



Don't Risk Denial:

Understanding Common Exclusions in Professional Liability Policies

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DIFFERENT WORKS

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Course Description

IS IT COVERED?

What's covered under a professional liability insurance policy?

Understanding the coverage and exclusions in a professional liability policy can be confusing for design professionals and their clients. The goal of this presentation is to explore what insurability means, why it matters to design firms and project owners alike, and look at some problematic contract language commonly seen in Owner-drafted contracts that can cause coverage concerns.

Learning Objectives

Participants in this session will:

- 1** Review some coverage exclusions commonly found in professional liability policies;
- 2** Analyze the implications of uninsurable exposures for both the design firm and their client;
- 3** Discuss frequently seen contract language that can cause uninsurable exposures to the design firm; and
- 4** Identify strategies for communicating the importance of uninsurable exposures to the client and negotiating more appropriate contract language for all parties involved.

Policy Coverage

Coverage for Wrongful Acts

To pay on behalf of the **Insured** all sums in excess of the deductible, which **Insured** shall be come legally obligated to pay as Damages or Claim Expenses as a result of a Claim for a **Wrongful Act** to which this insurance applies, including a Claim for a **Wrongful Act** for **Personal Injury**.

“Wrongful Act” means a negligent act, error, or omission, in the performance of Professional Service by an Insured or any person or entity for which the Insured is legally liable.

3 Important Elements of Coverage

Generally, Professional Liability policies covers damages and certain expenses to the extent they are caused by your negligence in the performance of your professional services

1 Caused by you

Damages must be caused by *you* or a person or entity for whom you are legally liable

2 Negligence

Damages must be caused by your *negligence* – your failure to meet the applicable standard of care

3 Performing professional services

Damages were caused in the performance of your professional services

#1 “Caused by you”

Accepting responsibility for damages or costs beyond those *caused by you and your firm* may create an uninsurable exposure for your firm.

Beware of terms/phrases such as:

“arising out of”

“related to”

“as a result of”

“in any way connected with”

“any and all damages, costs, claims, liabilities...”

“caused in whole or in part”

“damages of any kind of nature”

#1 “Caused by you”

Accepting responsibility for damages or costs beyond those *caused by you and your firm* may create an uninsurable exposure for your firm.

Beware of accepting responsibility for other parties:

Example – Don’t take responsibility for the Contractor’s errors.

“

Review of [Contractor’s] submittals is not for the purpose of determining the accuracy and completeness of other information such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor’s responsibility.

”

AIA B101-2017 § 3.6.4.2

#2 “Negligence”

Elevating your standard of care beyond a *negligence* standard may create an uninsurable exposure for your firm.

Standard of care:

Generally, the standard of care of professionals requires you to exercise the degree of skill and care ordinarily exercised by other design professionals in similar circumstances. *Perfection is not required!

Beware of terms/phrases such as:

“Highest”

“Best”

“Superior”

“Expert”

“Highest standards in the profession”

“Highest professional standards”

“Highest standard of care”

Standard of Care Sample Provision

AIA B101-2017 §2.2



The [Design Professional] shall perform their services consistent with the professional **skill and care ordinarily provided** by [Design Professionals] practicing **in the same or similar locality under the same or similar circumstances...**



Case Law

In *Thompson v. Gordon*, the Supreme Court of Illinois upheld a Circuit Court holding finding that the contract between the Design Professional and their Client did not require an elevated standard of care.



Contract Language: Scope of Services

Scope of services set forth in Attachment A, Article 2A & 2B

Article 2A Roadway Design

Final design and contract preparation for the Phase I, Stage A I-94/Grand Avenue interchange improvements will be provided.

*The proposed roadway **improvements** are as described below:*

- *Redesign Ramp B to two lanes, but maintain one lane at merge to southbound I-94.*
- *Provide lane drop recovery area on eastbound Grand Avenue east of Ramp B diverge.*
- *Improve Ramp E alignment.*
- *Proposed improvements are to tie to the widening of Grand Avenue, which is to be done by others.*

Additional related services to be provided include drainage design, roadway lighting design, and utility adjustments”

Article 2B Structural Design

*Final structural design plans will be provided for deck **replacement** of the existing Grand Avenue bridge over I-94. Final structural design plans will also be prepared for a proposed overhead cantilever sign truss on eastbound Grand Avenue, west of Ramp B.*

Contract Language: Standard of Care

Standard of care clause set forth in Article 4A of the Contract:

The standard of care applicable to ENGINEER's services will be the degree of skill and diligence normally employed by professional engineers or consultants performing the same or similar services. The ENGINEER will re-perform any services not meeting this standard without additional compensation.

Compare

Which is the appropriate standard of care?

A

The standard of care applicable to ENGINEER's services will be the degree of skill and diligence normally employed by professional engineers or consultants replacing a bridge deck.

B

The standard of care applicable to ENGINEER's services will be the highest degree of skill and diligence employed by professional engineers or consultants replacing a bridge deck.

C

The standard of care applicable to ENGINEER's services will be the degree of skill and diligence normally employed by professional engineers or consultants improving a bridge deck.

