February 5, 2018

HB 1015 - Indemnification for Design Professionals (A/E/Land Surveyors)


ISSUE: Design Professionals are being forced to sign contracts with a duty to defend in order to get work.

RESULT:
- Professional Liability Insurance does not cover it.
- Design Professionals still have to pay the expensive defense costs out of pocket, even if they are not negligent. It can put them out of business.
- In most of these cases, the Design Pro is forced to settle to avoid expensive defense costs even though there were no errors in design/professional services.
- Typical Design firms have only nominal assets for the third party to go after.

2 problems in the current law need to be fixed to make Professional Services contracts fair and business-friendly. We don’t want to go out of business. We want to fix contracts so insurance will pay.

1. Duty to Defend: Current law does NOT prohibit Design Professionals (A/E/Land Surveyors) from a “Duty to Defend” their clients before they are found to be at fault. The problem: it is not insurable under their Professional Liability Insurance policies. Professional Service firms are different than Contractors. Contractors’ General Liability Insurance will defend their client, Professional’s won’t.

Fix: Make “duty of defend” unenforceable for these Professional Services contracts.

2. Lack of Comparative Fault: The current statute preceded Indiana’s adoption of the comparative fault as a negligence standard. In other words, this allows clients to hold A/E/Land Surveying firms responsible for 100% of the fault, even if the client is responsible for 99% of the damages and the design professional is only responsible for 1%. General Assembly fixed this on INDOT contracts in 2008, but is still allowed for other public and private client contracts.

Fix: Restore proportionate responsibility for negligence.

DUTY TO DEFEND EXAMPLES:

County Highway: On a county highway, a car is stopped due to traffic. A semi truck doesn’t stop in time and rear ends the car, killing its passengers. The family of the passengers sue the County, Lead Engineering Firm, and the sub-consulting engineering firms involved in the design of the highway project. Some of the sub-consultants were required to sign a contract with a “Duty to Defend” the County. No negligence has been found, but the county has sued a sub-consultant for breach of contract and demanded defense coverage per the terms of the contract. The engineering firm’s professional liability company has denied coverage for the duty to defend demand under the “contractual liability exclusion” and the general liability company has denied coverage under the “professional services exclusion”. The engineering firm will be responsible for paying the expenses and legal fees of the county out of their own pocket.

Hospital: ABC Hospital Corporation hires a Developer to build a new satellite facility for the hospital. The Developer hires an architectural firm to design the building and it is required to sign a contract with a “Duty to Defend” the Developer. The Developer is responsible for the construction of the building, and upon completion, inspectors find a major ADA violation and the building cannot be occupied until fixed. ABC Hospital Corp sues the Developer. The
Architectural firm’s design was ADA compliant and there was no negligence on behalf of the Architectural firm. However the Developer invokes the “Duty to Defend” clause against the Architectural firm. Like the example above, the architectural firm’s professional liability has denied coverage of the duty to defend under the “contractual liability exclusion” in the professional liability policy and the general liability company has denied coverage under the “professional services exclusion”. The architectural firm will be responsible for paying the expenses and legal fees of the Developer out of its own pocket.

Survey: A homeowner hires an architect to design a new garage. The neighbor’s house is close to the homeowner’s property line so the architect hires a land surveyor to complete a “boundary” survey. The survey finds that the actual property line runs right through the edge of the neighbor’s deck. As the neighbor proceeds to take down that section of the deck, he falls and breaks his leg. The neighbor sues the homeowner, architect, and surveyor for damages. The surveyor signed a contract with the architect with a duty to defend both the homeowner and the architect. The surveyor is now paying out of pocket to defend the homeowner and architect from the neighbor. The surveyor’s report was accurate and there were no signs of negligence.

Contact: Beth Bauer, ACEC Indiana bbauer@acecindiana.org
Jason Shelley, AIA Indiana jshelley@aiaindiana.org
Indiana Code § 26-2-5.

Sec. 1. All provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction or design contract except those pertaining to highway contracts, which purport to indemnify the promisee against liability for:

(1) death or bodily injury to persons;
(2) injury to property;
(3) design defects; or
(4) any other loss, damage or expense arising under either (1), (2) or (3);

from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to the promisee, are against public policy and are void and unenforceable.

IC 8-23-2-12.5 "Contractor"; "professional services"; liability of contractors

Sec. 12.5. (a) As used in this section, "contractor" refers to a person who provides professional services under a contract with the department.

