CLAIMS AGAINST INDUSTRIAL HYGIENISTS: THE TRILOGY OF PREVENTION, HANDLING AND RESOLUTION

PART TWO: WHAT TO DO WHEN A CLAIM HAPPENS

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This article is the second in a three part series relating to claims against Industrial Hygienists. In Part One of the series, we pointed out that that there is a trilogy of considerations with respect to a claim and we discussed ways to try to prevent and/or mitigate such claims. We explained that whether and how a claim is made is to a great extent determined by the terms of the contract entered into with your client. As such, one of the best protections for Industrial Hygienists is to have a clearly written contract that details the nature and extent of the services to be provided and how you will be compensated for such services. We also described additional provisions that could be included in the contract to potentially deter a client from asserting a claim altogether. Finally, we pointed out that written documentation and confirmation of all discussions, instructions and changes, regardless of how frequently such oral communications are used by you and your client, can help to prevent or mitigate claims.

Unfortunately, claims cannot always be prevented. Therefore, this article will discuss what to do in the event a claim is made against you. The final article in this series will then discuss considerations and processes with respect to resolving a claim.

We must point out that all of these articles are intended to provide a general discussion of these topics. The articles are not intended to be an exhaustive review of these areas, nor are the articles intended to provide legal advice or counsel to the reader, or to substitute for consultation by the readers with their own legal counsel. Rather, the articles are intended to alert the readers to the possible means of dealing with these situations. It is suggested that if there is a need or interest in pursuing any aspects of the suggestions that are made, the readers should discuss same with their own legal counsel.

What is a "Potential Claim" as opposed to a "Claim"?

In order to discuss how to handle claims, we first must understand what constitutes a "Potential Claim" and a "Claim" in the context of the performance of telemessaging services.

A Potential Claim occurs when you become aware of some act, error, or omission that could potentially give rise to a Claim against you in your professional capacity, but you have not received any indication that anyone intends to seek compensation with

respect to such act, error or omission. This awareness does not have to be that you did in fact commit an error or omission, or that you will with certainty be responsible, but only that you can reasonably understand that a claim could possibly be made against you for what happened. Thus, as an example, if you become aware that a homeowner was complaining to a developer or contractor about mold in a building on which you, as an Industrial Hygienist performed a mold inspection and analysis, but a claim may not have as yet been made against you, you may be aware of the possibility that someone may assert you are responsible for alleged damage as a result of a failure to discover the presence of mold. This could constitute knowledge of a potential Claim, even if you do not know whether there was any actual error or omission or if the conduct caused any damage or injury.

A Potential Claim becomes a Claim when a question is actually posed as to your conduct and liability, or a demand for payment of damages is made. As pointed out in Part One of this trilogy, a common misconception is that, in the context of insurance coverage, the commencement of a lawsuit, institution of arbitration, or some other formal proceeding is required for a "Claim" to exist. While these may constitute Claims, a "Claim" can also be any form of a demand or effort to hold you responsible for damage incurred due to your business conduct. Thus, a "Claim" can be merely the assertion that you committed an error and that someone intends to hold you responsible for the damages resulting from that error. The Claim can be made orally, in writing, via electronic or other form of communication and it does not have to be specific as to the exact nature of your error, or the amount of damages sustained as a result.

As an example, a client calls and tells you only that he or she believes you failed to recommend a proper remediation plan. While the client failed to provide you with any details as to the nature of the failure or what a proper remediation plan would have been, or the amount of damages sustained as a result of the alleged failure, the client indicated that he or she is asserting that you committed an act or omission that caused him or her to sustain damages for which the client intends to hold you responsible. If this is not addressed, or if the claimant is not satisfied with the response, a lawsuit or arbitration could result.

Who should you tell if you become aware of a Potential Claim or if a Claim is made?

In the event you become aware of a Potential Claim or if a Claim is made against you, you should immediately advise your Errors and Omissions insurer. By doing so, you may prevent coverage issues from arising, as almost all insurance policies issued to Industrial Hygienists contain provisions requiring a Claim to be reported, either "immediately" or "as soon as practicable."

