Welcome to Beazley!

Thank you for choosing Beazley as your professional liability insurer. We are committed to providing you fast and comprehensive service and we look forward to building a relationship with you.

If you need to report a claim, know you are in good hands. We pride ourselves on our claims service. Our Architects & Engineers team consists of knowledgeable and skilled professionals and lawyers with years of experience handling A&E claims. Depending on your situation, we will assign one or more individuals to your case. They will work with you to develop and execute a strategy to reach the quickest and best possible resolution.

Beazley Insurance Company, Inc.

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Farmington, CT 06032
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Fax (860) 679 0247

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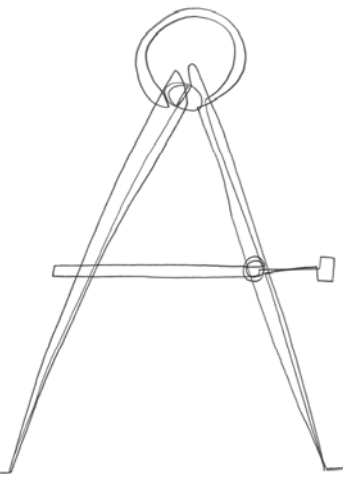
In the event you need to contact our claims team, please refer to the Declaration Page of your policy. Here we describe how and where to report your claim or circumstance. Within 24 hours an experienced attorney will contact you and begin working on your claim.

I also want to take this opportunity to remind you of our risk management website, www.beazley.com/AandE. Log-on with the first six digits of your policy number, found on the Declaration Page of your policy, to access archived copies of our webinars and a library of our *A&E Reporters*, as well as product information, forms, and underwriting and claims contacts. Regular updates include overviews of laws affecting A&Es in all 50 states, risk management and best practices articles, contract resources, and developments in the A&E and construction industries.

We continually strive to provide the highest standards of service and thank you again for choosing Beazley.

Kind Regards,

Andrew Horton
President
Beazley Insurance Company, Inc.



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Beazley Webinars and A&E Reporter Enrollment Form

Dear Policyholder:

Thank you for using Beazley for your professional liability insurance.

We are pleased to offer you our complimentary services of Beazley risk management webinars and our quarterly risk management newsletter, Beazley A&E Reporter.
If you would like to receive the newsletter or webinar invitations on a regular basis, please provide your email address to us by sending a short e-mail to **straightanswers@beazley.com**.

James K. Schwartz

Individual's Name	Firm Name	Email address

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A&E Reporter

Volume 6, Issue 3 – October 2011

Successful A&E Firms: How They Do It and How You Can Too!

by Colleen M. Palmer, Esq.

All companies want to succeed. After all, no one ever started a company with the goal of losing money and having to defend claims that the company's services were not up to snuff. But there is a big difference between dreaming of success and achieving it. So how do A&E firms become successful and, equally important, maintain that success? Success requires knowledgeable staff with the experience to perform the required professional services, but long term success demands more than technical proficiency.

Regardless of their area of expertise, highly successful A&E firms that consistently have superior claims history as compared to their peers have one trait in common: they all have robust risk management programs that are applied consistently. Successful firms do not necessarily strive to be completely risk averse; however, they carefully contemplate the risk vs. reward balance for the projects they take on and the clients with whom they work.

"Profit is the result of risks wisely selected."
–Frederick Barnard Hawley

An effective risk management program has three main prongs: 1. a corporate culture that consistently emphasizes risk management; 2. careful client and project selection; and 3. robust project specific risk management practices (such as contract negotiation and project management).