(b) As used in this section, "professional services" refers to engineering, architectural, or surveying services.

(c) Notwithstanding any provision of IC 26-2-5-1 to the contrary, the department may not require a contractor to assume any liability or indemnify the state for any amount greater than the degree of fault of the contractor.

(d) Any contractual provision in conflict with the prohibitions contained in subsection (c) is void and unenforceable.

As added by P.L.50-2008, SEC.1.
COMMERCIAL GENERAL LIABILITY POLICY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

PROVISIONS

1. The following is added to Paragraph 2., Exclusions, of SECTION I – COVERAGES – COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY:

   Professional Services

   "Bodily injury" or "property damage" arising out of the rendering of or failure to render any "professional services".

2. The following is added to Paragraph 2., Exclusions, of SECTION I – COVERAGES – COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY:

   Professional Services

   "Personal injury" or "advertising injury" arising out of the rendering of or failure to render any "professional services".

3. The following is added to DEFINITIONS Section:

   "Professional services" means any service requiring specialized skill or training, including:

   a. Preparation, approval, provision of or failure to prepare, approve, or provide any map, shop drawing, opinion, report, survey, field order, change order, design, drawing, specification, recommendation, warning, permit application, payment request, manual or instruction;

   b. Supervision, inspection, quality control, architectural, engineering or surveying activity or service, job site safety, construction contracting, construction administration, construction management, computer consulting or design, software development or programming service, or selection of a contractor or subcontractor; or

   c. Monitoring, testing, or sampling service necessary to perform any of the services described in Paragraph a. or b. above.
PROFESSIONAL LIABILITY POLICY

Y. **Wrongful Act** means any:
   1. actual or alleged act, error, omission, or **Personal Injury** **Offense** in the rendering of, or failure to render, **Professional Services**; or
   2. **Network and Information Security Offense**,

   by any **Insured**, or by any person or entity, including any joint venture, for whom the **Insured** is legally liable.

V. **EXCLUSIONS**

A. **Claims By An Insured Against Another Insured**
   This policy does not apply to any **Claim** by any **Insured** against another **Insured**.

B. **Claims By Certain Persons Or Entities**
   This policy does not apply to any **Claim** by or on behalf of, or in the name or right of, any entity:
   1. operated, controlled or managed by any **Insured**;
   2. that any **Insured**, or any **Insured's** spouse, individually or collectively with one or more **Insureds**, has an ownership interest that exceeds 49%;
   3. that holds the controlling financial interest in any **Insured**; or
   4. that manages or operates any **Insured**.

C. **Contract Liability**
   This policy does not apply to any **Claim** based upon or arising out of liability assumed by an **Insured** under any contract or agreement, whether oral or written, except to the extent that the **Insured** would have been liable in the absence of such contract or agreement.

D. **Cost To Repair Or Replace Faulty Workmanship**
   This policy does not apply to any **Claim** based upon or arising out of the cost to repair or replace faulty workmanship in any construction, erection, fabrication, installation, assembly, manufacture or remediation performed by any **Insured**, including the cost of materials, parts or equipment furnished in connection therewith.

E. **Criminal, Dishonest, Fraudulent Or Malicious Conduct**
   This policy does not apply to any **Claim** based upon or arising out of any:
   1. criminal, dishonest, fraudulent or malicious conduct; or
   2. other willful violation of laws,

   committed by the **Insured** or by anyone with the consent or knowledge of the **Insured**, provided that this exclusion does not apply to any **Insured Person** who did not participate in or have knowledge of such conduct or violation.

F. **Design Or Manufacture Of Sold Or Supplied Goods Or Products**
   This policy does not apply to any **Claim** based upon or arising out of the design or manufacture of goods or products which are sold or supplied by the **Insured** or by others under license from the **Insured**, provided that this exclusion will not apply to software sold or supplied by the **Insured** to its customer or client in connection with the **Insured's** provision of **Professional Services** for such customer or client.

