

7. Indemnity

An indemnity is a common contractual risk-shifting mechanism. To indemnify means to assume a specific liability in the event of a loss. As a basic principle of negligence law, the design professional is legally liable for damages caused as a direct consequence of its negligent acts or omissions, which is exactly what is covered by a design professional's professional liability insurance policy. Accordingly, it is very important that the design professional agrees to indemnifications that are limited to only those damages that are directly and proportionally attributable to the negligent performance of professional services. Indemnity clauses should have the following characteristics:

- Be fair and insurable, for the benefit of the owner and its defined representatives only, not "agents" or any other parties
- Be negligence-based and to the proportionate extent caused by negligent performance of services
- Not include or delete the word "defend". However, in California and potentially other states, not including or deleting the word "defend" is not enough. In California and potentially other states, the contract must specifically express that there is no duty to defend, and the wording must meet the governing state's legal standards and requirements in order for it to be upheld. The duty to defend another is not generally insurable under a design professional's liability insurance policy. It is considered a contractually assumed liability, which is typically excluded from PL insurance coverage.
- Be properly drafted in accordance with the state laws applicable to the project. Enforceability of indemnity provisions vary by state and wording that is acceptable and enforceable in one state may violate anti-indemnity statutes in another state.
- Provide for indemnification of reasonable attorneys' fees and expenses but only if recoverable by law in the applicable jurisdiction. Specifically exclude defense obligations prior to and in the absence of a finding of fault. If the attorneys' fees and costs would be awarded to the Client only because of the contract, and not because of governing law, it is considered a contractually assumed liability that is not insurable under a design professional's liability insurance policy.

Example language: *The Consultant shall indemnify and hold the Client and the Client's officers and employees harmless, but not defend, 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 Consultant, its employees and its consultants in the performance of professional services under this Agreement. The Consultant has no obligation to pay for any of the indemnitees' defense related cost prior to a final determination of liability or to pay any amount that exceeds the Consultant's finally determined percentage of liability based upon the comparative fault of the Consultant, its employees and its consultants.*