

IOA – SAMPLE INSURANCE RISK REVIEW

Proposed Client Indemnity Provision

(Problematic Items Highlighted in Yellow & Sample Solutions in Green)

1.0 Indemnification: To the ~~maximum~~ extent permitted by law, Design Professional shall ~~assume the defense of Client,~~ indemnify and hold harmless Client, its directors, officers, ~~agents, representatives,~~ and employees, and any other entity or person for which Design Professional is legally liable, from and against any ~~and all claims, demands, causes of action, suits,~~ loss, cost, damage, expense and liability (including, ~~without limitation,~~ attorneys' fees, costs and expenses recoverable under applicable law), that Client incurs from claims by third parties, ~~that arise out of, pertain to, or relate to, in whole or in part,~~ to the extent caused by the negligence, ~~recklessness or willful misconduct~~ of Design Professional, ~~any subconsultant,~~ and its employees, and any other entity or person for which Design Professional is legally liable in the performance of professional services under this Agreement and any other entity or person for which Design Professional is legally liable.

Notwithstanding any language to the contrary in Article 1.0, **with respect to the performance of professional services under this Agreement where the law establishes a professional standard of care for such services,** Design Professional shall only be required to reimburse Client for its reasonable defense fees, costs and expenses (including reasonable attorneys' fees, costs and expenses), in direct proportion to Design Professional's negligence on a percentage basis as ultimately determined by a court of competent jurisdiction and further, only to the extent such fees, costs, and expenses were directly attributable to Client's defense of a suit based on Design Professional's actual negligence.

Design Professional agrees to obtain executed indemnity agreements with provisions identical to those set forth in this indemnity provision from each and every consultant retained by Design Professional.

In no event shall the indemnification obligation extend beyond the date when the institution of legal or equitable proceedings for professional negligence would be barred by any applicable statute of repose or statute of limitations. Design Professional is not obligated to indemnify and hold Client harmless for Client's active or sole negligence or willful misconduct.

IOA COMMENTS:

The proposed Indemnity provision contains obligations that go beyond what the law would otherwise require of Design Professionals and are problematic with respect to protection afforded by Client-required insurance policies, such as:

1. Professional Liability
2. Commercial General Liability
3. Commercial Automobile Liability
4. Non-owned/Hired Automobile Liability

As with any business insurance policy, the scope of coverage does not extend beyond monetary responsibilities to the extent caused by a Design Professional firm's negligence. In other words, if a Design Professional contractually agrees to defend a Client irrespective of their negligence and is not

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directly linked to monetary responsibilities, the Design Professional’s insurance company will probably not cover said contractual obligation(s).

What Is Acceptable: If a Design Professional agrees to indemnify and hold their Client harmless from “damages, losses, liabilities, judgments, settlements, expenses, and costs (including reasonable attorneys' fees, costs and expenses recoverable under applicable law), that Client incurs from claims by third parties, to the extent caused by negligent acts, errors or omissions, including bodily injury, sickness, disease or death, or to injury to or destruction of tangible property of Design Professional in the performance of professional services under this Agreement and any other entity or person for which Design Professional is legally liable”

Client Defense Cost Obligations: A&E professional liability policies do not assume the defense of a Client based solely upon allegations of professional negligence in the services provided for the Client. Those allegations must be proven before the insurance company will reimburse (on a proportionate percentage of fault basis) defense costs “in the form of damage payments” through an indemnification agreement. That said, Commercial General Liability policies may assume the defense of a Client (when covered by an Additional Insured Endorsement) provided the allegations involve negligence in services provided for the Client.

Key California Issue: The passage of **Senate Bill 496** (which modified **California Civil Code 2782.8**) added significant Design Professional protections with respect to the duty to defend in public and private contracts executed **after 1/1/18**. As a result, Senate Bill 496 creates a requirement that there be a determination of the proportional liability of a Design Professional first, before there’s any payment or reimbursement of attorney’s fees and costs under an indemnity agreement*.

* For example, if a Design Professional was found to be 25% at fault, then the law provides that the Design Professional would only be liable for 25% of the attorneys’ fees and costs of a party seeking contractual indemnity and defense cost reimbursement.

Summary: If the indemnity obligation addresses other risks, or extends beyond the proportion of the Design Professional firm’s negligence, that part of the indemnification obligation is not within the scope of coverage and uninsurable.

KEY PROBLEMATIC ISSUE SUMMARY

• Indemnity Not Limited to Negligence

the negligence, ~~recklessness or willful misconduct~~ of Design Professional

IOA COMMENTS: Insurance protection only protects against negligence-related situations* and to the extent covered by a policy (i.e., professional liability, commercial general liability, commercial automobile liability, workers’ compensation/employers’ liability, and other policies that may have been purchased).

