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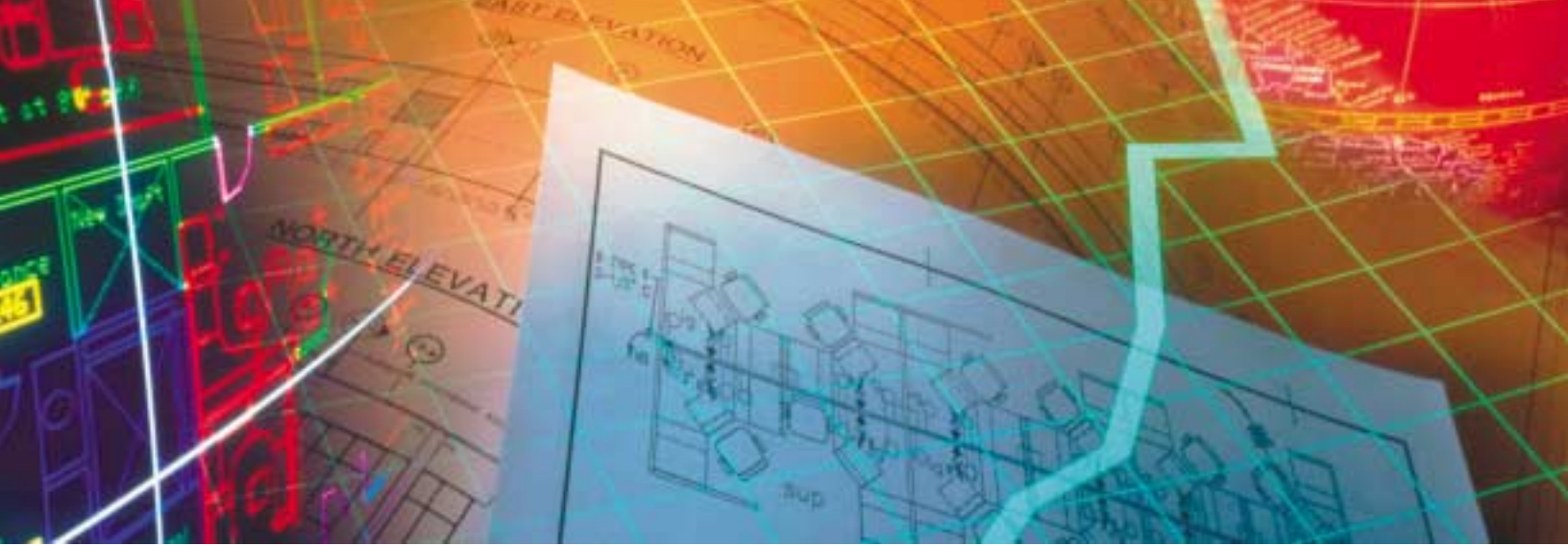
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a&e briefings  
structuring risk management solutions

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## recent trends in Claims

Zurich North America, like every other insurance company, keeps extensive databases of information concerning claims. In a volatile year like 2002, with markets up and down, the design professional liability landscape yielded some common wisdom results and a surprise.

### Loss location states

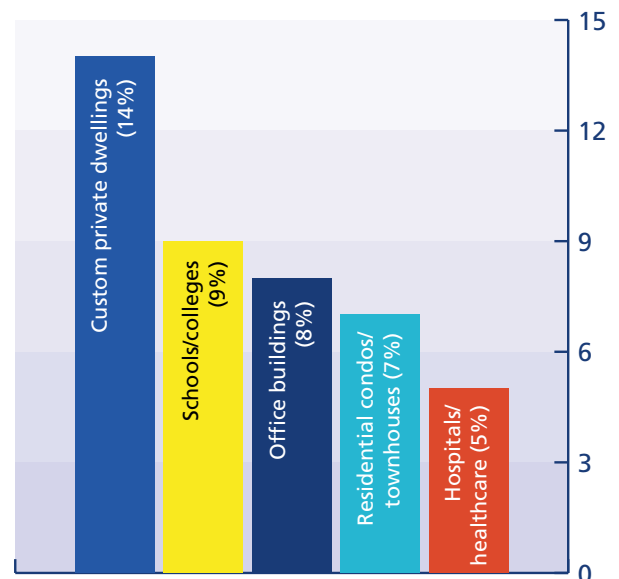
Not surprisingly, the highest number of claims came from the most populous states where the highest number of design professional and environmental consultant professional liability policies are written. The top five states based on number of claims were: 1)California, 2)Texas, 3)Florida, 4)Illinois and 5)New York.

Together, these states generated 46 percent of claims made in 2002. Coincidentally, based on average gross incurred charges, the loss location rankings stay the same. In 2002, California had higher dollar amount average claims than New York. Note: one extraordinary claim occurred in Texas last year that was deliberately not factored into the rankings, so as not to skew the results.