Creating a culture of risk management:

Open communication is critical to foster a risk management culture and the risk management message can be disseminated in a variety of ways. Management should embrace and stress the importance of risk management to emphasize that all levels of employees are expected to partake in the risk management process. There is no "one size fits all" and firms should tailor their program to suit their specific needs, but here are a few tips to help create a firm culture of risk management:

- Schedule regular lunch-and-learn sessions with an invited guest to lead a specific topic of discussion or more informal sessions among employees to promote internal communication, which can be especially valuable for junior employees. This type of relaxed setting encourages employees to discuss issues of concern, such as contracts and the risks associated with unfavorable contract terms.
- Establish a suggestion box and encourage all levels of

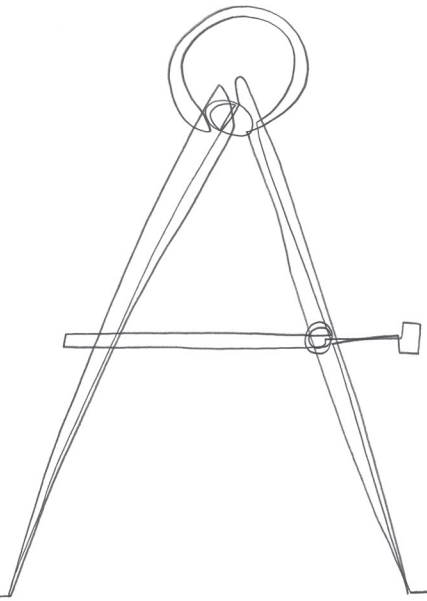
Current Developments in A&E Law

Beazley Funded Writ of Mandamus Results in Positive Ruling for Design Professionals in Nevada

We are pleased to announce that the Nevada Supreme Court recently issued a favorable decision for design professionals requiring claimants to file certificates of merit as required by N.R.S 11.258. *OTAK Nevada, LLC v. Eighth Judicial District Court*, 127 Nev. Adv. Op. 53 (2011). In actions against design professionals in non-residential construction cases (including suits filed by third-parties), Nevada statutes provide that the claimant's attorney "shall file an affidavit with the court concurrently" with the service of the first pleading stating that the attorney: 1. has reviewed the facts of the case; 2. has consulted with an expert; 3. reasonably believes the expert is knowledgeable in the relevant discipline involved in the action; and 4. has concluded that the action has a reasonable basis in law and fact. N.R.S. 11.258(1).

The claimant's attorney "must" attach a report to the affidavit prepared by an expert licensed in professional engineering, land surveying, architecture or landscape architecture stating that the expert is experienced in the discipline which is the subject of the report and that the expert has concluded there is a reasonable basis for filing the action. N.R.S. 11.258(3). Notably, N.R.S. 11.259 provides that the court "shall dismiss" an action if the claimant's attorney fails to comply with the requirements of N.R.S. 11.258.

In this case, the general contractor filed a third-party complaint against the design professional without including an affidavit and expert report, so the design professional filed a motion to dismiss the complaint pursuant to N.R.S. 11.258. Unfortunately, the district court denied the design



employees to submit written ideas for firm improvement. Of course, if you take this on, you need to make sure the suggestion box does not become a black hole and you should designate a person or committee to follow up and respond to the submissions.

- Develop a formal mentor program whereby senior employees are tasked with transferring knowledge and training junior employees. As with many professions, graduate school may arm the graduates with technical skills, but new employees will need training to work in the field and learn what is appropriate at your specific firm. It's particularly important to allow junior employees time to gain the necessary skill sets to effectively communicate with clients.
- Make sure everyone knows that project and overall firm success is a team effort. Promoting an "all for one, one for all" mentality and encouraging open forum discussion so everyone is aware of brewing issues is a great way to harness the collective knowledge and experience of your group. Discussions may reveal that a new problem on a project for one employee is an issue that another employee has successfully addressed in the past.

