

# Between the Lines

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Insights From a Career Claims Professional



## The Impact of Catastrophe on Design

As the unfolding devastation caused by the earthquake in Turkey and Syria reminds us, catastrophic events can change the perspective of the world. Any time a natural disaster occurs, the design community should think about whether they should reconsider their design going forward.

How can design professionals be expected to respond to every earthquake, storm, flood, or any catastrophe that have become all too common now, but once were considered aberrations? More to the point, what might become their new – and possibly heightened – responsibility for the health, safety, and welfare of the public after a catastrophic event occurs?

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In the aftermath of the devastating earthquake that struck Haiti in 2010 an architect who traveled there to help with the country's reconstruction expressed his dismay that the majority of damaged and destroyed buildings were being rebuilt with a similar lack of reinforcement against seismic risk. Certainly, while building codes and responsibilities vary in different parts of the world, the United States is unique because of its unparalleled litigious environment.

Earthquakes have become more common in states where they previously hadn't been much of a consideration. I recall dining in Maryland on August 23, 2011 when a noticeable tremor caused the shelf and glasses to rattle. Being in the proximity of Washington, DC my first thought was of a possible bomb incident. Yet, in fact what we felt was a 5.8 magnitude earthquake that originated near Mineral, Virginia, and was felt as far north as Ottawa, Ontario.

The estimated damage approached \$300 million, and the incident required the inspection of numerous buildings before they were allowed be re-occupied. Although it was expected at the time that the codes would change and new USGS seismic maps of the entire U.S. were issued in 2014, local codes are frequently slower to react. Consequently, existing codes often remain largely unchanged.

Does the fact that the earthquake happened cause architects and engineers to have to consider the occurrence in their designs? The answer is yes; foreseeability of an issue has gone from speculative to actual and must be considered. If there have been recent incidents in the location of a project you are working on, check to make sure there have not been any recent code revisions, or that there are not any in the works which you should be considering.

What duty do designers have to design to a standard that predicts the future? In the current environment, plaintiffs' counsel have become more creative than ever at bringing negligence claims against design professionals; and, unfortunately, it is not difficult for them to find experts who will testify that the standard of care dictates that design professionals must take into account the current state of scientific knowledge – whether or not the codes have been modified.

Of course, it is impossible to design for all potential scenarios, and most owners will not be willing to add significant costs to exceed codes. Nonetheless, design firms should be aware of any current changes in their respective project locations and environment, and have relevant discussions with the owner along with recommendations following careful evaluation. Any recommendations should be documented and confirmed, and the decisions made memorialized in a contemporaneous written document.

When tragic events occur, courts will do whatever they can to keep as many individuals in the case as possible notwithstanding actual liability or responsibility; the more parties in the case, the greater the likelihood of settlement.

Although there is nothing that can be done to fully insulate your firms from exposure, some contractual clauses that can help are a waiver of subrogation, a no third-party beneficiary clause, and clauses that disclaim liability for contractor issues. The most important of these is a waiver of subrogation, as the losses frequently are insured – and courts are more likely to allow an insurance carrier to sustain a loss than they are individuals.

When it comes to situations that might involve catastrophic risk, design firms should consider everything, including their professional responsibility to the public, advise the owner carefully and responsibly, and meticulously document those discussions including the owner’s ultimate decisions. You may not be able to avoid a claim completely, but you will put yourself in a stronger position should one be made.

*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.*

**About the Author:** Lauren Rhodes Martin is a risk management and claims specialist focusing on the firm’s architect and engineer accounts. In her role, Lauren, who is based in the Ames & Gough Washington, DC office, works directly with the firm’s partners and client executives on all aspects of design firm clients’ risk management, including contract reviews, claims advocacy, loss prevention training and advice. 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.

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