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Bulletin No. 5
September 1992

Professional Liability Perspective

Architects and Engineers

Professional Liability Insurance

Program endorsed by

ASSOCIATION OF CONSULTING ENGINEERING COMPANIES | CANADA

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Explaining Your Inability to Indemnify

How often have you been faced with a client seeking indemnification from your firm? "It is uninsurable," you point out patiently. "So what?" is the response. Stay calm. There are compelling reasons you can give for refusing to assume liability which properly belongs to someone else. Consider these.

1. There is no historic rationale for indemnification of clients by architects and engineers.
2. It has no economic justification.
3. It has no basis in law or in equity.

To understand how you might use these arguments successfully, it may be helpful to take a close look at the frameworks within which demands for indemnification are advanced by your clients and their legal counsel. There are three. Each is grounded in faulty reasoning. Your knowledge of the flaws can help you formulate an effective response.

The Construction Paradigm

The model is the construction contract. The mindset is based on the ill-considered notion that protections for the owner which are readily available from general contractors can somehow appropriately be imposed on the design team. Architects and engineers are, after all, part of the same process. Why should they be treated differently?

The answer is simple. The law treats them differently. Contractors do work. Their work is subject to a guarantee. They are obligated under the law to stand behind that work, and they are generally held responsible for damages caused by their faulty workmanship. Architects and engineers do not perform the work; they perform professional services. They are not obligated under the law to guarantee that performance, not even its result. They are generally held responsible only for those damages caused by their failure to exercise reasonable professional care.

Moreover, the historic and economic rationales which support indemnification by contractors simply cannot be applied to the design team. The historic rationale is based on the principle that when one party, for its own economic benefit, takes possession and control of the property of another, the associated risks ought reasonably to follow. The economic rationale is equally straightforward: Because general contractors are better positioned than owners to control the risks of construction, they can more efficiently manage those risks, or transfer them to subcontractors or insurers. In either case, the costs are measurable, and they are easily passed through to the owner.

Architects and engineers do not assume control of the property of the owner in a construction project, nor that of anyone else. Beyond responsibility for the consequences of their own negligence, they are not in a position to control, nor can they insure against the owner's risks. The costs are not measurable; passing them through to the owner is out of the question.

The Construction Paradigm does not apply to architects and engineers any more than it does to lawyers who practice law in the construction arena.

This is a point you may want to stress. The lawyers with whom you negotiate will understand exactly what you mean, and they will know you are right.

The Innocent Bystander

Those who cloak themselves in the robes of The Innocent Bystander are usually public entities. They characterize their role in construction as passive, and from this they draw the conclusion that if there is risk involved, it must belong to someone else.

The conclusion is false, at least in part because the assumption is wrong. Every owner faces enormous risk in construction. Every owner anticipates a profit commensurate with that risk. Otherwise, the project would have no economic justification in the first place. For public entities, "profit" takes the form of beneficial use of the facility by the public.

Architects and engineers are retained to help reduce the risk and enhance the gain, but they can neither eliminate the former, nor guarantee the latter. Their profit pales in light of the value of beneficial use, and it is ingenuous to assume that the risks of design and construction somehow ought to be transferred from the public to the design team because the latter is "actively" involved, whereas the former is not.

No design could go forward without active participation on the part of the owner. That participation has a direct bearing on the degree of risk involved. Cost/benefit trade-offs and the difficult decisions they require of the owner are examples; so too, is selection of a contractor whose low bid may be unrealistically out of line.

You might ask The Innocent Bystander, "Who is going to make these vitally important decisions?" and/or "Who reasonably ought to take the associated risks?" The owner, of course. But what about those aspects of design in which the owner's role truly is passive? What about them, indeed? It is reasonable to expect that you will be responsible for the consequences of your own negligence. This level of responsibility is commensurate with the profit you anticipate, it is what the law requires of you, and it defines the maximum limit of fairness. Passive participation notwithstanding, the owner's risk in construction encompasses everything else. It is not reasonable to expect you to share in it.

"Take It or Leave It"

This is a strong-arm tactic. It is usually adopted by clients prepared to press the advantage of a superior bargaining position. Their point of view is this: "Those who are privileged to work for us can accept our terms, no matter how onerous. If you choose otherwise, so be it. Thousands are standing in line to take your place." It is called winning by intimidation.

Do not be intimidated. The exercise of disparate bargaining power is contrary to public policy. It jeopardizes the enforceability of agreements and, particularly with respect to indemnification (which the courts view with disfavour in any event), it increases the likelihood that any "win" will prove to be a hollow victory.

"You will simply have to accept it as a cost of doing business," is a ridiculous posture for any client to assume. You are not an insurance company, and you are not in a position to collect a premium for assuming someone else's risk. Nor can you insure against that risk. What your client stands to gain by imposing a requirement which deprives you of your financial capacity to respond is difficult to understand. From both points of view, it makes far more sense to reach a fair, equitable and enforceable agreement.

Persistence, measured calm, reason and the knowledge that you were not selected out of the Yellow Pages should get you past this barrier. If not, you may be better off in the end if your "Take It or Leave It" client were to turn to that army of thousands out there. Keep in mind, as you consider this option, that it will not be easy, nor will it be inexpensive for your client to effect a change once you have been selected. Keep in mind, as well, that time is on your side. The more protracted your negotiations, the more negotiating strength you gain.

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