary during the **policy term**, but only while acting within the scope of their duties for the **Named Insured** or newly acquired subsidiary;
3. a retired partner, officer, director, member, stockholder or employee of the **Named Insured** or newly acquired subsidiary, but only for **professional services** or activities performed for or on behalf of, at the request of, and for the benefit of the **Named Insured** or newly acquired subsidiary; and
4. solely with respect to Insuring Agreement A.2., Pollution Incident Liability, any client or project owner for whom the **Named Insured** performs activities, provided that:
 - a. a written contract or agreement is in effect between the **Named Insured** and a client or project owner under which the **Named Insured** assumes the tort liability of the client or project owner to pay compensatory damages to a third party for a **pollution incident**;
 - b. such **pollution incident** is caused by the **Named Insured's** activities, or the activities of any person or entity for whom the **Named Insured** is liable; and
 - c. such written contract or agreement is executed prior to the **pollution incident**, and:
 - i. incorporates an enforceable indemnity provision pertinent to the **pollution incident**; or
 - ii. requires such client or project owner to be made an additional insured under the Policy that insures the **Named Insured** against **pollution incidents**.

For purposes of this definition only, "tort liability" means liability for a civil or private wrong imposed by law in the absence of any contract or agreement.

Policy Definitions - Continued

- **Named Insured** means the persons or entities identified on the Declarations as the Named Insured.
- **Knowledge date** means the date set forth on the Declarations as the Knowledge Date.
 - [Note: Knowledge Date means the effective date of the first Policy issued by the Company to the Named Insured and continuously renewed and maintained in effect to the inception of this Policy Period. A knowledge date on an insurance policy is the date that excludes coverage for any claims or situations that the insured knew about on that date. Knowledge dates are important when changing insurers because they require the insured to report any claims or potential claims to the previous insurer. If the insured answers "no" to the question about knowledge of incidents or errors on the new application, the carrier could deny coverage.]

POLICY TERM	KNOWLEDGE DATE
08/21/2020 to 08/21/2021 at 12:01 a.m. Standard Time at the Named Insured's address shown above.	08/21/2010
DEDUCTIBLE:	

Policy Definitions - Continued

- **Rectification expense** means reasonable and necessary fees, costs and expenses incurred by the Named Insured for rectification of a design defect caused by professional services in any part of the construction works or engineering works for any project upon which the Insured is responsible for design. Rectification expense does not include: overhead, mark-up, profit or any fee, charge, cost, or expense incurred by any Insured for materials supplied or services performed by any Insured.
- **Policy year** means the period of one year following the effective date of the policy term or any subsequent one-year anniversary thereof if the policy term is more than one year. As permitted by individual state law, a policy year may be extended or reduced by endorsement or by termination of the Policy.

Pre-Claim Assistance for Potential Claims

If there are indications of a potential claim/circumstance which may include a written or verbal accusations to make a claim, a realization that there may be some basis for professional negligence, or a claim filed against your client in connection with professional services you provided, pre-claim assistance is valuable. A potential claim is any conduct or circumstance that might reasonably be expected to be the basis of a claim, such as:

- A written or verbal threat to make a claim
- A subpoena for documents or testimony
- Your awareness of an actual or alleged error, even though no claim has been made
- When you feel sufficiently worried about a project that you believe a claim may result

You should report a potential claim to your insurer as soon as possible. At your insurer's discretion, they will provide pre-claim assistance. This is a free service that covers expenses incurred in the investigation of a potential claim and is not subject to a deductible. It may help prevent a potential claim from becoming a claim. It may also facilitate claim repair, mitigate claim exposures and help you to avoid the adverse publicity associated with litigating a claim.

It's a Claim. Now What?

Where to start:

- Preserve all documents referencing, referring to, bearing on the issue
- Contact your Insurance Broker to ensure the claim is reported promptly.
 - Determine the available policy coverage and for what claim(s)
- Initiate the claims process with your Insurance Carrier
 - Complete an ACORD Form Notice of Claim (or similar report if reporting through your insurance broker); or
 - submit a narrative report to your insurance carrier
 - most carrier websites have a "Report Claim" portal, *i.e.*,

AIG: <https://www.aig.com/home/claims/report-a-claim>

CNA: <https://www.cna.com/claims-center>

Lexington: <https://www.lexingtoninsurance.com/home/claims>

Travelers: <https://www.travelers.com/claims/file-claim>

[**NOTE:** If you have an Attorney, in reporting the Claim to your Insurer, state your preference for that Attorney to represent you. Carriers will often comply with that request.]

