

RLI[®]

DIFFERENT WORKS



RLI DESIGN PROFESSIONALS
Design Professionals Learning Event

Learning When to Waive Good-Bye

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DIFFERENT WORKS

Course Description

Waive

[wāv]
VERB

refrain from insisting on or using (a right or claim).
"he will waive all rights to the money"

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.

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.



Waiver

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.

Anti-Waiver Clause

“

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.

”

**Sample Contract
Language**

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.”

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

Unconditional Waiver

Waiver occurs absent any condition or stipulation.

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 v. Bilateral

Unilateral Waiver

Waiver is not reciprocated.

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

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

AIA B101-2017 § 8.1.3

Bilateral Waiver

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

Active v. Passive

Active Waiver

Waiver triggered by affirmative action.

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

- Silence
- Passage of Time
- Inaction/Failing to Perform

Passive Waiver

Waiver triggered by silence or inaction.

Analysis

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.

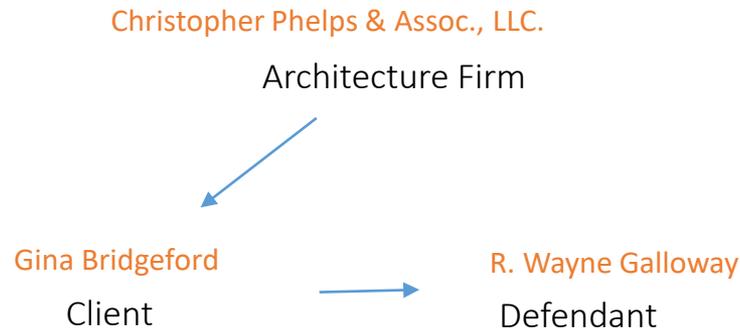
Sample Language

“

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



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.

Sample Contract Language

“

§ 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...

”

Ownership Rights Sample Language

AIA B101-2017 §§ 7.2 & 7.3

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

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

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.

Sample Language

“

Design Professional hereby agrees and acknowledges that its rights to file a construction lien are hereby waived and released.

”

Sample Contract Language

“

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.

”

**Lien Waiver
Sample Language**



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

Sample Contract Language

“

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.

”

**Trial Waiver
Sample Language**

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

Construction Industry Arbitration Rules of the American Arbitration Association? Judicial Arbitration and Mediation Services (“JAMS”)?

Sample Language

“

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.

Hypothetical

Delayed completion of an apartment building.



Delayed completion of a retail location.



Sample Contract Language

“

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

”

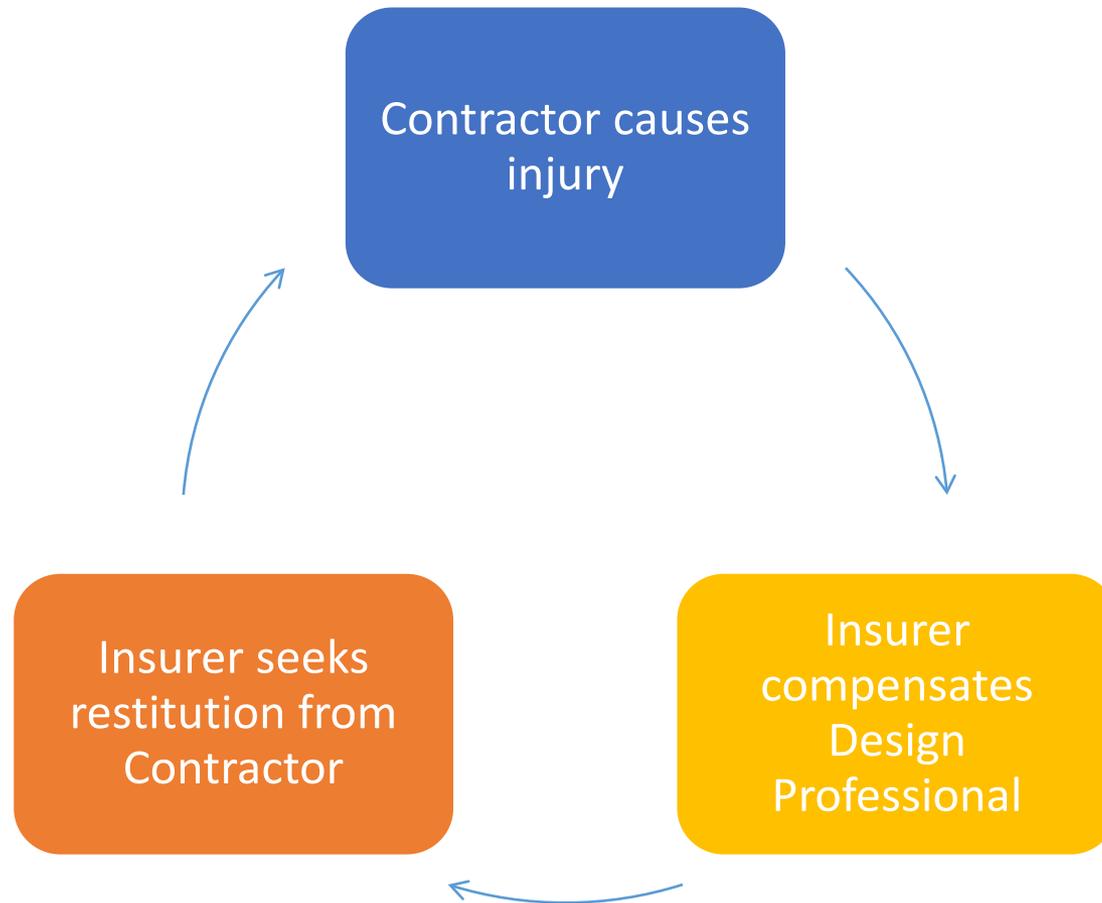
Consequential Damages Sample Language

AIA B101-2017 § 8.1.3



Subrogation Rights

Subrogation



Insurer “steps into the shoes of” Insured

Waiver of Subrogation

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).

RLI Policy

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

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.

4
Advice of Attorney

Consult with an experienced and knowledgeable attorney.

Thank you for your time!

QUESTIONS?

**This concludes The American Institute of Architects
Continuing Education Systems Program**



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