Significant Changes Occurring in the Field of Design Professional Liability

A significant change has occurred in the field of design professional liability during this session of the Indiana Legislature. Senate Bill 230 was passed and it has been signed by Gov. Holcomb. This new law fixes a troubling decision from the Court of Appeals and also eliminates a design professional’s contractual duty to defend its client (protecting firms from paying defense costs when it has not be negligent). A discussion of both aspects of the bill follows.

The Anti-Indemnification Statute

One of the hallmarks of a standard construction or design contract is the inclusion of an indemnity provision, which can be found in all AIA and most other construction contract documents. Essentially, indemnification is when one party to a contract (known as the “indemnitor” or “promisor”) agrees to pay any amounts which the other party to the contract (known as the “indemnitee” or “promisee”) is required to pay in a lawsuit (including defense costs). The typical scenario involving indemnity agreements occurs when a general contractor subcontracts out different portions of a construction project, and the employee of a subcontractor is injured on the jobsite. If the subcontractor’s employee receives workers compensation benefits, the subcontractor’s employee will be prohibited from suing his employer. However, a typical plaintiffs’ attorney will file a lawsuit on behalf of the injured subcontractor’s employee against the project owner, the general contractor, and in some cases the architectural/engineer/design firm that prepared the plans for the project.

Normally, the plaintiffs’ attorney for the injured subcontractor’s employee will sue the project owner, general contractor, and/or architectural/design firm under a vicarious liability theory. As the Indiana Supreme Court has explained: “Vicarious liability is ‘indirect legal responsibility.’ It is a legal fiction by which a court can hold a party legally responsible for the negligence of another, not because the party did anything wrong but rather because of the party’s relationship to the wrongdoer.” In other words, even if a subcontractor’s employee is injured on a jobsite only because of the subcontractor’s negligence, the property owner, general contractor, and/or design professional can still be liable under vicarious liability principles agreed to in its contract. This is where indemnity agreements come into play and it gets a little complicated. In the scenario described above, the standard contracts (including the prime contract and various subcontracts) will require the subcontractor to indemnify the property owner, general contractor, and any other party required by the contract. However, there is an Indiana statute which prohibits indemnification in “any construction or design contract” where the indemnitee/promissee is solely negligent (known as the “Anti-Indemnification Statute”). This means (or at least most Indiana attorneys practicing in the insurance/indemnity areas thought it means) that in the scenario above, if the subcontractor’s employee is injured because of the sole negligence of the property owner, general contractor, or architectural/design firm, then any contractual promise to indemnify will be void and unenforceable.

In 2017, however, the Indiana Court of Appeals issued an unpublished opinion (the “Wilhelm” decision) holding that even though only a subcontractor was responsible for its employee’s injury, the indemnification agreement between the general contractor and subcontractor was void and unenforceable because the general contractor was sued under a vicarious liability theory. Even though the general contractor was not negligent, the Indiana Court of Appeals reasoned that the sole negligence of the subcontractor was imputed to the general contractor under the language of the Anti-Indemnification Statute. If this opinion had been published by the Indiana Court of Appeals, it would have become binding precedent on Indiana trial courts and would have effectively invalidated the indemnity/insuring provisions of most, if not all, standard construction contracts (including AIA forms).

In response to the Wilhelm opinion, ACEC-Indiana lobbied for the passage of Senate Bill 230, along with the American Institute of Architects in Indiana. It takes effect on July 1, 2019. In relevant part, the Anti-Indemnification Statute is amended to include the following language: “Sole negligence does not include vicarious liability, imputed negligence, or assumption of a nondelegable duty.” This should clarify that in a standard construction or design contract, agreements to provide indemnity will be enforced by Indiana courts in a vicarious liability scenario (and liability insurers providing “insured contract” coverage will be required to cover indemnity obligations) so long as the indemnitee/promissee is not solely negligent. So we’re back to where we started prior to the Wilhelm decision.

The Duty to Defend.

With Gov. Holcomb’s signature on Senate Bill 230, not only does the above section clarify the intent of Indiana’s long standing anti-indemnification statute as it relates to vicarious liability, but an additional section became law specific to design professionals’ contractual duty to defend. While as mentioned earlier, indemnification still many times requires payment of the other party’s reasonable attorney’s fees if the design professional has been negligent, the immediate duty to defend (regardless of negligence) is no longer

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enforceable as a result of this new law. This part of the new law also takes effect July 1, 2019, for all contracts entered into on or after that date.

