

brought to you by:



Inside this issue

Prevailing Party Contract Clauses ... Page 1

Marketing That Works! ... Page 2

Reduce Your Flood & Water Damage Risk ... Page 3

HR That Works™ is a risk management tool designed to help you to avoid defending employee claims. Key products that come with HR That Works™ include:

- Personnel Forms
- Employment Law Compliance
- HR Audit
- Lawsuit Free
- Employee Handbook
- Employee Knowledge Survey

Contact PCIA immediately to learn more!

Prevailing Party Contract Clauses: Yes or No?

A “prevailing party” contract clause (also commonly called an attorney’s fee clause) is a contract provision that requires the loser of a lawsuit or claim to pay the winning party’s legal fees. In the absence of such a contractual provision, each party typically bears its own legal costs.

Prevailing party clauses can be unilateral (applied to only one party to the contract) or mutual (applied to both parties). A typical mutual prevailing party clause includes language such as:

In the event of any litigation arising from breach of this agreement, or the services provided under this agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred including staff time, court costs, attorneys fees, and all other related expenses incurred in such litigation.

Historically, many in the insurance industry and the legal professions recommended that mutual prevailing party clauses be included in design professional contracts. The logic was that such clauses make a client think twice before bringing a frivolous or otherwise questionable claim against a design firm. The prospect of paying the defendant’s legal bills in the event the plaintiff does not prevail makes a prospective plaintiff reconsider filing a lawsuit.

Prevailing party clauses were especially attractive from a design firm’s prospective when forced to sue a client for nonpayment of fees. The prospect of spending thousands of dollars in legal fees to collect receivables without the possibility of recovering legal costs caused many firms to

(Continued on page 2)

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN).

Visit our Website www.PCIAonline.com | Contact Us at 1.800.969.4041



Contract Clauses

(Continued from page 1)

throw up their hands, forget about recovering the fees and chalk the loss up to experience. With a prevailing party clause, a design firm is more apt to keep its resolve and fight for the fees it deserves.

Pros and Cons

Recently there has been much discussion as to whether or not a prevailing party clause is, in fact, in a design professional's best interest.



First, there is the fact that if your contract has such a clause and a court or other trier of fact finds you negligent as alleged, you have to pay the other party's legal expenses in addition to the damages you caused.

Making matters worse, this voluntary contractual assumption of liability for the other party's legal defense costs may not be

covered by your professional liability policy.

Professional liability insurance covers your legal liability arising out of your negligent acts, errors or omissions. However, it does *not* generally cover contractual assumptions of liability unless you would be legally liable in absence of the contract clause.

Because of this, the insurance industry remains divided on its opinion regarding the use of prevailing party clauses. Some companies continue to believe that these clauses effectively discourage frivolous claims. They encourage their usage and, for the most part, will cover prevailing parties' legal costs unless a unique circumstance prohibits it.

Other insurers see the clause as a double-edged sword and hedge their support of usage. They say they have had situations in which a

(Continued on page 3)

Marketing That Works!

*By Leslie Kusek, Marketing Consultant
248.722.4178 or Leslie@LMKconsulting.com*

Are you wondering..

- ∴ What kind of marketing should we do?
- ∴ How much should I be spending on marketing?
- ∴ Is my firm making the most out of our marketing investment?
- ∴ How can I help our staff stay up-to-date on best marketing practices?
- ∴ What can we do better to increase our revenue and profitability?

These are important questions. How you answer them has a big impact on your bottom line.

PCIA recognizes this, and is introducing a new tool — available exclusively to PCIA clients — Marketing That Works.

Marketing That Works is a training and coaching program that is structured to provide ongoing, layered learning, evaluation mechanisms and improvement practices. Best of all, you have the flexibility to choose what level of support is right for you.

If you feel like you are working harder to win less work at lower profits, maybe it's time to try Marketing That Works. This program is designed to empower you to impact your revenue and profitability from day one.

Interested in learning more? Contact Leslie Kusek at Leslie@LMKconsulting.com or 248.722.4178.

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN).

Visit our Website www.PCIAonline.com | Contact Us at 1.800.969.4041



Contract Clauses

(Continued from page 2)

prevailing party clause has been used to an insured's advantage, but warn that it can also result in significant costs should a plaintiff prevail against a design firm. They say a clause may or may not be covered by the professional liability insurance policy, depending on the specific language of the clause and the circumstances of the situation.

Other insurers are clearly against the prevailing party provision. In fact, they take the firm position that the contractual assumption of another's legal fees will not be covered under their PL insurance policies. While they acknowledge that prevailing party clauses can be a deterrent to a lawsuit, if the insured design firm is in fact the loser in a claim then the defense costs incurred by the plaintiff would be excluded contractual liabilities and uninsured as such. A liability assumed by contract that would not otherwise be a liability, they argue, would not be covered.

Interestingly attorneys who represent design firms are also split on the value of the prevailing party clause. Attorneys in favor of the clause say they recommend them because they discourage frivolous claims. More specifically, these attorneys say that without a prevailing party clause, a design firm typically cannot afford to pursue fee claims.