With respect to Potential Claims, while you may not be obligated by the terms and conditions of your insurance policy to report such matters, your failure to do so could potentially lead to significant coverage issues later on. This is especially true if a claim is first made against you after the expiration of your policy based on the Potential Claim you learned of during the policy period. If an insurer determines that you were aware of

the Potential Claim prior to the inception of the policy in which the Claim was first made, the insurer may seek to deny coverage or even rescind the policy based on such prior undisclosed knowledge, which may have caused the insurer to write the policy differently, or not even agree to issue the policy at all.

In addition to preventing coverage issues from arising, by promptly reporting a Claim or Potential Claim, you will afford your insurer the opportunity to investigate the circumstance or Claim, appoint legal counsel, if necessary and to take other appropriate steps, including attempting to resolve a claim before a client is lost or a lawsuit is even commenced. In any event, promptly reporting a Claim or Potential Claim to your insurer allows you to get assistance from people who have substantial experience with handling such situations, thereby alleviating, at least some of the stress that occurs when a Claim is made.

What else should you do when you become aware of a Potential Claim or a Claim is made against you?

In addition to providing notice to your insurer of a Potential Claim or the assertion of a Claim against you, you should immediately begin to collect as much information and documentation regarding the matter as soon as possible. Go through your files, separate, collect and preserve this information and documentation. Your legal counsel, as well as your insurer and its representative will undoubtedly request copies of all relevant documents in order to investigate and assess the claim. These documents will include such items as your contract, your inspection reports, laboratory reports analyzing samples, transmittal letters as to the samples, the reports and other items sent to others, your notes as to the inspection performed, any instructions or statements as to the scope of work, correspondence, memos or other communications to and from your client, and the names of employees, supervisors and others who were involved in the work.

As it is probable that you and your personnel will have to be interviewed as part of the investigation, the earlier you advise your insurer and these interviews can be accomplished, the better the recollection will be as to what occurred. Further, these individuals may be called on to provide signed affidavits or statements as to their recollection, especially if there is the possibility they may not later be available to personally appear or testify as to what happened. The usefulness of these documents may be directly linked with how soon they were prepared after the event. While you may want to conduct these interviews and obtain these statements yourself so as not to waste time, there are certain implications and advantages that may be obtained by having your legal counsel perform these tasks. Therefore, we strongly suggest that these efforts be conducted under the supervision of counsel or in cooperation with your insurer's representatives.

It is possible that there may be other persons or organizations that may have some responsibility for the events, or at the very least knowledge of the factual background of the work and the alleged errors or omissions, including any independent contractors

retained by you, testing laboratories, or independent field personnel. Your insurer or legal counsel appointed on your behalf can assist in identifying and contacting these persons and organizations, including putting them on notice of their potential exposure and the need or requirement to preserve their own documents that may be important to your defense of any claim. These parties may have to be advised to report the matter to their own insurer, so that they can confirm and preserve coverage for the damages that may have been incurred.

What should you NOT do when a Claim is made?

After a Claim is made, you may receive contact from and demands by your client, the client's attorney and/or your client's customer. However, you should never talk about the circumstances surrounding the Claim, admit that you committed an error or omission, or agree to make any payments in connection with said error without first consulting with your insurer, its representative and/or your legal counsel. There are both legal and coverage issues can arise if you admit that an error or omission occurred or agree to make a payment without first consulting with and obtaining the consent of your insurer, including whether by doing so you can breach a condition and lose coverage. In addition, in the event you make a payment, without obtaining the proper documentation confirming the payment, including an appropriately worded release, the client or others may still be able to seek additional damages from you relating to the error.

What is the difference between a Lawsuit, Arbitration and Mediation?

As explained above, a Claim can be made in several forms, including the filing of a demand for arbitration or the commencement of a lawsuit. But what is the difference between a lawsuit and arbitration?