Client and project selection:

Successful firms know that selecting the right client and project can make or break a firm and the allure of working on a new, exciting project must be tempered by sound risk management practices. Regardless of whether the project is pro-bono, for-profit, located in the United States, or internationally, successful firms rigorously investigate each new project and client. Keep these tips in mind:

- Make sure you have the skills required to perform the scope of services. Do not let your desire for work or the allure of an interesting project overpower an objective evaluation of your ability to provide the necessary services. Remember, inexperience combined with lack of knowledge leads to technical errors, which inevitably leads to claims.
- Listen to the client during initial meetings. A potential client will reveal valuable clues as to whether the client is the right fit for your company. Every interaction is an opportunity to gain insight into the client's goals and expectations, so if a client is unclear, get clarification so you can make an informed decision as to whether you want to work with that client.
- Look for red flags during the contract negotiation. Clients reveal their personalities during the contract negotiation phase and a client who is unreasonably difficult, presents a "take it or leave it" contract refusing to modify terms and conditions, or is unresponsive to your communication attempts is foreshadowing of the relationship. Likewise, a client who listens to the reasons you cannot accept certain provisions (such as broad indemnity obligations that are not based on your negligence) and is willing to negotiate the contract suggests the client will be reasonable during the project.
- You may need to read between the lines. If a client repeatedly tells you something in an attempt to reassure you, beware. For example, if a client states they "always

professional's motion and allowed the general contractor to file an amended pleading to attempt to cure its failure to comply with the statute.

Recognizing the importance of the protection afforded by N.R.S. 11.258, Beazley Group authorized and funded a writ of mandamus filed on behalf of the design professional. As an issue of first impression likely to recur, the Nevada Supreme Court accepted the writ petition to determine whether a construction design malpractice pleading is void *ab initio* if the statutorily required attorney affidavit and expert report are not filed with the court before the initial pleading is served.

The Nevada Supreme Court concluded that a complaint filed without the statutorily required attorney affidavit and expert report is void *ab initio* (meaning as if it never existed) and such a complaint cannot be amended because a void pleading does not legally exist. Further, the Court ruled that parties cannot rely on other parties' compliance with the statutes and each party that files a separate complaint must file its own expert report and attorney affidavit.

Based on the Court's decision, if a claimant files a complaint against a design professional without complying with N.R.S. 11.258, the trial court must dismiss the complaint and cannot allow the void complaint to be amended. The statutes do not prevent a claimant from filing a new complaint with a valid affidavit and expert report, but if any statutes of limitations have run in the interim, those claims would be time barred. Beazley would like to thank Weil & Drage, APC for its outstanding effort resulting in this fantastic result for design professionals.

"You Asked, We Answer!"

In this edition of "You Asked, We Answer!" we address specific questions regarding negotiating contractual indemnity provisions. We have long highlighted the risks to design professionals regarding language in the indemnity provision requiring the design professional to defend the client and the importance of ensuring the provision is negligence-based such that the indemnity obligation is limited "to the extent damages are caused by the design professional's negligence." Further, we have noted that design professionals who execute agreements governed by California law face special considerations based upon unfavorable decisions in the *Crawford v. Weather Shield* and *UDC v. CH2M Hill* cases. (See, the April 2010 and October 2010 editions of the *Beazley A&E Reporter* for a more robust discussion of our general recommendations for negotiating contractual indemnities and specific concerns regarding the duty to defend in California, respectively.)

Now more than ever, clients are requesting design professionals to agree to overly broad indemnity obligations and are refusing to modify these provisions. Clients are emboldened by the current economy and more inclined to have a "take it or leave it" attitude when it comes to contract negotiations. Nevertheless, it is important for design professionals to maintain diligent risk management practices to ensure their professional services agreements are acceptable (or, at a minimum, to fully understand the risks associated with onerously drafted provisions).

Further to the information outlined in the aforementioned

pay bills on time" it may, in fact, be a red flag that they do not pay in a timely fashion. Do more research and check with your peers to see if they have any information about working with this client.

- Trust your instincts. Beazley's claims handling history suggests that design professionals often have reservations about a client or project, but decide to proceed with the project despite their concerns. If your research of a potential project or client gives you pause or a "gut feeling" that you should not work with the client or take on the project, you should trust your instincts. As we have cautioned in the past, "the best project you may do is the one you turn down" often holds true.
- Nurture a new relationship. One important, but subtle, way you can encourage a new client relationship to thrive is by considering the interests of the firm's project managers and the client's project manager and pairing project managers with similar interests. This personal connection is valuable in the event an issue arises since human nature suggests it's easier to solve problems if you have a personal, not strictly professional, relationship.

