



# ACS Webinars™

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## ACS WEBINARS™

*Covering Your Elements – Understanding  
Professional Liability Concerns Facing Scientific  
Consultants and Strategies to Protect Yourself*



Speaker: Richard Kissel  
Kissel Hirsch & Wilmer LLP



Moderator: John Whittle  
Lamar University

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**June 17 - "A Life of Innovation – Finding Your Passion"** with David Walt, Robinson Prof. of Chemistry, Prof. of Biomedical Engineering at Tufts University, HHMI Professor, and a successful entrepreneur.



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## Covering Your Elements – Understanding Professional Liability Concerns Facing Scientific Consultants and Strategies to Protect Yourself



**Hays**

## Welcome, Thanks for Joining Us!

- Today's Discussion Points Include:
  - Understanding your risk
  - Anyone can be sued for anything: even if you're right!
  - The importance of a written contract as a risk management tool
  - What needs to be done in the event you are sued or believe you might be sued

## Anyone Can Sue Anyone For Anything

*You can do everything right and still be sued!*



Decisions and recommendations made in your professional duties can result in you being named in a lawsuit. It happens **all** the time. The costs of a defense can be devastating to a private practice. Even if the suit has no merit, the resulting legal costs can be sizable.

There is low risk to a plaintiff bringing a non-meritorious action against you.

- **Consider the Opportunity or Intangible Costs if Sued:**

- Loss of 'billable hours' as you spend time defending yourself*
- Office morale negatively affected*
- Adverse impact in business relationships and community reputation*

Professionals who choose not to be insured may want to keep in mind that the likelihood of a lawsuit is greater during unfavorable economic times.

## Understanding Your Risk...

- Professional consultants are held to a high "standard of care" by:
  - Clients
  - Courts
  - General Public
  - ...therefore, it is in your best interest to be aware of and manage risk.**
- Face your known risks:
  - Evaluate
  - Analyze / understand
  - Manage

Keep in mind there are unknown risks that can potentially lead to large and complex claims.

***The risk of being sued can have catastrophic effects on your business.***

## CLAIM SCENARIOS

- **The standard scenario:**

Plaintiff claims the consultant was negligent with respect to analysis of situation and/or services provided and breached professional obligations

- **What does this mean?**

The advice given fell below the standard required of a reasonable consultant in the particular area of expertise

### Example 1: Commercial or Residential Property Inspection

- **Scenario:** Plaintiff Commercial Property or Residential Property Owner claims consultant failed to detect or identify hazardous substance/pollution on the property in the course of rendering Professional Services

- **Scenario:** Plaintiff Owner alleges that Consultant failed to detect chemical erosion of machinery at Property that causes Bodily injury or Property Damage

Unstable Building Collapses at site where Consultant was hired to inspect situation, causing property damage to other buildings and bodily injury to a bystander

- **Scenario:** Plaintiff Property Owner alleges Consultant failed to detect mold at the property

Policy Generally Excludes this type of Claim

But, can purchase policy endorsement to cover this type of claim

## Example 2:

- **Scenario:** Consultant retained to give advice on mix of chemicals to be used at plant
  - Generally, the allegations against engineer would be that he/she failed:
    - To detect factors that led to an explosion
    - Failed to warn against possibility of explosion
    - Failed in calculations or otherwise to avoid risk of injury to others

## Example 3:

- **Scenario:** Chemical Engineer hired by company that manufactured machine that treated bio-hazard material. Engineer failed to maintain licensing status with regulators.
  - Who is likely to bring this type of claim?
    - Government v. Insured
    - Government v. Company and then company asserts third-party claim against Chemical Engineer, saying, you were negligent for failing to maintain proper licensing resulting in Damages

## Example 4:

- **Scenario:** Exposure to Chemicals Caused Physical Injury, Rashes, Dizziness
  - More specifically, this type of scenario includes actions against Chemical Engineer or Chemist claiming physical injury as a result of use of chemicals (i.e., cleaning products)

## Example 5:

- **Scenario:** Actions against Chemist or Chemical Engineer Claiming Injury Due to Exposure to Chemical Used in Manufacturing of Trailers
  - A specific example includes: FEMA Trailers coated with Formaldehyde, causing injury because of long-term living and use

## Tips for Avoiding A Professional Liability Claim:

- **Communication with clients**
  - Control client expectations
  - Explain delays
  - Provide clarity with respect to scope of work or advice to be provided
  - Obtain written instructions prior to agreeing to the work
  - Explain the use of sub-contractors and obtain client approval before using them

## Written Contract is Important!!

- **What should it include:**
  - Specifically defined scope of work (what is being done and what is not within the scope of work)
- **Why is a written contract important:**
  - Good business
  - Manages client's expectations
  - Reduces disagreement regarding the scope of work to be done
  - Ensure any modifications to the contract and/or scope of work are signed off by the client BEFORE THE WORK IS DONE