Answer

Which is the appropriate standard of care?

A

The standard of care applicable to ENGINEER's services will be the degree of skill and diligence normally employed by professional engineers or consultants replacing a bridge deck.

B

The standard of care applicable to ENGINEER's services will be the highest degree of skill and diligence employed by professional engineers or consultants replacing a bridge deck.

C

The standard of care applicable to ENGINEER's services will be the degree of skill and diligence normally employed by professional engineers or consultants improving a bridge deck.

#3 “Performing Professional Services”

Performing services beyond those you are legally qualified to perform may create an uninsurable exposure for your firm.

Professional services

“Professional Services” means those services the **Insured** is legally qualified to perform for others in the practice of architecture, engineering, land surveying, landscape architecture, interior design, construction management, environmental consulting, land planner, space planner, technical consultant or expert witness.

*Be as detailed and accurate as possible about the services your firm provides in your application for coverage.

Other Policy Exclusions

Other common exclusions:

Two other common coverage exclusions.

- 1** Contractually assumed liability
- 2** Warranties and guarantees

Policy Exclusion

Contractually Assumed Liability

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

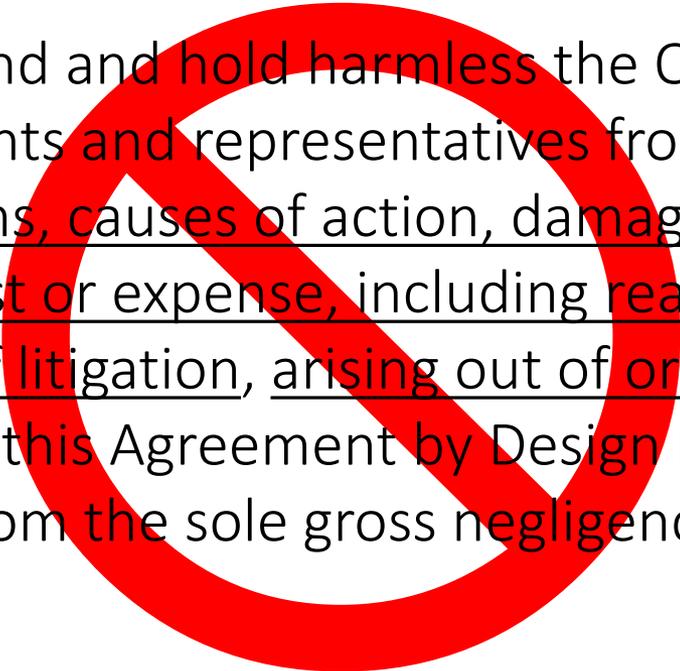
as a result of **liability assumed by the Insured under any contract or agreement**. This Exclusion does not apply to liability for Damages that the Insured would have had in the absence of the contract or agreement.

Sample Indemnity Clause

A badly worded indemnity clause can leave you liable for damages beyond those *caused by your negligence* in the performance of your professional services.

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.

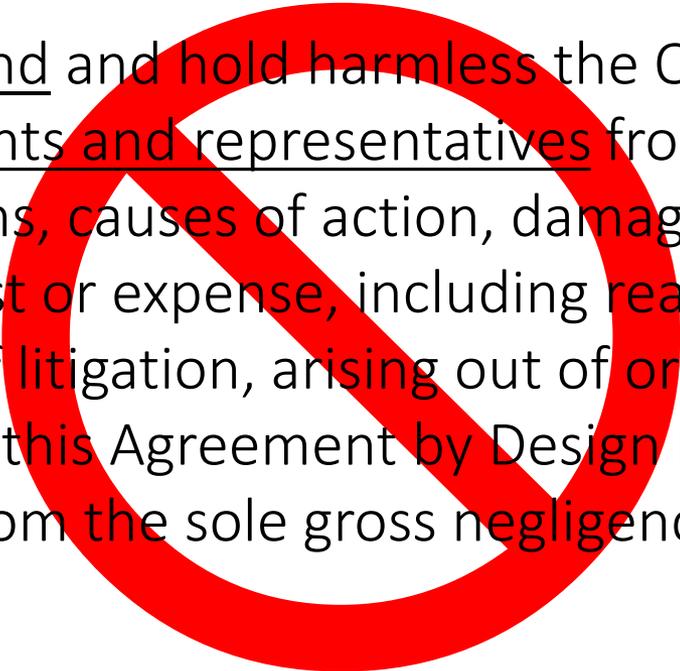


Sample Indemnity Clause

A badly worded indemnity clause can leave you liable for damages beyond those *that would exist in the absence of the contract.*

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.



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.

Contract Language: 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....**



Holding

“

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

”

Indemnification

AIA B103-2017 §8.1.3



The [Design Professional] shall indemnify and hold the Owner and Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but **only to the extent they are caused by the negligent acts or omissions of the [Design Professional], its employees and its consultants in the performance of professional services under this Agreement.** The [Design Professional]'s obligation to indemnify and hold the Owner and the Owner's officers and employees harmless **does not include a duty to defend.** The [Design Professional]'s duty to indemnify the Owner [] shall be limited to the available proceeds of the insurance coverage required by this Agreement.

