

RLI[®]

DIFFERENT WORKS



RLI DESIGN PROFESSIONALS
Design Professionals Learning Event

To Defend or Not to Defend

That and Other Relevant Questions

DPLE 192
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DIFFERENT WORKS

An Interview With
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&
Mika Dewitz-Cryan
Subject Matter Experts



DIFFERENT WORKS

Course Description

WHAT
WOULD
YOU DO?

You receive a
potentially lucrative job
that makes you

100% liable

for someone else's conduct.

Do you sign the contract?

This course will provide a quick overview of indemnity clauses, their implications for design professionals, and what design professionals can do to manage and mitigate the risks associated with them.

Learning Objectives

Participants in this session will:

1. Learn the nuances of indemnity clauses and spot potential issues for design professionals;
2. Discover the liabilities created by the duty to defend;
3. Gain insight into the different points of view on this issue between the design professional and their insurer; and
4. Consider ways to manage the risks with indemnity and the duty to defend going forward.

Indemnification

“ “ We probably receive **more calls concerning indemnification** provision than any other single contract clause... ” ”

ACS Lawyers

Definition

Indemnity:
Security against
hurt, loss, or damage.



Types of Indemnity

1 Common Law Indemnity

Duty to indemnify imposed by the court.

2 Contractual Indemnity

Duty to indemnify created by contract.

Contractual Indemnity

Types of contractual indemnity

1 Broad Form

Everything including
indemnitee's sole negligence
[ie: "in whole or in part"]

Most liability/
Least insurance coverage
for indemnitor

2 Intermediate Form

Everything but indemnitee's
sole negligence.
[ie: "in part"]

3 Limited Form

Only indemnitor's
sole negligence.
[ie: "to the extent"]

Least liability/
Most insurance coverage
for indemnitor



Hypothetical

Rental company fails to maintain rented vehicle. An accident occurs.

1
Broad Form
100% liable

2
Intermediate Form
Not liable

3
Limited Form
Not liable

Rental company fails to maintain rented vehicle and you are speeding. An accident occurs.

4
Broad Form
100% liable

5
Intermediate Form
100% liable

6
Limited Form
Proportionate liability

Negligent deliverance
of
professional services

Reasonable judgment and skill.

the skill and care provided by professionals practicing in the same place, under the same or similar circumstances.

Common Issues

1 Overbroad Parties

Indemnified **parties** are unnecessarily broad.

2 Overbroad Claims

Indemnified **claims** are unnecessarily broad.

3 Duty to Defend

Duty to defend goes **beyond** the design professional's **negligence**.

Limit the duty to indemnify to your client(s).

Clarify that this duty is owed only to your client(s).

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Red Flag Words

Beware of terms/phrases such as:

“agents”

“representatives”

“affiliates”

“servants”

“members”

“insurers”

“lenders”

“consultants”

“subconsultants”

“contractors”

Or any such extended list of indemnitees

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Sample Provision

Design Professional agrees to:

indemnify, defend and hold harmless the Owner, its officers, employees, agents and representatives from and against any and all claims, causes of action, damages, claims for damages, liability, loss, cost or expense, including reasonable attorneys' fees and expenses of litigation, arising out of or in any way related to performance of this Agreement by Design Professional, except claims arising from the sole gross negligence of the Owner.

Limit the duty to indemnify to your negligence.

Clarify that the duty to indemnify only arises once your negligence has been established.

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Over Inclusive Claims

Over Inclusive for 2 Reasons:

- 1) No limitation on **scope of triggering events**
 - a) “Any” connection with;
 - b) Non negligent acts; OR
- 2) No limitation on the **scope of liability**

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Broad Scope of Triggering Events

Beware of terms/phrases such as:

“arising out of/from”

“in any way connected with”

“regardless of”

“whether or not caused by”

“allegedly caused”

“solely liable and responsible”

“intentional fraud or misconduct”

“recklessness”

“willful misconduct”

“tortious misconduct”

“intentional acts”

“other improper conduct”

