DISPUTES & CLAIMS

UNDERSTANDING THE CLAIMS PROCESS



VICTOR

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MANAGING CLAIMS AND INCIDENTS

Professionals who have had a lawsuit filed against them say that they would have been less anxious if they had known more about what to expect during the claim handling process. By familiarizing yourself with the sequence of events in a typical claim, you can reduce the common feeling of being caught in a confusing process. This will help you obtain a greater sense of control, and reduce the stress of a claim and its impact on your professional life.

Preventing disputes begins at the outset of the firm's relationship with the client. Disputes with clients are the greatest source of claims. From 2011 – 2020, just under two-thirds (61.9%) of all claims against Victor and CNA-insured firms came from clients, and they resulted in roughly two-thirds (66.3%) of the costs to the program.

There are many causes of claims. Most result from communication or managerial issues, or contractual misunderstandings. Many claims have merit; harm was caused by the negligence of the firm. Other claims, however, may seem meritless. Firms often are dragged into claims because of events beyond their scope of control or responsibility.

Now is the time to obtain a greater sense of control, and reduce the stress of a claim and its impact on your professional life.



ANTICIPATING A CLAIM

The first indication that a professional liability claim might be made against your firm often comes long before an official demand for money or services alleging your negligence. Warning signs often include a client's dissatisfaction with services provided, or refusal to pay for services. If something unexpected or unusual occurs during a project, early investigation can determine if there is potential liability exposure. Requests that result in providing documents, or testifying on a client's behalf, or contact by an attorney regarding your services for a client are indications that you may be the target of a claim.
The ability to sense a potential claim usually develops with experience.

If you suspect that a claim might be filed, contact Victor. The earlier a potential claim is identified and reported, the better the chances of reducing the risk of an actual claim. Prompt notice also can help minimize the possibility of coverage issues. Whether a formal claim is filed, or an incident indicates that you might be involved in a claim, it is important to work with knowledgeable and experienced people to help deal with the issues raised.



USING THE PRE-CLAIM ASSISTANCE PROCESS

Disputes happen. Dissatisfied clients, construction firms with cost recovery programs, injured third parties, and other claimants often try to tap into the insurance and financial assets of firms to solve real or perceived problems.

CNA encourages policyholders to report any circumstance or incident that could lead to a claim so that CNA claim professionals can work with you to try to head off potential claims and litigation.

At the first indication of a problem, you should discuss the situation with your broker and contact your Victor underwriter. You also may want to contact, at your expense, your firm's counsel. Once we have been notified, we will take appropriate steps to try to determine the extent of the problem. A CNA claim professional will work with you to investigate, direct, monitor, and assess your situation.

When CNA decides that early assistance is desirable, the costs incurred in representing you in pre-claim situations are paid wholly by CNA. Costs associated with reporting a pre-claim or "circumstance" are not viewed as part of the loss experience during the underwriting process. An additional benefit of early reporting is that you lock in the limit of liability and deductible in force at the time the circumstance is reported should the incident later develop into a claim.

A "circumstance" is defined in the policy as "an event reported to the Insurer during the policy term from which the Insured reasonably expects that a claim could be made."

The pre-claim assistance program can be "preventative medicine" for disputes. You are encouraged to take advantage of the expertise of CNA's claim professionals, and the value of our pre-claim assistance program.

General claim categories

Technical errors

Design problems that have to be corrected and the harm they caused rectified.

Mangerial issues

Communication, documentation, and actions not meeting project requirements, fee disputes, and unmet expectations.

Changed conditions

Client or contractor financial concerns, site issues, regulatory changes, or other unanticipated events causing cost recovery efforts.

DEFENDING AGAINST CLAIMS



Your professional liability insurance policy is a contract that covers you for wrongful acts in the performance of your professional services. As your insurer, CNA has two separate obligations to your firm: 1) to defend you; and 2) to pay any judgment for which you are liable because of your failure to meet the professional standard of care for the services you provided. Of course, all of this is subject to the policy limits, and the deductible and all other terms, conditions, and exclusions of the insurance contract. Not every allegation made against a professional, however, leads to a professional liability claim, and not every claim that appears to be related to professional services is based on the duty of the firm to meet the applicable standard
of care.

It is imperative—and something that is required by the policy—that you cooperate in the handling of the claim. This includes refusing, except solely at your own cost, to voluntarily make any payment, admit liability, assume any obligation, or incur any expense without CNA's prior approval.