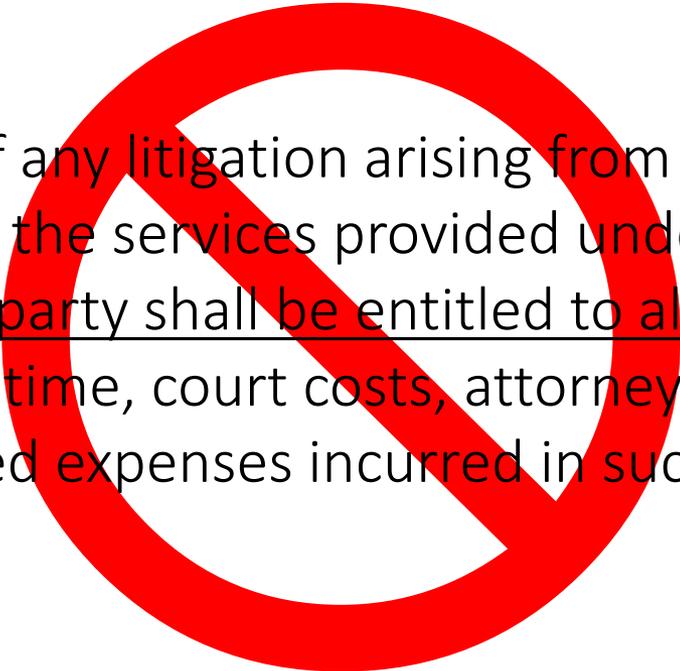


Sample Prevailing Party Clause

In the United States, each party is typically responsible for paying its own legal fees, unless otherwise allowed by a statutory authority or contractual provision.

Design Professional agrees to the following:

In the event of any litigation arising from breach of this agreement, or the services provided under this agreement, the prevailing party shall be entitled to all costs incurred including staff time, court costs, attorneys fees, and all other related expenses incurred in such litigation.



Policy Exclusion

Express Warranties or Guarantees

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

Based upon or arising out of any express warranties or guarantees. However, this Exclusion does not apply to a warranty or guarantee by the Insured that the Insured's Professional Services are in conformity with the standard of care applicable to that Professional Service.

Quiz #1

Standard of Care Warranty Provision

The [Design Professional] warrants and guarantees that its services under this agreement shall be performed in conformance with the skill and care ordinarily exercised by other members of the profession practicing at the same time under the same or similar circumstances in the same locale.

Standard of Care Warranty Provision

The [Design Professional] warrants and guarantees that its services under this agreement shall be performed in conformance with the skill and care ordinarily exercised by other members of the profession practicing at the same time under the same or similar circumstances in the same locale.

Impact of Uninsurable Provisions

IS IT COVERED?

And why it matters for you and your Client.

- Potential bankruptcy by design firm
- Client left “holding the bag”
- Disruptions to project progress
- Hiring/training replacement firm
- Infringement of intellectual property rights
- Increased project costs

Assuming Uninsured Obligations

If you knowingly assume an uninsured obligation, make sure you're adequately compensated for the added risk.

Example: If you agree to an elevated standard of care...



...consider what additional services you may need to provide to meet a higher standard of care (e.g. additional site visits), and price the project accordingly to reflect those additional services.

Assuming Uninsured Obligations

If you knowingly assume an uninsured obligation, consider including a limitation of liability clause.

Limitation of Liability

Limits the exposure a firm faces in the event a lawsuit is filed or a claim is made.

* The enforceability of a limitation of liability clause depends on: (1) the specific language of the provision; and (2) the jurisdiction.



“ “ 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).

Moore & Associates Inc. v. Jones & Carter Inc.

\$18k v. \$200k

Design Firm's indemnity obligation limited to \$18k due to a limitation of liability clause contained in the parties' contract.

Contract Language

LOL Clause in Contract



In order for [Contractor] to obtain the benefit of the fee which includes a lesser allowance for risk funding, [Contractor] agrees to limit [Design Professional]’s liability arising from [Design Professional]’s professional acts, errors or omissions such that the total liability of [Design Professional] shall not exceed [Design Professional]’s total fees for the services rendered on the project.



Additional Insured Clauses

Unlike some other types of insurance coverages, your Professional Liability insurance policy does not allow additional insureds.



1 Scope of Coverage

Generally, your client is not providing “professional services”, which is what a Professional Liability policy covers.

2 Insured v. Insured

Being added as an additional insured may trigger the “insured v. insured” exclusion.

Checklist

Make sure the risk you assume is covered.

Or be aware of the risks if it's not. At a minimum, here are some things to consider:

- ✓ Liability is limited to damages caused by your negligence in the performance of your professional services.
- ✓ No contractually assumed liability that would not exist in the absence of the contract.
- ✓ No express warranties or guarantees other than a warranty to provide services in conformance with applicable standard of care.

Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
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