G. **Expected Or Intended Failure And Internet Service Interruption**
   This policy does not apply to any **Claim** based upon or arising out of any **Network and Information Security Offense** that results in:
Professional Liability Exclusion At Work

Sample email from Professional Liability Insurer acknowledging no coverage:

As discussed, “Insurance company” also understands that a lawsuit has been filed by “your client” against you in Ohio, but that you have not yet been served with the lawsuit. “your client’s” lawsuit includes two counts for breach of contract and one count for declaratory judgment. The lawsuit does not include a count against you for negligence. As mentioned, the policy has an exclusion for contractual liability that provides that the policy does not apply to any claim, “as a result of liability assumed by the Insured under any contract or agreement. This Exclusion does not apply to liability for Damages that the Insured would have in the absence of the contract or agreement.” Please let us know if you are served with the lawsuit, and “insurance company” will provide you with a more formal coverage position at that time. “insurance company” reserves its rights with respect to this matter.
Sample uninsurable contracts

Indemnification clause from a Large Indiana Hospital:

"Owner shall release, defend, indemnify, and hold harmless Architect, its officers, directors, employees, and sub-consultants from and against any and all costs, expenses, including reasonable attorney’s fees, losses, claims liabilities, suits, actions and damages whatsoever, arising out of or related to any negligence, omission, error or act, breach of contract, or violation of any applicable law by Owner connected with or incidental to this Contract, excepting only such damages or claims arising out of Architect's gross negligence or intentional misconduct. Architect shall release, defend, indemnify, and hold harmless Owner and [Redacted], and each of their officers, directors, and employees, from and against any and all costs, expenses, including reasonable attorney's fees, losses, claims liabilities, suits, actions and damages whatsoever, arising out of or related to any to the extent caused by negligent omissions, errors or acts of the Architect breach of contract, or violation of any applicable law by Architect connected with or incidental to this Contract, excepting only such damages or claims arising out of Owner's gross negligence or intentional misconduct.

Indemnification Clause from a Large Contractor:

Subcontractor agrees to indemnify, defend and hold harmless Contractor and Owner from any and all loss and/or liability, including contractual liability, costs, damages, reasonable attorney’s fees and expenses, and such costs, expenses and fees incurred by Contractor in establishing and enforcing its right to indemnification hereunder and from any claim or cause of action of any nature, including environmental, arising while on or near the project (including preparing or delivering materials or equipment to the project) while performing Subcontractor's Services, including claims relating to its subcontractor's suppliers or employees, or by reason of any claim or dispute of any person or entity for damages from any cause directly or indirectly relating to any action or failure to act, whether negligent or otherwise, by subcontractor, its representatives, employees, subcontractors or suppliers, and whether or not it is alleged that contractor, owner or the architect or other representatives of Owner, in any way contributed to the alleged wrongdoing or is liable due to a nondelegable duty. It is the intent of the parties that Subcontractor shall indemnify Contractor and Owner under this Section 12 to the fullest extent permitted by law, including any comparative fault or negligence which may be alleged, assigned or attributed to Contractor and/or Owner; however, the Subcontractor may not be obligated to indemnify the Contractor or Owner for their sole negligence or willful misconduct, where such indemnification is contrary to law.
Indemnification Clause from an Indiana Utilities Company:

Section 8.01. General Indemnity. Consultant shall defend, indemnify and hold harmless Owner, Owner's Wastewater System affiliate if any aspect of the Services relates to the Wastewater System, and their employees, officers, directors and agents ("Indemnitees") from and against all claims, damages, losses and expenses, including attorneys' fees arising from such claims, damages, losses or expenses as well as prosecuting this indemnity clause, if:

(a) such claims, damages, losses or expenses are attributable to bodily injury, sickness, disease or death, or injury to or destruction of tangible or intangible property, including the loss of use resulting therefrom; and

(b) the act or acts giving rise to such claims, damages, losses or expenses are caused or are claimed to have been caused, in part, by any negligent act or omission of Consultant, any subcontractor or sub-consultant hired by Consultant, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable.

The duty of Consultant to defend, indemnify and hold harmless the Indemnitees under this Section shall exist regardless of whether or not the act giving rise to this duty is caused or claimed to have been caused, in part, by a party indemnified hereunder and such duty shall be determined without regard to any apportionment of liability under the laws relating to Comparative Fault; provided, however, this provision does not apply to claims arising out of or caused by the sole negligence or willful misconduct of the Indemnitees. In any and all claims against the Indemnitees by any employee of Consultant, any subcontractor or sub-consultant, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, this indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Consultant or any subcontractor or sub-consultant under Workers' Compensation Acts, Disability Benefit Acts, or other Employee Benefit Acts.

