

Say No to Unfair Liability Shifts – Vote NO on SB 213

Background: Indemnity is the transferring of risk. Indemnity provisions are common place in construction contracts among owners, design professionals, general contractors, sub contractors and material suppliers. Indemnity contract provisions allow parties to manage risk associated with a construction project. Currently, Oregon law prevents one party to a construction contract from passing their own negligent conduct on to another, but allows the parties to a construction agreement to require the negligent party to defend their own conduct in litigation. This is a fair outcome for all parties in a construction contract.

Senate Bill 213: This bill changes the ability of contractors and owners to negotiate duty to defend provisions in their contracts with Design Professionals. If passed, this bill would remove the ability of parties to contract the upfront legal costs of design professionals, such as architects and engineers are responsible for. The practical implication of this change will be to require contractors and owners to defend the liability design professionals until a case is concluded. This is an unfair shifting of the legal burden.

Particularly egregious is that the contractors and owners will be required to front the cost for the design professionals' attorneys' fees. While the bill does allow for the other parties to recover the proportional amount of attorneys' fees at the end of the legal proceeding, the upfront costs for these fees could be substantial. The design professionals should be responsible for the costs to defend themselves against claims from the beginning.

The bill's changes are particularly problematic in today's construction market. Removing design professionals from contract provisions that assign risk is problematic in an era where construction design goals are fluid and not just about fitness, durability, and aesthetics, but entail energy efficiency, carbon reduction, and environmental ratings of buildings. Indemnity provisions are becoming more important as design professionals attempt to accomplish other societal goals for owners. Freedom to contract risk is ever more important in today's construction environment. SB 213 would preclude those considerations to the detriment of all parties.

In an attempt to deal with insurance coverage and availability issues, the design professionals instead are placing the burden of liability on other parties to the contract. We proposed a solution that would put every party to the contract on even footing for contract agreements. However, the bill proponents continue to seek a resolution that is not workable for the rest of the industry.

In order to be fair, all parties to a construction agreement must be on equal footing when litigation occurs. SB 213 creates an advantage for design professionals in contracting and subsequently in litigation. While we remain committed to finding a solution that works for the entire industry, we cannot support SB 213 and its burden shift.



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