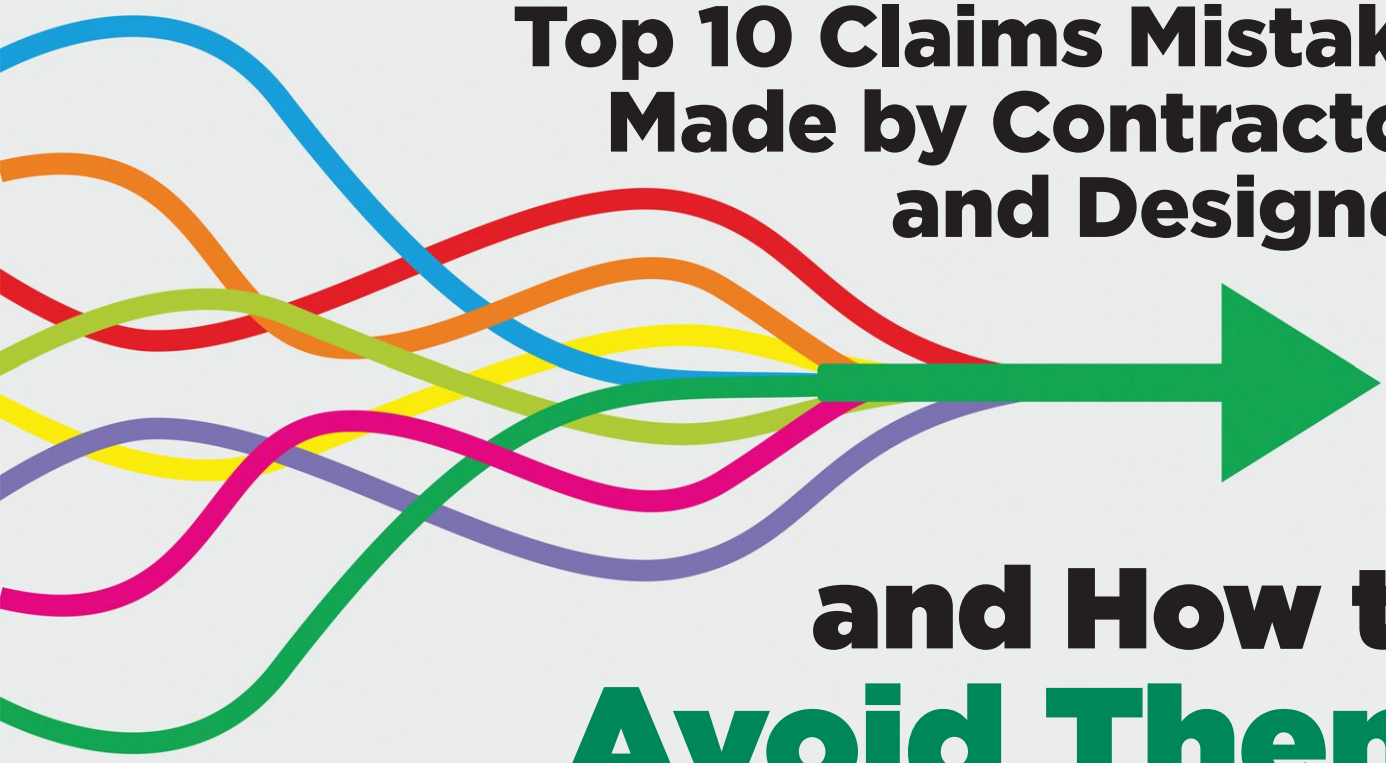
Top 10 Claims Mistakes Made by Contractors and Designers and How to Avoid Them



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Claims happen. They are a reality for contractors and designers alike on construction and transportation projects. Many are avoidable and, while some are better at avoiding them than others, claims are inevitable for most significant players in this industry. Managing them correctly from the start is critical, as it is often difficult and expensive to make up for mistakes down the road. This list is offered from the perspective of a construction litigation attorney. The list is intended to identify some fairly simple, but often overlooked, practical tips contractors and designers should consider when facing potential claims situations.