Project specific risk management:

As suggested above, contract negotiation is critically important to the success of a project. We regularly address the risk management and professional liability implications associated with specific contract provisions in our Risk Management Webinars and on the A&E Risk Management Website (www.beazley.com/A&E), but remember these guidelines when negotiating your contract:

- Follow your review policy. Whether you use outside counsel, have an internal review team, or some combination thereof, successful firms have a contract review and negotiation policy in place that is consistently applied. Successful firms review every contract for every project, even if the contract is presented by a client with whom the firm regularly does business. Not only does this practice allow you to confirm or re-evaluate your position on terms and conditions, it ensures you discover any changes to the contract. Despite a good relationship and regardless of how many times you have executed an identical contract, the client is under no obligation to alert you to changes in a contract, and it's your obligation to thoroughly review it.
- Make sure the scope of services is detailed and defined. Beazley has long emphasized that effective negotiation starts with a careful review of the required scope of services to ensure it is well defined and that the parties agree upon the required services. A broad, undefined or open-ended scope requiring the firm to perform "any and all necessary services" will surely lead to disagreement about what the firm is required to do and how the firm will be compensated for that service.
- Some clients present special risks. Negotiating with public entities can be particularly difficult since they traditionally refuse to modify their contracts. If you accept a contract with unfavorable terms, you need to understand and attempt to mitigate the risks and assign an experienced team to the project; involve senior management early if there is an issue; maintain a good rapport with the client's

editions of the *A&E Reporters*, we address the following issues recently posed by design professionals:

- Indemnifying the client for our "breach of contract"
- Indemnifying the client for our "recklessness, wrongful acts, intentional misconduct, willful misconduct and gross negligence" and
- The importance of limiting the definition of "Indemnitees" (i.e., the parties the design professional will agree to indemnify) to the client, the client's employees, officers, and directors.

Indemnifying for breach of contract:

These days, clients are including "breach of contract" among the laundry list of circumstances under which the design professional is required to contractually assume a duty to indemnify. From a risk management and professional liability standpoint, language requiring the design professional to indemnify for its breach of contract creates a significant additional exposure. Arguably, most third-party claims will arise out of a performance-based issue by the design professional and will boil down to assertions that because the design professional breached the contract, the design professional failed to meet the applicable standard of care and was negligent, thus triggering the professional liability insurance policy. Further, from a business standpoint, asserting during contract negotiations that the design professional has no obligation to indemnify the client if it breaches (or certainly if it "materially breaches") its contract may not pass the "laugh test" and a design professional will be hard pressed to convince the client that it has no indemnity obligation to the client under a breach of contract scenario.

That being said, if a breach of contract claim does not arise out of the design professional's performance, the design professional's contractual obligation to indemnify the client for breach of contract may be beyond the coverage provided by a negligence-based professional liability insurance policy.

Indemnifying for intent-based actions:

It is critically important to ensure the indemnity provision is negligence-based. If the indemnity provision is not negligence-based, the design professional may be exposed to liability beyond that for which it is insured. Including language requiring the design professional to indemnify for its "recklessness, wrongful acts, intentional misconduct, willful misconduct and gross negligence" (or some combination thereof) potentially exposes a design professional to a liability beyond that for which it is insured.

These words are problematic because they have an element of intent and are not negligence-based. Deleting language requiring the design professional to indemnify for its "gross negligence" may be particularly troublesome since "negligence" is referenced, but keep in mind that Black's Law Dictionary defines "gross negligence" as the "intentional failure to perform" a duty, thus clearly establishing an element of intent which is beyond coverage contemplated by professional liability insurance.

Limiting the definition of "Indemnitees":

It is prudent for design professionals to limit the indemnified parties to the design professional's client, and the client's employees, officers, and directors. We typically

project manager by communicating early and often; and proactively address issues if they do arise.