### Project types

Several factors determined the top-ranking project types for most claims in 2002.

The residential real estate market continued to be strong, with record-setting new housing starts. In the commercial and institutional worlds, publicly funded, high-profile project owners tended to manage risk by shifting it to design professionals, resulting in more claims. Below, in order, are the top five project types, based on number of claims. The numbers in parentheses indicate the percentage of total claims generated by the project type.



Although these project types ranked high for numbers of claims, they ranked mostly in the median range for severity of claims. Based on average gross incurred charges, the highest severity project types for 2002 were: 1)stadiums, 2)airports,

3)water systems, 4)hospitals/healthcare and 5)manufacturing/industrial.

### Activities

Which activities got firms into trouble? Design-only accounted for one-third of claims. Design and observation accounted for another third. No surprises there. One surprise our analysis found was that activities associated with feasibility studies generated as many claims as construction management. Why? One theory is that many feasibility studies rely on inadequate preliminary environmental assessments. These inadequacies are not apparent until the feasibility study is done and implemented.

### What can you do?

There are two major preventive measures you can take so that you do not become a statistic in next year's claims analysis.

1. Choose your clients and projects well. Can you afford a difficult client or a bad project? Turning down the work costs you zero. Alternately, don't overextend yourself taking on more work than your practice can properly handle or that is beyond your expertise.
2. Do your paperwork and follow up on it. This advice concerns your administrative paperwork (time sheets, invoices, etc.), and construction administration (submittals, change orders, etc.).

Real life and real practice for design professionals usually consist of a never-ending cycle of peaks and valleys. Try for consistency. Very often, over the life of a project, it is not the big things that create problems, but rather the cumulative effect of the little day-to-day issues and tasks. Consistency in business practices and communication can go a long way in preventing and mitigating claims. Don't forget that **Zurich Design Professional Risk Management** staff is available to assist you in evaluating and addressing risk through contract reviews, newsletters, training sessions and general resource inquiry.

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Where were you on March 13, 1991? You're probably so busy that you can't remember 12 days ago, much less 12 years ago. But, as a design professional, what happened on March 13, 1991, can affect you, your clients and colleagues for the rest of your career.

### **The Fair Housing Act**

Before we can discuss 1991, we have to go back to 1968. The Fair Housing Act was passed as Title VIII of the Civil Rights Act of 1968. Title VIII prohibited discrimination in the sale, rental and financing of dwellings based on race, color, religion, sex or national origin.

Two decades later, the Fair Housing Amendments Act (FHAA) of 1988 was passed. The FHAA expanded Title VIII protections to the disabled and established design and construction requirements for accessibility. Failure by designers and builders to incorporate these accessibility requirements is regarded as unlawful discrimination, enforceable by the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ).

What are the penalties? To quote HUD: "Under the Fair Housing Act, if an administrative law judge finds that a respondent has engaged in or is about to engage in a discriminatory housing practice, the administrative law judge will

order appropriate relief. Such relief may include actual and compensatory damages, injunctive or other equitable relief, attorneys' fees and costs, and may also include civil penalties ranging from \$10,000 for the first offense to \$50,000 for repeated offenses. In the case of buildings which have been completed, structural changes could be ordered, and an escrow fund might be required to finance future changes. Further, a federal district court judge can order similar relief, plus punitive damages as well as civil penalties for up to \$100,000 in an action brought by a private individual or by the U.S. Department of Justice."

### **You need to know this law**

The Fair Housing Act applies to multifamily housing consisting of four or more dwelling units built for first occupancy after March 13, 1991. First occupancy is defined as a building that has never before been used for any purpose. Covered multifamily housing includes:

- In buildings *with* one or more elevators: ALL dwelling units in buildings containing four or more dwelling units, and
- In buildings *without* elevators: ALL ground floor dwelling units in buildings containing four or more dwelling units.

# what's fair about the fair housing act? part I

The intent of the Fair Housing Act is twofold: to give people with disabilities greater freedom of choice in where to live and to give an aging population the opportunity to continue to live in their dwellings longer.



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### References

To promulgate the Fair Housing Act, HUD published the “Fair Housing Accessibility Guidelines” (Guidelines) on March 6, 1991. (Between 1988 and 1991, ANSI A117.1-1986, “American National Standard for Buildings and Facilities- Providing Accessibility and Usability for Physically Handicapped People,” was the accepted guide.)

Subsequently, HUD issued a “Supplemental Notice, Questions and Answers about the Fair Housing Accessibility Guidelines,” in 1994. The release of the “Fair Housing Design Manual” occurred in 1996, with an update in 1998. The current 1998 update of the “Fair Housing Act Design Manual” (Manual) is available free as a pdf download at <http://www.huduser.org/publications/destech/fairhousing/html>. Although “free” sounds good, the Manual is 334 pages long. That’s a lot of paper and toner from your printer. A better alternative may be to purchase the Manual online from HUD for \$5.00. The same address above guides you to, and through, the online purchase process.

