

Indemnification Clauses: All You Need to Know

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Most architects that I know would choose to run and hide whenever they encounter the word “Indemnification”. We would all rather spend our time designing the built environment than learning about legal concepts – that’s what lawyers are for, right? While you should indeed engage your attorney to review contract language, this legal concept can significantly increase your risks on a project, especially if you agree to a poorly written indemnification.

It’s important to know that if you agree to an indemnification clause, it is a promise by you to cover the losses of the other party (usually your client’s, if you do something that causes them harm or causes a third party to sue them). Some courts have even made architects pay the legal costs of owners or contractors who are sued – even when the architect is ultimately found not to have done anything wrong.

Your Professional Liability Insurance policy will cover you for this risk if there is proper indemnification language, but it will not cover you if you agree to language that is excluded from your policy. This paper addresses this issue, flags problems that you should avoid, and gives suggestions as to how to negotiate indemnification clauses.

What is Bad Contract Language?

A common, and typical indemnity clause is shown below.

INDEMNIFICATION

Architect covenants to save, defend, hold harmless, and indemnify the Owner, and all of its elected and appointed officials, officers, employees, agents, departments, agencies, boards, and related entities and contractors working for the Owner, from and against any and all causes of action, proceedings, claims, losses, damages, injuries, fines, penalties, costs (including court costs and attorney’s fees), charges, liability, or exposure, however caused, resulting from, arising out of, or in any way connected with the Architect’s acts, errors, or omissions, recklessness or intentionally wrongful conduct of the Architect in performance or nonperformance of its work called for by the Contract Documents.

There are numerous red flags in this paragraph:

- If the Architect agrees to “defend,” they may have to pay the other party’s legal fees if they are sued, even if the court eventually concludes that the Architect did nothing wrong. Words like "claims"; "suits"; "causes of action"; "actions"; "demands"; and "allegations" are also problematic because they suggest a duty to defend.

- There are no limitations on the Architect's exposure to the indemnification risk. Careful architects limit liability to "where [their] insurance applies," and use words from their insurance policies to describe the circumstances that would trigger their liability like "negligent acts" or "design defects."
- The Architect is exposed to risks of poor performance by a large number of people such as the Clients' "agents"; "parent company"; "subsidiaries"; "related entities"; "assigns"; "lenders"; "subcontractors," Even worse, the Architect is exposed to people unknown to them like those for whom the Architect "may be liable" and those whom the Architect "directly or indirectly retained."

What is a Reasonable Indemnity Clause?

Often, when we object to certain language, the other side may ask you to write alternate language, or you may offer to do so. The following language is suggested, which eliminates any defense obligation and is limited to damages and costs that you are legally obligated to pay to third parties:

Indemnification. Notwithstanding any clause or provision in this Agreement or any other applicable Agreement to the contrary, Architect's only obligation with regard to indemnification shall be to indemnify, but not defend, the Client, its officers, directors, employees and agents from and against damages arising out of third-party claims that Client is legally obligated to pay as a result of the death or bodily injury to any person or the destruction or damage to any property, to the extent caused by the negligent act, error or omission of the Architect or anyone for whom the Architect is legally responsible, subject to any limitations of liability contained elsewhere in this Agreement. ¹

Note the specific reference to affirmatively state that there is no duty to defend. This is highly recommended for all indemnification clauses in any state but is absolutely necessary if you are working in California, due to recent court cases there. Also note that the indemnity obligations have been limited to only third-party claims.

For example, on a recent project, when the owner's attorney took a tough stance on proposed "duty to defend" and "contractual liability" language, I proposed two options. Either: 1. Delete the language that is excluded from our professional liability policy, or 2. Purchase a "contractual liability" rider that is now available at the owner's cost, which was not inexpensive. The owner begrudgingly accepted the first option, as he could not argue that contractual liability was covered in our base policy.

Conclusion

Architects must be acutely aware of the contractual liability exclusion in their Professional Liability policies which will provide no coverage for indemnification obligations that otherwise would not be imposed by prevailing law. When you are presented with such a clause and you are proposing modifications, you should propose language that limits the indemnity obligation to damages caused only by your negligence and to clearly make it applicable only to third-party claims.

The first step in the prevention of these uninsurable risks is a keen awareness of the issues. Then, you must be willing to negotiate contract language strongly with your client and if you do so with a good understanding of the issues, your client may respond favorably. If he or she, or his or her attorney, is unwilling to make language changes after a presentation of the issues, then you should consider walking away from this project if you consider that the additional risk is too great to accept.

This information is provided for educational purposes only and should not be construed as legal advice. Laws, regulations, licensing requirements, and ethical codes vary by state, and individuals should seek legal counsel or professional advice to evaluate their specific set of facts and circumstances.

¹ J. Kent Holland, J.D., *Indemnification Clauses: Uninsurable Contractual Liability*, Zurich A&E Briefings, Spring 2012.