

# Design Professional Newsletter



## Roadway Projects and Bodily Injury Claims

*By: Roseanne DeBellis and Mark Bonavita*

In 2023, Great American's Risk Management Newsletter Series focused on contract provisions and ways to tighten your contract language to best protect you and your firm. This year we will be concentrating on trending projects that can present high exposure situations for design professionals.

Our first topic of 2024 will focus on Roadway Projects, which tend to have an expensive project price resulting in expensive claims, ranging from cost overruns and delay claims to catastrophic bodily injury and wrongful death lawsuits. The potential and/or ultimate exposure facing a Design Professional in these types of claims can be excessive. Poor contract documentation that provides a broad scope of services including inspections and construction management, undocumented scope changes, and lack of communication among project participants are all factors which give rise to claims.

This article will discuss a bodily injury/wrongful death situation arising from a roadway project. Roadway signage is frequently at issue, and common allegations against Design Professionals include insufficient or improperly placed warning signs located in or around the construction zone, the use of inaccurate signage that causes confusion to drivers, and/or the design of the construction zone requiring motorists to make sudden maneuvers.

### Claim Study: Wrongful Death at a Roadway Project

Let's consider this set of facts: A collision between a dump truck and another vehicle occurred about 1 mile before the start of a 14 mile-construction zone where nightly lane closures reduced the highway to a single 12-foot lane in each direction. Speed was reduced from 70 to 45 mph. The dump truck driver failed to slow as he approached a construction zone and collided with the smaller vehicle killing the driver of the car. Police statements indicate that there was signage for 20 miles down the highway warning of the construction and slowing traffic. The Design Professional, who was the Traffic Engineer for a portion of the roadway, was sued (along with many others) for wrongful death of the driver. The allegations included the Traffic Engineer's alleged negligent

supervision and inspection of the project; failure to keep the construction zone in a reasonably safe condition; failure to follow requirements regarding controlling the flow of traffic in a construction zone; and failure to design construction warning and informational signs.

The Wrongful Death lawsuit sought \$45 million in damages.

The project agreement defined the Engineer's scope of services as follows:

*“Engineer shall prepare design documents for the maintenance of traffic plans in accordance with the design criteria and standards of the Owner. The design documents shall include all information necessary to complete all other Project work.”*

On its face, this language implicated the Engineer in the liability context of the claim in that it was too broad and all encompassing. The contracted scope of services did not specify the location of the project site where the design services were provided or the phase of the project. In addition, words such as “all” and “other” were used. Given the size of the Project, there were, in fact, several other traffic engineers and consultants involved in designing differing locations of the roadway. In this particular instance, this Engineer did not provide design services for the portion of the highway where the accident occurred.

Throughout the litigation, requests for dismissal were denied by the Court due to the broad language of the contract. It was not until two years later, after the completion of written discovery, depositions of key witnesses and over \$100,000 in legal fees were spent, that the parties were able to confirm that the traffic plans prepared by the Engineer did not include the location where the accident occurred. In fact, the Engineer's traffic plans depicted the highway design ten miles further down the roadway. As such, this case ended with an ultimate dismissal of the Engineer.

### Lesson Learned

Here, the Engineer's scope of services could have provided more specificity because they were only contracted to design a portion of the project. For example, the language could have included the specification of particular highway mile markers to provide a more accurate description and placement of the Traffic Engineer's design services.

In general, it is crucial that your design service agreements sufficiently detail and define your scope of services so the parties fully understand what each party will, and will not, do during the course of the project. The scope should not include ambiguous language and should avoid “absolutes” and terms such as “all”; “complete”; “each and every”; and “all necessary”. This language will be the first line of defense in mitigating your liability in a claim or litigation setting.

### Protect Yourself

If you become aware of an accident or incident at your project, and this not only applies to roadway projects, but to all projects:

- 1) Notify your agent **immediately** and ensure that both your professional liability carrier and general liability carrier (and excess carrier as well, if applicable) are notified.
- 2) Inquire about the availability of free pre-claims assistance under your Great American Policy.
- 3) Secure all project documents including contracts, inspection reports and written correspondence.
- 4) Ensure that your subconsultants (if applicable) notify their insurance carriers.
- 5) Do not accept responsibility or admit fault.

**About the Author:** Roseanne DeBellis is a Divisional Vice President at Great American Insurance Group. In her role as a Divisional VP, Roseanne is the lead on Design Professional and Real Estate Claims and also provides risk management services to agents and insureds. Roseanne has more than 17 years of professional liability experience, beginning her career in private practice defending design professionals against errors and omission claims. She is a licensed attorney admitted to practice law in New York and Connecticut. In addition, she holds adjuster licenses in various jurisdictions.

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Mark received his J.D. from Syracuse University College of Law and graduated with a B.A. in history from Lafayette College. He is a licensed attorney admitted to practice law in Pennsylvania and New Jersey. Mark lives in Conshohocken, PA, and enjoys spending the weekends with his daughters, gardening, reading and painting landscapes

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