



»» **Professional Liability –
The Basics**

Oswald Companies



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Focus Forward

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»» **Course Description**

Participants will learn common causes of claims and how they can be prevented or mitigated. Participants will explore current loss prevention issues and techniques that can be used in daily practice.

»» Learning Objectives

- Participants of this program will learn the key parts of liability insurance that protect not only the design professional but also the project owner and the public.
- Participants will gain knowledge of the professional liability insurance underwriting process and how premiums are calculated.
- Participants will be able to correlate how claims/contract provisions effect insurance premiums
- Participants will learn how certain design/construction contract provisions may compromise insurance coverage

»» **Agenda**

- Learn what is “Professional Liability” and the impact it has on your firm
- Claim statistics- how to avoid common claims
- Risk management tools and insurance
- Develop an action plan for your firm

»» **Setting the Stage with your Client**

- Don't oversell
- Educate client
- Expectation gap

»» Professional Standard of Care

- Standard of Care not black and white
- Standard of Care does not mean perfection

»» Negligence Defined

- Duty
- Breach of Duty
- Damages
- Proximate Cause
- Duty + Breach of Duty + Damages + Proximate Cause = Liability

»» Breach of Contract

- Contractual Obligation
 - Written
 - Oral or Assumed
- Breach of Contract
- Damages
- Breach of Contract + Damages = Liability

»» Discussion point: True or False?

- Claims upon design professionals which are without merit have little real impact.

»» The True Cost of a Problem

Cost of problem

Revenue needed to offset problem cost

- \$1,000 - \$20,000 (400 hours)
- \$10,000 - \$200,000 (4,000 hours)
- \$50,000 - \$1MM (20,000 hours)

assumes 5% pre tax profit



»» Claim Statistics

»» What percentage of claims actually go to trial?

- A. Approximately 5%
- B. Less than 10%
- C. 12-15%
- D. Approximately 25%
- E. Less than 50%

»» When Do Claims Happen?

Years from Substantial Completion of Project	Percentage of Claims	Cumulative Percentage
Prior To Completion	26.3%	26.3%
1 – 2 Years After	34.5%	60.8%
3 – 4 Years After	16.9%	77.7%
5 – 6 Years After	8.9%	86.5%
7 – 8 Years After	4.5%	91.0%
9 – 10 Years After	3.0%	94.0%
More than 10 Years After	6.0%	100.0%

»» Discussion Point: True or False?

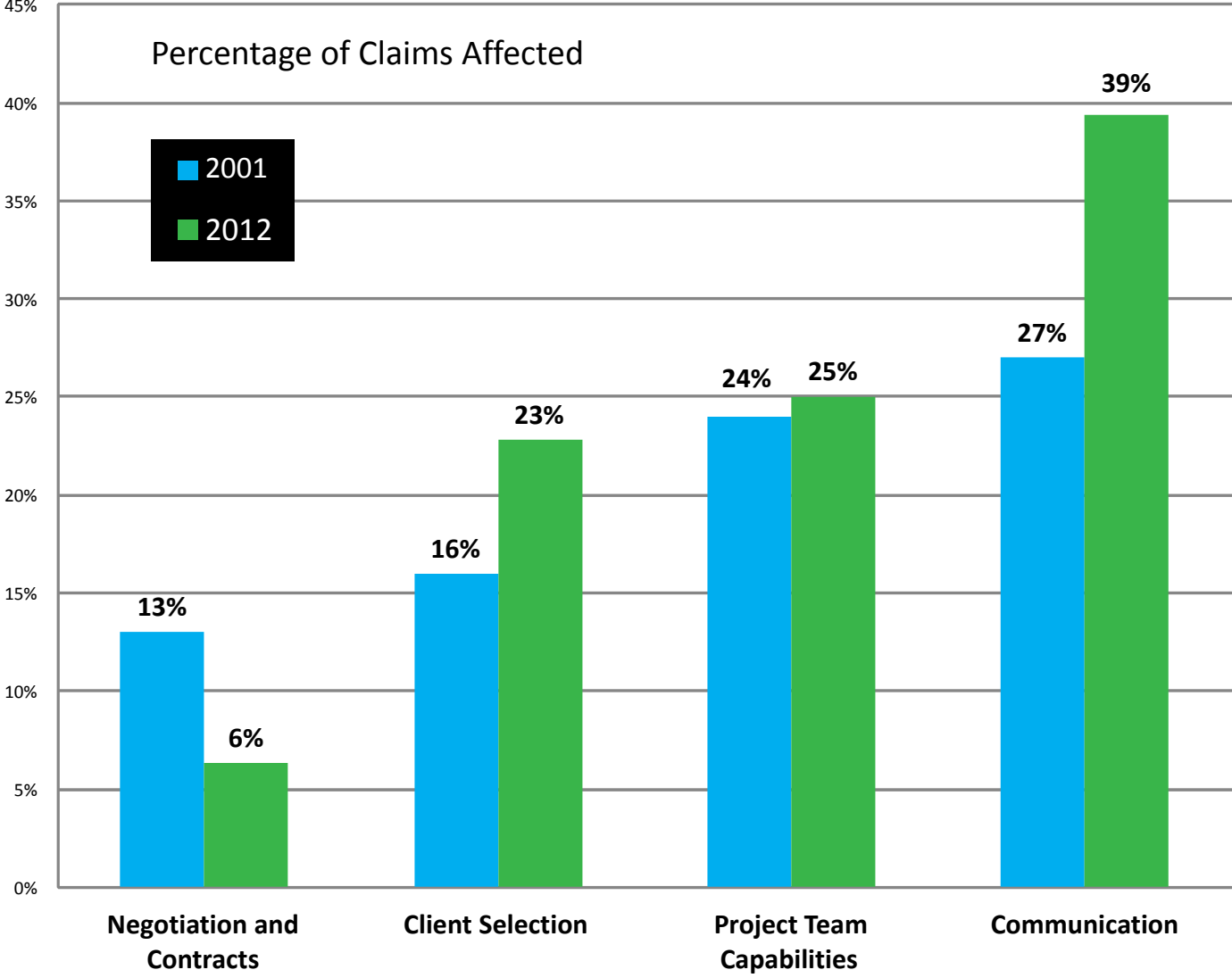
- Most claims against design professionals relate primarily to technical competence.