You may be served with formal legal documents related to a claim—a summons and complaint usually based on established terminology and precedents. A complaint is not proof of a wrongful act. In fact, complaints are often the result of a misunderstanding as to potential responsibility and liability. A complaint also could be part of a nuisance suit—a non-meritorious claim that is little more than an attempt to obtain money or recover costs.

The harsh and accusatory terms often used reflect the elements that must be established to prove negligence. The tone, language, and number of allegations may reflect an attempt by the plaintiff's attorney to induce a quick settlement. An attorney might also make an allegation unsupported by evidence to preserve the plaintiff's chance to sue on the basis of that allegation if later supported
by evidence.

As with any dispute, it is prudent to react to a claim by gathering all client records and project information. This includes organizing any notes or records, correspondence with the client or anyone else about the

project, and financial records, including all bills submitted for services rendered to the client. Never alter or destroy original records. The information should be accumulated in a separate claim file that includes all correspondence received from your attorney and from us—this information does not belong in the project file.

Some circumstances and claims are resolved with the assistance of legal counsel appointed by CNA. The attorney selected to represent a policyholder is experienced in construction law and professional liability defense. Most routinely attend our Annual Meeting of Invited Attorneys that provides intensive education on specific issues that affect the practices of design and construction-related firms. The attorney represents your interests and not those of the insurance company. Even though attorneys are formally retained and compensated by insurance companies, they are bound both legally and ethically to place their clients' interests first.

Reserving procedures

By law, once a claim is reported, an insurer must segregate or reserve funds anticipated to be required to resolve the claim. This requirement is intended to keep insurers solvent and to have the resources necessary to pay the obligations assumed under insurance contracts. The reporting of a circumstance that could lead to a claim, however, causes only a token reserve for expense-tracking purposes to be established. Once a claim is brought against you, your attorney will analyze the liability and damages issues presented and work with you and CNA to develop a resolution plan based on the facts and circumstances of your case, as well as applicable laws and procedures. CNA will establish a reserve as soon as reasonably possible based on this realistic sense of your potential exposure and a careful analysis of the value of the claim. From this, a strategy for resolving the claim can be established. When there is a better understanding of the projected cost of a claim against you, you can work with the claim professional to plan the appropriate defense strategy or settlement negotiations.

Proper reserving can help resolve claims more quickly, and helps to create a position of strength in negotiation. Finally, a realistic evaluation of the insurance cost of a claim provides firms with valuable information. Such information helps firms adapt practice techniques, contract language, and risk management procedures so that similar situations are less likely on future projects.

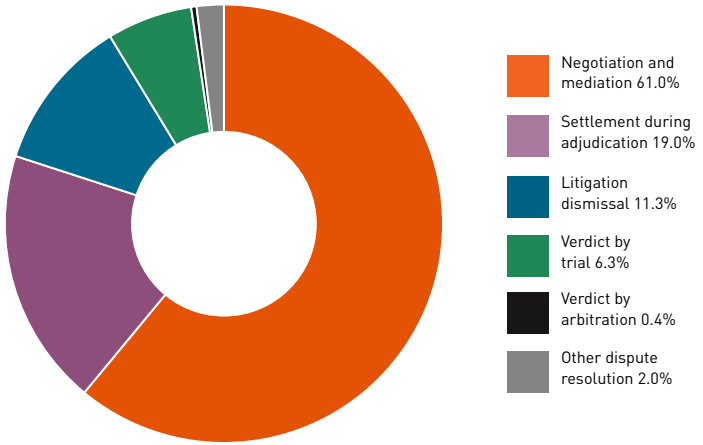


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FIGURE 1

Claims by dispute resolution method (2009 - 2018)



Reservation of rights letters

At times, allegations in a complaint against your firm might not be covered by your professional liability insurance policy. Depending on how a claim is worded, CNA may not be able to determine its obligation to pay on your behalf under your policy based on one or more specific allegations. When coverage questions arise as to specific allegations, CNA will notify you through use of a "reservations of rights" letter. If a reservation of rights letter is issued, CNA will continue to defend you until the coverage question is resolved. A reservation of rights letter may, in fact, cause the plaintiff to refine its allegations to limit your exposure, or to settle a claim when there might be multiple allegations that, even if proven by the plaintiff, would not result in a recovery.

You typically will not receive such a notice without first having discussed the matter with your claim professional. If you have questions about the reservation of rights, call your claim professional, and/or consult your personal counsel. While personal counsel may involve an expense, this added source of expertise can ease the burden of bearing these responsibilities on your own.

