

Design Professional Liability Episode 3

PLUS Staff: [00:00:00] Hello, everyone, and welcome to this PLUS Podcast, Design Professional Liability, Episode 3. We would like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers or of plus the contents of these materials may not be relied upon as legal advice.

And now I'd like to turn it over to Andy Treloar.

Andy Treloar: Thank you and welcome to today's podcast, Caring About the Standard of Care. My name is Andy Treloar, and I am Claim Counsel at Travelers located in Denver, Colorado. Joining me as co-host today is Allison Weinstein, also Claim Counsel at Travelers out of the Hartford, Connecticut office.

How are you today, Alison?

Alison Weinstein: I'm good. Thanks, Andy. So today is our third podcast in a three-part introductory series to the world of design professional liability claims. Today, we're going to be talking about the standard of care. Standard of care is incredibly important in design professional claims. The standard of care plays a crucial role in how liability is measured [00:01:00] against a design professional.

A design professional's failure to meet the standard of care can increase the risk for claims and liability exposure. We hope that our discussion today will help shed some light on the importance of standard of care so that brokers and insurance professionals can better understand this concept and how it impacts design professionals.

We are very lucky to be joined today by attorney Anne Myers, a shareholder at Comegno Law Group in Pennsylvania. Anne focuses her practice on defending design professionals and other decision makers in matters involving complex claims of negligence and malfeasance. Hello, Anne. Thank you so much for being here today.

Anne Myers: Thank you. It's a pleasure to be here.

Andy Treloar: Thank you both. But before we begin, please remember that this material is for general informational purposes only and is not legal advice. It is not designed to be comprehensive, and it may not apply to your particular facts and circumstances. Please consult as needed with your own attorney or other professional advisor.

So Anne, let's start off today with the [00:02:00] basic question. What is the standard of care for design professionals?

Anne Myers: To establish a breach of duty in a design professional negligence action, a plaintiff must show that the defendant's conduct fell below the standard of care for the professional services at issue.

In most cases, this determination requires expert testimony because the negligence of a professional encompasses matters not within the ordinary knowledge and experience of laypersons. Generally, the standard of care is defined under the common law as the ordinary and reasonable care usually exercised by one in that profession on the same type of project at the same time in the same place and other similar circumstances.

This standard establishes the baseline. If a design professional fails to meet the standard of care, he or she may be deemed negligent.

Alison Weinstein: Anne, you mentioned in your definition just [00:03:00] now that the standard of care requires, looking at the same profession, the same type of project, the same time and same place and under similar circumstances.

Why is it so important for the standard of care to be looking at same profession, similar circumstances? Why do you want to have a similar type of comparison there?

Anne Myers: The standard of care sets up an apples-to-apples comparison. The standard should be defined by similar professionals working on similar projects under similar circumstances.

The idea is, what would another professional typically have done in the same situation? Circumstances governing the standard of care concern time and area. The standards can change over time and vary by region. By way of example, the standard of care for designing a foundation on the Pacific Coast Highway is very different than designing a foundation for a house located, say, in West Texas.

Andy Treloar: Are standard of care provisions, Anne, in contracts for a [00:04:00] project and should a design professional put a standard of care provision in their contract if it isn't already there?

Anne Myers: The obligation to meet the standard of care exists whether or not there is a contract. If there is no specific standard of care provision in the contract, the standard of care would be the common law definition I noted earlier.

However, it's generally recommended to have a well written clear standard of care provision in the contract between the design professional and its client. It helps the design professional define the relationship between himself or herself and the client. And it can be an important tool for educating clients and managing, documenting clients' expectations.

It gets the parties on the same page. It helps set up realistic expectations for the clients. Perfection is not required, nor is it expected. As a result, the contract can be a valuable part of the risk management process. A well-crafted contract can protect [00:05:00] against client misunderstandings or claims that the client did not understand the standard of care.

Managing expectations up front might help prevent claims in the future.

Alison Weinstein: That, that's a great point, Anne. Now when you're looking at these standard of care provisions in contracts, are there any red flags that you should watch out for or any danger areas that design professionals should be aware of?

Anne Myers: That's a great question because a very well written contract, providing a well written standard of care can be helpful. However, a poorly written contract with poorly written provisions can be very detrimental. And we see this a lot when it comes to client drafted owner drafted contracts. Sometimes clients will use these provisions to try and elevate the obligations and the level of performance for the design professional.

You don't want to agree to a heightened standard of care. This can increase the design professional's responsibility and obligations and increase the design [00:06:00] professional's exposure. A higher standard 1 beyond that, which the law provides means there's a greater chance that the design professional services will not meet that standard and a greater chance that the design professional will be found to have breached the standard of care.

As a result, in contracts, you should avoid words which inflate or elevate the standard of care, such as best, highest, nationally-recognized. While these words might make the design professional feel good about themselves, all they do is set up a trap for later claims of negligence. Also avoid expectations of perfection and avoid warranties or guarantees.

Avoid the creation of a special relationship or a fiduciary obligation. If you see something in the contract that says the design professional is an expert in his field and the client is relying entirely on the design professional for advice, run or at least strike out that clause.

Andy Treloar: I think that's really good advice, Anne. And I [00:07:00] think for the brokers and other insurance professionals listening today, to the extent there's ever any contract review that they're asked to do, these are really good tips to things to be able to look for to be able to advise a design professional to be wary of in that agreement because it sounds like if you put it in that contract, it may be applicable later.

So, I think that's a really good point to raise. Following along that line, when we're talking about proving up a claim in design professional liability cases, Anne, how is the standard of care established at trial? And how is the particular standard of care for an architect or an engineer, how is that demonstrated in an actual trial setting?

Anne Myers: As we noted earlier, the standard of care is going to be established by an expert at trial. Expert testimony is necessary to prove what the standard of care is, and that the design professional either met that standard of care or failed to meet that standard of care, because the knowledge of what is expected of a design professional is beyond the general [00:08:00] understanding of the public.

The jury will listen to the experts to understand what the standard of care is in that particular situation. Experts will normally testify as to the proper and customary practices in their profession, whether the professional met the performance level and whether the professional's acts caused damage.

Armed with this information and other documents that might be put before the jury, such as codes, licensing statutes, regulations, professional societies, can also assist the jury in determining whether or not there was a breach of a duty of care. The jury will take in this information and then decide whether the architect or engineer's actions met that standard of care.

And then if the jury finds the architect and engineer did not meet the standard of care or breach the standard of care, that architect or engineer will be found liable.

Alison Weinstein: Anne, thank you so much for your discussion today on standard of care. I thought that was really helpful and [00:09:00] then giving us a little more in depth look at what design professionals have to deal with every day.

I want to thank our listeners and thank you so much to PLUS having us today. We hope you enjoyed this podcast. Thank you everyone. Have a great day.

PLUS Staff: Thank you to our speakers for sharing their insights with PLUS, and thank you to our listeners for listening to this PLUS Podcast. If you have ideas for a future PLUS Podcast, you can share those by completing the Content Idea Form on the PLUS website.