- Contact your Attorney and let them know that you have a claim and request they initiate the Claims Process with your Insurance Carrier

Online Claims Reporting (Exemplar – CNA)

CNA Industries Products & Solutions Risk Control Claims Center Find An Agent Agent Login

We're standing by.
Our highly experienced Claims service professionals are here to support you.

in X Print

Report a claim
Start here by entering a few details, and quickly learn your options.

SELECT CLAIM TYPE

Need more Help?
call: (877) 574-0540
M - F, 8 am - 8 pm (Eastern)

HELPFUL RESOURCES
Find supporting information to help you manage risk, get back to business quickly during an incident, and more.

ACORD

LIABILITY NOTICE OF OCCURRENCE / CLAIM

DATE (MM/DD/YYYY)

PRODUCER		INSURED LOCATION CODE	DATE OF LOSS AND TIME 12:00		AM PM
		CARRIER	NAIC CODE		
		POLICY NUMBER			
CONTACT NAME		LINE OF BUSINESS Professional Liability-A/E			
PHONE (A/C, No, Ext):					
FAX (A/C, No):					
E-MAIL ADDRESS:					
CODE:		SUBCODE:			
AGENCY CUSTOMER ID:					
INSURED					
NAME OF INSURED (First, Middle, Last)			INSURED'S MAILING ADDRESS		
DATE OF BIRTH	FEIN (if applicable)				
PRIMARY PHONE #	<input type="checkbox"/> HOME <input checked="" type="checkbox"/> BUS <input type="checkbox"/> CELL	SECONDARY PHONE #	<input type="checkbox"/> HOME <input type="checkbox"/> BUS <input type="checkbox"/> CELL	PRIMARY E-MAIL ADDRESS:	
				SECONDARY E-MAIL ADDRESS:	
CONTACT					
NAME OF CONTACT (First, Middle, Last)			CONTACT'S MAILING ADDRESS		
PRIMARY PHONE #	<input type="checkbox"/> HOME <input type="checkbox"/> BUS <input type="checkbox"/> CELL	SECONDARY PHONE #	<input type="checkbox"/> HOME <input type="checkbox"/> BUS <input type="checkbox"/> CELL	PRIMARY E-MAIL ADDRESS:	
				SECONDARY E-MAIL ADDRESS:	
OCCURRENCE					
LOCATION OF OCCURRENCE			POLICE OR FIRE DEPARTMENT CONTACTED		
STREET:			REPORT NUMBER		
CITY, STATE, ZIP:					
COUNTRY:					
DESCRIBE LOCATION OF OCCURRENCE IF NOT AT SPECIFIC STREET ADDRESS:					
DESCRIPTION OF OCCURRENCE (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)					
TYPE OF LIABILITY					
PREMISES: INSURED IS			TYPE OF PREMISES		
<input type="checkbox"/> OWNER	<input type="checkbox"/> TENANT				
OWNER'S NAME & ADDRESS (if not insured)			PRIMARY PHONE # <input type="checkbox"/> HOME <input type="checkbox"/> BUS <input type="checkbox"/> CELL		
			SECONDARY PHONE # <input type="checkbox"/> HOME <input type="checkbox"/> BUS <input type="checkbox"/> CELL		
			PRIMARY E-MAIL ADDRESS:		
			SECONDARY E-MAIL ADDRESS:		
PRODUCTS					
PRODUCTS: INSURED IS			TYPE OF PRODUCT		
<input type="checkbox"/> MANUFACTURER	<input type="checkbox"/> VENDOR				
MANUFACTURER'S NAME & ADDRESS (if not insured)			PRIMARY PHONE # <input type="checkbox"/> HOME <input type="checkbox"/> BUS <input type="checkbox"/> CELL		
			SECONDARY PHONE # <input type="checkbox"/> HOME <input type="checkbox"/> BUS <input type="checkbox"/> CELL		
			PRIMARY E-MAIL ADDRESS:		
			SECONDARY E-MAIL ADDRESS:		
WHERE CAN PRODUCT BE SEEN?					