RESOLVING THE DISPUTE

Most disputes involving professional service firms are resolved through negotiated settlement or mediation. At times, usually because of contractual obligations, mandatory and binding arbitration between a client and professional is used. Each dispute resolution process has characteristics that may make it an effective way to deal with the facts and circumstances of a particular claim.

Mediation

Mediation is a process where an impartial facilitator actively assists the parties in clarifying issues of concern and reaching agreement on solutions for those issues. For mediation to work effectively, it is important that:

- the mediator be carefully selected on the basis of qualification, reputation, and knowledge in the design and construction process;
- representatives of the parties with authority to resolve the dispute directly and personally participate in person or by telephone in the mediation process; and
- the parties be willing to participate in the process in good faith and maintain an open mind with respect to the issues in question.

Arbitration

Arbitration provides an alternative form of adjudication. The parties agree, usually by contract, to have an arbitrator or panel of arbitrators rule on the merits of their claims. The parties must agree on the rules for selection of arbitrators and on the rules for the arbitration process. Organizations such as the American Arbitration Association (adr.org) have been created to provide standardized rules, a panel of prequalified construction industry arbitrators, and administration of the arbitration process.

Arbitration results in an award being determined. Arbitration awards are not self-effectuating; the parties have to enter the award into the record in an appropriate court to create an enforceable judgment.





Litigation

A lawsuit typically commences with the filing of a complaint or petition with a court by an allegedly harmed party—the plaintiff. A summons is then issued and served on the party who allegedly caused the harm—the defendant. In addition to identifying the defendant, the complaint presents the plaintiff's cause of action, which describes the facts from the plaintiff's point of view, identifies the theories of alleged liability, and states the damages claimed.

The defendant must respond to the complaint with a motion to dismiss or an answer, either admitting or denying the allegations, within a specified time period. Failure to respond in a timely manner may result in a default judgment in favor of the plaintiff. If the defendant also has a claim against the plaintiff, a counterclaim can be filed. Both the plaintiff's claim and the defendant's counterclaim will be subject to resolution in court.

If the defendant believes that the suit is based on the actions of a third party, the defendant may add that party as a third-party defendant. Alternatively, if the plaintiff initially filed suit against both parties, a cross-complaint could be filed against the co-defendant. Third-party complaints and cross-complaints typically seek indemnity and/or contribution to the potential verdict. In this context, indemnity means shifting the economic loss to the party responsible for that loss, and contribution means partial reimbursement from another party jointly responsible for the economic loss. At this point, the lawsuit would include all the parties necessary to resolve all the issues.

LITIGATING A CLAIM

Few professional liability claims are resolved through trial; many are resolved, however, because of the litigation process. The steps leading to a trial often lead to settlement.

Discovery process

After the complaint is filed, and the defendant or defendants have answered, filed counterclaims, third-party complaints, and/or cross-complaints, the process known as discovery usually begins. During this stage, attorneys for both sides investigate the facts of the lawsuit, the opinions of both parties, the opinions of experts, and the existence and contents of relevant documents. As a result, the discovery process substantially reduces the probability of surprises during trial.

Interrogatories, requests for production, and depositions

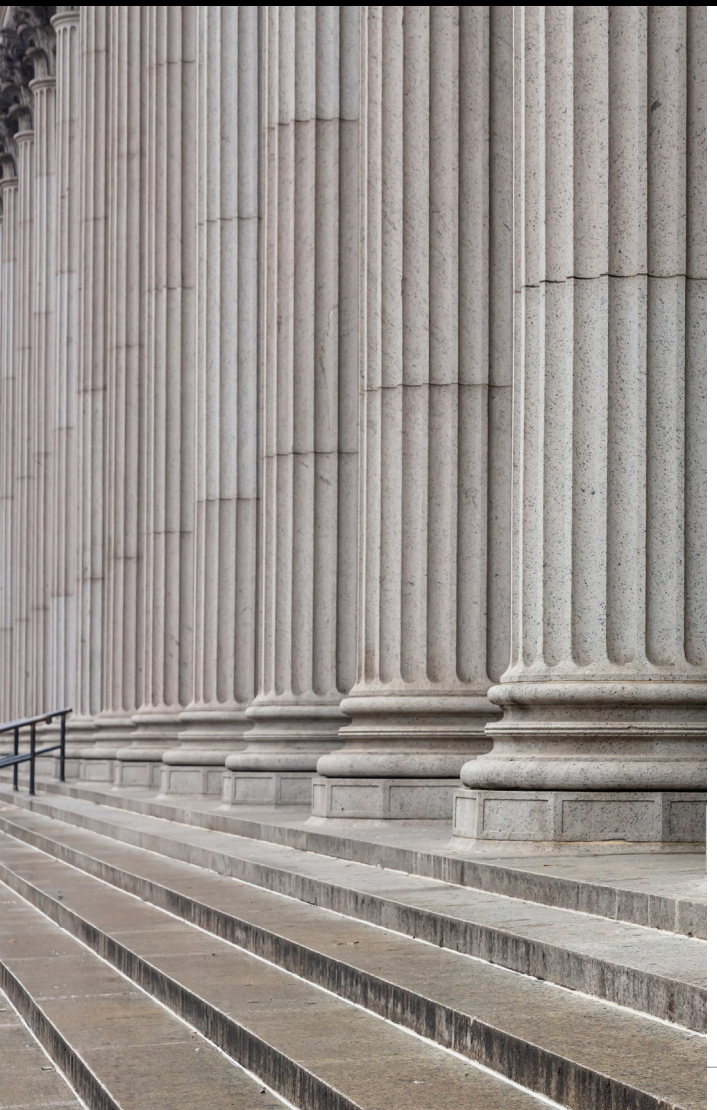
Discovery may begin with serving interrogatories, which are written questions submitted by one party to another.

