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

PART ONE: PREVENTION AND MITIGATION

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Industrial Hygienists ("IH") can be subject to claims by their clients and others. These claims are typically reported to and handled by your insurance carriers, if you have obtained insurance overage for your business conduct. There are, however, ways in which such claims can be prevented by deterring the claimants from asserting them, or can be mitigated and reduced prior to their being asserted. These areas will be the subject of this article.

There are also two other areas, however, that make up the trilogy of consideration of a claim. These include how and what to do to handle a claim that is asserted, as well as the considerations and processes in resolving a claim. These two areas will be the subject of two additional articles.

We also point out that 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 substitute for consultation by the readers with their own legal counsel. The articles are rather 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 "Claim" Anyway?

In order to discuss how to prevent claims, we first must understand what a "claim" is the context of performing industrial hygienist services. A common misconception is that, in the context of insurance coverage, a "Claim" is the assertion of a lawsuit, an arbitration, or some other formal proceeding. These are only part of what may constitute a claim and, in fact, may be only the end result of a claim that has already been asserted. Rather, a "Claim" can be any form of a demand or effort to hold you responsible for damage incurred due to your business conduct. Thus, a "Claim" can also be merely an assertion that you have committed an error and are responsible to the claimant for the damages resulting from that error. It can be in oral, written, 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, an e-mail that states "you

failed to detect mold in my house and I got sick and incurred medical costs due to your negligence" could be a claim, although it does not state when the alleged failure occurred or how much the client had to pay to his/her medical providers. While it does lack such details, it does indicate that the client is asserting you committed an act or omission that caused damage for which you are responsible. If this is not addressed, or if the claimant is not satisfied with the response, a lawsuit or arbitration could result.

Whether a Claim is brought in the form of a lawsuit filed in a court of law, or is instituted as an arbitration, is usually determined by the terms of the contract you enter into with your client. Many contract forms specify the way in which disputes are to be resolved. There are some contracts that require the parties within a particular period of time to discuss and negotiate a dispute before any formal proceeding can be instituted. Other contract provisions require that the parties must arbitrate their differences and do not have the right to file any lawsuits, with a further requirement that the arbitration be through a specified body, such as the American Arbitration Association. These types of provisions can have a significant impact on claims, as an agreement requiring arbitration prevents a party from putting the dispute before a jury, rather than an arbitrator who is most probably more experienced in the field and less influenced by emotional or irrelevant factors.

Also, arbitrations can potentially have certain advantages, such as in many cases being less expensive than lawsuits; possibly quicker in obtaining a decision; arbitration decisions are generally unpublished and therefore would not be of public record, whereas lawsuits are available to the public and could create adverse public relations; and it may give the parties an opportunity to obtain a determination from an arbitrator that has some experience or background in the substantive aspects of the dispute. However, the downside to arbitration is that the arbitrator is not strictly bound to the rules governing lawsuits as to what may or may not be considered by the arbitrator and it is extremely difficult to appeal an arbitrator's decision, as there are only very limited bases for such an appeal, making the decision essentially final.

What must also be kept in mind, however, is that the contract between you and your client does not necessarily apply to or prevent some third party, such as the client of your client, from filing a lawsuit or doing something not otherwise permitted by the contract. Your contract is, therefore, your protection against the claims of your client against you, which in many cases may be the only claim you will be facing and therefore of great value.

What Does your Contract Say?

Too often, the IH contract is brief, unspecific and concentrated on the amount and payment of fees, rather than clearly setting forth all of the aspects of the services to be provided. There are many situations where the IH may have an ongoing relationship with a client and will perform work on an "as call" basis, with the submittal of a bill on transmittal of the report. When a claim comes along, however, this makes the terms of your retention harder to prove.

One of the best protections to the IH as to claims is to have a clearly written contract that sets out in detail the nature and extent of the services to be performed and **not** to be performed, including, for example, exactly what tests are to be completed and in what portions of the house or building for which your services have been retained. Further, these contracts should be reviewed and, if necessary, revised on a periodic basis so they are kept up to date. This periodic review also gives the IH an opportunity to insert favorable provisions, as discussed below. In addition, when you perform work on an "as call" basis, you may want to consider confirming in writing the terms of your specific retention, within the framework of this continuing relationship.