1
Overbroad
Parties

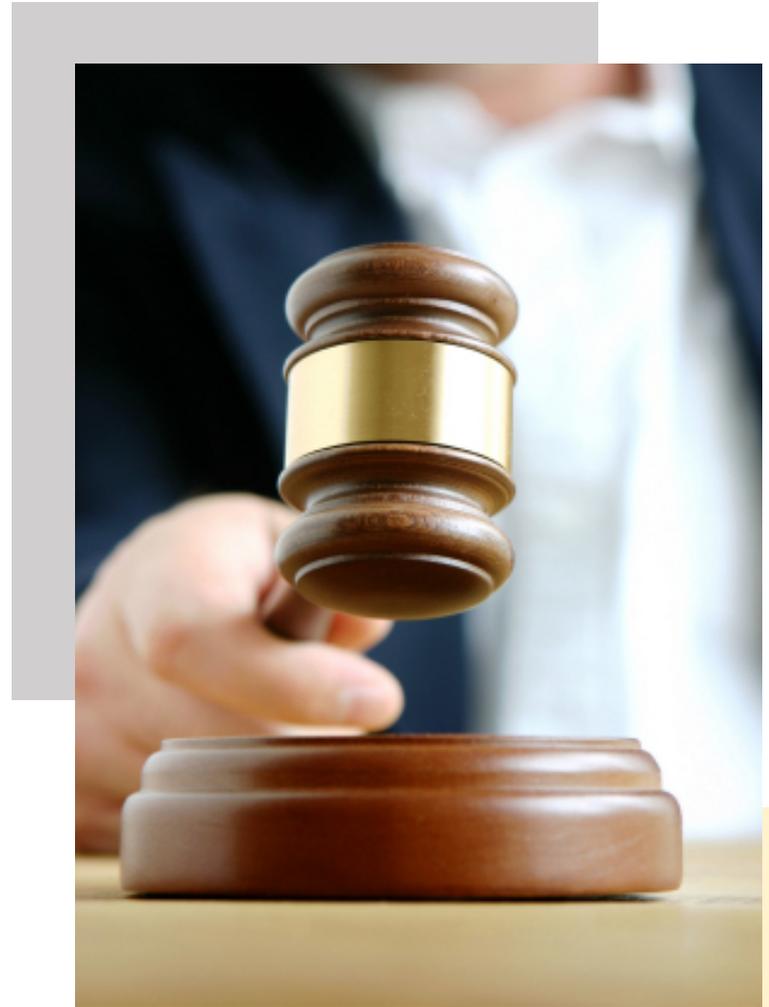
2
Overbroad
Claims

3
Duty to
Defend

Release from Own Negligence

Case Law

In *Florida Power & Light Company v. Mid-Valley, Inc.*, the Court held an indemnity clause obligated the Florida Power & Light Company to indemnify and hold consultants harmless from consultants' own negligence.



Indemnification Clause

Engineer's liability to Owner for any indemnity commitments or for any damages arising in any way out of the performance of this contract is limited to such insurance coverages and amounts. **In no event shall Engineer be liable for any indirect, special or consequential loss or damage arising out of the performance of services hereunder including, but not limited to, loss of use, loss of profit, or business interruption whether caused by negligence of Engineer, or otherwise, and Owner shall indemnify and hold Engineer harmless from any such damages of liability.** (emphasis added).

Florida Power & Light Co. v. Mid-Valley, Inc., 763 F.2d 1316 (1985).

Broad Scope of Liability

Beware of terms/phrases such as:

“any”, “all”, “any and all” ... claims, etc.

“suits or causes of action”

“fines or penalties”

“attorneys’ fees and defense costs”

“other liabilities”

“other obligations”

“any other kind of expense”

1
Overbroad
Parties

2
Overbroad
Claims

3
Duty to
Defend

Regulation of Professions and Occupations

(3) Except as provided in s. 558.0035, the fact that a licensed **engineer** practices through a business organization does not relieve the licensee from **personal liability for negligence**, misconduct, or wrongful acts committed by him or her...Any officer, agent, or employee of a business organization other than a partnership shall be **personally liable** and accountable only **for negligent acts, wrongful acts, or misconduct committed by him or her or committed by any person under his or her direct supervision and control, while rendering professional services on behalf of the business organization...**

Florida Statute § 471.023.

Regulation of Professions and Occupations

§ 481.219 (11) - [E]xcept as provided in s. 558.0035, the **architect** who signs and seals the construction documents and instruments of service shall be **liable for the professional services performed**, and the interior designer who signs and seals the interior design drawings, plans, or specifications shall be liable for the professional services performed.

Florida Statute § 481.219.

§ 481.319 (6) - Except as provided in s. 558.0035, the fact that a registered **landscape architect** practices landscape architecture through a corporation or partnership as provided in this section does not relieve the landscape architect from **personal liability for his or her professional acts**.