Attorneys opposed to the provision state they may be a trap for design professionals, actually encouraging owners to sue if they think they have a strong case. This is particularly true, they say, for large clients who can extend a substantial (and expensive)

(Continued on page 4)

Take Steps to Reduce Your Flood and Water Damage Risk

Water damage from naturally occurring floods and mechanical breakdowns cause extensive and catastrophic losses to homes every year. But there are numerous ways you can safeguard your home from these losses, including the following.

Your home's drainage system should be checked to verify that proper water drainage occurs. For example,

gutter downspouts should extend the proper distance from the foundation. Your yard should be properly



graded to slope away from your home to allow surface water to adequately drain. French drains can also assist in this process.

A sump pump system should be considered in your basement to keep unwanted water out of this vulnerable part of your home.

Periodically check your washing machine hoses since these hose failures cause millions of dollars of water losses each year. Hoses should be replaced at the first sign of wear. Consider upgrading to the heavy-duty wire mesh hoses or stainless steel hoses during this replacement.

Ascertain the location of your main water shutoff valve. Water shut-off valves should be installed on water lines under toilets and sinks and water lines leading to outside faucets.

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN).

Visit our Website www.PCIAonline.com | Contact Us at 1.800.969.4041



**PROFESSIONAL CONCEPTS
INSURANCE AGENCY**

Contract Clauses

(Continued from page 3)

effort to win their lawsuit. Plus, these attorneys recognize that prevailing party legal expenses are uninsurable under a growing number of professional liability policies. They contend that the “American Rule” is that parties bear their own attorneys’ fees in litigation and prevailing party clauses are far from typical. They argue these clauses can actually promote litigation when the proper thing for the parties to do is to work out their difficulties through alternative dispute resolution such as mediation.

Some attorneys who draft contracts for design professionals say they always discuss the pros and cons of a prevailing party clause. They advise clients that such a clause can deter a plaintiff from filing a claim out of fear of an award of attorneys’ fees. They remind their clients, however, that most claims settle before going to court and the settlement rarely includes a recovery for fees and costs.

Your Course of Action

So what should a design firm do if a client presents a contract with a prevailing party clause? If the clause is unilateral in favor of the client, ask that the clause be removed. Explain to the client that the clause is not only unfair since it is being imposed unilaterally, but it is likely uninsurable. Even if your insurance company agrees to cover the prevailing party legal costs at the time the contract is entered into, there is no guarantee these costs will be covered at the time a claim is made and reported. Remember: professional liability insurance is a claims-made and reported policy and the insurance that is in effect is the insurance in place when the claim is made and reported. At that time, your insurance company may have

Alternative Contract Clauses

The primary purpose of a prevailing party clause, most proponents claim, is to reduce the number of frivolous claims and protect innocent parties from having to pay huge legal fees to defend themselves. Fortunately, there are two other types of contract clauses that can better achieve these aims:

Certificate of merit clause. This clause requires that before a party to the contract can file a claim against the other party, it must obtain a written certificate from a qualified professional that such a claim has merit.

ADR provision. This contract clause requires that before a party can file a formal lawsuit against the other, it must first submit to an alternative dispute resolution (ADR) technique such as mediation or arbitration. Such a clause can dramatically lower the legal costs incurred by both parties to the claim and help reach an amicable resolution.

changed its policy toward prevailing party clauses or you may have a different insurer.

If the client refuses to remove the clause, then, at a minimum, design firms and their lawyers might try to negotiate a mutual prevailing party clause so that it applies to the client as well as the design firm. Also, your attorney may want to make sure that the clause specifies “reasonable” legal costs – otherwise, a client could pull out all the stops in mounting an extravagant claim and your design firm could be obligated to foot the entire legal bill. Some attorneys also recommend that the language specify that the

(Continued on page 5)

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN).

Visit our Website www.PCIAonline.com | Contact Us at 1.800.969.4041



**PROFESSIONAL CONCEPTS
INSURANCE AGENCY**

Contract Clauses

(Continued from page 4)

clause only applies to “breach of contract” matters, rather than broader language such as matters “arising out of” or “related to” the contract.

Should a design firm ever present a prevailing party contract clause to a client? As a general rule, such an action is not recommended unless there are extenuating circumstances that may call for one. For example, if a client is new to the design and construction process or has a less-than-stellar credit history, a design firm might want to negotiate a limited prevailing party clause in the contracts billing and collection provisions only. Such a clause would be limited to suits for fees, where such a clause makes it financially feasible to attempt to collect unpaid amounts. Such a clause might include language such as:

In the event legal action is required to enforce the payment terms of this agreement, the consultant shall be entitled to collect from the client any judgment or settlement sums due plus reasonable attorneys’ fees, court costs and other expenses incurred by the consultant for such collection action.

The inclusion or exclusion of a prevailing party clause – or any alternative clause intended to achieve similar objectives -- should be discussed thoroughly with your attorney. We welcome the chance to answer any related insurance questions that you might have.

The preceding article is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN).

Visit our Website www.PCIAonline.com | Contact Us at 1.800.969.4041



**PROFESSIONAL CONCEPTS
INSURANCE AGENCY**