Typically, the parties' attorneys draft interrogatories and answers to interrogatories, but the parties assist their attorneys with content, and must verify the facts contained in their answers. Your expertise and knowledge of the client and circumstances that led up to the complaint are the basis for interrogatories addressed to the plaintiff. In responding to interrogatories sent to you, it is important that answers are accurate and complete.

Interrogatories may be used as the basis for your deposition, or for cross-examination during trial. Your defense counsel will review your answers before they are subscribed and sworn to by you.

Another form of discovery is a request for the production of documents. This process allows each party to inspect and copy all of the documents and other tangible evidence relevant to the case.





Other discovery tools are depositions. The attorney for one party orally questions individuals who are believed to have knowledge of the facts involved in the suit. They answer these questions under oath while both questions and answers are recorded by a court reporter. Typically, the most expensive and time-consuming phase of a lawsuit, discovery can continue from a few months to many years depending on the jurisdiction; the court involved; the applicable procedural rules; the complexity of the case; the discretion of the judge to whom the case is assigned; the strategies and tactics of the parties; and whether the parties see expeditious litigation or delays to be in their interests.

Counsel will be present during all depositions to protect their client's interests. Depositions serve two purposes:

1. they allow parties to obtain information that will assist in the preparation of their case for trial, and
2. they lock in the deponent's testimony so that it can be later used to discredit or impeach the deponent as a witness at the trial if the testimony changes.

The deposition also is used to gather evidence not otherwise available through the discovery process. It allows parties to the case the opportunity to verify the accuracy of evidence and statements; to determine the credibility, knowledge, and demeanor of witnesses; and to identify witnesses, defendants, or experts. A deposition has the same weight as live testimony at trial.

As a named defendant, you have the right to attend any or all depositions in your case. It may be important for you to be present when the plaintiff is being deposed. Your presence might encourage more truthful responses, and may discourage the exaggeration of claimed damages. In addition, your attendance may be helpful when the plaintiff's expert witness is being deposed. The expert's critical opinions might be more tempered. And you might be able to assist your lawyer in formulating the most effective line of questioning. Depositions, although often physically and emotionally demanding and time consuming, move litigation toward a conclusion and end to your involvement.

During the course of your deposition, your lawyer might voice objections to some questions. In this situation, the objection is being made to protect your interests. The rules of discovery allow the plaintiff's attorney to question you in cross-examination style. You must be prepared to
respond appropriately.

Motions for dismissals

At some point prior to trial, defense attorneys often attempt to have the case against their clients dismissed through a motion for summary judgment. This is a request filed with the judge to dismiss the suit before trial because the case against that defendant is not supported by expert testimony, or does not present facts that constitute a legal basis sufficient to warrant disposition by trial. While it may seem clear to a defendant, for example, that there is no reasonable basis for the suit on either factual or legal grounds, the courts will generally not grant summary judgment if it is determined that there are disputed facts.

There might be a voluntary dismissal of the case by the plaintiff. This often occurs because the plaintiff is experiencing difficulties in obtaining expert testimony that supports the case. A case can be dismissed "without prejudice," meaning that the plaintiff has additional time and may refile the suit.