Both the downloaded and purchased versions include the 1991 Guidelines, the 1994 Questions and Answers (that’s where the penalties quote came from), and the 1998 Manual. You may think you know the definition of “ground floor,” but the Manual will make you think again.

### The seven requirements

The following seven design requirements must be incorporated into dwellings covered by the Fair Housing Act and are taken directly from the “Fair Housing Act Design Manual (1998).”

#### **Requirement 1: Accessible Building Entrance on an Accessible Route.**

Covered multifamily dwellings shall be designed and constructed to have at least one building entrance on an accessible route, unless it is impractical to do so because of terrain or unusual characteristics of the site.

#### **Requirement 2: Accessible and Usable Public and Common Use Areas.** Public and common use areas must be readily accessible to, and usable by, people with disabilities.

#### **Requirement 3: Usable Doors.** All doors designed to allow passage into and within all premises must be sufficiently wide to allow passage by persons in wheelchairs. Accessible doors in public and common use spaces and primary entry doors of

dwelling units must provide a clear opening of 32 inches minimum. Usable doors (secondary exterior doors and doors that allow passage within the dwelling unit) are to be a nominal 32 inches clear width. A 34-inch door, hung in the standard manner, provides an acceptable nominal 32-inch clear opening. Tolerances of 1/4 inch to 3/8 inch are considered an acceptable range for usable doors. This tolerance does not apply to accessible doors.



**Requirement 4: Accessible Route Into and Through the Covered Dwelling Unit.** There must be an accessible route into and through the dwelling units, providing access for people with disabilities throughout the unit. A minimum width of 36 inches is required for an accessible route.

**Requirement 5: Light Switches, Electrical Outlets, Thermostats and Other Environmental Controls in Accessible Locations.** All premises within the dwelling units must contain light switches, electrical outlets, thermostats and other environmental controls (which are operated on a frequent basis) in accessible locations.

**Requirement 6: Reinforced Walls for Grab Bars.** All premises within dwelling units must contain reinforcements in bathroom walls to allow later installation of grab bars around toilet, tub, shower stall and shower seat, where such facilities are provided.

**Requirement 7: Usable Kitchens and Bathrooms.** Dwelling units must contain usable kitchens and bathrooms such that an individual who uses a wheelchair can maneuver about the space.

### Sounds fair

So, if you just followed the various HUD directives over the years, you're safe, right? Even the 1991 Guidelines state: "These guidelines are intended to provide a safe harbor for compliance with the accessibility requirements of the Fair Housing Act." Not necessarily.

Did you notice how the 1991 Guidelines were issued only seven days before the Fair Housing Act took effect on March 13, 1991? Not much time to incorporate the requirements contained therein. The Guidelines also contained the following statement:

"These guidelines are not mandatory, nor do they prescribe specific requirements which must be met, and which, if not met, would constitute unlawful discrimination under the Fair Housing Act. Builders and developers may choose to depart from these guidelines and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act."

If the first occupancy of a project occurred more than two years ago, hasn't the statute run, and therefore any claim filed is untimely?

The cover of the 1996 Manual included the statement:

"[N]o guarantee of the accuracy or completeness of the information or acceptability for compliance with any mandatory requirement of any code, law or regulation is either offered or implied."

The disclaimers were finally removed in the 1998 Manual. So, for the time period from 1991 until 1998, HUD allowed for builders and developers to reasonably depart from the HUD-issued standards and, even if the builders and developers followed the standards, HUD reserved the right to sue. The situation is rendered even worse. After the release of the 1998 Manual update, the National Association of Home Builders and the National Multi Housing Council jointly commissioned Lawrence G. Perry, AIA to study the document. Mr. Perry produced "A Review and Analysis of the Fair Housing Act Design Manual" (Review) which identified portions of the Fair Housing Act Design Manual that stated requirements that appeared to be inconsistent with the Fair Housing Act Accessibility Guidelines. The Review identified over 150 inconsistencies to be addressed and clarified.

Unfortunately, from the case history available, it appears that the Guidelines and Manual are being enforced as mandatory minimum standards retroactively. How can that happen? At most, the statute of limitations for a private lawsuit is two years after the occurrence or the termination of the alleged discriminatory housing practice. If the first occupancy of a project occurred more than two years ago, hasn't the statute run, and therefore any claim filed is untimely? To seek avoidance of the statute of limitations, HUD, the DOJ and federally funded private advocacy groups regard non compliance with the Fair Housing Act as a continuing violation. Liability may exist forever, as long as someone asserts that discrimination has occurred.

