



RISK SOLUTIONS

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Deal Makers and Deal Breakers

The Big Picture

Successful firms usually have certain things in common: they perform risk analysis of new clients and projects, they carefully draft their prime and subconsultant contracts, they seek the advice of qualified legal and insurance counsel when appropriate, they make time to train their staff, and they educate clients about what to expect on their projects.

Experience has shown that certain contract clauses can have a significant impact on the liability exposures of a firm, some for the better and some for the worse. Those clauses that tend to mitigate the risk exposures of the design professional could be called “deal makers,” and those that increase the risk of the design professional could be called “deal breakers.” This is not to say that any one contract clause will make or break a project. Different firms have different appetites for risk. The goal of this article is to identify how certain contract clauses influence the risk of a project so that the design professional can evaluate the overall risk exposure and negotiate the most favorable terms possible.

Deal Makers

First on our list of “deal makers” is an acceptable definition of the **Standard of Care**. This is key because professional liability insurance will cover damages resulting from a failure to meet the generally accepted standard of care, but policies have exclusions for contractual liability, which would include agreements to perform to the “highest” standard of care, or warranties and guarantees. An acceptable standard of care clause might look like this:



Employee Benefits Update

Ten Easy Ways To Stretch Your Healthcare

You can hardly turn on the nightly news or pick up a newspaper without hearing about the rising cost of healthcare and the stifling effect it is having on individuals and employers. With experts predicting national healthcare cost increases to stay in the double-digits for the near and long-term, employers are passing more costs on to their employees, and individuals and families are looking for ways to stretch their healthcare dollars.

Making the most of your healthcare dollars can actually be easier than you think. Below are ten easy ways you can easily stretch your healthcare dollar and do your part to help keep overall healthcare costs down.

1. ***Understand how your health plan works.*** This is probably the first and most important step in getting the most for your healthcare dollar. You need to know what is and what is not covered, what procedures you need to follow to ensure your claims are paid, and which providers and facilities to use to get the most cost-effective care. Know the deductibles, copayments, and other out-of-pocket costs you are responsible for paying before you use medical products or services or get a prescription filled.
2. ***Use in-network providers.*** Participating providers (doctors, hospitals, and other providers in your plan's network) generally charge discounted rates for plan members. When you go to a non-participating provider you will likely pay a higher coinsurance percentage (for example, 30 percent out-of-network versus 10 percent in-network). And, you will likely have to pay the difference in price between the participating provider's discounted fee, and the non-participating provider's "regular" fee.
3. ***Look into freestanding surgical and diagnostic centers.*** If you need surgery, you might save money by having it performed at an ambulatory surgical center — a freestanding clinic that is not a hospital or operated by a hospital. These centers usually charge less than hospitals or their outpatient surgical centers. Freestanding diagnostic centers are also available and tend to charge less for certain tests like MRIs, CAT scans, X-rays, and bone density scans. But before you go, make sure the facility is in your plan's network and that your plan's benefits cover the service. And as always, talk to your doctor to be sure this course of action is appropriate for you.
4. ***Ask your doctor about home testing and monitoring devices.*** Home tests for blood pressure, diabetes, and other conditions can help ensure you are following your doctor's orders and that prescribed treatments are working. These tests will usually cost less than in-office testing. Check with your doctor to be sure in-home testing is appropriate, report your results regularly, and call your doctor if you notice anything unusual.
5. ***Only go to the hospital emergency room for true emergencies.*** If you need medical care when your regular doctor is not available, think about going to an urgent care center rather than a hospital emergency room. This can often be a tough call, but for a cold or a minor sprain, avoiding the ER will probably save you money for two reasons: 1) the copayment is usually lower for a doctor visit or an urgent care visit, and 2) your insurer might make you pay for the full cost of care if you use an emergency room for a non-emergency. And, getting care at an urgent care center will almost certainly be faster than at the ER. Call your plan's health hotline, if available, to get advice on how, when, and where to seek care in a non-emergency situation.
6. ***Carefully check all medical bills.*** Insurance companies and hospitals are not immune from making billing errors. In fact, errors are common. Insurers often miscalculate the family deductible, so keep a careful tally of individual as well as total family payments to be sure you don't pay too much. If you have a hospital stay, try to keep a log of all the services, medications, and supplies you are given, so when you get a bill you can be sure you are not charged for procedures you didn't have or items you didn't use. Ask for an itemized bill.

Deal Makers and Deal Breakers (Cont'd.)

STANDARD OF CARE

In providing services under this Agreement, the Design Professional will endeavor to perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances.

