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Emerging Topics

1

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Agenda

- Licensing and Regulations
- M & A Claims
- Climate Change
- Fundamental E&O
- Retaining Geotechnical Engineers
- Social Inflation
- The Economy



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Licensing & Regulations

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Occupation Regulation

Each state imposes its own rules for whether someone must become licensed before being able to work legally in a certain occupation

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At least 25 percent of the American workforce is subject to occupational licensing

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Examples of occupations subject to licensure

Auctioneer	Dance Instructor	Bartenders	Pet Groomer	Florists	Makeup Artists	Sheep Dealers	Upholsters	Fortune Tellers
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The Deregulation Movement

Precipitating Events

- 2008 – ALEC developed a model law titled The Occupational Licensing Relief and Job Creation Act
 - Ensures “that an individual may pursue lawful occupation free from unnecessary occupational regulations, and protect against the use of occupational regulations to reduce competition and increase prices to consumers”
- Deregulation efforts involve the establishment of a professional licensure review committee that:
 - Ensure that the least restrictive regulations are being used to regulate all professions, and
 - Makes recommendations for the elimination of licenses in the state
- 2015 – U.S. Supreme Court ruled against the North Carolina Board of Dental Examiners in its efforts to stop non-dentists from offering teeth-whitening services
- Allows anti-trust challenges to licensing regulations

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The Deregulation Movement

Examples

- 2011 – Florida House approved a bill that would deregulate 14 licensed occupations, including auctioneers, athlete agents, hair braiders, interior designers, and professional fundraising consultants and solicitors. The bill ultimately failed after it was rejected in the Senate
- 2014 – the Indiana Jobs Creation Commission recommended by a 5-0 vote that the state stop regulating and licensing engineers
- 2016 – Arizona proposed H.B. 2613, aiming to abolish state licenses for geologists and landscape architects
- 2017 – Arizona legislature proposed the “Right to Earn a Living Act”
- Arkansas, Florida and Michigan have also considered bills to deregulate landscape architect



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Deregulation... Overview, Benefits, Consequences, & Examples (corporatesolutions.com)

6

Deregulation Efforts



Response



According to the AIA statement, approximately 25 states were in the process of shrinking licensure requirements through legislation or executive actions.



The AIA called the growing number of states delicensing professionals like architects a "troubling trend."



M&A: Buyer Be Aware



Full Liability Purchase

- Purchased all assets and liabilities of firm
- Claim arises out of purchased firm's prior contract
- Includes fee shifting clause
- Project done when bought



Acquisition of a solo practitioner

Solo practitioner a structural sub to the architect on the project

Joins new firm during the course of the project.

Continues working on project

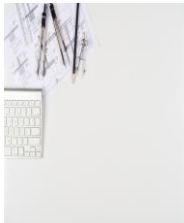
No employment agreement

Claim arises



Acquisition of a solo practitioner

- Employee Response
 - Admits original calculations were wrong
 - Sends new drawings for repairs
 - Uses new employer's email
 - Uses new employer's computer
 - Bills for remedial work under new employer
 - New employer accepts payment



Assets Only Purchase

- Principal of small engineering firm retires
- Firm dissolves and remaining engineers purchase the assets of the old firm
- New firm operates out of old space
- New firm has substantially the same employees
- New firm services substantially the same clients

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Climate Change


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Design Professional

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A design professional must exercise the same level of ability, skill, and care customarily used by those in the profession under similar circumstances – *i.e. in the same geographic area.*



Roofs collapse in Brown and Outagamie counties
www.greenpressjournal.com

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Are design professionals liable for failing to anticipate the effects of climate change?

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- While tort law generally does not attach liability for harms that were not foreseeable, the effects of climate change are increasingly foreseeable
- Adhering to applicable codes and following industry customs typically satisfies the standard of care for design professionals
- Many building codes in the United States are based on historical data and do not account for future risks related to climate change, such as sea level rise

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Foreseeability

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What is foreseeable?

- Unforeseeable → No tort claim
- What is foreseeable may vary geographically
 - Rising sea levels in Denver?
 - Multiple-foot increase in average snowfall in Miami?
- Past performance ≠ indicator of future results
- Can't hide behind
 - contractual requirements
 - applicable codes
 - industry custom



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Laukkanen v Jewel Tea Co.

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222 N.E2d 584 (Ill. App. Ct., 4th Distr. 1996)

Facts

- Shopper sued building engineer when a concrete pylon toppled in an unprecedented windstorm

Claim

- Highest wind speeds on record
- Based on scientific knowledge available at the time of design, winds were reasonably foreseeable

Ruling

- Engineers knew or *should have known* of potential wind speed and used heavier concrete to prevent collapse

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Conservation Law Foundation v. ExxonMobil Corp.