Any provision in a contract between a design professional and its client that imposes a “duty to defend” the client against professional liability claims is now void and unenforceable in Indiana. This term usually is included in an indemnification requirement in a contract for services, where the contract requires the design professional to “indemnify, defend and hold harmless” the client. That duty to defend is now void.

This has significant implications. A design professional’s Errors and Omissions insurance policy does not provide coverage for the defense of the client. Thus, the design professional is liable to pay for the client’s attorney’s fees while the litigation proceeds, without any finding that the design professional has in fact been negligent. This new law eliminates that requirement.

If a trial results in a finding that the design professional was indeed negligent, and the design professional agreed to indemnify his client for damages resulting from such negligence, the client’s attorney fees could be recovered as damages. This damage award would be covered under the design professional’s errors and omissions policy, unlike the duty to defend costs prior to trial. All in all, the new law protects the design professional from paying his client’s attorney fees out of his own funds, as opposed to his insurer paying those costs.

Care should be taken to strike the duty to defend requirement from contracts and refer the client or his counsel to the newly amended Indiana Code 25-2-5-4.

Special thanks to Sen. Mark Messmer (SEA 230), Rep. Jerry Torr (HB 1015), many members as well as ACEC Indiana’s lobby team LegisGroup Public Affairs (Glenna Shelby) for the hard work and success of this policy change.

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**2019 Annual Recognition Luncheon**

Join ACEC Indiana with guest speaker Linda Darr, ACEC National President and CEO, for the Annual Recognition Luncheon on Thursday, June 20 in Indianapolis.

ACEC Indiana will acknowledge the Engineer of the Year and other special honor recipients. Members of the 2018-19 Board of Directors and the Engineering Leadership Program will also be recognized as a part of this program. In addition, members of the 2019-20 Board of Directors will be announced.

**Location**
Willows on Westfield
6729 E. Westfield Blvd.
Indianapolis, IN 46220

**Schedule of Events**
11:30 Registration & Networking
12:00 Lunch
12:45 Program
1:45 Program Conclusion

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**Water-related Infrastructure Legislation Passes Indiana General Assembly**

After passage of the highway & local road funding package in 2017, ACEC Indiana’s next top priority was Water-related infrastructure planning and additional funding to help close the gap for these essential capital projects. Working with legislative “champions” Senator Ed Charbonneau (R-Valparaiso) and Rep. Ed Soliday (R-Valparaiso), significant and lasting policy has passed the 2019 Indiana General Assembly!

The legislative package is contained in two bills (Senate Enrolled Act 4 and House Enrolled Act 1406) and the budget (HEA 1001). Taken as a whole, the laws establish statewide policy and procedures to improve and manage drinking and wastewater systems, as well as take a deeper dive into stormwater management issues.

Highlights of the legislative package include:

**COORDINATION**
Appointment of IFA to coordinate executive branch activities of the state’s water programs

**ADDITIONAL STATE FUNDING**
Additional $20 M in state funding in FY 2021 to IFA to be distributed through the State Revolving Fund (SRF) program

**COOPERATION**
Demonstrated cooperation among utilities that apply to IFA for funding

**WATER LOSS AUDITS**
Annual “water loss audits” required by utilities and report findings to IFA, with independent verification every other year

**ASSET MANAGEMENT PLANS**
Asset Management Plans required to obtain funding from IFA, and must be maintained by utility

**PROJECT PRIORITIZATION**
Project prioritization system and project priority list must be established by IFA for funded projects

**SMALL UTILITIES**
40% of funding from certain sources of revenue set aside for small utilities serving less than 3,200 customers

**STORMWATER MANAGEMENT TASK FORCE**
Storm Water Management Task Force to meet after this session ends and make recommendations for the 2020 Indiana General Assembly

IFA will begin to implement policy and procedures to carry out the legislative directives, and ACEC Indiana has offered to be of assistance. Thank you to the many members who played a part in this success, as well as ACEC Indiana’s lobby team of APPIAN (Dennis Faulkenberg and Laurie Maudlin) and LegisGroup Public Affairs (Glenna Shelby.) ACEC National Minuteman grant provided some additional financial resources that were instrumental. Both of the bills carried by Sen. Charbonneau (SEA 4) and Rep. Soliday (HEA 1406) had unanimous support, so be sure to thank your state legislators for their support!