Note that the clause says that the design professional will “endeavor to” achieve this standard, as opposed to “warrants” that result. Recently there was a case in another jurisdiction where a design professional had a limitation of liability to \$50,000 in his contract, but warranted that he would meet the professional standard of care. When a \$650,000 claim arose, the court found that the warranty overrode the limitation of liability, and \$650,000 in damages was awarded.

Next on our list is to provide that the **Agreement is for the Sole Benefit of the Client**. The law of Illinois provides that for purely economic loss, in most cases the only party that can sue is the client who signed the contract. This means that a contractor cannot sue a design professional directly for claims arising from errors and omissions in the plans or specifications. This is more likely to become an issue in an era when design professionals are asked to provide electronic files to contractors. A contractor might argue that he then becomes a

“third-party beneficiary” of the contract, or someone with rights, but no duties, under the contract! We can address this issue by stating:

THIRD-PARTY BENEFICIARIES

Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or the Design Professional. The Design Professional's services under this Agreement are being performed solely for the Client's benefit, and no other party or entity shall have any claim against the Design Professional because of this Agreement or the performance or nonperformance of services hereunder. The Client and Design Professional agree to require a similar provision in all contracts with contractors, sub-contractors, subconsultants, vendors and other entities involved in this Project to carry out the intent of this provision.

Not only is there an obvious benefit to limiting your liability exposures to the client, but there is a potential insurance coverage issue here as well. Any agreement to perform for the benefit of third-parties to the contract would create a liability that does not exist under the common law, and may therefore be a contractual liability that is beyond the scope of professional liability coverage. Due to the high costs associated

with civil litigation, it is desirable to include an **Alternative Dispute Resolution** (or ADR) clause in your contract. Mediation is the preferred method of dispute resolution because it is highly successful and cost-effective. Mediation is a voluntary process where the parties to the dispute get together with a third-party mediator who listens to each side of the story and tries to bring the parties together to reach a voluntary resolution of the dispute. The better insurance companies believe so strongly in mediation that they offer to reimburse the design professional 50% of its costs incurred under the deductible in the event that a claim is resolved through voluntary mediation. Mediation should be distinguished from arbitration, which is like a mini-trial, and yields a binding result. There is some controversy over the benefits of arbitration. While some feel that there is a benefit to having your dispute resolved by a construction industry expert who understands your issues, others feel that the relaxed rules of evidence and lack of a right of appeal make civil litigation preferable as the final step in the dispute resolution process. An acceptable ADR clause might read as follows:

MEDIATION

In an effort to resolve any conflicts that arise during the design and construction of the Project or following the completion of the Project, the Client and the Design Profes-

Deal Makers and Deal Breakers (Cont'd.)

sional agree that all disputes between them arising out of or relating to this Agreement or the Project shall be submitted to nonbinding mediation unless the parties mutually agree otherwise.

The Client and the Design Professional further agree to include a similar mediation provision in all agreements with independent contractors and Design Professionals retained for the Project and to require all independent contractors and Design Professionals also to include a similar mediation provision in all agreements with their subcontractors, subconsultants Professionals, suppliers and fabricators, thereby providing for mediation as the primary method for dispute resolution between the parties to all those agreements.

Every design professional's contract should provide that the **Contractor is Solely Responsible for the Means, Methods, Techniques, Sequences, Procedures of Construction and Jobsite Safety**. This is crucial in order to establish a defense in the event of a jobsite injury suit or OSHA administrative action. In both cases, the court will look to the contract first in order to determine the intent of the parties. Of course, once the contract is executed, you should live within the agreement and not assume re-

sponsibility for means and methods by offering advice to the contractor on how to do his job. Please see Dan Buelow's article entitled 'Critical contract clauses for the design firm' on pages 28 and 29 of the most recent issue of *Licensed Architect* for a sample of this and each of the following "deal maker" clauses.

While jobsite injury claims are a concern, they represent a minority of the claims filed against design professionals. Most claims are for economic loss caused by change orders or delays and are brought by the client. Probably the most powerful clause for mitigating this exposure is the **Limitation of Liability** clause. The concept is that in the event of a claim, the client agrees to limit the liability of the design professional to the fee, or a multiple of the fee, or a dollar amount up to the available insurance proceeds at the time of settlement or judgment. Note that I said "available insurance proceeds" rather than "limits of insurance" because most professional liability policies provide that defense costs are paid out of the policy limit of liability and reduce the amount of money available to pay for damages. If you have success in limiting your liability in your contracts, you should track your success as many underwriters will give credits if you are able to document that limit your liability in a way that reduces the underwriter's exposure.