It's a Claim. Now What? (Part 2)

- **Without Your Insurer's Consent Do Not:**
 - **make any payment,**
 - **admit any liability or fault,**
 - **assume any obligation,**
 - **incur any expense or**
 - **provide any rectification services.**

The lack of the Insurer's prior consent may result in such costs or services not being covered by the Policy.

It's a Claim. Now What? (Part 3)

Cooperation is a requirement of your policy. In the event of a claim you must:

Policy § VI. Conditions B. The Insured's Duties if There is a Claim

[. . .]

4. fully cooperate with the Insurer or the Insurer's designee in the defense of a claim, including but not limited to assisting the Insurer in: the conduct of suits or other proceedings, settlement negotiations, and the enforcement of any right of contribution or indemnity against another who may be liable to You. You shall attend hearings and trials and assist in securing evidence and obtaining the attendance of witnesses.

WHO ELSE MAY BE INVOLVED?

CONSULTANTS (and others)?

- Does the claim involve or implicate in any manner any work performed by a consulting or affiliated design professional?
 - Is the consulting or affiliated design professional in your chain of contractual privity?
 - Subdiscipline contracted by you
 - Lead designer to whom you are a subconsultant
- Does the Claim involve or implicate in any manner any delegated design work within the CONTRACTOR's scope?
- Does the Claim implicate Construction Directives or Changes that are Owner-Directed?
- Does the Claim arise from substitutions of specified material or equipment?
- Does the Claim result from force majeure or acts of god (such as a once-in-a-century pandemic)?
 - [NOTE: a "force majeure" occurrence is an unforeseen event outside of the design professional's control that makes it impossible or dangerous to perform them]


Insurance Company Reservation of Rights Letter

An insurance reservation of rights (ROR) letter is a notice from an insurance company to an insured that the insurance company may not cover a claim. The letter informs the insured of the insurance company's position on the claim, and it allows the insurance company to investigate the claim without waiving its right to deny coverage later.

An insurance company may send an ROR letter for a number of reasons, including:

- The insurance company has doubts about whether the policy covers the claim
- The claim may be incomplete or contain contradictory information
- The insurance company wants to gather more facts before deciding whether to deny coverage

The ROR letter is not the same as a denial, which is when the insurance company refuses to pay a claim. The insurance company may ultimately deny the claim, or they may decide to defend the insured against a claim made against them. In many cases, the insurance company fully defends and indemnifies the insured up to the limits of liability even after issuing a ROR letter.

- 
- Contact your attorney
 - Don't have an attorney?



The Role of Insurance-Assigned Counsel

- Insurance carriers have panel counsel pre-vetted with experience in design/construction issues
- Insurance-assigned counsel can only advise on the claim itself
- Insurance-assigned counsel is YOUR attorney, not the insurance company's
- Insurance-assigned counsel, also known as "litigation counsel," owes their duty to the design professional client
- Insurance-assigned counsel is required to provide regular reporting and updates to the carrier as a condition of maintaining coverage, keeping the carrier informed of developments, liability and exposure evaluation
- Any disputes between the design professional and the insurance carrier, such as the scope or extent of the insurance coverage available, must be addressed by the design professional through their insurance broker or through a separate coverage counsel retained by the design professional directly
- The design professional client is entitled to be copied on or participate in all communications between the carrier and insurance-assigned counsel

Know the Terms of Your Insurance Policy

- **What coverage applies?**
- **Professional Liability?**
- **General Liability?**
- **Who is covered?**
- **What are the Policy Limits of Liability?**
- **What is your Deductible or Self-Insured Retention?**
- **Are there any applicable exclusions to coverage?**
- **Is the policy an occurrence policy or claims made policy?**
- **Does the policy have a consent clause?**
- **Does the policy allow the design professional to designate their insurance-assigned defense counsel?**