1. Who's the Boss?

Mistake: Not knowing who is calling the shots on the other side.
Right Way: Identify actual decision maker(s) early.

You need to know who the actual boss is for the other side – the decision maker. Often, this means someone other than the project manager you've been having a letter-writing war with for the last few months. This doesn't mean you want to be perceived as going over someone's head at the first sign of a potential claim, and rarely does it make sense to freeze day-to-day operations personnel out of claims-related communications.

It does mean you should actively seek to determine who the other decision makers are from the outset. Typically, the best way to ensure this is happening is to make an agreement with the other side to reciprocate by identifying your key decision maker(s) and ensuring they also are included on key claims-related communications (even if they are merely getting copied on communications). Messaging and the perception of the other side's management team about claims issues are often as important as the substance of the dispute itself. By identifying the actual decision makers and creating clear lines of communication early, you minimize risks of bias associated with how non-decision makers are reporting up the chain of command on claims issues.

2. Nothing Personal

Mistake: Taking things personally.
Right Way: Calm, cool, collected and detached.

Claims always involve disputes. Disputes mean people disagree about things; however, disagreeing can lead many people to emotional, personal reactions in the handling of claims issues. This is rarely helpful, usually expensive, and tends to delay resolution. Although a claim may feel unjust by some members of your team, or because of the team member's role on the project they perceive certain things as "personal," it is important not to let personalities drive the bus. When there is any risk of team members letting their personal feelings influence the process, it is prudent for management to appoint an unattached "editor-in-chief" to filter and manage all claims-related communications.

3. Turn Up the Heat

Mistake: Blowing things up prematurely.
Right Way: Escalate disputes strategically, not by default.

There can be benefi ts to unnerving the opposition in pre-suit actions. However, bluffi ng and posturing don't always work. Contractors and designers often make the mistake of pounding the table and sending contentious communications, or otherwise escalating a dispute too early. This is unhelpful and often helps lawyers more than either party.

Rather, it is important to escalate a dispute strategically, not by default. By meaning what you say and saying what you mean rather than constantly blustering, the other side is forced to take you more seriously. Some disputes can't be resolved by agreement pre-suit, and escalation to a formal lawsuit or arbitration proceeding is required. In that case, parties still should consider winning the race to the courthouse, but they should do so only when they have fi rst meaningfully considered whether escalation is helpful or unavoidable.

4. Look to the Contract

Mistake: Checking the contract after the fact.
Right Way: Review the contract before taking action.

Contractors and designers should consider the dangers of reviewing contract language too late. While very basic, it is a common problem observed by construction litigators. Parties in the midst of a dispute sometimes assume the contract's requirements and take action, write letters and adopt fi rm positions on claims only to later learn what the contract actually says. This is not only embarrassing but can undermine a claim. Early review of the contract allows for the identifi cation of potential construction claims and disputes before they arise, enabling the early resolution of issues before they morph into a formal claim.

In addition to contract terms on dispute resolution, a contract can call for specifi c ac-tion and requirements for notice provisions, time extensions, directives, change orders, insurance and indemnity, diff ering site con-ditions, etc. Depending on the contract lan-guage, there can be substantial risks of not providing timely, written notices of events impacting cost or project timelines. Simply reviewing the plain language of the contract before acting on a claim or in defense to one is a critical step.

5. Count the Beans

Mistake: Computing claims values only after the fact.
Right Way: Create cost codes and track in real time.

One easily avoidable pitfall of claims management is failing to track impacts in real time. It is important to track time and costs of changes separately from base scope time and costs. A calculated claim total tends to look more suspicious, even if legitimate, when someone goes through cost or schedule records after the job to retroactively assign claims values.

Naturally, a suspicious-looking claim is harder to settle. By trying to compute claim values only after the fact, there is an inherent risk in failing to capture bona fide damages that should have been included. By creating cost codes when a claim arises and tracking those costs contemporaneously, contractors and designers will improve the probability of settling or winning a claim.

