Learning When to Waive Good-Bye

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This course will review important waiver provisions in design contracts, the risk they pose, and the actions that design professionals can take to manage and mitigate their liability.

**Waive**

[wāv] VERB
refrain from insisting on or using (a right or claim).
"he will waive all rights to the money"
Learning Objectives

Participants in this session will:

1. Identify common waiver clauses in design contracts;
2. Discuss important considerations when negotiating or drafting waiver provisions;
3. Discover ways to preserve contractual rights and mitigate exposure to risks inherent in waiver clauses; and
4. Learn how to recognize legal issues regarding the enforceability of waivers.
What is a Waiver?

Waiver

voluntary relinquishment of a present or future right, claim, or privilege

- Express v. Implied
- Conditional v. Unconditional
- Unilateral v. Bilateral
- Active v. Passive
Express v. Implied

Express Waiver
Written or oral statement of a party’s intent to relinquish their right, claim or privilege.

Implied Waiver
Waiver by conduct indicating a party’s intent to relinquish their right, claim, or privilege.
The failure of either party to insist on strict performance of any of the provisions of this Subcontract shall not be construed as a waiver of any such provision or the relinquishment of the parties’ rights hereunder in the future. A waiver by either party of any breach of any provision of this subcontract shall not be construed to waive or limit the need for such consent or approval in any other or subsequent instance.
Conditional v. Unconditional

**Conditional Waiver**
Waiver is *conditioned on* the occurrence of an event or act by another.

**Unconditional Waiver**
Waiver *occurs absent* any condition or stipulation.
Conditional v. Unconditional

**Conditional Waiver**
Waiver is conditioned on receipt of payment from Client.

“Design Professional waives and releases...to the extent of each payment received from Client.”

**Unconditional Waiver**
Waiver occurs absent any condition or stipulation.

“Design Professional hereby waives and releases all lien rights to the fullest extent permitted by law...”
Unilateral v. Bilateral

Unilateral Waiver
Waiver by one party to the contract, without receiving a reciprocal waiver from the other party.

Bilateral Waiver
Waiver by both parties to the contract; reciprocal waivers.
Unilateral Waiver
Waiver is not reciprocated.

“Design Professional and Owner waive consequential damages for claims, disputes, or other matters...”

Bilateral Waiver
Both parties mutually agree to waive their respective rights against each other.

“AIA B101-2017 § 8.1.3

“Design Professional waives consequential damages for claims, disputes, or other matters...”
Active v. Passive

**Active Waiver**
Waiver triggered by affirmative action.

- By writing
- Notice/Consent
- Delivery/Receipt of Goods or Services

**Passive Waiver**
Waiver triggered by silence or inaction.

- Silence
- Passage of Time
- Inaction/Failing to Perform
1 Rights and privileges
What rights and privileges do you lose by agreeing to the terms of this provision/contract?

2 Liability
What is your exposure to liability?

3 Discussion points
Identify discussion points for your contract negotiations to manage and mitigate your exposure.
Ownership Rights
Ownership Rights

Waiver of Ownership Rights

Waive rights to documents, materials, and other instruments of service used and created in connection with the project.

1. Rights and privileges
   Right to ownership and reuse, payment, involvement in use of documents.

2. Liability
   Liability for damages arising out of reuse or misuse without your involvement.

3. Discussion points
   See slide 21.
Client shall be the owner of all designs, drawings, documents, plans, specifications, maps, calculations, computer files, programs or models...whether draft or final, hard copy or digitalized, and whether maintained in electronic format or otherwise, made, conceived, developed, or prepared by or for the benefit of Design Professional in connection with the performance of its services under the Agreement.
Case Law

Christopher Phelps & Assoc., LLC.

Architecture Firm

Gina Bridgeford
Client

R. Wayne Galloway
Defendant

Architect awarded $20,000 for homeowner’s unlawful use of designs.

The plans contained the following copyright:

© 2000 Copyright Christopher Phelps & Assoc., L.L.C. These plans are protected under the federal copyright laws. The original purchaser of this plan is authorized to construct one and only one home using this plan. Modifications or reuse of this plan is prohibited.
§ 7.2 The Architect and Architect’s consultants shall be deemed authors and owners of their respecting Instruments of Services...and retain all common law, statutory and other reserved rights, including copyrights...

§ 7.3 The Architect grants to the Owner a nonexclusive license to use the Architect’s Instruments of Service...
Waiver of Ownership Rights

Mitigate risk by clarifying the following:

- License to use is granted only when paid in full
- Documents are project-specific; not for reuse
- Reuse without your involvement at Client’s sole risk
- Permitted to retain one record copy
Lien Rights
Lien Rights

Waiver of Lien

Waive rights to file claim against the real property on which design professional has bestowed labor or furnished material for the value of those services.