A defense motion might call for dismissal of the case for failure to comply with the court's order regarding discovery of experts, or by a motion for summary judgment that argues that the evidence obtained through discovery did not generate a material issue of fact regarding your liability. If either of these motions is granted, it is usually "with prejudice," meaning that the plaintiff cannot bring the same claim again in the future.

Settling a claim

During litigation, cases often settle through discussions among the parties. A settlement is essentially a compromise whereby the parties agree about their respective rights and obligations, thereby eliminating the need for an adjudicated resolution of the dispute.

Courts often forcefully facilitate settlements through court-supervised settlement conferences where attendance by the parties and their insurers is mandatory. When the parties agree to a settlement, a stipulation of dismissal is filed with the court. You should know that a settlement is not an admission of liability.



Risk mitigation credit



This credit offers eligible policyholders the option of receiving a deductible credit of up to $25,000 if they implement certain "best practices" in the engagement and performance of professional services. Firms with annual billings of less than $25 million are eligible and must have a written contract in place prior to performance of services giving rise to the claim. Detailed information on qualifying for the risk mitigation credit are available.

While in principle any unjustified claim should be thoroughly contested, it may become evident that there is considerable risk that what you might consider to be a meritless claim could result in a decision by a jury in favor of the plaintiff. Your attorney might feel that your case is not defensible because of poor documentation or lack of evidence or witnesses in your favor.

Usually, however, a settlement occurs because, after investigation, is it apparent that some degree of negligence is provable. A settlement might help you avoid loss of time, emotional turmoil, and the uncertainly involved in allowing the case to go to trial. You, with the advice of your defense counsel and your claim professional, may decide that settlement is in your best interests. CNA will not settle any claim without the policyholder's agreement.

Final resolution in court

If the case fails to settle, the legal process continues to either a bench trial, in which the judge is authorized to decide both the facts and the application of law, or to a jury trial, in which a jury renders a decision based on its perception of the credibility of the witnesses and information presented by the parties.

At the conclusion of the trial, a judgment is entered, which the prevailing party can enforce. Either side may have the option to appeal to an appellate court on the basis of alleged errors in the trial. Even when the appeal is successful in overturning an adverse verdict for legal or procedural reasons, however, the result may be a remand by the appellate court to the trial court to conduct additional hearings or an entirely new trial. It is not uncommon for more complex cases to be in the courts for many years before final disposition.

REPORTING A CLAIM OR CIRCUMSTANCE CHECKLIST

To maintain coverage for claims, they must be reported within the timeframe specified in your insurance policy.

1. Report a claim or circumstance by providing written notice via email to designclaims.us@victorinsurance.com.
2. All principals and staff members involved should be prepared to document the details of what led to the claim or circumstance. Your written report should include the following:
   - Your firm's name and address
   - Your policy number
   - Date, time, and location of the situation
   - Brief description of the allegation against you
   - Name of person or entity making the claim
   - Amount of demand, if known.
   - Gather and be prepared to provide:
   - Lawsuits or legal proceedings
   - Your professional services agreement for the project
   - Any other pertinent documents, including newspaper accounts, photos, etc.
3. If the claim or incident involves a traumatic situation (collapse of a structure or serious bodily injury, etc.), take photographs of the claim site if possible. Amateur photos taken promptly are more valuable than professional photos taken at a later date.
4. Consult with your CNA claim professional before you agree to attend any conferences arranged for the specific purpose of discussing the situation.
5. Do not sign or accept releases from any parties without first obtaining approval from your CNA claim professional.
6. Keep all pertinent letters of agreement for services, correspondence, and memoranda.
7. Accept all letters, memoranda, and suit papers without comment or argument. Do not admit liability and do not attempt to place blame.

About Victor

Victor Insurance Managers LLC is the world's largest managing general underwriter with locations in the US, Canada, UK, Netherlands, Germany, Italy, and Australia. It handles more than $2.5 billion USD in premium on behalf of numerous insurance carriers, through a large network of more than 25,000 active insurance agents and brokers. With deep, specialized underwriting expertise, the company provides a wide range of insurance coverage – from specialty property and casualty and professional liability insurance to group and retiree benefits. Victor is committed to building on 60-plus years of experience to develop products that address risk in new and evolving areas. For more information, visit victorinsurance.com.

Visit us at victorinsurance.com/risk-advisory to learn more.

This document is for illustrative purposes only and is not a contract. It is intended to provide a general overview of the program described. Please remember only the insurance policy can give actual terms, coverage, amounts, conditions and exclusions. Program availability and coverage are subject to individual underwriting criteria.

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