Managing Risk

Your Pre-Inspection Agreement: ATTORNEY'S FEES

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InspectorPro™ INSURANCE PROGRAM

Note: *The Managing Risk column with InspectorPro Insurance provides home inspectors with tips to protect their businesses against insurance claims and examines best practices for crafting effective pre-inspection agreements.*

When Michelle Shishilla of Honor Services in Florida received a complaint regarding mold behind wallpaper, she knew her inspection company wasn't at fault. They had offered mold testing and the client had refused it. Plus, a visual, non-invasive inspection can't find mold behind wallpaper.

"In our mind, we were covered six ways from Sunday. We offered them a refund. They didn't want to take it. And so, at that point, we were kind of at an impasse because we didn't know what else we could do. It didn't seem like anything that we were willing to do was going to make them happy," Shishilla said.

The complaint escalated from a phone call demanding restitution to a full-blown court case. To the Shishillas' surprise, the claim involved far more than the mold. With a previous report from another inspector, the case revealed termite and attic damage, which was concealed by insulation prior to Honor Services' inspection.

Stephanie Jaynes is the Marketing Director for InspectorPro Insurance, ASHI's one and only Premier Insurance Partner (http://ipro.insure/ASHI-partner). Through risk management articles in the Reporter *and on the InspectorPro website, InspectorPro helps inspectors protect their livelihood and avoid unnecessary risk. Get peace of mind and better protection with InspectorPro's pre-claims assistance and straightforward coverage. Learn more at www.inspectorpro-insurance.com/ashiadvantage.*

As such, the Shishillas should have been dismissed from the case, while the sellers and listing agent faced the consequences for their cover-up. However, due to a provision in their inspection contract, the Shishillas were obligated to pay the claimant's thousands of dollars in attorney's fees.

"It was acknowledged—by all parties—that there was no way that Honor could have seen any [of the damages]. The only reason we ended up having to pay out any sum of money was because of that attorney's clause," Shishilla said.

WHAT IS AN ATTORNEY'S FEES PROVISION?

An attorney's fees provision is a clause in your pre-inspection agreement that awards legal expenses to one of the parties in a dispute. Despite the provision's name, legal expenses are more than just attorney's fees. They can include court fees, too—like the costs to file papers, serve a summons and pay a court reporter.

Often, attorney's fees provisions award the prevailing party or whoever "wins" the suit. However, some are written to get inspectors' legal expenses paid, regardless of whether they win or lose a dispute. Your contract might also stipulate that clients owe you attorney's fees incurred as you collect past-due inspection fees.

HERE'S AN EXAMPLE OF WHAT AN ATTORNEY'S FEES PROVISION MIGHT LOOK LIKE IN A PRE-INSPECTION AGREEMENT:

> *In any arbitration or legal action in which we are found to be without fault, the client(s) agree to reimburse us for any attorney's fees incurred in our defense of the proceeding.*

At face value, attorney's fees provisions sound beneficial. After all, legal proceedings are costly and if you can circumvent them, you can save substantially. Additionally, many inspectors see attorney's fees provisions as deterrents to frivolous claims because they can punish those who can't prove an inspector's fault.

HOW CAN THE ATTORNEY'S FEES PROVISION HURT HOME INSPECTORS?

Despite the perceived benefits of these provisions, we, as insurance providers, have found no evidence that attorney's fees provisions reduce the number of claims inspectors receive. Additionally, attorney's fees provisions rarely give inspectors the result they hope for.

In instances where an inspector's attorney's fees provision is upheld, payouts rarely follow. After all, if a homeowner is suing their inspector in hopes that the inspector will pay for the repairs they can't afford, it's unlikely that homeowner will have the funds to pay for the inspector's attorney.

Courts can turn attorney's fees provisions against inspectors, too. Since most attorney's fees provisions are one-sided—meaning only one party has their fees paid if another takes action against them—courts regularly see such provisions as unreasonable. (In fact, pursuant to California Civil Code 1717, the state of California automatically converts any one-way attorney's fees provisions into mutual provisions.) As such, courts either refuse to honor attorney's fees provisions, throwing them out altogether or, like in California, they mandate that the provisions be applied to both parties, meaning that the losing party pays the attorney's fees.

Many cases that go to court end in settlement. Even if you can enforce your limitation of liability provision to, say, the inspection fee, payment of the inspection fee equates to a loss, thus mandating that you pay the claimants' attorney's fees. Worse still, while you may be held harmless in a suit, if anyone else was named a defendant, you can still be held liable for the claimants' attorney's fees—like the Shishillas. Just a dollar in payout to the claimants can trigger your attorney's fees provision.

"WE HAD SEEN ATTORNEY'S FEES PROVISIONS IN OTHER CONTRACTS… AND WE HAD HEARD OTHER INSPECTORS TALKING ABOUT IT," *Shishilla said.* **"WE THOUGHT WE WERE PROTECTING OURSELVES. WE HAD NO IDEA THAT OUR ATTORNEY'S FEES PROVISION COULD BACKFIRE.**

WHAT CAN YOU INCLUDE IN YOUR PRE-INSPECTION AGREEMENT TO DETER CLAIMS INSTEAD?

There are other provisions you can include in your pre-inspection agreement to deter claims, many of which we have discussed in this Managing Risk column in previous issues of the ASHI *Reporter*.

Where permissible, inspectors can use a limitation of liability provision to cap financial responsibility—often the inspection fee or a multiple of the fee. By potentially limiting how much you must pay to resolve a claim, clients are less likely to demand restitution for their perceived loss—particularly if that loss is minimal.

You should also consider including an arbitration provision, which will send your claims before an impartial third party (an arbitrator) instead of going to court and appearing before a judge. Arbitration can resolve issues more quickly, keep claims more private and lead to fairer resolutions.

Additionally, by coupling your arbitration provision with an enforcement fees and costs provision, you can demand compensation if a claimant goes against your agreement's specified method of dispute resolution. For example, when your contract calls for arbitration, if a client decides to file suit against you and you have to go to court, all your costs related to filing a motion to move the claim to arbitration are put back on the client.

MANAGE YOUR RISK AGAINST POTENTIAL CLAIMS.

Since facing the claim mentioned earlier, the Shishillas have removed the attorney's fees provision from their contract. "Don't put that [attorney's fees] clause in [your agreement]," Shishilla suggests.

> **"MAKE SURE THAT YOU SEND YOUR AGREEMENT TO YOUR INSURANCE COMPANY. AND THEN, IF THEY OFFER YOU ANY KIND OF GUIDANCE OR ADVICE, MAKE SURE YOU HEED THEIR ADVICE BECAUSE THEY'RE ONLY LOOKING TO PROTECT YOU."**

Don't let poor contract provisions work against you. Consider removing the attorney's fees provision from your contract to avoid unnecessary payments to your claimants. To learn more about pre-inspection agreement clauses, read this Managing Risk column next month when we explore the statute of limitations provision.