

## Design Firm Risk Management: Prototype/Product Design Related Issues

Prototype and Product Designs bring significant risks and challenges. The risks associated with client and third party claims are not typically commensurate with the fee for these services. Prototype and product design can take the design professional beyond professional liability, and into a product liability exposure. When design documents are interpreted to be a product produced by the design professional and then replicated, the design professional may not be protected by professional liability insurance coverage. In addition, product design is subject to more than the common law negligence standard, and may fall under the strict liability standard for damage caused by the design. The firm may also be exposed to class action type lawsuits, which can easily erode a limit of liability on the design firm's professional liability insurance policy.

The client must understand the limited scope of services performed, and be aware of the possibility of third party claims in order to help protect the design firm from frivolous lawsuits. Your contract should include the following:

- 1. An indemnity and hold harmless clause** for claims from users or buyers. The indemnity provision should state that the design professional, in providing service for a prototype, may be subject to numerous meritless claims from future users or buyers. It is reasonable that any use of the information without the design professional's verification and adaptation to changes in codes, standards, site conditions or other factors should be at the clients sole risk. In addition, it is unrealistic that the client should defend and indemnify the design professional for all claims, costs, losses, or damages to the design professional resulting from the use of the information.
- 2. A limitation of the design firm's liability.** Please keep in mind that this is only in effect between the parties of a contract and, therefore, third party claims would not have a limitation of liability. The limitation of liability section should clearly state that the limitation is based on the discrepancy between the risk to the design professional and the compensation. It should limit the risk to that which is foreseeable and manageable by the professional. If the client is not willing to allocate the risk so they absorb the risk for unanticipated or unmanageable risks, you will want to consider if it is worth taking on the project.
- 3. A disclaimer constituting a warning to future users,** which identifies the service as a recommended or a prototype design for a specific set of design parameters. A disclaimer to avoid product liability should state that there is no warranty implied in the service provided and that the calculations or other instruments of service are prepared according to the standard of care for such services. The disclaimer should state that

there is no representation or express warranty of merchantability, of fitness for a particular purpose, or as to the quality, adequacy, completeness, or sufficiency of the documents with respect to the use of the documents by the client. It should also serve as a warning to the ultimate user that the design was based on certain parameters and conditions and needs to be examined for specific conditions and code compliance.

The design firm and client should work together to form a fair and equitable arrangement for both parties. Achieving this goal will require some discussions with your client regarding the inherent risk in comparison to the reward that the design firm will realize from prototype and product design. If the client is unwilling to compensate the design firm for each prototype, and each subsequent product, it is reasonable to expect to be protected, and indemnified from third party claims.

It is also important to contact your insurance agent whenever your activities and professional services deviate from those services which were stated on your professional liability insurance application.

*\*This information is presented for professional liability risk management guidance. It is not legal advice nor should it be construed to be a determination on issues of coverage for specific claims. Contract language establishes legal duties and rights and should be reviewed by competent local legal counsel.*