Lawsuit

A lawsuit is the most common type of Claim and is a proceeding commenced in a court seeking to recover damages or to address some grievance. Depending on the amount of damages being sought, the action can be brought in small claims court or other courts of limited jurisdiction, wherein parties are only able to seek a limited amount of damages, or in courts of more expansive or general jurisdiction, wherein parties do not have limits on the amounts they can seek. In some cases, lawsuit can be commenced in a court that is empowered to award equitable relief, such as injunctions and restitution, as opposed to monetary damages. If a lawsuit is commenced, you will likely need to retain counsel to represent your interests, especially if you are a corporation as such entities generally must be represented by an attorney.

After a lawyer is retained, he or she will meet with you discuss the salient facts so that a response to the lawsuit can be prepared. The response can either be in the form of an Answer or a Motion. An Answer responds to the allegations in the complaint, whereas a motion can seek to dismiss the lawsuit for various reasons.

Assuming that you file an Answer or a motion to dismiss is not granted, the parties will then proceed with discovery. Discovery is the process through which the parties seek information and documentation about the claims being made and the defenses to such claims. Discovery can be very timing consuming and divert your attention from your business as during discovery, you will have to assist counsel by responding to questions, gathering documents and information, help counsel prepare responses to written discovery requests made on you by other parties, and prepare and attend depositions of you and your personnel seeking sworn testimony about the incident at issue. Your attorney will attempt to prepare you by asking questions that he thinks will be asked by the opposing counsel and of course, all such questions must be answered truthfully and to the best of your recollection.

After discovery is concluded and if the case cannot be resolved by either settlement or on dispositive motions seeking to dismiss the action, a trial will likely occur. During the trial, a judge or a jury will hear all of the evidence and testimony and then determine whether the plaintiff has demonstrated that it is entitled to recover any damages from you. The party against whom the decision is rendered can then appeal the court's decision, assuming there is a basis upon which to do so.

Arbitration

Contracts often specify that the parties will resolve their differences by arbitration, rather than litigation. In theory, arbitration can be less expensive to pursue and quicker to obtain a determination, although this is not always the case in actual practice, especially when taking into consideration the fees charged by the arbitrators or arbitration services. Arbitration must be agreed to by the parties, or they will be free to file legal actions.

In an arbitration, the parties select an impartial third party or third parties, the "arbitrators" and agree that they will comply with the arbitrator's decision. As with a lawsuit, the parties participate in discovery, although often this discovery is more limited than the discovery that is permitted or required in a legal action. However, the arbitrator is not required to follow the same rules as a judge and thus, discovery can be less formal and extensive. Another important distinction between litigation and arbitration is that while the parties to a lawsuit can appeal a judge's decision, an arbitrator's decision is usually final and only under very limited circumstances will a court reexamine and overturn or alter the arbitrator's decision. This can be a very important distinction and factor in deciding to arbitrate or litigate a dispute, as judges and arbitrators sometimes make mistakes or fail to properly interpret or take into consideration facts, documents and controlling law. The inability to appeal a decision and award can take away the ability to correct such errors.

Mediation

Prior to the commencement of a lawsuit or institution of arbitration proceedings or even while such are ongoing, the parties can participate in mediation. Mediation is a proceeding wherein the parties select an independent third party to listen to their positions and attempt to assist them with reaching an amicable resolution to the dispute. Mediators may form opinions as to what the proper result may be and advise each of the parties as to the strengths and weaknesses of their respective positions. However, the mediator does not make decisions and the process does not bind any of the parties. Mediation can be advantageous as the financial cost is less than proceeding through a trial or an arbitration hearing. However, mediations do not always result in a settlement, especially as the mediator's suggestions and recommendations are not binding on the parties. It may be possible for you to put into your contract a provisions requiring that you and your client mediate any dispute before a lawsuit or arbitration is started. This may afford you an opportunity to resolve a dispute before incurring the time and effort of defending such proceedings and allow you to avoid the filing of a proceeding that can be part of a public record.

CONCLUSION

While no one intends to make a mistake, these do occur, or parties believe that they took place, as a result of which claims are made. When a claim is made, you need to be prepared and know what to do so ensure that a bad situation is not made worse. Most claims, even those that are made in the form of a lawsuit or through a demand for arbitration, settle without a trial or full hearing. The third and final article will discuss the resolution of claims.