

# Between the Lines

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Insights From a Career Claims Professional



## Avoiding Coverage Issues When Admitting Responsibility

Here's the scenario: An issue arises during construction that originates from a design problem, and as a result, there will be an associated change order by the contractor. Although this situation has not given rise to a formal claim, the firm believes the costs associated with the change order are likely to be well within the standard of care or the professional liability deductible. The firm should be open with the owner about the issue. Firms need to proceed with caution to avoid potential coverage issues in the future. Making an admission, although it is frequently the right thing to do, has potential coverage risks which can be severe.

Most professional liability policies include a condition that says something to the effect of "as the policyholder you must refuse, except solely at the insured's own cost, to voluntarily make any payment, admit liability, assume any obligation, or incur any expense, without the insurer's prior written approval." In my experience, the design community is one that feels obligated to step up to the plate when a situation like this occurs.

**Advising the owner that you've made a mistake or agreeing to cover the costs can potentially cause future coverage issues, so it is a good idea to let your carrier know the situation before this discussion takes place.**

Suppose the firm reasonably believes these costs to be within the deductible, and feels an obligation to either credit the owner or pay the owner for the costs associated with the mistake. In this case, the firm may be able to avoid a problem in the future. If the cost is nominal, the carrier may feel that there is no obligation to reimburse the owner and can help guide the firm in explaining the standard of care. They can likely provide material that helps support that type of discussion with the owner. The carrier may also suggest language for an appropriate - and very limited release, which can often be accomplished informally. It may simply be an agreement about the scope of and cost

associated, as a broader release will likely not be acceptable to the owner.

Once this discussion has taken place, make certain that it is memorialized in an email to the file so that the firm has accomplished the "written approval" aspect of the admission condition. Even if the carrier believes the firm should refuse to pay the associated costs, they will likely agree to allow the admission of liability, which may be paramount to the relationship with the client and alleviate coverage issues should unexpected escalation occur.

Although the small amount of money generally involved in this situation may seem like hyperbolic advice at first blush, there are several advantages to reporting this situation to your professional liability carrier.

First, and most importantly, reporting the matter will protect the firm from potential uninsured risk. Situations can change in unexpected ways. A \$5,000 estimate from a contractor could result in a \$50,000 change order with delay language associated within, and if a critical path argument can be associated with that delay, you could suddenly be looking at a six-figure claim, for which there would be no coverage if the carrier were unaware before the admission.

Second, depending on the “related claim” language in the policy, which is generally extremely broad, the reporting of the matter may lock in the applicable policy period when this problem arises for other issues that may occur on the project. Other potential errors and omissions regarding the same contract and set of contract documents are likely related.

Third, it facilitates a relationship with your carrier to be established or strengthened on what will hopefully be an easily handled situation. Generally, under this scenario, an adjuster should be receptive to remaining “behind the scenes” so as not to remind the client of the insurance involved. However, their experience can be utilized as a tool

if needed. Be careful to let the carrier know that you do not believe that direct contact with your client will benefit the situation under the circumstances and be ready to explain. Keep an open mind and an open rapport with the carrier because that scenario could change as the project progresses.

Finally, reporting a matter that is resolved within your deductible, where a carrier doesn’t make a payment, should not affect your loss ratio, and therefore should not impact your coverage adversely. **Many carriers believe that an alert, proactive insured is the best insured to have in their risk portfolio.**

*Ames & Gough, as your insurance and risk management advisor, is providing this update to assist you in your risk management efforts. While insurance is a critical component of any risk management and risk financing plan, the most important thing your organization can do is to work to prevent or minimize losses before they occur. If you have any questions or need further information about this topic and related issues, please contact your Ames & Gough client executive.*

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Prior to joining Ames & Gough, Lauren had a distinguished career of nearly 35 years at CNA, where she held positions of increasing responsibility in claims and client management, culminating with her appointment in 2018 as A/E Platinum Accounts Director. For more than three decades she was directly responsible for handling architect and engineer errors and omissions (E&O) claims.