Insurance Policy Limits of Liability

V. LIMITS OF LIABILITY/DEDUCTIBLE

A. Limits of Liability

1. Subject to paragraph 2. below, the limit of liability shown on the Declarations as the each claim Limit of Liability is the maximum the Insurer will pay for each claim first made against the Insured and reported to the Insurer during the policy year.
2. The limit of liability shown on the Declarations as the Aggregate Limit of Liability per policy year is the maximum the Insurer will pay for all claims first made against the Insured and reported to the Insurer during the policy year.
3. Subject to paragraph 4. below, the each design defect circumstance Limit of Liability shown on the Declarations is the maximum the Insurer will pay as reimbursement expense for each design defect circumstance reported by the Insured in accordance with the Section of the Policy entitled COVERAGE, the subsection entitled SUPPLEMENTAL INSURING AGREEMENT – RECTIFICATION EXPENSE. This limit is a sublimit of liability, which further reduces and in no way increases the applicable each claim and aggregate limits shown on the Declarations.

Insurance Policy Limits of Liability (Continued)

V. LIMITS OF LIABILITY/DEDUCTIBLE

A. Limits of Liability

[...]

4. The aggregate **design defect circumstance** Limit of Liability per policy year shown on the Declarations is the maximum the Insurer will pay as reimbursement expense for all **design defect circumstances** reported by the Insured in accordance with the Section of the Policy entitled COVERAGE, the subsection entitled SUPPLEMENTAL INSURING AGREEMENT – RECTIFICATION EXPENSE. This limit is a sublimit of liability, which further reduces and in no way increases the applicable aggregate limit shown on the Declarations.
5. All limits of liability set forth above apply on a policy year basis and are excess over any deductible amount. . . . If the limits of liability as specified above for any policy year are exhausted, the Insurer's obligation for that policy year shall be deemed completely fulfilled and extinguished.
6. All **related claims**, whenever made, shall be considered a single claim first made and reported to the Insurer on the date on which the earliest of the related claims was first made and reported to the Insurer.
7. **Claim expenses** are subject to and included within the applicable limit of liability.

Policy Definitions Redux – Claim Expenses

Claim expenses mean:

1. fees charged by an attorney designated or approved by the Insurer to represent the Insured;
2. all other fees, costs, and expenses resulting from the investigation, adjustment, defense, and appeal of a claim, if incurred by:
 - a. the designated attorney,
 - b. the Insurer, or
 - c. the Insured, with the Insurer's prior written consent; and
3. premiums for bonds posted in connection with an appeal. However, the Insurer is not obligated to apply for or furnish any such bonds.

Claim expenses do not include fees and expenses of independent adjusters or salaries of the Insurer's officials or employees, **other than fees and expenses charged by the Insurer's employed attorneys who may be designated to represent the Insured with the Insured's prior consent.**

Policy Definitions Redux – Related Claims

Related claims mean all claims made against the Insured and arising out of:

1. a single wrongful act or related wrongful acts that are logically or causally connected by any common fact, situation, event, transaction, advice, or decision;
2. a single design defect or related design defects that are logically or causally connected by any common fact, situation, event, transaction, advice, or decision; or
3. an activity or related activities that result in a single pollution incident or multiple pollution incidents that are logically or causally connected by any common fact, situation, event, transaction, advice, or decision.

Insurance Policy Limits of Liability (Declaration Page)

LIMITS OF LIABILITY:	
\$1,000,000	Each claim Limit of Liability (including claim expenses)
\$2,000,000	Aggregate Limit of Liability per policy year (including claim expenses)
\$1,000,000	Each design defect circumstance Limit of Liability
\$2,000,000	Aggregate design defect circumstance Limit of Liability per policy year
\$1,000,000	Each claim death or disability and non-practicing extended reporting period Limit of Liability (including claim expenses)
\$2,000,000	Aggregate death or disability and non-practicing extended reporting period Limit of Liability (including claim expenses)

Insurance Policy Deductible

B. Deductible

The Insured's obligation to pay up to the per claim Deductible amount shown on the Declarations and the aggregate Deductible per policy year shown on the Declarations, if any, including but not limited to claim expenses, shall apply to all Insuring Agreements and Supplemental Insuring Agreements under the Section of the Policy entitled COVERAGE.