* “Recklessness”, “wrongful acts”, “intentional misconduct”, and “willful misconduct” are intent-based vs negligence allegations.

• Uninsurable Liability Damage Obligation(s)

To the ~~maximum~~ extent permitted by law,

IOA COMMENTS: Professional Liability policies only provide coverage “to the extent caused by” a Design Professional. That said, Commercial General Liability policies, via its additional insured coverage endorsement, provide coverage “caused in whole or in part” by a Design Professional.

INDEMNITY AGREEMENT “WORDS-TO-AVOID”

- **Beyond the Scope of Insurance Policy Covered Parties**

of Design Professional, ~~any subconsultant,~~ and its employees

IOA COMMENTS: Insurance policies do not cover other parties that are not employees of a Design Professional, except to the extent found legally liable.

- **Expanded Client Indemnification Obligations/Disproportionate Risk**

from and against any ~~and all~~

IOA COMMENTS: There cannot be any broader classification than the words “and all”. In its ordinary and natural meaning, the words “and all” leaves no room for exceptions.

- **Words That Obligate Design Professionals to Defend Clients (Beyond Insurance Policy Coverage)**

Design Professional shall ~~assume the defense of Client,~~

IOA COMMENTS: A&E professional liability policies do not assume the defense of a Client based solely upon allegations of professional negligence in the services provided for the Client. Those allegations must be proven before the insurance company will cover the defense costs “in the form of damage payments” through an indemnification agreement. That said, Commercial General Liability policies may assume the defense of a Client (when covered by an Additional Insured Endorsement) provided the allegations involve negligence in services provided for the Client.

~~claims, demands, causes of action, suits,~~ loss, cost, damage, expense and liability

IOA COMMENTS: The implied duty to defend applies to “claims, demands, allegations, litigation, actions, causes of action, lawsuits” and/or “suits” is triggered as soon as one of the aforementioned situations arises: rather than after a judgment is entered or loss has been proven, like an indemnification clause. This means, the duty to defend anticipates unproven allegations (i.e., prior to any factual findings of negligence or breach).

~~that arise out of, pertain to, or relate to, in whole or in part,~~

IOA COMMENTS: The term “arising out or in any way connected to” of has been construed as a very broad, general, and comprehensive term; meaning “originating from or growing out of or flowing down.” “Arising out of” also does not mean losses must be caused by the Design Professional’s negligence or breach: a claim merely has to involve an alleged negligent act, error or omission in the performance of the contract.

That said, Commercial General Liability policies, via its additional insured coverage endorsement, provide coverage “caused in whole or in part” by a Design Professional.

The words “pertain to, or relate to” also present similar issues. The proper words that focus liability in accordance with a Design Professional’s standard of care is “to the extent caused by the negligence.

(including, ~~without limitation,~~

IOA COMMENTS: Use of the words “without limitation” or “including, but not limited to” is not suggested because the words equate to an undefined expansion of a Design Professional’s obligations within a Client Agreement; of which further negotiation is suggested so the words are no longer necessary.

IOA – INSURANCE RISK REVIEW CONTINUED

• Inappropriate & Beyond Scope of Insurance Policy Covered Indemnitee(s)

indemnify and hold harmless Client, its directors, officers, ~~agents, representatives,~~ and employees

IOA COMMENTS: Avoid indemnitee requests to protect inappropriate parties whose connection with the Design Professional is remote (i.e., who is not directly part of the Client entity) and may not ordinarily be entitled to indemnity under common law negligence (i.e., in the absence of a contractual connection). An appropriate solution is the delete these terms and replace with “any other entity or person for which Design Professional is legally liable”.

* For example, “agents”, “volunteers” and “representatives” are considered an undefined term and may enable a clearly unintended party to claim indemnified party status and be positioned to hinder or even scuttle settlement discussions. Other problematic examples include “attorneys”, “insurers”, “parent company”, “subsidiaries”, “affiliated companies”, “assigns”, “lenders”, “contractors”, “sub-contractors”, and “consultants”.

• Other, Beyond the Scope of Policy Covered Issues

To the ~~maximum~~ extent permitted by law,

IOA COMMENTS: Insurance policies do not cover indemnity obligations that obligate a Design Professional to, conceivably, the CA or US Supreme Court: with a continuing obligation after the Design Professional is no longer a party to the issue in question.

(including, ~~without limitation,~~ attorneys’ fees, costs and expenses

IOA COMMENTS: Insurance protection does not pay for client attorney fees, except (1) to the extent of a final determination of liability based upon the Design Professional’s proportionate or comparative percentage of fault, or (2) if agreed upon by insurance company prior to final determination of liability.

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