1. Rights and privileges
   - Right to file liens and recover money owed.

2. Liability
   - Non-payment for services duly rendered.

3. Discussion points
   - Conditional waiver of liens.
Lien rights for design professionals differ by state.

- **No Lien Rights**: No lien rights entirely.
- **Modified Lien Rights**: Lien rights subject to regulations specific to design professionals.
- **Same Lien Rights**: Same lien rights as those available to contractors.
Design Professional hereby agrees and acknowledges that its rights to file a construction lien are hereby waived and released.
Design professional hereby agrees and acknowledges that its rights to file a construction lien...are hereby waived and released in consideration for, upon receipt of, and to the extent of all payments received by Design Professional hereunder.
Waiver of Right to Trial
Mandatory Arbitration Clauses

Waiver of Right to Trial
Waive right to seek resolution of disputes through litigation.

1. Rights and privileges
   Right to resolve disputes through litigation and availability of the appeals process.

2. Liability
   Time, cost, governing law, and appeals process.

3. Discussion points
   See slide 31 & 32.
Dispute Resolution

3 Different Methods:

- Litigation
- Arbitration
- Mediation
By agreeing to resolve all disputes through binding arbitration, Client and Consultant each give up the right to have their respective claims and defenses decided by a judge or jury. All claims and defenses shall instead be decided by the arbitrator.
Waiver of Trial Rights

To mitigate risk, consider the following:

**Mediation as an alternative**

**RLI Policy**

If any **Claim** made against the **Insured** and reported to the Insurer during the **Policy Period** is **resolved**, with the Insurer’s consent and agreement, **through the use of Mediation**, the Insured’s Deductible as respects the Claim shall be reduced by fifty percent (50%) subject to a maximum reduction of $12,500.

**Attach conditions to trial waiver**
Conditions to Arbitration

**Bilateral/reciprocal waiver**
Is mandatory arbitration reciprocal?

**Choice of arbitrator**
Who chooses the arbitrator? Is mutual agreement required?

**Choice of venue**
Who chooses the location? Is mutual agreement required?

**Applicable rules**
Any controversy or claim between the Client and Design Professional arising out of, or related to this Agreement, or the breach thereof, shall be settled by binding arbitration if the Client, in its sole discretion, elects to arbitrate the controversy or claim in lieu of litigation. The election to arbitration shall be solely in the discretion of the Client, and if Client elects to arbitrate, the Design Professional expressly consents to arbitration...”
Consequential Damages
Waiver of Consequential Damages

Waive right to seek recovery of foreseeable damages in the event of a breach of contract by Client.

1 Rights and privileges
   Right to recover foreseeable damages indirectly resulting from Client’s breach of contract.

2 Liability
   Liability for indirect damages caused by Client’s breach of contract (including but not limited to lost profits, lost opportunity, etc).

3 Discussion points
   Bilateral waiver.
Examples

Lost Profits
Loss of Use
Loss of Rent
Interest and Finance Charges
Additional Labor Costs
Material Escalation Costs
Depreciation
Loss of Productivity and Efficiency
Case Law

Four month delay resulted in $14.5 million awarded in damages to Owner, where the contract with Plaintiff was for $600,000.

Greate Bay Hotel & Casino, Inc.
Client

Perini Corporation
Construction Manager

Sands Hotel & Casino
Project

“Reasonably foreseeable” because Perini was aware of:

1) Purpose of project;
2) Client’s desire and need to finish the project before the summer season;
3) Client’s plan to delay the project until the following year if untimely completed; and
4) High stakes involved in the Atlantic City casino-construction industry.

Delayed completion of an apartment building.

Delayed completion of a retail location.
The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this agreement...”

Consequential Damages
Sample Language

AIA B101-2017 § 8.1.3
Subrogation Rights
Subrogation

Contractor causes injury

Insurer compensates Design Professional

Insurer seeks restitution from Contractor

Insurer “steps into the shoes of” Insured
Waiver of Subrogation

Waive right for someone to “step into your shoes” and pursue recovery.

1. **Rights and privileges**
   - Right for insurance to seek reimbursement from responsible party.

2. **Liability**
   - Can affect insurance premiums and coverage.

3. **Discussion points**
   - Bilateral waiver. Limit waiver to Client(s).
In the event of any payment under this Policy, the Insurer and the Insured may have the right to recover all or part of any payment the Insurer or the insured makes under this Policy... The Insured must do nothing to impair [right of subrogation]

...The Insurer waives its rights of subrogation under this Policy against clients of the Insured as respects Claim(s) arising from Professional Services under the client’s contract requiring waiver of subrogation but only to the extent required by written contract.
### Remember

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<td><strong>Rights and privileges</strong></td>
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QUESTIONS?

This concludes The American Institute of Architects Continuing Education Systems Program

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