»» Classification of Causes

- Technical
 - Error and/or omission of a technical nature which resulted in a loss prevention file or claim
- Non-technical
 - Breakdown in project or practice management processes which contribute to a loss prevention file or claim being made

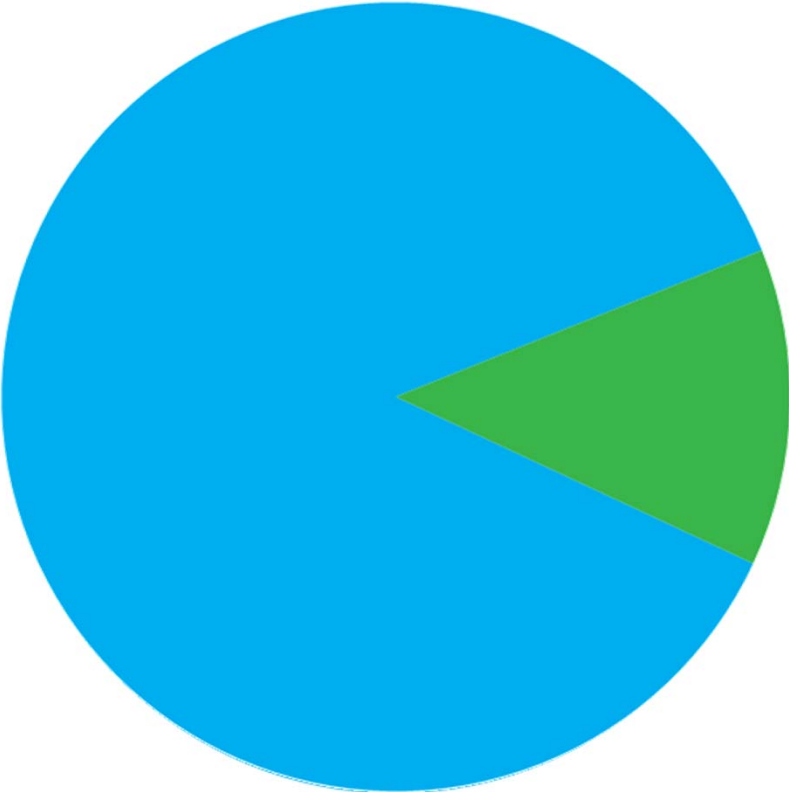


Top 4 Non-Technical Risk Drivers





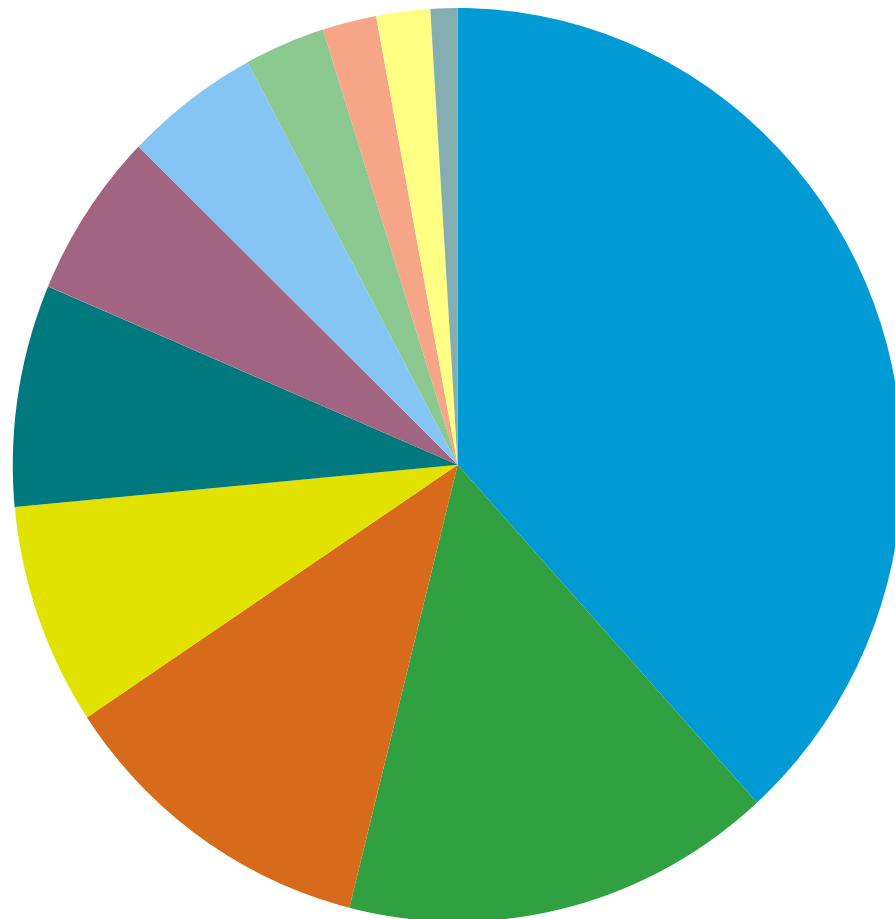
Negotiation and Contract Issues



- A primary factor in
 - 6% of claims count
 - 13% of claims dollars