Of course, it can be a challenge

getting a client to agree to limit your liability. The fundamental argument is that the client derives a much greater benefit from the project than the design professional does. It is therefore fair to balance the risks and rewards of the project by limiting the liability exposure of the design professional. One of the substantial benefits of using the standard form agreements developed by the ALA is that they include a limitation of liability clause. A limitation of liability can also include a **Corporate Protection Clause**, where the client agrees to bring any claim solely against the assets of the company (if the design professional is not a sole proprietor or partnership), and not against the assets of any individual employees of the design professional company.

Another clause that balances the risks and rewards of the project is the **Waiver of Consequential Damages**. In this clause, the client and the design professional both agree to waive any claims for consequential and delay damages against each other. This is fair because consequential damages are difficult to predict or measure and potentially far outweigh the design professional's benefit from doing the project.

This article is no substitute for sound legal advice. As always, you should review the suggested contract language with your attorney before you include it in

Ten Easy Ways To Stretch Your Healthcare Dollars (Cont'd.)

7. *Use any additional programs or discounts provided by your employer or health plan.*

Many health plans provide access to free disease management programs for chronic conditions like asthma, diabetes, and heart disease. These programs can help you stay healthy and manage your condition, and can possibly save you money in the long run. In addition, many employers offer complementary programs that are designed to prevent illness and lower health costs over the long run. These programs may include smoking cessation and weight loss programs, or discounts on fitness clubs or other items that help you live a healthy lifestyle.

8. *Live a healthy lifestyle.*

Healthy habits like exercising regularly, eating well, and not smoking can increase your stamina, lighten your mood, and lower your risk for certain diseases. Aside from the physical and psychological benefits, healthy living can also offer financial rewards. One recent study noted the impact healthy living has on healthcare costs:

- A 41 percent difference in healthcare costs between those who ate poorly and those who ate well
- Smokers had a 31 percent higher annual claims cost than non-smokers
- Overweight people were

hospitalized 143 percent more than people of average weight

- People with high blood pressure spent 24 percent more days in the hospital than people with normal blood pressure

9. *Make careful decisions about prescription drugs.*

Prescription drugs are the fastest rising area of healthcare costs and one of the biggest reasons behind dramatic increases in healthcare costs nationwide. The driving factors behind this trend are increased advertising, development of new and expensive drugs, and greater utilization — more people are simply taking more prescription drugs than ever before. Here are some ways you can reduce your prescription drug costs:

- *Use generic drugs whenever possible, even for over-the-counter medications.* Remember, the most expensive drug is definitely not the best. There are usually generic equivalents that are less expensive than the drugs you see advertised on TV. Before your physician finishes writing your prescription, ask about generic equivalents, lower-cost brand name drugs to treat the same condition, and even over-the-counter options.
- *Know how your drug plan works.* Check your co-payments and know the maximum amount your plan will pay for in one year. Find

out if your plan has a formulary (a list of preferred drugs they will cover). A health plan with a closed formulary pays only for certain pre-approved drugs. A plan with an open formulary will cover most drugs but at varying prices.

- *Use a mail order pharmacy if one is available.* Ordering prescriptions by mail can save 10 – 15 percent and is perfect for patients who take medication on an ongoing basis and can place orders in advance.
- *Talk to your doctor.* Make sure your physician knows if you have to pay for your prescriptions out of your own pocket. Often there are less expensive but equally effective treatment options.
- *Compare prices.* Shop around for the pharmacy that offers the best value for your needs. You may even need to get different medications from different pharmacies depending on which offers a better price.
- *Consider pill-splitting.* Some medications can be obtained at double the prescribed dose, and then split in half. This practice can result in 50 percent savings. But, you must be sure your medication is appropriate for splitting, so talk to your doctor first. Some medications require very precise dosing, and others simply can't be split

Ten Easy Ways To Stretch Your Healthcare Dollars (Cont'd.)

- effectively or accurately.
- *Look into manufacturer aid programs.* Most major drug manufacturers have programs to subsidize patients who can't pay for medications they need. All of these programs require your doctor to apply for you.
 - *Take all medications as prescribed.* Not refilling your prescription might seem like a good way to save money, but it may in fact cost you more money in the long run. Many drugs, when taken as directed, keep you from needing expensive medical care or hospitalization.
- 10. Use a healthcare spending account to pay for medical expenses with pre-tax money.** If your employer provides you access to a Flexible Spending Account (FSA) or Health Savings Account (HSA), use it. These accounts let you set aside pretax money from your paycheck to pay for eligible items like prescription drugs and over-the-counter medications, deductibles, coinsurance, dental expenses, and vision care. You get to save for these expenses gradually, rather than having the money in your checking account when the need arises. And, because you don't pay taxes

on the money, you are actually getting a "percent off" or a discount on everything you purchase with your saved money. For example, assuming the government takes 20 percent of your income, and you put \$500 in your health care spending account, you save about \$100 in taxes.