DEDUCTIBLE:	
\$10,000	Purchased Deductible
\$2,500	Deductible Credit
\$7,500	Per claim Deductible (including claim expenses)
N/A	Aggregate Deductible per policy year (including claim expenses)
LIMITS OF LIABILITY:	

C. Reimbursement to the Insurer

If the Insurer has paid any amounts in excess of the applicable limit of liability, or within the amount of the Insured's deductible, the Insured shall be liable to the Insurer for all such amounts, and, upon demand, shall pay such amounts to the Insurer.

Insurance Policy Exclusions – Not Covered (Common Exclusions)

IV. EXCLUSIONS

The Insurer will not defend or pay under this Policy for any claim:

A. Claims by Insureds

brought by the Insured or on the Insured's behalf against another Insured covered by this Policy;

B. Contractual Liability arising out of:

1. the Insured's actual or alleged liability under any oral or written contract or agreement, including but not limited to **express warranties or guarantees**; or
2. **any actual or alleged liability of others that the Insured assumes under any oral or written contract or agreement.**

However, this exclusion shall not apply to the Insured's liability that exists in the absence of such contract or agreement.

In a foreign jurisdiction where the Insured's liability to a client is predicated only on contractual liability, subparagraph 1. of this exclusion does not apply except to the extent that the Insured has agreed to pay consequential or liquidated damages;

Insurance Policy Exclusions – Not Covered (Continued)

C. Faulty Workmanship

arising out of any actual or alleged cost to repair or replace faulty workmanship the Insured performs on any construction, erection, fabrication, installation, assembly, manufacture or remediation, including any materials, parts, or equipment furnished in connection therewith except that this exclusion does not apply to drilling, excavation, or other sampling or testing procedures or the supplying of furnishings as part of interior design services, necessary to perform professional services;

D. Liquidated Damages/Fines and Penalties/Money Due/Return of Fees

for liquidated damages in excess of the Insured's liability caused by a wrongful act or a pollution incident; for fines and penalties imposed on the Insured; or for the failure or refusal of a client to pay money due the Insured; or for return of fees paid to the Insured;

Insurance Policy Exclusions – Not Covered (Continued)

L. Intentional Acts

arising out of any actual or alleged dishonest, fraudulent, criminal, malicious act or omission or intentional wrongdoing by an Insured except that the Insurer shall provide the Insured with a defense of such claim unless or until the dishonest, fraudulent, criminal, malicious act or omission or intentional wrongdoing has been determined by any trial verdict, court ruling, regulatory ruling or legal admission, whether appealed or not. Such defense will not waive any of the Insurer's rights under this Policy. Criminal proceedings are not covered under this Policy regardless of the allegations made against any Insured.

Working Towards an Acceptable Resolution

Considerations:

- Is the Claim asserted by a Developer / Owner / Contractor with whom you have an established professional relationship you wish to retain?
- Is it a design defect?
 - Are any construction defects / failure to follow drawings implicated?
 - Are Owner-directed changes implicated?
 - Is it a delegated design issue?
- Is a negotiated, amicable resolution possible?
- If insurance funds are implicated in paying to achieve a resolution, what impact will that have on your insurance premiums?



Insurance Policy “Consent” Provisions

C. DEFENSE AND SETTLEMENT

1. The Insurer has the right and duty to defend any claim against the Insured seeking amounts that are payable under the terms of this Policy, even if any of the allegations of the claim are groundless, false or fraudulent. The Insurer will designate or, at its option, approve counsel to defend the claim. The Insurer is not obligated to defend any claim or pay any amounts after the applicable limit of liability has been exhausted.
- 2. The Insurer will not settle any claim without the informed consent of the first Named Insured.**

Claims Process Takeaways

- **If it's a Demand for Money or Services, it's a Claim**
- **Timely Report the Claim to Your Insurance Carrier**
- **Preserve all Project Documents / Records**
- **Work with Your Insurance Broker to understand Your Insurance Policy Terms, Conditions, Rights, Duties, Deductible, Exclusions and Limits of Liability**
- **Work with Your Attorney and the Insurance Carrier to achieve an acceptable resolution**



Questions?