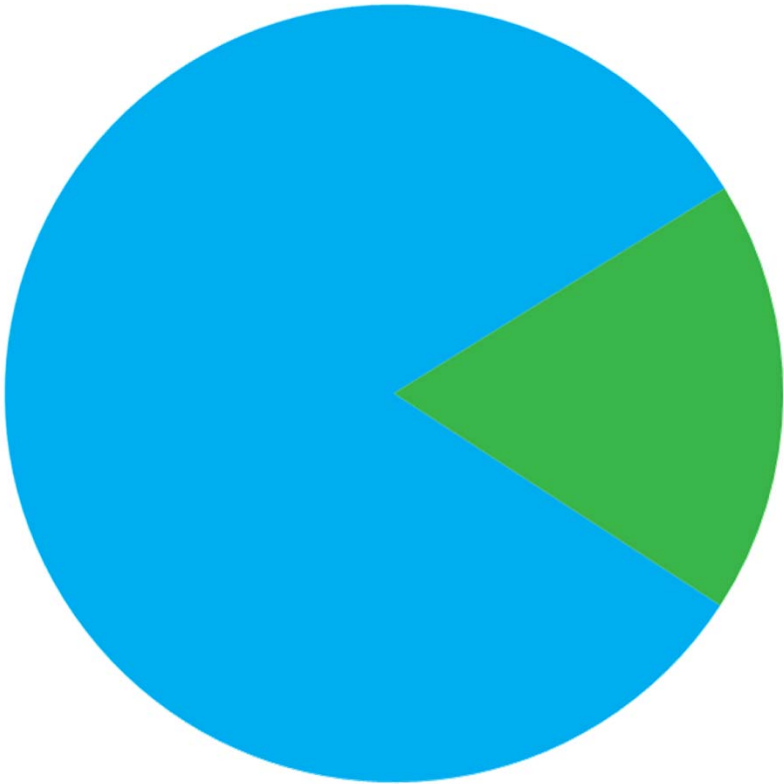
Negotiation and Contract Issues



- 38% - Unclear or inappropriate scope
- 16% - No formal project evaluation
- 12% - No contract before work started
- 8% - Lack of construction phase services
- 8% - Other
- 6% - Lack of mediation clause
- 5% - No contingency fund
- 3% - Deal Breakers in contract
- 2% - Client agreement not reviewed by lawyer
- 2% - Field staff didn't have/understand contract
- 1% - Client agreement not reviewed by senior management