Healthcare costs are tied directly to utilization; when you use your health plan more, there are more claims. And the higher the claims, the more you and your employer must contribute

to pay for these claims. Don't forget that the most cost effective way to reduce the cost of healthcare is to make better decisions about the way you live, including the way you eat, exercise, and spend your healthcare dollars.

This brochure is for informational purposes only and is not intended to replace the advice of your HRH A&E/AVA insurance professional.



HRH A&E/AVA presenting our risk management seminar "Construction Observation as a Risk Management Tool" at the recent Association of Licensed Architects Conference.

HRH A&E/AVA 2006 Public Seminar Schedule

October 17, 2006

8:30am to 12pm

Holiday Inn Crowne Plaza

Lake Harriet Room

618 Second Avenue South

Minneapolis, MN 55402

Planning For A Successful Mediation

Presented by Sue Yoakum from Donovan Hatem and

Jeffrey W. Coleman of Coleman Hull & van Vliet

See below program description for details



October 18, 2006

8:30am to 12:00pm

Marriott Southfield

27033 Northwestern Highway

Southfield, MI 48033

248-356-7400

“Ten Commandments of Risk Management”

Presented by Dan Buelow and Tom Harkins from HRH A&E along with Greg Thomas from

Thomas, DeGrood & Witenoff

In today's world, it is essential that design professionals practice good risk management in their business. Please join representatives from HRH A&E, an agency dedicated solely to design professionals, as they present the Ten Commandments of Risk Management with Gregory Thomas from Thomas, Degrood & Witenhoff. This program will review the top risk management practices that every firm needs to be made aware of in order to enhance project management capabilities and prevent professional liability claims.

November 2, 2006

8:30am to 12pm

Hilton Chicago

720 S. Michigan Avenue

Chicago, IL 60605

Planning For A Successful Mediation

Presented by Sue Yoakum from Donovan Hatem and Eric Singer from Wildman Harrold

This presentation will explore the advantages and disadvantages of mediation in resolving disputes involving design professionals and discuss strategies for successful mediations. Our speakers will also demonstrate the principles of mediation through a mock mediation. Attendees will see first-hand the roles the parties play at a mediation session and directly observe negotiation techniques. The mock mediation will take the parties through the complete process from the initial preparation session through to the final resolution of the matter. *This program has been registered for 3.0 hours of CE credits.*

November 8, 2006

9am to 11am

AIA Chicago

Merchandise Mart Plaza

Electronic Files and Ownership of Documents

The participant will learn to identify the risks associated with transfer of electronic files and ownership of copyrights, analyze the risk and rewards associated with file transfers and compare the AIA and EJCDC contract schemes on these issues.



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HRH A&E / AVA

What Makes HRH A&E/AVA Different?

Specialized Personnel

We maintain a staff of professionals specifically trained in the unique insurance needs of the design professional. HRH A&E has more resources and in-house expertise dedicated specifically to servicing architects and engineers than any other broker.

Complete Insurance Service

We can fulfill all of your firm's insurance needs including professional and general liability, property, workers compensation, health insurance, employee benefits and employment practices liability.

Contract Review Services

Design professionals are often asked to sign uninsurable client drafted contracts. HRH A&E has established a contract Hotline to assist our clients with the review and negotiation of these contracts.

Seminars

As the recognized leader in our industry, we are often asked to speak on various risk management topics to associations such as AIA, ALA, NSPE, ACEC, etc. In addition, we also provide custom in-house training and loss prevention seminars, which are tailored to meet the unique needs of each firm. As an AIA registered provider, all of our programs qualify for AIA continuing education credits.

Loss Prevention Assistance

Formal loss prevention programs benefit firms because they minimize risk and can positively influence premium pricing. We can assist your firm in the development of such programs and provide up-to-date information which will keep your programs current.

Member of Professional Organizations

Among others, we are an active member of AIA and ALA as well as ACEC, NCSEA, NSPE and others.

Carrier Relationships

Because HRH A&E/AVA Insurance Agency, a member of Hilb, Rogal & Hobbs (NYSE:HRH), is a recognized leader by the insurance community, we can access more carriers on a direct basis than any other broker. This guarantees your firm the best pricing and coverage options for our clients.

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