6. Impact Your Schedule

Mistake: Schedule updates that undermine your claims.
Right Way: Ensure schedule updates mirror claims positions.

In some instances, contractors and/or de-signers provide confl icting schedule infor-mation that can be used against them. This often occurs when the contractor or design-er provides interim schedule updates that are inconsistent with schedule data refl ect-ed in time impact claims produced during the same time period.

This is a common mistake observed and often taken advantage of by construction litigation attorneys. This often happens when the project scheduler is not fully in the loop with the team member preparing claims documentation. Contractors will have diffi culty explaining to owners a schedule reflecting on-time completion while simultaneously prosecuting a claim for signifi cant periods of delays against another party.

While often inadvertent, once the contractor or designer has presented conflicting schedule information, credibility issues arise, and claims can become harder to re-solve. Therefore, it is important to ensure everything produced about schedules lines up (updates to all parties, daily reports, etc.) and that the individual maintaining the schedule is well aligned with those managing claims to ensure consistent communications.

7. Reserve Your Rights

Mistake: Unwittingly waiving claims. **Right Way:** Create and use fair, reasonable reservation language.

Many contractors and designers unwittingly sign off on form pay applications, modified lien/bond waivers and/or change orders without reading the fi ne print that says they waive claims. Unfortunately, this waiver language can be enforceable. By unwittingly waiving claims, contractors and designers may for-feit rights at the onset of an issue and create the possibility of being legally precluded from successful recovery on a claim. To avoid this potentially fatal mistake, a contractor or designer should create reservation language to make clear the intention to not waive claims and should religiously include reservation language on future pay applications, change orders, and lien and bond releases.

8. Circle the Wagons

Mistake: Fighting everyone at once.
Right Way: Pick your battles, align with others where possible.

Some contractors, designers and/or their attorneys seem to believe they should fight anyone and everyone whenever a claim arises. While sometimes necessary, it is rarely desirable and never a position to be taken by default. By fi ghting everyone simultaneously, parties in construction disputes face (at least) a two-fronted war whereby they may claim one thing upstream against the own-er while inconsistently defending the same thing against downstream subs. Instead, it is a good practice to align with subcontractors and enter into joint defense/prosecution, liquidating agreements or common inter-est agreements. This strategy is not always possible, but it is always worth considering – and typically sooner is better.

9. Get to The Finish Line

Mistake: Not having a plan to resolve claims.
Right Way: Develop an actual plan, even if it needs to later change.

Construction litigators commonly find that contractors and designers who are prosecuting or defending claims may do all the right things, yet fail to resolve claims because they relied on inertia rather than developing an actual plan for resolution. Rather than submitting claims and merely demanding the other side send a check, consideration should be given to what an effective process for claims resolution will include.

For example, if the claims involve technical elements or substantial material for the other side to digest, consider meaningful response time. Similarly, consider whether letter writing, in-person meetings, a dispute review board or mediation is the best forum. These considerations are done on a claim-by-claim basis and depend on personalities, amounts at issue, contract terms and other factors, but developing a plan for claims resolution is important. Ideally, both sides will agree early on or via their counsel as to the logistics for claims resolution. However, if parties cannot even agree on the process for trying to resolve claims, chances of resolving the dispute itself are slim.

10. Bring in The Big Guns

Mistake: Waiting too long to hire help.
Right Way: Hire trusted advisors who will help manage and steer.

The most sophisticated and successful claimants in the world of construction claims tend to retain construction litigation counsel and/or specialty experts/consultants sooner than others. The reason for this is simple. When contractors and designers self-manage their claims and only call for legal and industry specialists once all hope of a reasonable early resolution has passed, they have virtually guaranteed a longer, more expensive battle. And the ability for specialists to help manage and steer claims development and presentation is limited because positions have already been taken.

Rather, to maximize chances of early resolution and/or to improve probability of prosecuting a successful formal claim in litigation or arbitration, consideration should be given to hiring specialists while claims are still being developed and negotiated. This can be done on a relatively short leash to control expenses, but will provide valuable input at a time when fundamental claims-related decisions are still being developed.

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