## Content of Your Contract is Important

### ■ Selecting Good Attorney to Review Your Contracts

- Invest time and money up front to avoid future problems and expense
- Even Form Contract better than no contract
- Society has form contracts

### ■ Important Clauses Your Contract Should Contain

- Set forth what you intend to do, what you do not intend to do
- List materials provided and that you relied on
- Do not provide guarantees or warranties for services
- Limitation of Liability Provision (not applicable in every jurisdiction)
- Watch out for indemnification provisions in contracts

## What is Professional Liability Insurance?

- May commonly be referred to as 'Errors and Omissions' Insurance (E&O)
- Offers protection if a client files a suit pursuant to how you did or did not fulfill your professional, contractual obligations, subject to policy terms, conditions, and exclusions.
- Common reasons alleged in professional liability claims include **negligence, misrepresentation, violation of good faith and fair dealing**, and the rendering of **inaccurate advice**
- The industry average to defend claims can exceed \$50,000, even claims with no merit!

## A Written Contract is a Requirement for Coverage

### ■ POLICY PROVIDES:

The Insuring Agreement says:

#### A. Coverage

To pay on behalf of the Insured Damages and Claims Expenses which the Insured shall become legally obligated to pay because of any Claim or Claims first made against the Insured and reported to the Underwriters during the Period of Insurance or Extended Reporting Period, arising out of any negligent act, error or omission of the Insured *in rendering or failing to render Professional Services as stated in Item 8 of the Declarations*, for others on behalf of the Named Insured designated in Item 1 of the Declarations, and caused by the Insured except as excluded or limited by the terms, conditions and exclusions of this policy.

Declarations Page says:

#### 8. Professional Services

Professional Services provided by a member of the American Chemical Society and/or the American Institute of Chemical Engineers to Third Parties *for a fee pursuant to a current written contract*.

## What do I need to do if I perceive the possibility of a claim?

### ■ What are circumstances indicating the possibility of a claim?

As precaution, any information you learn that makes you believe that there is possibility that a claim might be made against you.

### ■ Key things to remember:

- Bad situations do NOT generally get better over time
- Promptly notify local broker and Insurer (See Appropriate Recipient of Notice Contained in Policy Declarations Page)
- Utilize Insurer's Experience to assist in mitigation of potential loss or resolution of problem
  - This could be the first time you have seen this type of situation. The Insurer has seen similar situation many times.
- Failure to Promptly Notify can threaten ability to recover under policy (mandatory notification of potential claim)

### **What do I need to do if I get sued or my client advises me that he is pursuing a claim against me?**

- Immediately notify local broker and Insurer (See Appropriate Recipient of Notice Contained in Policy Declarations Page)

#### **What happens next?**

- The Insurer will determine if allegations are within the scope of coverage
- If so, the Insurer will provide local defense counsel pursuant to its "duty to defend" to respond to complaint without waiving potential defenses
  - Insurer can negotiate favorable rates for defense counsel
- Insurer will provide evaluation of coverage as investigation continues
- Insurer will, if opportunity presents itself, seek early reasonable resolution of claim without lengthy litigation

### **What do you need to do once a claim or circumstance has been notified?**

- Cooperate fully with the insurer, defense counsel or the insurer's outside counsel
- Provide additional information as requested
- Assist in the defense of the litigation
- Avoid trying to resolve situations on your own!
- DO NOT admit liability or offer any amount to resolve without Insurer consent

## Review your Policy's Declaration Page

### ■ Declarations Page Contains Valuable Information

- Policy Period
- Maximum Amount Insurer will pay
- Retention or Deductible
- Where to send Notice of a Claim or Circumstance
- Retroactive Date, if any

## Former Employers

Work as Independent Contractor

### Key things to remember:

- Make sure you have a written contract
- Don't assume you are covered under their insurance  
Former Employers' Lawyers will use defense against any liability that is alleged against you, they will be sure to draw independent contractor distinction, therefore, contract identifying role and services to be provided is very important to prevent arguments later about who was responsible for what

## Professional Liability Plan

- Covers the cost of legal defense (once the policy deductible has been satisfied), including:
  - Local defense counsel
  - Settlement costs
  - Other defense fees (i.e., court costs, etc.)
- Coverage offered for either a consultant or a company
- Underwritten by the Beazley syndicate at Lloyd's of London, rated "A" (Excellent) by A.M. Best

## *You're Invited....*

- To learn more about the valuable benefits of the ACS and AIChE Endorsed Professional Liability Program, or to request a complimentary risk consultation, please contact:

■ **Henry Cifuentes**

■ **Hays Companies**

■ **1133 20<sup>th</sup> Street, NW, Suite 450**

■ **Washington, DC 20036**

■ **Phone: 1-888-437-7008**

E-mail: [questions@hayscompanies.com](mailto:questions@hayscompanies.com)

Internet: <https://acs-aiche.haysaffinity.com>

**QUESTIONS??????**



**Q&A SESSION**

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