There are numerous examples of how important it is to have a good contract form available in the context of a claim. In one instance, a claim was made against an IH regarding a failure to investigate and remediate environmental and water intrusion issues in the home of their client. The IH insisted that despite the client's assertion to the contrary, he was not retained to remediate the home and that he was not required to investigate issues in any room other than the master bedroom and the garage. However, the contract did not specifically identify the rooms which were to be investigated and did not clearly specify that he was only being retained to investigate and not to remediate the issues. As such, the IH did not have any independent document confirming the scope of his retention. With such a document, it was possible that the lawsuit filed against the IH could have been avoided and/or the matter might have been resolved for a nominal amount. Without it, substantial defense costs were incurred and the settlement value of the matter was significantly increased, as there was no definitive proof that the IH did not have the alleged duty to investigate or remediate the entire house.

Contract Provisions that Can Prevent or Mitigate Claims

The contract between you and your client gives you a substantial opportunity to insert provisions that can deter your client from making claim against you, or to limit the possible damages you might have to pay, thereby making it a more difficult decision on the part of your client to proceed with a claim. While it is not always possible to get a client to agree to all of the terms of your proposed contract, it is worthwhile to try to get these terms in your agreements. These types of provisions include the following:

1. Damage Limitation Clauses

These types of clauses provide that, in the event the client is caused to incur any damage as a result of conduct on the part of the IH, the amount payable by the IH is limited to a specific amount. Some frequently used provisions limit recovery of damages against the IH to an amount equal to the fees charged to the client, or a percentage of the total fees. Other provisions specify a maximum amount, such as $ 500 or $ 1,000. The enforceability of these types of provisions is determined by the law of the state governing the contract, which is usually where the contract is entered into, although some contracts provide what state law is to apply. While most states will find these types of provisions to be valid, where the parties have negotiated the terms of the contract on an equal footing,

there are instances where courts will choose not to enforce these provisions where the exposures are disproportionate to the damage exposures.

2. Exculpation Clauses

These provisions state that the IH is not responsible at all for any damages incurred by the client. The rationale for this type of provision is that the performance of such services will never be perfect and that the amount paid for such services is so small as compared to the exposures that the IH should not be required to pay damages. Often, these contract provisions specifically state these rationales in the contract itself, so as to justify the limitation. These provisions are sometimes enforced under state law, but most often must be limited to the situation where the IH has only committed ordinary negligence. Courts will generally not enforce these provisions, nor, for that matter, provisions limiting the amount of damages, if the damages result from either intentional or grossly negligent conduct on the part of the IH.

3. Standard of Care Clauses

These provisions, while not stating a limitation or exemption from liability, specify that the IH, rather than being held to an ordinary standard of care that would attach to any IH providing such services, will be held responsible only if the IH is grossly negligent or acts intentionally in the performance of services. The impact of these types of provisions is to make it more difficult for a client to make a sustainable claim against the IH, as it is a much heavier burden on the part of the client to prove the IH acted intentionally or grossly negligent. This, in turn, operates as a deterrent to the assertion of claims against the IH.

4. Defense and Indemnification Clauses

There are other types of contract clauses that can either deter, or limit the impact of claims. These include provisions that require the client to defend and indemnify the IH from claims asserted by third parties to the IH contract, where the situation is at least in part due to the conduct of the client. Typically, these provisions are reciprocal, with the IH also having a duty to defend and indemnify the client for situations where the claim is at least in part due to the alleged conduct of the IH. Also, these or related provisions sometimes require that the parties obtain insurance coverage naming the other party as an "additional insured" for purposes of protection against these claims. In practical application, these provisions often are not very useful, as each of the parties will assert that the claim was caused solely by the conduct of the other party, thereby relieving each party of the duty to defend and indemnify the other.