Indemnification Clause from an Indiana based university:

12) INDEMNIFICATION: COMPANY agrees to indemnify [Redacted], and its trustees, officers, agents, servants, attorneys, employees, successors or assigns ("Indemnified Parties") and hold the Indemnified Parties harmless from and against all liability, losses, damages, claims, liens, and expenses (including reasonable attorneys' fees) arising out of or connected with the work or services performed, COMPANY's breach of this Agreement, or resulting from damages or injuries incurred by [Redacted] by reason of any defect in material, workmanship, and/or design of any goods furnished hereunder (collectively "Indemnifiable Losses"), excepting only such liability as may result solely from the acts of negligence of [Redacted] or its employees. COMPANY shall at the request of [Redacted] undertake to defend any and all suits and to investigate and to defend any and all claims or suits, investigate and defend any and all claims whether justified or not, if such claim or suit be against [Redacted], or their respective officers, agents servants, attorneys, employees, successors or assigns, provided however, that COMPANY may not settle any claims against the Indemnified Parties without the Indemnified Parties' prior written consent.
RE: Duty To Defend

August 25, 2017

Dear Mike,

Thank you for your recent inquiry and discussion regarding contractually imposed defense obligations levied against design professional firms. Generally speaking, these provisions are problematic and are often deemed to be “uninsurable” provisions within the context of design firm professional liability policies.

The majority of design firm professional liability policies are structured to provide coverage for a firm’s legal liability arising out of issues stemming from their professional services. A deviation from an established standard of care needs to exist in order for a firm to be held liable. Only after such determination and apportionment of liability will an insurance carrier fund the loss. A contractual duty to defend imposes the obligation immediately, before liability can be established.

Additionally, the policy coverage is structured specifically for the Insured. The defense afforded under the policy will extend only to the Insured design firm itself. Traditionally, insurance carriers would therefore decline to extend this defense to a third party. Generally, policies also contain a contractual liability exclusion (in an instance where liability would not otherwise exist) which would also trigger a declination for extending the defense beyond the Insured. Reasons such as these would cause insurance carriers to deem a contractual defense obligation “uninsurable”.

Sincerely,

Douglas A. Strong, RPLU, CRIS
Chief Underwriting Officer
XL Catlin Design Professional
Duty to Defend in Design Contracts

By signing this letter, I agree that per the attached letter dated August 25, 2017 from Professional Liability Insurance Company XL Catlin, it is not the intent of the professional liability policy to defend a third party. Agreeing in a contract to defend another party could create an uninsurable loss.

Richard Hartman, Vice President
Printed Name and Title

ARCH INSURANCE
Company

Signature

10/18/2017
Date

Duty to Defend in Design Contracts

By signing this letter, I agree that per the attached letter dated August 25, 2017 from Professional Liability Insurance Company XL Catlin, it is not the intent of the professional liability policy of Berkley Design Professional to provide defense to a third party. Agreeing in a contract to defend another party could create an uninsurable loss.

Andrew Mendelson, Chief Risk Management Officer
Berkley Design Professional

Date: October 9, 2017
Duty to Defend in Design Contracts

By signing this letter, I agree that per the attached letter dated August 25, 2017 from Professional Liability Insurance Company XL Catlin, it is not the intent of the professional liability policy to defend a third party. Agreeing in a contract to defend another party could create an uninsurable loss.

David F. Blue, III
Divisional Vice President

Printed Name and Title

Great American Insurance Company

Company

Signature

10/6/17

Date
Other States that have adopted similar statutes as the Georgia statute:

California
Arizona
Georgia
Colorado
Montana
Oklahoma
Oregon
Texas

Other states that have bared indemnity for sole or partial fault:

Connecticut
Delaware
Florida
Illinois
Iowa
Kansas
Kentucky
Louisiana
Minnesota
Mississippi
Missouri
Nebraska
New Hampshire
New Mexico
New York
North Carolina
Ohio
Rhode Island
Utah
Washington
Wisconsin

*Based on data published in 2016 by The Foundation of the American Subcontractors Association Inc with help from Kegler Brown Hill & Ritter.*
House Bill 943 (AS PASSED HOUSE AND SENATE)
By: Representatives Rogers of the 29th, Pak of the 108th, and Wilkinson of the 52nd

A BILL TO BE ENTITLED
AN ACT

1 To amend Chapter 8 of Title 13 of the Official Code of Georgia Annotated, relating to illegal
2 and void contracts generally, so as to provide for additional limitations on indemnification
3 and duty to defend clauses which are void and unenforceable in contracts for engineering or
4 architectural services; to provide for exceptions; to provide for related matters; to repeal
5 conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Chapter 8 of Title 13 of the Official Code of Georgia Annotated, relating to illegal and void
contracts generally, is amended by revising Code Section 13-8-2, relating to contracts
contravening public policy generally, as follows:

*13-8-2.
(a) A contract that is against the policy of the law cannot be enforced. Contracts deemed
contrary to public policy include but are not limited to:
(1) Contracts tending to corrupt legislation or the judiciary;
(2) Contracts in general restraint of trade, as distinguished from contracts which restrict
certain competitive activities, as provided in Article 4 of this chapter;
(3) Contracts to evade or oppose the revenue laws of another country;
(4) Wagering contracts; or
(5) Contracts of maintenance or champerty.
(b) A covenant, promise, agreement, or understanding in or in connection with or collateral
to a contract or agreement relative to the construction, alteration, repair, or maintenance of
a building structure, appurtenances, and appliances, including moving, demolition, and
excavating connected therewith, purporting to require that one party to such contract or
agreement shall indemnify, hold harmless, insure, or defend the other party to the contract
or other named indemnitee, including its, his, or her officers, agents, or employees, against
liability or claims for damages, losses, or expenses, including attorney fees, arising out of

H. B. 943
- 1 -
bodily injury to persons, death, or damage to property caused by or resulting from the sole
negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against
public policy and void and unenforceable. This subsection shall not affect any obligation
under workers' compensation or coverage or insurance specifically relating to workers'
compensation, nor shall this subsection apply to any requirement that one party to the
contract purchase a project specific insurance policy, including an owner's or contractor's
protective insurance, builder's risk insurance, installation coverage, project management
protective liability insurance, an owner controlled insurance policy, or a contractor
controlled insurance policy.

(c) A covenant, promise, agreement, or understanding in or in connection with or collateral
to a contract or agreement for engineering, architectural, or land surveying services
purporting to require that one party to such contract or agreement shall indemnify, hold
harmless, insure, or defend the other party to the contract or other named indemnitee,
including its, his, or her officers, agents, or employees, against liability or claims for
damages, losses, or expenses, including attorney fees, is against public policy and void and
unenforceable, except for indemnification for damages, losses, or expenses to the extent
caused by or resulting from the negligence, recklessness, or intentionally wrongful conduct
of the indemnitee or other persons employed or utilized by the indemnitee in the
performance of the contract. This subsection shall not affect any obligation under workers'
compensation or coverage or insurance specifically relating to workers' compensation, nor
shall this subsection apply to any requirement that one party to the contract purchase a
project specific insurance policy or project specific policy endorsement.

SECTION 2.

All laws and parts of laws in conflict with this Act are repealed.
A bill for an act
relating to civil actions; prohibiting certain indemnification agreements;
proposing coding for new law in Minnesota Statutes, chapter 604.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. [604.21] INDEMNITY AGREEMENTS IN DESIGN PROFESSIONAL
SERVICES CONTRACTS VOID.
(a) A provision contained in, or executed in connection with, a design professional
services contract is void and unenforceable to the extent it attempts to require an
indemnitor to indemnify, to hold harmless, or to defend an indemnitee from or against
liability for loss or damage resulting from the negligence or fault of anyone other than the
indemnitor or others for whom the indemnitor is legally liable.
(b) For purposes of this section, "design professional services contract" means a
contract under which some portion of the work or services is to be performed or supervised
by a person licensed under section 326.02, and is furnished in connection with any actual
or proposed maintenance of or improvement to real property, highways, roads, or bridges.
(c) This section does not apply to the extent that the obligation to indemnify, to hold
harmless, or to defend an indemnitee is able to be covered by insurance.
(d) This section does not apply to agreements referred to in section 337.03 or 337.04.
(e) A provision contained in, or executed in connection with, a design professional
services contract for any actual or proposed maintenance of, or improvement to, real
property, highways, roads, or bridges located in Minnesota that makes the contract subject
to the laws of another state or requires that any litigation, arbitration, or other dispute
resolution process on the contract occur in another state is void and unenforceable.
(f) This section supersedes any other inconsistent provision of law.
EFFECTIVE DATE: APPLICATION. This section is effective August 1, 2014, and applies to contracts or agreements entered into on or after that date.
Currently

A girl gets hurt in a park and the mom sues the owner of the park (client) for damages.

The proposed changes will NOT effect this.
No Changes.

Contractor

Insurance Policy

General Liability

Client

Defend me per the contract.

Professional Liability

Contractor will defend.

With the Proposed Changes

A girl gets hurt in a park and the mom sues the owner of the park (client) for damages.