

# Fee Dispute Mitigation Reimbursements Coverage

## A small silver lining in an otherwise difficult situation

By Liz Molina,

Assistant Vice President, Senior Claims Examiner, Berkley Alliance Managers, a Berkley Company

May 10, 2021



As long as I have been managing claims for design firms, one of the primary risk management principles held by architects and engineers (A&E) professional liability insurance (PLI) carriers is that a design professional should avoid suing their clients for unpaid fees.

Why? Because a suit for outstanding fees is usually met with a counterclaim for professional negligence. And, while in general, those allegations trigger coverage under an A&E PLI policy, the attempt to recover the outstanding fees is not covered because fees are not considered damages as defined in A&E PLI policies. Unfortunately, the outstanding fees become part of the negotiations when attempts are made to resolve the negligence allegations. In most cases, the design firm has to significantly compromise its fee claim – and sometimes completely walk away from it – in order to get the negligence claim resolved, even when some of the negligence allegations lack merit or would be difficult to prove. This leaves the design firm frustrated because they end up not getting paid, while at the same time having to spend their policy deductible to defend and/or settle the negligence claim. In essence, they actually lose more money, which does not even include the lost billable time that was spent helping to defend the claim instead of working on projects that generated income.

So how can the dynamic be changed? I recently assisted an insured with a matter where they were owed fees of approximately \$600,000 and the alleged damages were approximately \$2 million. After several meetings with the client, the insured identified approximately \$1 million in damages that related to their scope of service but still required additional information from the client. After requesting additional documents and even suggesting mediation, the client only provided the insured with cost directives

and was not interested in mediation. The insured and I got the distinct sense that the client would walk away from their negligence claim if the insured did not pursue their outstanding fees.

To test our theory and try to achieve the walk away, our first step was to convince the insured's subconsultants who were owed fees to waive them. While the contracts between the insured and their subconsultants had a "pay when paid" clause, we needed to show that the insured diligently attempted to pursue the fees. Fortunately, most of the subconsultants agreed to waive their fees in order to preserve their working relationship with the insured.

Once we obtained the waiver from the subconsultants we approached the insured's client. As we suspected, we were able to reach an agreement and the insured's client agreed to walk away from their negligence claims if the insured agreed to not pursue its outstanding fees.

The decision for the insured to forego their attempts to recover their outstanding fees was a difficult one. Their thought process included considering the fact that there would be a cost to defend the negligence claim from both a deductible standpoint and also from a time and energy perspective. Given the circumstances, the insured was understandably not interested in working with this client in the near future which also affected their decision.

There was however, a small silver lining. Although the outstanding fee was quite large, I was able to advise the insured that their situation met the criteria of our Fee Dispute Mitigation Reimbursement coverage as outlined in the Additional Coverages section of their Berkley Design Professional A&E PLI policy.<sup>1</sup>

We paid the insured the maximum of \$25,000 and although it was not much in comparison to what was owed to them by their clients, they appreciated that we recognized the impact that such a decision would have on their business while also enabling them to avoid the cost and aggravation of litigation.

<sup>1</sup> [Berkley Policy: BDP0417001](#), III. Additional Coverages, D. Fee Dispute Mitigation Reimbursements, page 3.

## About the Author



Liz Molina is an assistant vice president, senior claims examiner at Berkley Alliance Managers, a Berkley Company. She has more than 25 years of experience with A/E professional liability insurance claims. She joined Berkley Alliance Managers in 2017. Over the years she has handled A/E professional liability claims for several leading carriers. Contact Liz at [emolina@berkleyalliance.com](mailto:emolina@berkleyalliance.com).



© 2021 Berkley Design Professional, a Berkley Company.  
All Rights Reserved