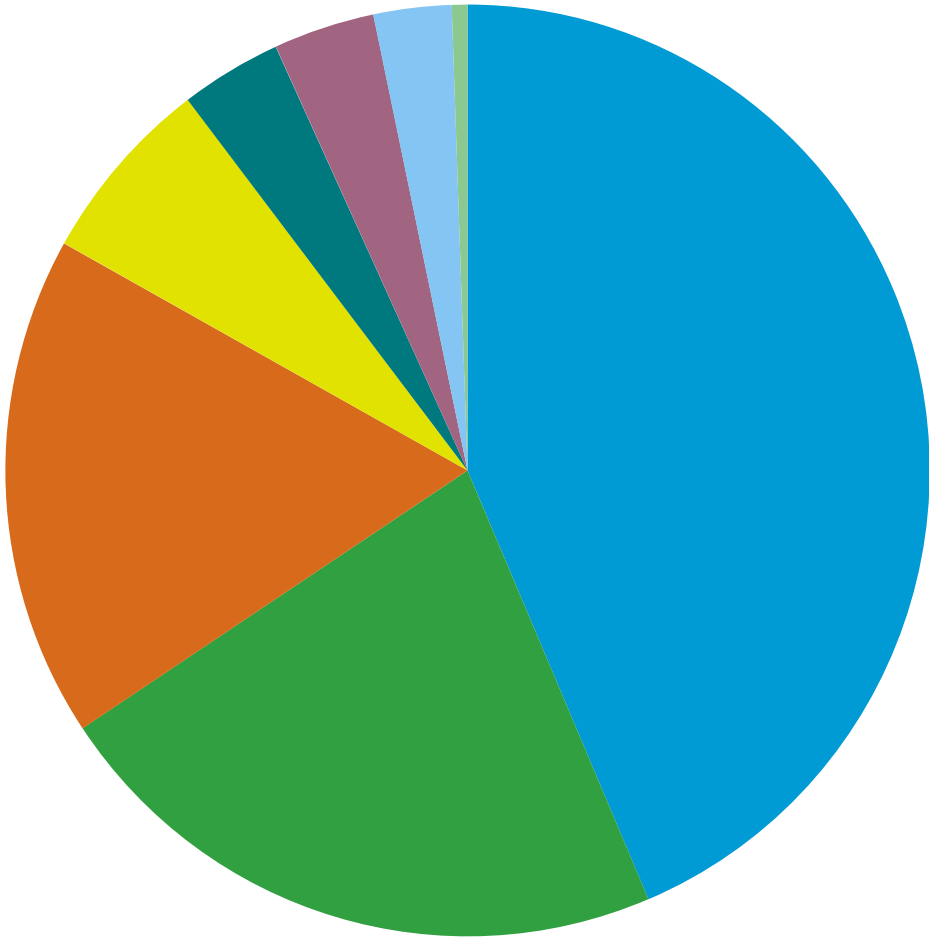
Client Selection Issues



- A primary factor in
 - 23% of claims count
 - 18% of claims dollars



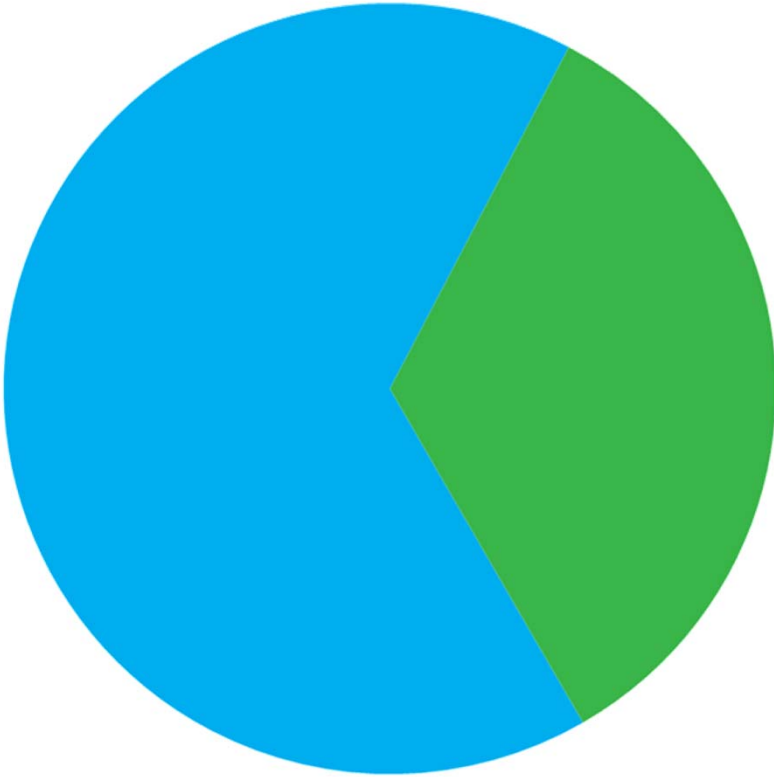
Client Selection Issues



- 44% - Client inexperienced in design issues
- 22% - Client has history of claims / litigation
- 17% - Client in Poor Financial Condition
- 7% - Client behind in fee payments
- 4% - Contractor selection
- 4% - No Formal Review of client
- 3% - Other
- 1% - Client not receptive to ADR