Florida Statute § 481.319.



Case Law

In *Gerhardt M. Witt v. La Gorce Country Club Inc.*, the Court affirmed a judgment holding the design professional, **personally liable for damages in excess of \$4 million** to La Gorce Country Club.

Indemnity Clause – La Gorce



...La Gorce agrees, to the fullest extent permitted by law, to limit the liability of [GMWA] and its subconsultants to the total dollar amount of the approved portions of the scope for the project for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, so that the total aggregate liability of [GMWA] and its subconsultants to all those named shall not exceed the total dollar amount of the approved portions of the Scope or [GMWA's] total fee for services rendered on this project, whichever is greater...



Sample Provision

Design Professional agrees to:

indemnify, defend and hold harmless the Owner, its officers, employees, agents and representatives from and against any and all claims, causes of action, damages, claims for damages, liability, loss, cost or expense, including reasonable attorneys' fees and expenses of litigation, arising out of or in any way related to performance of this Agreement by Design Professional, except claims arising from the sole gross negligence of the Owner.

No duty to defend.

Steer clear of the duty to defend which arises regardless of any negligence.

Duty to Indemnify

ONLY arises **once negligence has been established.**

Duty to Defend

Arises **regardless of negligence.**

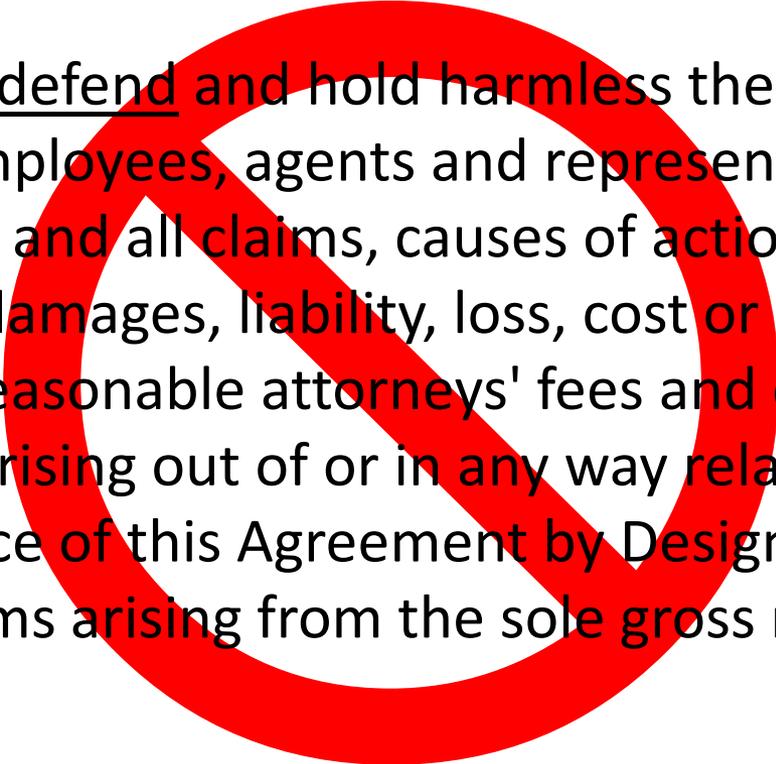
1
Overbroad
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Duty to
Defend

Design Professional agrees to:

indemnify, defend and hold harmless the Owner, its officers, employees, agents and representatives from and against any and all claims, causes of action, damages, claims for damages, liability, loss, cost or expense, including reasonable attorneys' fees and expenses of litigation, arising out of or in any way related to performance of this Agreement by Design Professional, except claims arising from the sole gross negligence of the Owner.



Release from Own Negligence



Case Law

In *UDC Universal Development v. CH2M Hill* the Court held an indemnity clause obligated an engineering firm to defend its client, a developer, despite a jury finding of non-negligence by the engineering firm in the performance of its services.

Indemnity Clause

“Consultant [CH2M Hill] shall indemnify and hold Owner, Developer ...free and harmless from and **against any and all** claims...losses and **expenses of any kind**, including reasonable fees of attorneys fees... **to the extent they arise out of or are in any way connected with** any negligent act or omission by Consultant...whether such claims, liens, demands, damages, losses or expenses are based upon a contract...or upon **any other legal or equitable theory whatsoever**. Consultant agrees, at his own expense and upon written request by Developer or Owner of the Subject Property, to **defend any suit, action or demand** brought against Developer or Owner **on any claim or demand covered herein**.”

