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

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cases being less expensive than lawsuits; possibly quicker in obtaining a decision; arbitration decisions are generally unpublished and therefore would not be of public record, whereas lawsuits are available to the public and could create adverse public relations; and it may give the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

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