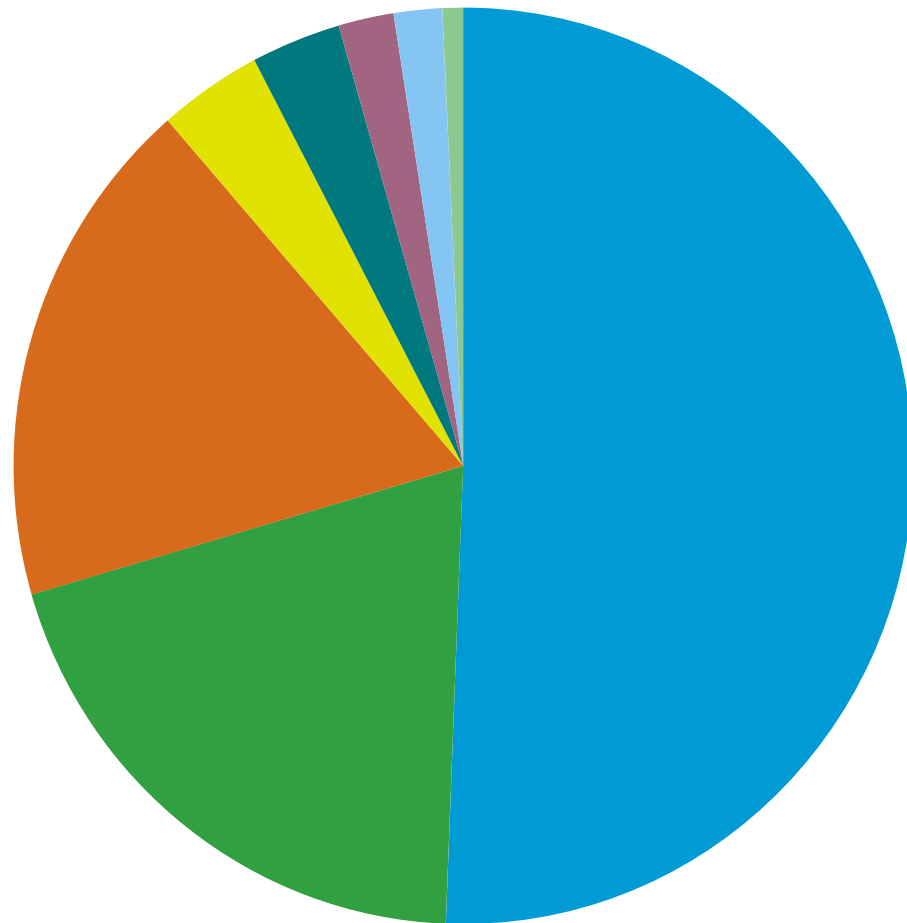
Project Team Capabilities



- A primary factor in:
 - 25% of claims count
 - 34% of claims dollars



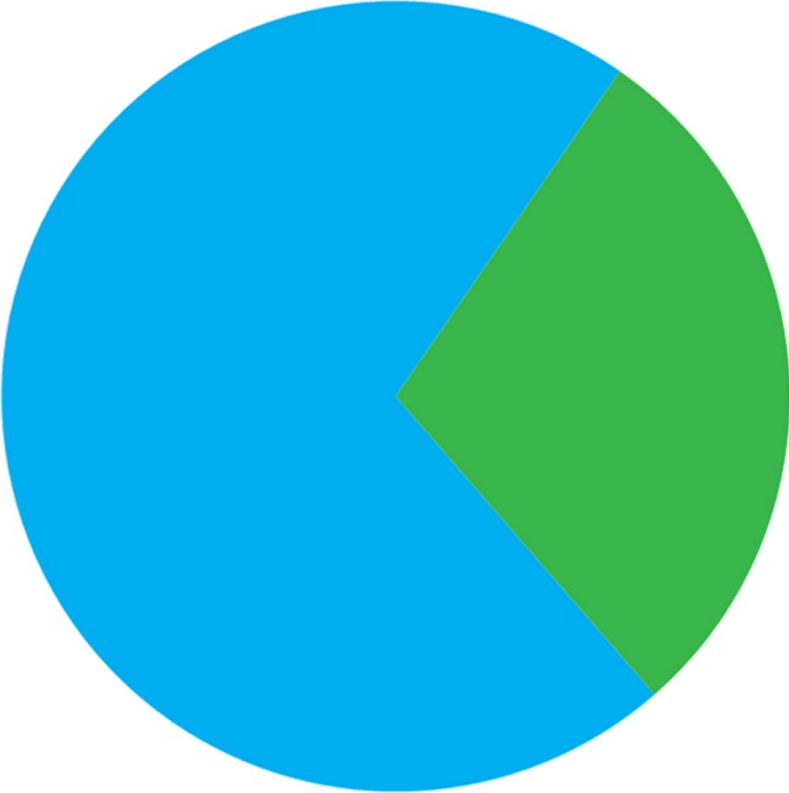
Project Team Capabilities



- 51% - Inexperienced design staff
- 20% - Inexperienced on-site staff
- 18% - Inexperienced project manager
- 4% - Other
- 3% - Firm inexperienced in project type
- 2% - Unqualified back-up staff
- 2% - Outside firm's normal territory
- 1% - Insufficient number of staff



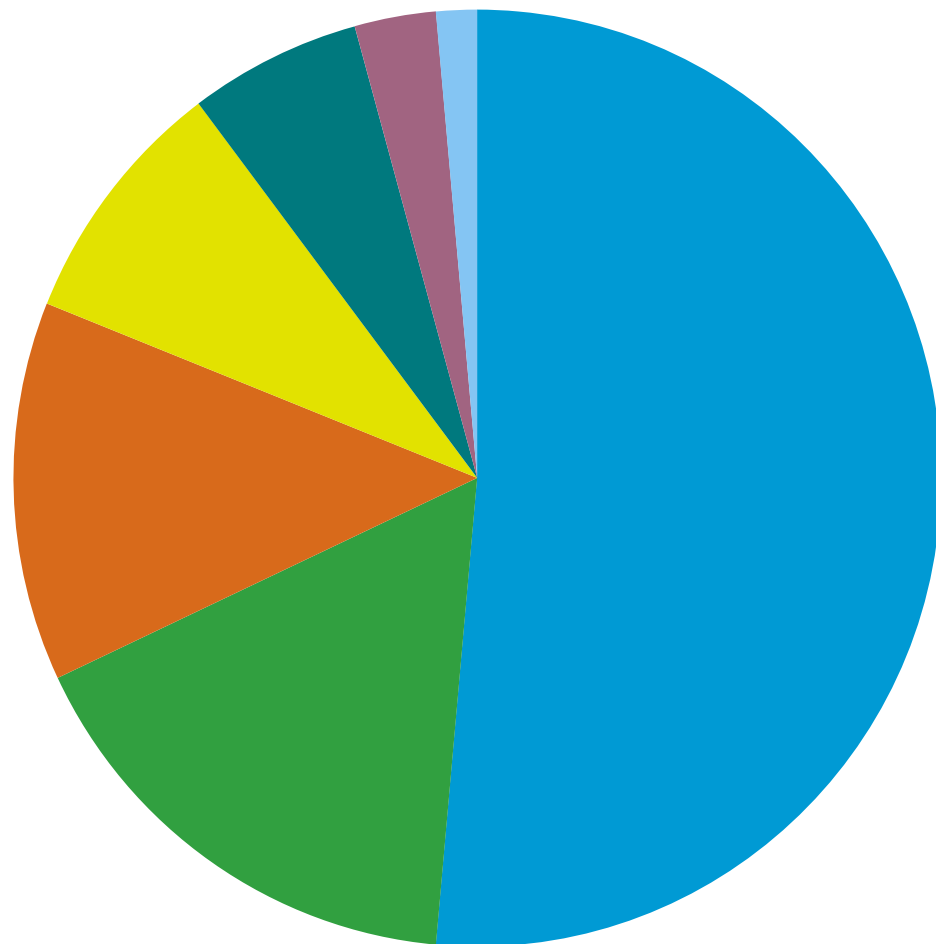
Communication Issues



- A primary factor in:
 - **39% of claims count**
 - **29% of claims dollars**



Communication Issues



- 51% - Lack of procedure to identify conflicts, errors and omissions
- 17% - Project issues and potential disputes not handled correctly
- 13% - Scope of services not explained to client
- 9% - Lack of documentation re: changes in scope, budget, etc.
- 6% - Project staff not aware of responsibilities
- 3% - Other
- 1% - Regular progress reports regarding changes not approved

»» Risk Management

- “The process of making and implementing decisions that will minimize the adverse effects of accidental and business losses on an organization”.