Impact of CH2M Hill

“

[A] duty to defend arises ... as soon as the litigation commences and regardless of whether the indemnitor is ultimately found negligent.

”

Exclusion

This Policy does not apply to any Claim(s):

p. Contractual Liability

As a result of **liability assumed by the Insured under any contract or agreement**. This Exclusion does not apply to liability for Damages the Insured would have in the absence of the contract or agreement.

Types of Indemnity

1

Conflict of interest

Insurance company required to provide separate defense for client, whose interests may conflict with your interests.

2

Deplete available limits

Defense would increase your likelihood of paying out of pocket costs.

State laws

Legal standard may differ by State which can increase or limit your liability.



CA Civil Code § 2778

In the interpretation of a contract of indemnity, the following rules are to be applied, **unless a contrary intention appears**:

3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, **embraces the costs of defense** against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion;

4. The **person indemnifying is bound**, on request of the person indemnified, **to defend** actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so;

CA Civil Code § 2782

(a) Except as provided in Sections 2782.1 , 2782.2 , 2782.5 , and 2782.6 , provisions, clauses, covenants, or agreements contained in, collateral to, or affecting **any construction contract** and **that purport to indemnify the promisee against liability for damages** for death or bodily injury to persons, injury to property, or any other loss, damage or expense **arising 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, or for defects in design furnished by those persons, are against public policy and **are void and unenforceable...**

CA Civil Code § 2782.8

(a) For **all contracts**, and amendments thereto, entered into on or after January 1, 2018, **for design professional services**, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, **that purport to indemnify**, including the duty and the cost to defend, the indemnitee by a design professional against liability for claims against the indemnitee, **are unenforceable, except to the extent that the claims against the indemnitee arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional.** In no event shall the cost to defend charged to the design professional exceed the design professional's **proportionate percentage of fault...**

NY Labor Law imposes **strict liability** for practically all accidents occurring at a construction site **on Owner and/or Contractor.**

Applies to Contractors and Owners

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure...”

Requires them to provide safety equipment

shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

NY Labor Law Section 240

Does NOT apply to Architects and Engineers

“No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers as provided for in article one hundred forty-five of the education law, architects as provided for in article one hundred forty-seven of such law or landscape architects as provided for in article one hundred forty-eight of such law who do not direct or control the work for activities other than planning and design.”

UNLESS common law or contract law

This exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provision of law.”

Limiting Exposure

1 Limit covered parties

2 Limit covered claims

3 Avoiding the duty to defend

4 Monetary limitations

Indemnity Clause – La Gorce



...La Gorce agrees, to the fullest extent permitted by law, to limit the liability of [GMWA] and its subconsultants to the total dollar amount of the approved portions of the scope for the project for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, so that the total aggregate liability of [GMWA] and its subconsultants to all those named shall not exceed the total dollar amount of the approved portions of the Scope or [GMWA's] total fee for services rendered on this project, whichever is greater...



EJCDC Limitation of Liability

To the fullest extent permitted by Laws and Regulations, and notwithstanding any other provision of this Agreement, the total liability, in the aggregate, of Engineer and Engineer's officers, directors, members, partners, agents, employees, and Consultants, to Owner and anyone claiming by, through, or under Owner for any and all injuries, claims, losses, expenses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project, Engineer's or its Consultants services or this Agreement from any cause or causes whatsoever, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied of Engineer or Engineer's officers, directors, members, partners, agents, employees, or Consultants shall not exceed the total amount of \$ _____ or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee.

Limit Liability To:

1 Set Fee

“not to exceed \$__ amount.”

shall not exceed the total amount of \$____ or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee.

2 Contract Price

“not to exceed contract price.”

shall not exceed the total compensation received by Engineer under this Agreement.

3 Insurance Coverage

“to the extent such provisions or indemnity is covered by the design professional’s professional liability insurance.”

shall not exceed the total insurance proceeds paid on behalf of or to Engineer by Engineer’s insurers in settlement or satisfaction of Owner’s Claims under the terms and conditions of Engineer’s insurance policies applicable thereto (excluding fees, costs and expenses of investigation, claims adjustment, defense, and appeal).

Take Away

Limit indemnity obligation to **behavior over which you have control, and proportionate risk.**

Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
Continuing Education Systems Program



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