As a design professional, what can you do? The prudent design professional will adhere strictly to the 1998 Manual scoping and technical criteria. The prudent design professional should consider accessibility suggestions in the Manual as mandatory requirements and disregard the six safe harbors listed in the Preface to the Manual. Also, don't think that you're in compliance with the Fair Housing Act design and construction requirements if you have met all state and local codes and accessibility guidelines. Although jurisdictions may have more stringent accessibility requirements, these

may only apply to 5 percent of the dwellings in a covered development. The Fair Housing Act requirements may apply to ALL of the dwelling units. Always, the most stringent requirements should be incorporated.

In the next *A&E Briefings* we'll discuss why and how projects are targeted for Fair Housing Act enforcement, look at specific cases and examine court interpretations of Fair Housing Act requirements. In future newsletters we'll also cover other federal acts that affect design professionals: The Architectural Barriers Act of 1968, Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990.

*Note: Special thanks to James W. Harris, Esq., Vice President of Property Management at the National Multi Housing Council for his invaluable assistance in the preparation of this article. □*

This is the case (2001 Cal. App. Unpub. LEXIS 973) of a fee dispute between a consulting engineer and a project developer. The civil engineering firm sued and was eventually awarded the full amount of unpaid compensation. It only took about four years. Think they broke even? Not likely. Read on to learn some valuable risk management lessons.

### **Hollywood (almost)**

Manhattan Beach Studios was the first new motion picture studio built in Los Angeles County in over 50 years. About 20 miles from downtown Hollywood, the \$90 million project was “ultra fast track.” Phase I should have taken about 15 months to complete. Instead, it was finished in less than seven months, despite record-breaking El Nino rains and the discovery of toxic waste on the site.

The developer was Shamrock Entertainment Investors II, Inc. and Shamrock MBS, L.L.C. (Shamrock). Bastien and Associates was the architectural firm. The general contractor was Snyder Langston. Dalcin Cummins Associates was the civil engineering consultant.

Shamrock got a studio in less than half the time. Bastien and the other consultants got paid. Snyder Langston got a \$200,000 cash bonus. The project superintendent got a new 1998 Porsche

Boxster. All Dalcin Cummins got was an outstanding bill for \$155,818.78. Then, when Dalcin sued Shamrock for payment, Dalcin got a cross-complaint for fraud, breach of contract and professional negligence. Why?

### **Things happen**

Why did Dalcin Cummins get the short end when everyone else made out okay? First and foremost, to quote the Court of Appeal of California: “Of all the entities working on the project, only Dalcin Cummins Associates lacked a written contract.” “Because Dalcin Cummins Associates had no written contract, the scope of its responsibilities changed from design meeting to design meeting. . .” Manage your risk: Get the contract, and the scope of services, in writing and make sure ALL parties have signed it prior to starting work.

Second, from the Court record, it appears that many verbal orders and assertions were made to Dalcin Cummins that weren’t transmitted to the other parties. For example, Shamrock’s owner’s representative instructed Dalcin Cummins to stop working for more than two months while a replacement tenant was found. Neither Shamrock nor Snyder was aware of this. The other parties to the project began thinking Dalcin Cummins was behind schedule. It’s ironic that even though the project was ahead of schedule

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nothing  
lucky  
about this  
shamrock



### Manage your risk:

Get the contract,  
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work.

and within budget, Shamrock contended that Dalcin Cummins had delayed the project. The Court discussed eight other instances where Dalcin Cummins was either innocent of causing delay or unfairly made to look responsible for delay. Manage your risk: Get verbal change orders in writing (standard forms are helpful), and make sure ALL parties have signed. Alternatively, document verbal orders and discussions in letters or memos distributed to ALL parties concerned. This is especially critical when you are:

1. depending on another party to provide information, and
2. relying on the information provided.

Document discussions, promises and schedules, adding the consequences of non-performance or misinformation.

Third, Dalcin Cummins let outstanding invoices accumulate to total \$155,818.78. Can you afford that?

Manage your risk: Never allow your accounts receivable to exceed an amount you are prepared to lose, whether it's

\$5,000 or \$50,000. Invoice and collect your fees in a timely manner, whether it's by the week, by the month or by project phase. Don't let a fee dispute get to court. Invariably, a cross-complaint will be filed against you. If you're not getting paid, if your contract allows, stop working. If this is a problem area for you, tighten up your contracts and tighten up your billing and collection systems.

Yes, eventually Dalcin Cummins collected their \$155,818.78. But at what cost? It's a well-known insurance industry statistic that pursuing or defending a claim costs a firm an average of \$32,000 just in personnel time and expenses (attending meetings, depositions, etc., and going through files, producing documents and exhibits, etc.) That doesn't include attorney fees and expert witnesses (Dalcin Cummins spent \$57,975.00 on expert witness fees).

**The bottom line:** Get paid, get paid in a timely manner or cut your losses. □

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