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Case 1:16-cv-11950, United States District Court for the District of Massachusetts

- Clean Water Act claim alleging ExxonMobil failed to consider imminent increases in rainfall, severity of storms, and sea levels
- CLF had standing to make such a claim against ExxonMobil for present and imminent storm-related risks because of the substantial risk that severe weather could cause the terminal to release pollutants in an amount greater than it was allowed under its CWA permit
- Alleged ExxonMobil did not engage in "good engineering practice"



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Foundational E&O

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Not Tracking Paperwork

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Facts

- Piping crossed a creek
- Permit required from Department of Natural Resources
- Insured missed deadline to secure the permit / stop work order issued

Claims

- Breach of contract
- Delay
- Negligence

Outcome

- Alleged damages over a million
- Headed to litigation

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Work Scheduled, Not Performed

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Facts

- Duct renovation
- Sprinkler head scheduled to be moved
- Work scheduled multiple times - did not happen due to lack of communication or missed work
- Heat turned on by municipality prior to work being performed

Claims

- Breach of contract
- Negligence (failure to call out sprinkler head on plans)

Outcome

- Alleged damages \$4.4million
- Headed to litigation

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No Warning

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Facts

- Road construction in gated community
- Engineer designed speed hump to slow traffic around entrance
- Plans called for speed hump to be stripped
- Plans called for warning signs to be placed
- Biker strikes speed hump and falls

Claims

- Breach of contract
- Negligence (inappropriate use of speed hump)

Outcome

- In litigation

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Hiring the Geotech

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Hiring the Geotech

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Don't do it, but if you do...

- Conventional Wisdom
 - Owner hires the Geotech
- Emerging Trend
 - Owner forcing prime design consultant to hire the geotech
 - Public entity projects leading the way
 - *Intent* – Procurement and accounting convenience
 - *Potential* – Liability landmine

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Social Inflation

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What is social inflation?

Social inflation is a term that describes how claims costs are increasing above general economic inflation.

Arises from:

- Largely publicized large jury verdicts
- Celebrity salaries
- Lottery winnings
- Broader definition of liability
- Rollback of tort reforms



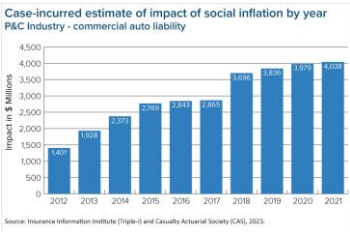
67% of jurors believe companies sacrifice safety to make more profit

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Cost of social inflation



Year	Impact in \$ Millions
2012	1,401
2013	1,924
2014	2,273
2015	2,719
2016	2,843
2017	2,895
2018	3,595
2019	3,887
2020	3,070
2021	4,038

Source: Insurance Information Institute (Triple-I) and Casualty Actuarial Society (CAS), 2023.


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Social Inflation and Design Professionals

- Professional liability carriers for design professionals saw an increase in claim severity in 2021 of over 50%.
- Over 50% of insurers raised premiums in 2021 for the first time in years.
- Less limits, higher deductibles, less coverage.



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The Economy

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ACEC Q3 2023 Update

- Growth – accounting for inflation
 - 2024 – 3.7%
 - 2025 – 2.6%
- Supply Chain
 - 32% concerned (56% one year ago)
- Hiring
 - 10% of positions unfilled
 - Fewer firms with openings / fewer openings
 - 61% of firms turning down because of staffing shortages
- Future opportunities
 - Water/wastewater/
 - Transportation (IJA \$238 Million)
 - Energy and utilities



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Recession?

NABE

- Pushing to end 2024 or beyond
- Modest economic growth
- Moderate job growth
- Declining interest rates
- Slowing Inflation

Bloomberg

- *July 17, 2023*: Goldman Hatzius reports odds of recession next year at 20%
- *August 4, 2023*: JP Morgan now sees continued expansion in 2023 and modest growth in 2024
- *August 13, 2023*: More economists predicting US will escape recession

NABE Economic Policy Results
August 2023
www.nabe.com

For 10/11/2023 to 10/11/2023 2023 to See if US Recession. Can Be Avoided -
Bloomberg
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L.P. Securities, 2023 to 10/11/2023, 10/11/2023, 10/11/2023, 10/11/2023, 10/11/2023



Questions?

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