- Remain vigilant to keep the project on track and minimize the risk of claims, even if the contract includes favorable terms. Successful firms stress the importance of timely and effective communication with the client, in conjunction with extensive documentation, to maintain project clarity and address issues as soon as they arise.

Conclusion:

Being a highly successful firm is no accident. With hard work, these firms institute and embrace detailed risk management practices that are consistently applied firm wide by all employees. The firms diligently weigh the risks associated with each client and project and devote appropriate resources to negotiate their professional services agreements. It's not easy to develop and stick to your risk management practices, but if you do, you're on your way to becoming, and staying, successful.

How did your firm become successful? Send your tips & contact information to straightanswers@beazley.com and the winner will receive a **$50 AMEX gift card and we will publish your tips in the next newsletter.**

Event Updates

Industry conferences

November 2 – 4: Professional Liability Underwriting Society (PLUS)
PLUS 2011 International Conference
San Diego, CA

November 13 – 17: International Risk Management Institute, Inc. (IRMI)
IRMI 31st Construction Risk Conference
San Diego, CA

Once again, Beazley took part in the annual ACEC 2011 Fall Conference, held October 19-21 in Las Vegas. Many ACEC members stopped by booth 204 for a chat with Beazley representatives and for a chance to enter our drawing for a table DVD player. Congratulations to our winner!

What's New in the Webinar World?

Beazley conducts quarterly risk management webinars for its insureds. The next topic is **Building Information Modeling**. Please join us on **Thursday, December 8, 2011** for that program. To be added to our invitee list, send your contact information including email to straightanswers@beazley.com.

Our September webinar presenters reviewed the difference between contractual ownership and copyright and explained that owning design documents is not the same as owning a design's copyright. To view the archived presentation, please log on to the risk management site.

All issues of the *Beazley A&E Reporter* may be accessed on our A&E Risk Management Website at www.beazley.com/A&E in the *A&E Reporter* Library section. The Website also contains valuable information regarding the AIA contract documents and our recommended modifications, archived Beazley webinars, state laws affecting A&Es, and other valuable information design professionals need to know.

delete broad and undefined terms such as the client's "agents"; "attorneys"; "insurers"; "parent company"; "subsidiaries"; "related and affiliated companies"; "assigns"; "lenders"; "contractors"; and "subcontractors" from the "Indemnitees" definition since it may be impossible to determine with any degree of certainty who would fall into those categories at the time of contract negotiations.

Jurisdictions vary in their interpretation of whether a design professional owes a duty of care to another party with whom the design professional has no contract, based in large part on the application of the economic loss doctrine, which is why design professionals commonly seek to negotiate language in the agreement expressly stating there are no third party beneficiaries. In addition to negotiating a "No Third Party Beneficiaries" provision, design professionals commonly seek to delete third parties (such as the client's contractors, consultants, lenders, insurers, attorneys, etc.) from the "Indemnitees" definition in any indemnity provision. These third parties are not directly part of the client entity and the design professional does not (and should not) owe them the same duties it owes its client with whom the design professional has a contract. In the event any of these third parties are damaged by the design professional (including damages caused by the design professional's negligence) they can seek remedies to the extent any remedies are available at law.

By specifically including third parties in the "Indemnitees" definition, these parties may establish a third-party beneficiary status, at least with respect to the indemnity provision. In fact, lately we have seen "Third Party Beneficiaries" provisions in agreements that have language along the lines of, "Except with respect to the indemnity obligations, there are no third party beneficiaries to this agreement." By including the third parties in the "Indemnitees" definition in the indemnity provision, combined with the Third Party Beneficiary language as noted above, any protections afforded under the economic loss doctrine may be lost and the design professional could owe these parties an indemnity obligation. In the event the design professional is called upon to indemnify these third parties, there may be a coverage issue with the design professional's professional liability insurance because, absent the contract language, there may be no obligation for the design professional to indemnify those parties.

Feedback/Contact Information

We welcome your feedback on the *Beazley A&E Reporter*. Send us your comments, observations or future topic requests.

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