»» Basic Risk Management

- Identify / analyze
- Evaluate: client, project, your firm
- Accept or avoid? Go; No Go
- Implement loss control / risk management
- Monitor / modify

»» Risk Management Tools:

1. Transfer
 - Insurance
2. Manage:
 - Client / Project Selection
 - Contracting / Negotiation
 - Project Management
 - Communication / Documentation
 - Construction Phase Services
 - Avoiding / Managing Disputes

»» Transferring Risk via Insurance

- One way to transfer risk
- No product covers everything
- Must be a fortuitous loss and must adhere to indemnity principle
- Contract between you and carrier (not your client)

»» Liability Insurance Policies

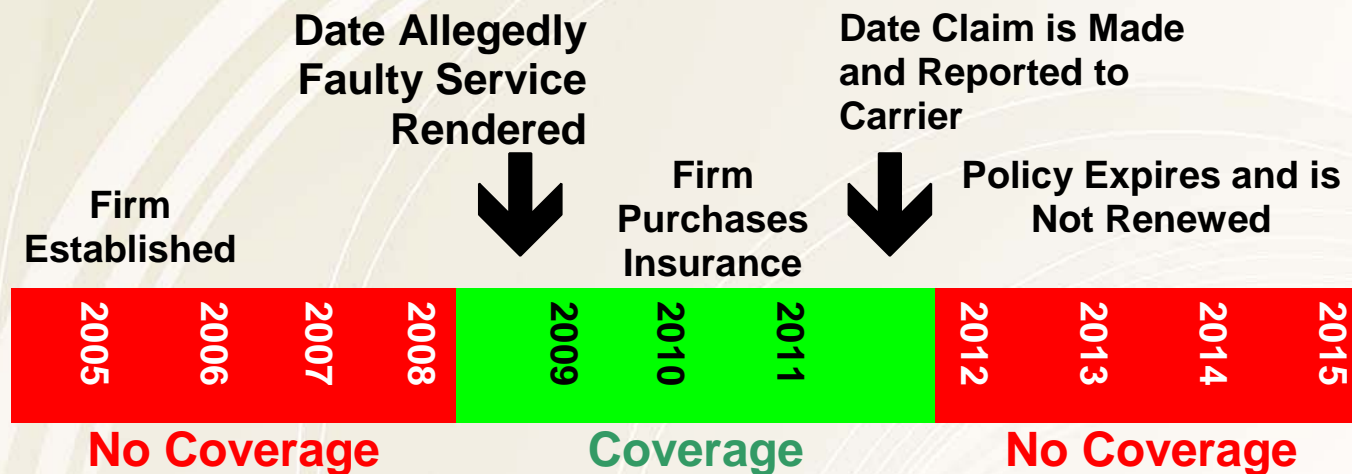
Professional (PL)

- Claims made
- Covers “professional services”
- Expense within limits

General (GL)

- Occurrence form
- Excludes “professional services”
- Expense outside the limits