Some Other Contract Considerations

As mentioned above, some clients at times may insist on using their own contract including "purchase orders" which in many cases have terms printed on the back. The terms of these client contract forms and particularly the terms of the purchase orders

should be reviewed very carefully, as they may contain items that are either inappropriate for IH, such as warranties or guarantees of performance, or contain onerous provisions placing responsibility on the IH for claims and liabilities.

The IH can also be held responsible for the work of any of its subcontractors, vendors, or service providers, such as testing laboratories. While it may be difficult to eliminate such liability in the contract between the IH and its client, care should be taken in your contracts with subcontractors, vendors and others who furnish you with equipment, goods, or services, so that these parties owe you defense and indemnity for their conduct and you confirm or make certain the rights of action you have against these parties. You should also consider requiring these parties to confirm in writing that they have their own insurance coverage to extend to their possible exposure. This will help ensure that these parties will be financially responsive to any demand by you for defense or indemnity.

Other Ways to Prevent or Mitigate Claims

In addition to your contract, there is nothing more effective in deterring a claim than by documenting everything you do on a project, from start to finish. You should make sure all events on the project are documented in some fashion – handwritten memos, e-mails, job logs or diaries, minutes of meetings, letters, etc. Written records made contemporaneous with the events are tough for claimants to deny or disprove.

It also does not hurt if the contemporaneous record is sent to others on the project, such as the client, the owner, the contractors or subcontractors. If they do not respond or dispute your record, it will be harder for them later to deny its accuracy and validity.

Many things can happen on a project resulting from oral discussions or instructions. While this may be standard procedure, it can later lead to problems, as people tend to remember things different as time goes by and their interests in what took place can be adversely affected. No matter how clear it is at the time, or how much you trust the other parties, put it in writing. This can actually preserve relationships, by eliminating later disagreements.

Clearly document not only what you **did**, but also what you **did not do**; often, this can be more important. As an example you can clearly state that you did not do any interim testing while remediation efforts were going on, because you were not asked to do so and your contract did not require it. You should also document when you left the job – this can help to confirm that you are not responsible for matters taking place after you left.

Preserve your documentation in a way that will make it relatively easy to locate and retrieve, if and when a claim is made. Record retention has become much easier and less expensive with the advent of electronic storage. Converting documents these into stored files is not difficult and it would appear that many of you do so already. One of the

most frequently asked questions we have received in this regard, however, is how long these records should be kept?

The easiest approach would be to keep these records forever. Electronic storage makes space limitations less significant and in most cases the storage can be on-site. However, if a document destruction program is desired, a factor to be considered in establishing the period for retention is the applicable statute of limitations on claims in the state where claims against you will most likely be asserted. As an example, New York law establishes a six years statute of limitations on claims for breach of contract and a three year statute for claims based on negligence and tort. California law specifies a four year statute of limitations for breach of written contracts and two years for breach of oral contracts, negligence and tort, while Illinois has a ten year statute of limitations for breach of written contracts, five years for breach of oral contracts and two years for negligence and tort. Kansas has a five year breach of written contract statute of limitations, a three year statute of limitations for breach of oral contracts and two years for negligence and tort. Thus, these statutes of limitations can vary in significant ways between states. You may therefore wish to consult with your own legal counsel to determine the applicable statutes of limitations in your jurisdiction. Keep in mind, however, that if you provide services to clients in more than one state, the law of each state in which you provide services should be reviewed. A suggestion would be to take the longest statute of limitations that might apply and use that as the base for determining how long to retain records.

The type of records to be retained is also an issue of importance. These should not only include the contract with the client, but also any handwritten memos, e-mails, job logs or diaries, minutes of meetings, letters, reports submitted to the client and any samples collected, if appropriate.

CONCLUSION

While no one intends to make a mistake, these do occur and you can be prepared to be avoid, deter, or mitigate these claims by using a number of methods and procedures. Many of these methods and procedures are merely what you are already doing, or are extensions and refinements of your current business practices. It does not have to be expensive, onerous, or disruptive to accomplish these goals and the benefits that will result can far outweigh the negatives.