



TO OUR MEMBERS AND FRIENDS:

OHIO GENERAL ASSEMBLY
AMENDED SUBSTITUTE SENATE BILL 56:

**LIMITATION OF LIABILITY
FOR
OHIO DESIGN PROFESSIONALS**

A Legislative Update

January, 2023

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LIMITATION OF LIABILITY FOR OHIO DESIGN PROFESSIONALS

INTRODUCTION

Ohio recently enacted a new law to limit malpractice liability on public improvements for licensed Design Professionals including Architects, Landscape Architects, Engineers, and Surveyors.

PRIOR LAW

It is typical in any Design Professional Contract with an Owner for design services that the attorney drafting the agreement includes an Indemnification clause, requiring that the Design Professional pay for any malpractice. In addition, it is typical that the agreement also requires that the Design Professional carry malpractice Insurance covering that liability exposure.

Consistently, as a condition of licensure, Ohio Administrative Code 4703-3-08 requires that, "A registered architect or architectural firm shall, when providing professional design services to a public authority, have and maintain professional liability insurance or other assurance of financial responsibility as may be required by the public authority."

Professional Liability Insurance is limited to the scope of professional practice. The malpractice insurance policy will not cover other losses such as property or personal casualty damage or general business liability losses.

But the concept of "indemnification" is broad. Any person may enter into an agreement to indemnify another party regardless of insurability. For instance, a contractor cannot buy commercial general liability insurance to cover defective workmanship, as that could incentivize intentional cost-cutting or improper construction. *Westfield Ins. Co. v. Custom Agri Sys.*, 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269.

Therefore, a dilemma arises in contract drafting when the Indemnification requirement describes actions beyond the scope of available malpractice Insurance, limited to the professional scope of practice and the professional standard of care. This is of particular concern when a Design Professional is engaged in a Design-Build Project, where the lines between Professional Practice and Construction "means and methods" are blurred.

In the public sector, Design Professional documents often are standardized forms drafted by public agencies for use in various projects and for various owners. The

contract typically is circulated in final form prior to the statutory Qualifications-Based Selection process of the Design Professional. This standardization effectively prevents the Design Professional from negotiating individual project terms, such as limiting liability to the professional scope of practice and insurance coverage.

NEW LAW

Amended Substitute Senate Bill 56 expressly limits a Design Professional's duty to indemnify a contract party to the "proportionate share of the tortious conduct." The new legislation only applies to contracts on construction of Ohio public improvements.

Conceptually, if a personal or property injury occurs, the injured party sues all possible liable parties. To hold a Design Professional solely for the loss would require that the court determine that the design was the only cause. No longer can a Design Professional be held "jointly and severally liable" for the loss with construction contractors or other defendants.

Introduced on February 9, 2021 by Senator Bill Blessing (R, Cincinnati), the bill passed the Ohio Senate unanimously, and passed the Ohio House by a vote of 91-2. The Governor signed the law effective March 14, 2023. Senator Blessing is a licensed Professional Engineer, the only Design Professional serving in the Ohio General Assembly.

Senate Bill 56 enacts this limitation by creating a new provision, Revised Code 153.81. The key provision states, "The indemnification shall only be for the liabilities incurred from the proportionate share of the tortious conduct, *** of the professional design firm or any consultant, subcontractor, or other entity used by the professional design firm, in performing under the public improvement contract."

The legislation was supported by the following organizations through testimony and letters:

- American Council of Engineering Companies of Ohio (ACEC Ohio)
- American Institute of Architects, Ohio Society (AIA Ohio)
- Ohio Chapter of the American Society of Landscape Architects (OCASLA)

In Sponsor Testimony, Senator Blessing argued that public agencies carry other insurance, and that it is unfair to shift the risk to a Design Professional. This results in the Design Professional paying for a lawyer to defend against all claims, beyond professional malpractice before any determination is made. Blessing concluded, "design professionals, as a matter of basic fairness, should not be asked to contractually

indemnify and/or defend another party for losses that the designer did not cause, cannot insure against, and were caused by factors beyond the designer's control."

CONCLUSION

The Limitation of Liability for Design Professionals on Public Improvements will encourage the proper allocation of risk to the owner's agent only for professional actions.

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