»» Claims Made Policy

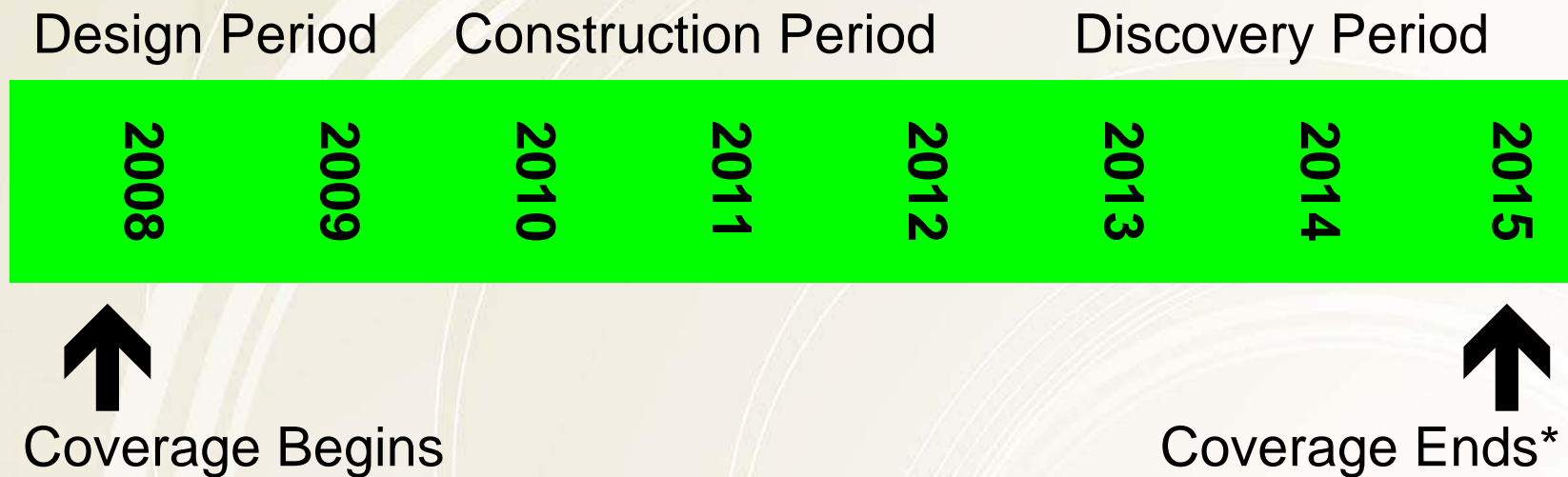


Coverage: Coverage Would Apply, Subject to Limits and Deductible for Policy Year 3

»» Project PL Insurance

- Guarantees limit of coverage
- Guarantees length of time of coverage
- Covers all professionals on project
- Promotes better claims handling
- Dispute resolution encouraged

» Project PL Policy



*At This Point, the Project Policy Expires and Coverage Reverts to the Design Team's Practice Policies

»» Key Parts Professional Liability Insurance Policy

- What is insured ?
 - “Professional services” of an architect, engineer, construction manager

»» Key Parts Professional Liability Insurance Policy

- What is insured ?
- Key Definitions
 - “Professional Services”- every carrier has a different definition
 - “Claim(s)”- always a demand for money or service
 - Loss Prevention Assistance – anything that a reasonable person believes will turn into claim

»» Key Parts Professional Liability Insurance Policy

- What is insured ?
- Key Definitions
- What is excluded?
 - Better covered elsewhere / Workers Comp
 - Uninsurable / Nuclear
 - Clarifies intent of insurer / Construction

»» **Examples of Uninsurable Contractual Obligations**

- “Highest” or “best”
- Comply with “all laws”
- “Guarantees” or “Warranties”
- Indemnities not tied to “negligence”

»» Key Parts Professional Liability Insurance Policy

- What is included ?
- What is excluded ?
- Key definitions
- Who is insured ?
 - Principals, partners, all employees including temporary and retired personnel
 - Not 1099 personnel

»» Underwriting

- Based on gross fees
- Areas of discipline
- Types of projects
- Types of services
- Contracts
- Claims experience
- Loss Control Measures

»» **Managing Risk**

- Client / Project Selection
- Contracting / Negotiation
- Project Management
- Communication / Documentation
- Construction Phase Services
- Avoiding / Managing Disputes

» Client Selection...some questions to ask

- Is the client a regular or first-timer?
- Does the client have funding?
- Is the client realistic?
- Does the client understand your services?
- Is the client litigious?

How do you find out?

» Project Selection...Some Things to Consider

- Is this a high risk project type?
- Has your firm ever done similar project?
- Are there special project issues?
- Is project budget adequate?

» Contracting / Negotiations

- Scope of services
- How & when paid
- Adequate schedule
- Define role during construction
- Client responsibilities
- Risk allocation
- Dispute resolution
- Termination / Suspension
- Standard of care
- Ownership of documents
- Fee

»» Contracting Protocols

- Who authorized?
- Begin with your agreement
- Follow same procedures for all contracts
- Obtain signed agreement for every project

»» Project Management

- Identifying client & project needs
- Selecting Project Team
- Overseeing/monitoring project
 - Requires technical knowledge
 - Requires soft skills

»» Communication

- Better to over communicate than under communicate
- No problem gets any easier to solve than at the point of discovery

»» Documentation

- Consistent / prompt documentation increases credibility
- If it is not documented, it did not happen
- Includes written records, A/V tapes, photos, electronic files
- Record factual observations and conditions – do not editorialize
- Remember to memorialize conversations

»» **Dispute Resolution Methods**

- Negotiation
- Mediation
- Arbitration
- Litigation

»» To Reduce Claims:

- Promote an atmosphere of openness
- Be proactive when problems arise
- Create and enforce strict policies
- Use written contracts on all projects
- Clearly define scope of services
- Communicate and document

»» Review

- From what we have covered today, what do you think the major issues are facing *your* firm?
- Can you think of specific ways that risk management can be improved on in your firm?

»» Action Plan

- We know what needs to be done and what tools to use, but -
 - Who will do this in your firm?
 - What is the timetable to start?
 - How will you know it is working?

»» Conclusion

- Sign in sheets
- Certificates of completion
- Evaluation forms
- Other paperwork required

Thank you

>> Questions?

This concludes The American Institute of Architects
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